

CAN THE GOVERNMENT PROHIBIT GAY MARRIAGE?

JESSE H. CHOPER

JOHN C. YOO*

INTRODUCTION

Everyone involved in the debate over same-sex marriage understands that the Constitution is centrally involved. We believe that under current doctrine, the Constitution affords some protection to gay marriage, but not in the manner that most would imagine. Under existing judicial interpretation, neither the Due Process Clause nor Equal Protection Clause creates a federally-protected right of individuals of the same sex to marry when prohibited by state law. It is possible that some of the federal government's powers could be used in ways that could attempt to discourage or prevent the interstate expansion of gay marriage, but we do not think that Congress could impose an outright, nationwide prohibition without a constitutional amendment. We close with a discussion of what we feel should be a presumption in favor of individual liberty in respect to this as a matter of public policy. Even if states have the authority to regulate same-sex marriage, we submit that the case has not been made for states to enact a prohibition.

Part I of this article discusses whether Congress has the authority to ban gay marriage if a state has made it legal. We find that Congress may be able to create disincentives to gay marriage, but that the present state of the law does not give Congress constitutional authority to prohibit it throughout the country. Part II explains that while the Court's rulings do not vest the national government with the power to forbid gay marriage, they do not compel states to recognize it either. Part III closes with our thoughts on how state governments should resolve the policy decision whether to ban or allow marriage

* Earl Warren Professor of Public Law and Professor of Law (respectively), University of California, Berkeley.

between individuals of the same sex.

I. FEDERAL POWER TO PROHIBIT GAY MARRIAGE? MAYBE

While the regulatory power of Congress is broad, we do not believe that it would authorize the federal government to preempt state laws allowing same-sex couples to marry. Rather, Congress at most may create disincentives for such marriages and may attempt to limit the ability of gay marriage to extend from a state that permits it to another that prohibits it. We do not think that Congress can reach gay marriage through the use of its authority to regulate purely intrastate activity even though it may have a substantial effect on interstate commerce, in light of the Court's limitations of that power in the last fifteen years.¹ We do not address Congress's power under the Full Faith and Credit Clause to regulate one state's recognition of another state's "[a]cts, records and judicial proceedings" to restrict gay marriage.² That issue has been fully explored elsewhere in regard to Congress's enactment of the Defense of Marriage Act, which allows states to refuse to recognize gay marriages legalized in other states.³

The most expansive authority potentially available to force state compliance with federal goals is through the Spending Clause, which grants Congress the "Power . . . to pay the Debts and provide for the . . . general Welfare of the United States."⁴ In the Republic's first few years, James Madison and Alexander Hamilton split over the interpretation of the provision's scope.⁵ Madison argued that the central government could spend funds only in connection with those subjects enumerated in Article I, § 8, while Hamilton considered the objects of federal spending to be independent of Congress's other powers.⁶ In 1936, the Court appeared to agree with Hamilton⁷ (though its ruling was closer to Madison). In any event, it has thereafter consistently followed the Hamilton view. It has also given Congress great flexibility to define the "general welfare" advanced by federal spending, although to be sure, the Court's recent narrowing of the Commerce Clause may lead it to reconsider the toothless test

1. Jesse H. Choper & John C. Yoo, *The Scope of the Commerce Clause After Morrison*, 25 OKLA. CITY U. L. REV. 843, 852-54 (2000).

2. See 28 U.S.C. § 1738 (2000).

3. 28 U.S.C. § 1738C (2000).

4. U.S. CONST. art. I, § 8, cl. 1.

5. See Choper & Yoo, *supra* note 1, at 855.

6. *Id.*

7. See *United States v. Butler*, 297 U.S. 1, 66 (1936) (adopting the Hamiltonian view of the Commerce Clause).

announced in *United States v. Gerlach Live Stock Co.*⁸

Congress could use its power of the purse in several ways to achieve its regulatory aims. Most broadly, Congress could refuse to provide funds to any state that has a past record of violating national policy. If, for example, a state has permitted gay marriage, Congress could limit any further federal grants or reduce block grants to that state during the next appropriations cycle. Withholding federal payments might expose the state political leadership to significant criticism, place the state at a disadvantage in comparison to its neighbors in attracting citizens and business, and thus induce it to alter its position.

Similarly, Congress could place prior conditions on funding to persuade a state to conform to federal policy. Congress currently uses this technique in many areas, ranging from the environment to antidiscrimination to drinking age.⁹ As the Court made clear in 1987, this allows Congress to use the Spending Clause to achieve results that it could not command through Article I, Section 8 legislation.¹⁰ In *South Dakota v. Dole*, the Court sustained a federal statute that withheld five percent of allocable highway funds from any state that did not impose a minimum twenty-one-year-old drinking age.¹¹ Even though the Court assumed that the Twenty-first Amendment barred Congress from setting a nationwide drinking age, the Court upheld the condition because it was “directly related to one of the main purposes” of the interstate highway system: safe travel.¹² Since then, the Court has not found any spending condition to violate this “direct relationship” test. Moreover, a frequently cited proposal advanced by Justice O’Connor in her dissenting opinion in *Dole*—that the Court distinguish between conditions that only generally relate to the purposes of Congress’s grant (and thus often realistically amount to regulations), and conditions that expressly specify how the money

8. 339 U.S. 725, 738 (1950) (holding that spending power is “limited only by the requirement that it shall be exercised for the common benefit as distinguished from some mere local purpose”).

9. For an informative discussion of the Spending Clause, see Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995). For our own contribution to the literature, see Jesse H. Choper & John C. Yoo, *Who’s Afraid of the Eleventh Amendment? The Limited Impact of the Court’s Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213 (2006); Choper & Yoo, *supra* note 1, at 855–58; Jesse H. Choper, *Taming Congress’s Power Under the Commerce Clause: What Does the Near Future Portend?*, 55 ARK. L. REV. 731, 762–69 (2003) [hereinafter Choper, *Taming Congress’s Power*].

10. See *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

11. *Id.* at 205–06.

12. *Id.* at 208.

should be spent¹³—seems just as malleable.¹⁴

Despite the Rehnquist Court's "federalism revolution," its Spending Clause decisions suggest that the Justices are not about to attempt to significantly tighten the required link between spending conditions and federal funds. Four terms ago, in a largely overlooked decision, the Court rejected a challenge to a federal criminal prohibition on bribery of state and local officials whose entities received at least ten thousand dollars in federal funds.¹⁵ A near-unanimous decision ruled that Congress could attach such a broad condition, even without requiring proof that the bribery related to conduct actually involving the use of any federal funds, reasoning that the Spending Clause (as enabled by the Necessary and Proper Clause) provides the authority "to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars."¹⁶ Still, despite the essentially boundless authority that *Sabri*'s rationale implies,¹⁷ its relevance to gay marriage may be limited by the Court's observation that the statute in *Sabri* "is authority to bring federal power to bear directly on individuals who convert public spending into unearned private gain, not a means for bringing federal economic might to bear on a State's own choices of public policy."¹⁸ To illustrate, *Sabri* might appear to support congressional efforts to use the spending power to discourage a decision by individuals of the same sex to marry by prohibiting them from doing so simply because they receive some national subsidies or grants-in-aid. The government would reason that it has the right to ensure that its funds do not underwrite any activity contrary to its policies and that the broader ban beyond any actual showing of the

13. *Id.* at 217 (O'Connor, J., dissenting). For a similar, but more developed approach, see Baker, *supra* note 9, at 1962–78.

14. See Choper, *Taming Congress's Power*, *supra* note 9, at 766–67.

15. *Sabri v. United States*, 541 U.S. 600, 602 (2004).

16. *Id.* at 605.

17. See *id.* at 611, 614 (Thomas, J., concurring). Justice Thomas states, [T]he Court appears to hold that the Necessary and Proper Clause authorizes the exercise of any power that is no more than a "rational means" to effectuate one of Congress' enumerated powers. . . . [But it] does not explain how there could be any federal interest in "prosecut[ing] a bribe paid to a city's meat inspector in connection with a substantial transaction just because the city's parks department had received a federal grant of \$10,000."

Id. at 611, 613.

18. *Id.* at 608 (majority opinion).

use of federal funds to support gay marriage is necessary due to the fungibility of money. But *Sabri* might not support such loosely drawn efforts to use the spending power to compel states to change their policies on gay marriage.

Examples of conditional spending authority reveal its enormous potential to accomplish federal policy goals either specifically or globally. Although it may “require navigating some difficult jurisdictional shoals in Congress,”¹⁹ if the lawmakers have the will to do so, they could attach as a condition to one or more federal spending programs that states not recognize gay marriage. For example, Congress could require that all recipients of any federal funds for family programs not recognize such marriages. Congress need only identify a nexus between the subject matter of the prohibition on gay marriage and the goals of a federal spending program.²⁰ Broad federal spending programs in domestic areas such as education, crime, welfare, and transportation, to name just a few, could provide grounds for Congress. Indeed, Congress might straightforwardly satisfy Justice O’Connor’s approach, if necessary, by specifying that its family and welfare funds be spent for designated purposes that in no way support gay marriage.

One possible objection may be that Congress has little political incentive to use the Spending Clause in this way. In fact, however, Congress regularly uses its spending powers to achieve uniform policy changes through state adoption of federal standards, rather than through direct federal enactment of uniform nationwide rules. Title IX of the Civil Rights Act of 1964, which requires that colleges and universities receiving federal funds not discriminate on the basis of gender,²¹ and its subsequent interpretation to require equal funding of men’s and women’s intercollegiate sports teams,²² provides just one noteworthy example.²³ The No Child Left Behind Act, which

19. Daniel J. Meltzer, *Overcoming Immunity: The Case of Federal Regulation of Intellectual Property*, 53 STAN. L. REV. 1331, 1380 (2001).

20. See *id.* at 1377–78.

21. 20 U.S.C. §§ 1681–1688 (2000).

22. 45 C.F.R. § 86.41 (2007).

23. Congress also took this approach in two other significant civil rights laws, Section 5 of the Rehabilitation Act of 1973, see 29 U.S.C. § 794 (2000 & Supp. 2002), and Title VI of the Civil Rights Act of 1964, see 42 U.S.C. § 2000d-1 (2000). See also *Rust v. Sullivan*, 500 U.S. 173, 177–79 (1991), involving Title X of the Public Health Service Act, 42 U.S.C. §§ 300–300a-6 (2000), which provides federal funding for family-planning services, and upholding regulations thereunder specifying that a “Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.”

conditions federal education funding on state adoption of mandatory standardized testing to measure school performance,²⁴ is another. Cooperative federal-state programs in the healthcare and welfare areas provide yet another fertile area where Congress is already using funding to achieve state approval of federal norms in the area of family and marriage, and this is where a prohibition on gay marriage could possibly be included.²⁵

The Taxing Power in Article I, Section 8, which authorizes Congress to “lay and collect Taxes, Duties, Imposts and Excises,”²⁶ affords another source of congressional action to influence broad areas of behavior at the state and local level, including gay marriage. Nearly a century ago, the Court held that Congress could not use the Taxing Clause to achieve results forbidden to it under the Commerce Clause when the dominant intent of the tax is to prohibit or regulate the conduct rather than to raise revenue.²⁷ While the Court has never explicitly repudiated this reasoning, it has applied it only once more to invalidate a federal tax,²⁸ and that before the New Deal Court’s “switch-in-time.”²⁹ Since then, the Court has consistently refused to reject a federal tax as an effort to impose regulatory standards alleged to be outside the scope of other enumerated federal powers.³⁰ Due to

24. See 20 U.S.C. § 6311 (2000).

25. See Mark Andrew Ison, Note, *Two Wrongs Don't Make a Right: Medicaid, Section 1983 and the Cost of an Enforceable Right to Health Care*, 56 VAND. L. REV. 1479, 1513 (2003) (arguing that Congress could “force the States to voluntarily abrogate their sovereign immunity as a condition of participating in the Medicaid program”).

Similarly, it has been pointed out that “statutory provisions purporting to abrogate sovereign immunity . . . in bankruptcy proceedings . . . are not now, and could not easily be, associated with federal spending programs.” Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 55 (1996). But the current Spending Clause doctrine would not seem to pose an insuperable obstacle if Congress acts determinedly. For the view that allowing states to decide whether to assert or waive immunity from bankruptcy actions is consistent with most articulations of bankruptcy policy, see Adam Feibelman, *Federal Bankruptcy Law and State Sovereign Immunity*, 81 TEX. L. REV. 1381, 1386 (2003).

26. U.S. CONST. art I, § 8, cl. 1.

27. Child Labor Tax Case, 259 U.S. 20, 37–38 (1922).

28. See *United States v. Constantine*, 296 U.S. 287, 294 (1935).

29. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 998 (1992) (Scalia, J., concurring in part and dissenting in part) (describing the Court’s switch from its widely opposed and erroneous opposition to New Deal social measures)

30. See *United States v. Kahriger*, 345 U.S. 22, 23 (1953) (discussing a ten-percent tax on all wagers coupled with registration of all wager takers, whose names must be given to state prosecutors, if requested); *United States v. Sanchez*, 340 U.S. 42, 43 (1950) (stating that Congress expressed the objectives of raising revenue and making “extremely difficult the acquisition of marihuana”); *Sonzinsky v. United States*, 300 U.S. 506, 513–14 (1937) (discussing a \$200 tax on each transfer of concealable firearms and stating “[i]nquiry into the hidden motives which may move Congress to exercise a power constitutionally

the post-1937 expansion of national legislative power, however, under which these challenged taxes might readily have been upheld as a necessary and proper exercise of the Commerce Clause, neither the Court nor Congress has had occasion to seriously reconsider the principle of symmetry between the commerce and taxing powers in effecting regulations.

It seems clear that the federal power to tax is not subject to the same recent limitations that have been applied to the Commerce Clause, such as the commercial/noncommercial distinction for the “substantial effects” prong. Although much of the income tax code certainly can find justification as the regulation of commercial activity, other provisions have as their purpose and effect not to raise revenue, but rather to achieve regulatory ends such as encouraging charitable contributions.³¹ Moreover, while gift and estate taxes involve the transfer of wealth, large portions do not seem to involve commercial or economic activity of the sort contemplated by current Commerce Clause jurisprudence.³² Holding that the congressional taxes in these areas are unconstitutional would involve serious disruption of long-settled federal practices.

Pursuant to its long-established practice of imposing a tax on conduct as well as on products, Congress could use its taxing power to gain access to a broad reservoir of authority to replace its losses in the Commerce Clause arena. While Congress might not be able to ban handguns near school zones, it might raise taxes on such guns to a level that would effectively discourage the activity. Congress might not be able to create a private cause of action to stop gender-motivated violence, but it might be able to impose taxes on individuals who commit such actions. Or, building on the existing tax code, Congress might deny anyone who possessed a handgun near a school zone or who committed gender-motivated violence any deductions or exemptions, or might impose a very high tax on any gifts or inheritances they receive. As applied to gay marriage, Congress might refuse to grant beneficial tax treatment to same-sex couples married under state law, for example, by granting lower standard deductions and tax credits for the tax returns of gay couples than it provides for other marriages. Congress currently provides significant tax advantages for married couples with children; it does this with the

conferred upon it is beyond the competency of courts”).

31. See 26 U.S.C.A. § 170 (West 2002 & Supp. 2008).

32. See, e.g., 26 U.S.C.A. § 2001 (West 2002 & Supp. 2008) (estate tax); 26 U.S.C.A. § 2501 (West 2002 & Supp. 2008) (gift tax).

purpose of encouraging families to have children.³³ It might do the exact opposite with regard to gay marriages. Just as Congress can use the Commerce Clause to destroy as well as encourage interstate commerce, it might use the tax power to discourage certain forms of relationships rather than encourage them.³⁴

A third area of congressional governance that might be used to regulate gay marriage is the Commerce Clause. Under it, Congress has broad authority to control the movement of individuals across state borders, to manage commercial and economic activity, and even to reach purely intrastate activity that has a “significant effect” on interstate commerce.³⁵ Congress has successfully used this mandate in the past to enact what might be called “morals” legislation designed to promote or inhibit desired conduct, regardless of whether the activity is commercial in nature.³⁶

It is true that the Rehnquist Court imposed limitations on what had become the most sweeping element of the Commerce Clause, its application to conduct that has “substantial effects” on interstate commerce (more on that later).³⁷ This recent jurisprudence, however, explicitly reaffirmed and left wholly unqualified the other two “broad categories of activity that Congress may regulate under its commerce power”: (1) the “channels” and (2) the “instrumentalities” of interstate commerce.³⁸ Since neither *Lopez* nor *Morrison* involved a statute that included a jurisdictional element (or “jurisdictional nexus”), i.e., in which the subject of federal policy is or has been (or perhaps will be) in the “channels” of interstate commerce, the Court gave no indication of how elastic this category might be to insulate similar legislation from constitutional invalidation.³⁹ Indeed, under the current state of the law, the “jurisdictional nexus” prong of Commerce Clause analysis seems to permit virtually unlimited congressional regulation (including prohibition) of gay marriages.

33. See 26 U.S.C.A. § 24 (West 2002 & Supp. 2008).

34. We should also make clear, however, that Congress’s power here is not without limits. The Taxing Power allows the federal government to directly regulate individuals through the tax code; we are not referring here to taxes levied upon states *qua* states, which would raise difficult, separate federalism issues.

35. See *Perez v. United States*, 402 U.S. 146, 150–51 (1971).

36. *United States v. Darby*, 312 U.S. 100, 114–15 (1941).

37. See, e.g., *United States v. Morrison*, 529 U.S. 598, 627 (2000) (holding the Violence Against Women Act exceeded the Commerce Clause); *United States v. Lopez*, 514 U.S. 549, 567–68 (1995) (holding the Gun-Free School Zones Act exceeded the Commerce Clause).

38. *Lopez*, 514 U.S. at 558–59.

39. *Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 561.

In *Lottery Case*,⁴⁰ for example, the Court upheld legislation prohibiting the interstate transportation of lottery tickets from states where lotteries were legal to states where they were not.⁴¹ Because the tickets were intrinsically harmless and the law's purpose was the social regulation of public morals rather than some commercial or economic goal, the decision's rationale led "to the conclusion that Congress may arbitrarily exclude from commerce among the States any article, commodity or thing, of whatever kind or nature, or however useful or valuable, which it may choose, no matter with what motive."⁴² In *Caminetti v. United States*,⁴³ the Court rejected a challenge to a federal law that banned the transportation across state lines of a woman for non-commercial but immoral purposes.⁴⁴ In *Cleveland v. United States*,⁴⁵ the Court upheld application of the Mann Act (the law at issue in *Caminetti*) to a Mormon who wished to transport multiple wives across state lines for the purpose of practicing polygamy.⁴⁶

Under current case law, it appears that Congress may be able to (a) prohibit the travel in (or use of) interstate commerce in the future by persons who have violated federal policy in the past, and (b) forbid the violation of federal policy in the future by persons who have traveled in (or used) interstate commerce in the past.⁴⁷ Consequently, it might bar the travel across state lines of gay married couples, on the ground that the legislature believes gay marriage is immoral and its spread to other states is to be prevented. Or it might go so far as to preclude anyone who has ever traveled in interstate commerce in the past from marrying another individual of the same sex. The Court's decisions have not required that any nexus exist between the time that persons cross state borders and the time they engage in the prohibited activity. Due to the nationalization of the economy and our society, almost every person and every product in the country crosses a state boundary at some point, allowing Congress to impose a virtually nationwide rule of conduct without relying upon the "substantial effects" prong of the Commerce Clause.

Congress would need to enact these hypothetical laws under this jurisdictional nexus approach to the Commerce Clause because it is

40. 188 U.S. 321 (1903)

41. *Id.* at 363–64.

42. *Id.* at 362.

43. 242 U.S. 470 (1917).

44. *Id.* at 491–92.

45. 329 U.S. 14 (1946).

46. *Id.* at 16, 18.

47. Choper, *Taming Congress's Power*, *supra* note 9, at 759–60.

doubtful that Congress could ban gay marriage under the “substantial effects” prong. Both *Lopez* and *Morrison* rely heavily on the notion that activities with an essentially economic character are within Congress’s power to legislate under the “substantial effects” prong, whereas noneconomic activity is not.⁴⁸ There is a two-fold problem with the approach used in *Lopez* and *Morrison*. First, the Court has not carefully identified the boundary between economic and noneconomic activity, and its plasticity seems to show that it provides neither a workable nor meaningful standard for judicial review. Second, the Court has not persuasively explained why a noneconomic activity that indisputably produces an ultimate economic effect does not logically or analytically come within the reach of the Commerce Clause, apart from the Justices’ concern that this would permit Congress to “regulate any activity that it found was related to the economic productivity of individual citizens” and would make the Court “hard pressed to posit any activity by an individual that Congress is without power to regulate.”⁴⁹

Despite these difficulties, the lines drawn by *Lopez* and *Morrison* would seem to exclude gay marriage from the scope of the Commerce Clause’s substantial effects prong. While it certainly has economic effects and dimensions, marriage seems to fall into that class of conduct more like education or violence against women, the two areas placed off limits in the two cases.⁵⁰ If marriage is considered noneconomic conduct, then it does not benefit from the class aggregation principle of *Wickard v. Filburn*.⁵¹ Although the Court may not have drawn a bright line in *Morrison* against aggregation in such cases, it observed that the aggregation principle has only been held to operate in areas where the “regulated activity was of an apparent commercial character.”⁵² In other words, Congress could not add up all of the individual economic effects that gay married couples may have on interstate commerce in order to justify national regulation of purely intrastate activity. This principle would not be disturbed by the Court’s more recent decision in *Gonzales v. Raich*,⁵³ which upheld regulation of a purely intrastate activity even though the Court

48. See *United States v. Morrison*, 529 U.S. 598, 610–11 (2000); *United States v. Lopez*, 514 U.S. 549, 559–60 (1995).

49. *Lopez*, 514 U.S. at 564.

50. *Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 567.

51. See *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942).

52. *Morrison*, 529 U.S. at 611 n.4.

53. 545 U.S. 1 (2005).

conceded that it was not “commercial.”⁵⁴ Unlike same-sex marriage, the Justices held that the federal prohibition of intrastate cultivation and use of marijuana, even when permitted by state law for medicinal purposes, was subject to the aggregation approach because Congress had a rational basis for concluding that this was needed for effective regulation of the interstate market and traffic in illicit drugs, a quintessentially economic activity.⁵⁵

Another important reason that Congress would not be able to justify the prohibition of gay marriage is that the conduct falls within an area of “traditional state concern.”⁵⁶ First raised in Justice Kennedy’s concurrence in *Lopez* and then incorporated into the majority opinion in *Morrison*, this concept precludes Commerce Clause regulation of areas considered historically subject to state regulation.⁵⁷ The underlying offense in both *Lopez* and *Morrison* was criminal in nature, which came within the state’s police power.⁵⁸ It was this incursion that prompted Justice Kennedy to worry 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.”⁵⁹ In *Lopez* and *Morrison*, the majority identified specific areas—“family law (including marriage, divorce, and child custody),” “criminal law enforcement,” and “education”—“where States historically have been sovereign.”⁶⁰ In both opinions, Chief Justice Rehnquist expressed the fear that “if we were to accept the Government’s arguments [to sustain congressional power], we are hard pressed to posit any activity by an individual that Congress is without power to regulate.”⁶¹

If this deference to state control over certain areas of conduct continues under the Roberts Court, gay marriage is a strong candidate

54. *Id.* at 32–33.

55. *Id.* at 32.

56. *United States v. Lopez*, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring) (explaining areas of traditional state concern to be those “having nothing to do with the regulation of commercial activities”).

57. *Morrison*, 529 U.S. at 617–18; *Lopez*, 514 U.S. at 577.

58. *Morrison*, 529 U.S. at 617–18; *Lopez*, 514 U.S. at 567–68 (majority opinion).

59. *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring). Justice Kennedy contended that if the line of demarcation between the federal government and the states was blurred, “political responsibility would become illusory” and “[t]he resultant inability to hold either branch of the government answerable to the citizens . . . [would be] more dangerous even than devolving too much authority to the remote central power.” *Id.*

60. *Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 564 (majority opinion).

61. *Lopez*, 514 U.S. at 564; see *Morrison*, 529 U.S. at 613 (citing *Lopez*, 514 U.S. at 564).

to be one of those subjects that fall outside the Commerce Clause. As indicated, in *Lopez*, the majority specifically identified family law, including marriage, as an area that was of traditional state concern.⁶² Indeed, it does not appear that Congress has ever enacted any nationwide law concerning the definition of marriage, although it has legislated against the background of state law regarding marriage, as when it provides tax or social security benefits to married couples.⁶³ And Congress can enact its own definition of marriage for the operation of federal spending and taxing programs.⁶⁴ But it appears that current Commerce Clause doctrine might well halt any federal effort to preempt state laws defining marriage.

II. AN INDIVIDUAL RIGHT TO GAY MARRIAGE? PROBABLY NOT.

Even if Congress had the power to regulate gay marriage, it would come to little if the Constitution were interpreted to invalidate laws that discriminate based on sexual orientation. In two cases, *Romer v. Evans*⁶⁵ and *Lawrence v. Texas*,⁶⁶ the Court has overturned state regulations that discriminated against gays. But neither decision recognized a general right on the part of homosexuals to be free of discriminatory state action. In both *Romer* and *Lawrence*, the Court found that the state rules that had discriminated against gays failed the rational basis test because the motivation for the discrimination was the product of irrational animus.⁶⁷ In settling on this rationale, the Court avoided any decision on whether gays had a fundamental right to engage in homosexual conduct or whether discrimination against them was subject to heightened judicial scrutiny.

Analysis of the issue would presently arise under either the Due Process or Equal Protection Clauses. The Court has read the Due Process Clause to encompass a substantive right to privacy, one that includes reproductive rights, such as the use of contraceptives,⁶⁸ and access to abortion,⁶⁹ and rights related to the family, such as the right

62. *Lopez*, 514 U.S. at 564.

63. *See, e.g.*, 26 U.S.C.A. § 1 (West 2002 & Supp. 2008) (providing married individuals the benefit of filing joint returns and other favorable tax treatment); 42 U.S.C.A. § 402(a)-(c) (West 2003 & Supp. 2008) (allowing Social Security Survivor's Benefits for surviving spouses).

64. *See, e.g.*, 26 U.S.C.A. § 7703 (West 2002 & Supp. 2008); 42 U.S.C.A. § 416 (West 2003 & Supp. 2008).

65. 517 U.S. 620 (1996).

66. 539 U.S. 558 (2003).

67. *See Lawrence*, 539 U.S. at 578; *Romer*, 517 U.S. at 635.

68. *See Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

69. *See Roe v. Wade*, 410 U.S. 113, 164 (1973).

to decide on the education of children,⁷⁰ and the right to marry.⁷¹ When the Court invalidated a Virginia law that prohibited interracial marriages, it did so mainly on Equal Protection but also on Due Process grounds.⁷² The Court declared that “[m]arriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival,” and to deny it based on racial classifications denied the plaintiffs of due process as well as equal protection.⁷³ Similarly, in *Zablocki v. Redhail*, the Court invalidated a Wisconsin law that prohibited a marriage license to any resident who failed to fulfill his court-ordered child support obligations.⁷⁴ “[O]ur past decisions make clear that the right to marry is of fundamental importance,” the Court observed, “among the personal decisions protected by the right of privacy.” Since the Wisconsin statute “significantly interfere[d] with decisions to enter into . . . marital relationships” and, like bans on gay marriage, “absolutely prevented” the desired ritual, it was held to be unconstitutional.⁷⁵ If a right is deemed “fundamental,” the Court will subject the law to strict scrutiny, which would require the state to provide a compelling state interest and narrow tailoring to survive review.⁷⁶

So far, the Court has refused to find homosexual conduct to be a fundamental right protected by strict scrutiny. In *Lawrence v. Texas*, the state had made consensual homosexual sodomy a crime.⁷⁷ The Court found that the law intruded into private, consensual sexual conduct undertaken in the home and, hence, “is within the liberty of persons to choose without being punished as criminals.”⁷⁸ But it clearly refused to find it a fundamental right.⁷⁹ While *Lawrence* explicitly overruled *Bowers v. Hardwick*, which had held in 1986 that a

70. See *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923).

71. See *Loving v. Virginia*, 388 U.S. 1, 2 (1967).

72. *Id.*

73. *Id.* at 12 (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

74. 434 U.S. 374, 375–77 (1978).

75. *Id.* at 383–87.

76. See *Johnson v. California*, 543 U.S. 499, 505–06 (2005). Although *Zablocki* clearly described the right to marry as “fundamental,” it did not subject the state law to strict scrutiny as ordinarily defined. Rather, the Court reasoned that “when a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.” *Zablocki*, 434 U.S. at 388. Ultimately, it found that the Wisconsin statute sought to protect “legitimate and substantial interests,” but “the means selected by the State for achieving these interests unnecessarily impinge on the right to marry....” *Id.*

77. 539 U.S. 558, 562 (2003).

78. *Id.* at 567.

79. *Id.* at 586 (Scalia, J., dissenting).

similar anti-sodomy law survived rational basis review,⁸⁰ *Lawrence* did not make clear exactly why the Texas law in 2003 now failed. The only clue was the Court's view that a legislative judgment that homosexual conduct was simply immoral was not enough of a justification to survive the Due Process Clause: "The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime."⁸¹ "The Texas statute," the Court concluded, "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."⁸² It also explicitly noted that it did not address "whether the government must give formal recognition to any relationship that homosexual persons seek to enter,"⁸³ a seemingly clear reference to state prohibitions on gay marriage. After *Romer* and *Lawrence*, states are likely to engage in a serious effort to demonstrate why banning gay marriage advances legitimate state goals in the area of family policy.

The Equal Protection Clause also does not presently provide a barrier to state laws prohibiting gay marriage. The Court's framework for applying Equal Protection is similar to that under the Due Process Clause. The Court will review a state law discriminating against a member of a suspect class with strict scrutiny, which requires that the state's action further a compelling government interest and that it be narrowly tailored to achieving that goal.⁸⁴ While strict scrutiny is not fatal in theory, it has been observed, it is virtually always fatal in fact.⁸⁵ The only modern Equal Protection decision to uphold a state law under the strict scrutiny test involved the use of race-based affirmative action programs by universities in their student admissions decisions.⁸⁶ Race, ethnicity, and national origin remain the groups that receive protection under strict scrutiny.⁸⁷ Plaintiffs who are not members of a suspect class may still receive a form of intermediate scrutiny, which requires the government to show that a law which classifies its citizens serves "important governmental objectives" and that the means employed are "substantially related to the achievement of those

80. 478 U.S. 186, 196 (1986).

81. *Lawrence*, 539 U.S. at 578.

82. *Id.*

83. *Id.*

84. See *Johnson v. California*, 543 U.S. 499, 505 (2005).

85. See *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring), *withdrawn in part*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'").

86. See *Grutter v. Bollinger*, 539 U.S. 306, 343-44 (2003).

87. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985).

objectives.”⁸⁸ Gender-based discrimination is the primary type of law that triggers this form of review under the Equal Protection Clause, and it has also been used to protect illegitimate children.⁸⁹ If a group does not fall within these categories, any government classification will be reviewed under the rational basis test, which only requires some reasonable relationship between the law and a constitutionally permissible government objective.⁹⁰

If discrimination against gays were considered to fall within the same category as race-based classifications, the case against same-sex marriage prohibition would appear to be quite strong. The Court, however, has not found that sexual orientation is a specially protected class under the Equal Protection Clause. Rather, it has specifically refused to find gays subject to any standard other than the rational basis test.⁹¹ Although *Lawrence* analyzed the case under the Due Process Clause and did not reach the Equal Protection Clause at all, *Romer* did.⁹² *Romer* involved a challenge to an amendment to the Colorado constitution that prohibited the state or cities from providing any special protections for homosexuals, such as a law prohibiting discrimination against gays.⁹³ The Court ruled that Colorado’s classification did not have a rational basis because it made “a general announcement that gays and lesbians shall not have any particular protections from the law” and inflicted on them “immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it.”⁹⁴ What was rather noteworthy about the Court’s reasoning is that it held denial of a group’s ability to seek specific protections from government was not a valid state objective.⁹⁵

Even Justice O’Connor’s concurrence in *Lawrence*, which found Texas’ anti-sodomy statute a violation of the Equal Protection Clause rather than the majority’s preferred Due Process Clause analysis, did not find gays a specially protected class.⁹⁶ Instead, she concluded the law failed the rational basis test because “[m]oral disapproval of a group cannot be a legitimate governmental interest under the Equal

88. *United States v. Virginia*, 518 U.S. 515, 532–33 (1996).

89. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988).

90. *See Romer v. Evans*, 517 U.S. 620, 631 (1996).

91. *See Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring).

92. *Id.* at 564 (majority opinion); *Romer*, 517 U.S. at 623.

93. *Romer*, 517 U.S. at 623–24.

94. *Id.* at 635.

95. *Id.* at 633.

96. *Lawrence*, 539 U.S. at 579–85 (O’Connor, J., concurring).

Protection Clause.”⁹⁷ She expressly cautioned that this “does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review.”⁹⁸ Specifically addressing gay marriage, Justice O’Connor observed that “[u]nlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.”⁹⁹ Accordingly, as with the Due Process Clause, application of the Equal Protection Clause to a ban on gay marriage would not inexorably lead to a finding of unconstitutionality. *Romer* and *Lawrence* were unusual in that the Court found that the government’s objective was an irrational animus against gays that served no legitimate public purpose.¹⁰⁰ A ban on gay marriage would present a harder case for the Court because states will seek to demonstrate that the prohibition protects the traditional institution of marriage or other family policies.

It is possible, of course, that the Court will change direction and accord gays the status of a specially protected class. Several prominent scholars have suggested that *Lawrence* and *Romer* will inevitably lead to this result.¹⁰¹ That outcome will likely depend on whether the Court considers sexual orientation to be akin to the other groups that receive the protections of strict (or heightened) scrutiny. It may be argued that gays do not bear the same characteristics as racial and ethnic minority groups (the core of the Equal Protection analysis) or gender because they do not have a visible, immutable trait that openly distinguishes them. Some have contended that a ban on gay marriage amounts to gender discrimination because such laws facially permit marriage only between two individuals of different sexes.¹⁰² In response, it may be noted that a ban on gay marriage applies equally to the sexes and, instead, discriminates by not requiring that sexual orientation be taken into account. Moreover, even if homosexuality were deemed to be the result of immutable characteristics, or even

97. *Id.* at 583.

98. *Id.* at 585.

99. *Id.*

100. *Cf.* U.S. Dept. of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973) (rejecting discrimination against “hippie communes”); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985) (rejecting an “irrational prejudice against the mentally retarded”).

101. *See, e.g.*, Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 452 (2005); Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1945 (2004).

102. *See, e.g.*, William N. Eskridge, Jr., *Multivocal Prejudices and Homo Equality*, 74 IND. L.J. 1085, 1103 (1999); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 201 (1994).

visible ones, that might not by itself justify elevated scrutiny. The disabled and the elderly possess immutable and visible characteristics, yet the Court reviews discriminatory laws against both groups only under the rational basis test.¹⁰³

On the other hand, status as a specially protected class need not depend purely on visible traits. State discriminations against aliens are usually reviewed under the strict scrutiny standard¹⁰⁴ even though, in a nation of immigrants like the United States, status as a non-citizen is not visibly obvious. Discrimination against illegitimate children is subject to intermediate scrutiny.¹⁰⁵ While illegitimacy is an immutable characteristic, which arises through the decisions of the child's parents, it is not a visible one. As the Court has said, "illegitimacy does not carry an obvious badge."¹⁰⁶

Moreover, both the Court and scholars have also suggested a number of other criteria that will be used by advocates for including a particular group in the "heightened scrutiny" category. The enterprise began with Justice Stone's famous footnote in *Carolene Products*, which raises "prejudice against discrete and insular minorities" as a trigger for "searching judicial inquiry."¹⁰⁷ This standard was relied on by the Court when it first held that state discrimination against aliens is subject to strict scrutiny.¹⁰⁸ Other proposed norms have tended to give fuller content to the meaning of "prejudice" in this context, e.g., when membership in the group "will usually be perceived as a stigma of inferiority and a badge of opprobrium"¹⁰⁹ or will be "the object of widespread vilification" or "unjustified widespread hostility."¹¹⁰ Laws that work against certain segments of the polity have been said often to involve

a traditionally disfavored class [A] traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification. Habit, rather than analysis, makes it seem acceptable and natural But

103. See *City of Cleburne*, 473 U.S. at 435 (discussing discrimination against the disabled); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976) (discussing age discrimination).

104. See *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971).

105. See *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

106. *Mathews v. Lucas*, 427 U.S. 495, 506 (1976).

107. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

108. See *Graham*, 403 U.S. at 371-72.

109. *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1127 (1969).

110. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 153 (1980) (emphasis omitted).

that sort of stereotyped reaction may have no rational relationship—other than pure prejudicial discrimination—to the stated purpose for which the classification is being made.¹¹¹

It may be urged that these benchmarks are captured in the Court's finding of "irrational animus" against gays, but here it would result in placing them in a suspect class, a consequence urged by a number of observers,¹¹² rather than simply finding no legitimate justification for the discrimination.

It would be difficult, if not impossible, to predict whether a majority of the Court would find sexual orientation to be more like illegitimacy and gender, on the one side, or age and disability, on the other, for defining the standard of review. But if it were to use rational basis review, the Court would have to take more seriously a state's claim that its law was not the product of irrational animus against gays, but instead sought to preserve the widely shared values surrounding the traditional institution of marriage.

III. SHOULD STATES PROHIBIT GAY MARRIAGE? NO.

If Congress cannot prohibit gay marriage, but gays have no federal right to displace state law on the issue, the decision becomes one for the states. As an initial matter, some will argue that allowing the states to decide this question may provide better results for the nation because of the competitive benefits of federalism. But we believe that, although reasonable minds may differ, without more evidence states should not forbid gay marriage.

Federalism may provide a solution to the gay marriage controversy. Rather than seek a federal solution, either with a national prohibition or a federally protected right, our political system could allow the states to determine for themselves whether to allow gay marriage or not. There are several reasons why federalism may be thought to afford a desirable method for decision of this question. First, following Justice Brandeis' famous view of states as laboratories of experimentation,¹¹³ it may not yet be clear what the effects will be of permitting gay marriage. If gay marriage does indeed undermine the institution of marriage, that may become evident in those states where it is allowed. Policy analysts will seek to measure whether the number and durability of marriages are different between states with and

111. *Mathews*, 427 U.S. at 520–21 (Stevens, J., dissenting) (footnote omitted).

112. See, e.g., ELY, *supra* note 110, at 153.

113. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

without gay marriage. Allowing the states to experiment on policy may also provide more information as to whether a national solution is needed and what it should be. Different configurations of gay marriage may be possible—such as allowing civil unions rather than gay marriages—and may be more suited to some states rather than others.

Second, many believe that relying on federalism may enhance the overall utility of those who oppose and support gay marriage. Theorists have argued in favor of the benefits of the jurisdictional competition created by a federal system in which states offer various combinations of public policies.¹¹⁴ Citizens can choose to live in those governmental units that maximize their individual utility. A state, for example, may have higher income taxes to pay for better schools and roads; people who want that particular tradeoff of taxes to local public goods can move there. A diverse population, as Robert Cooter has observed, will sort itself by states that offer the preferred package of public goods.¹¹⁵ Gays and heterosexuals who support gay marriage will experience an increase in their utility when they move to states that permit them to marry. Similarly, those who oppose gay marriage can move to states that prohibit it and, hence, increase their utility. Overall utility for the population as a whole will increase, though perhaps not as much as suggested here, if individuals experience disutility just from the knowledge that the policies they oppose are in force elsewhere in the country. It must be emphasized, however, that in order for these benefits to accrue from federalism, two conditions must hold: the costs of moving from one state to another must be low and there must be enough jurisdictions to offer the different policy choices.¹¹⁶

How should an individual state decide the question of gay marriage for itself? Our view is that it should not prohibit gay marriage. States should generally exercise their police power when the social benefit of a regulation outweighs any harm that it may generate. With regard to gay marriage, the cost of a prohibition is the restriction of the liberty of two individuals of the same sex who seek the same legal status for an intimate relationship that is available to individuals of different sexes. This harm may not be restricted just to the individuals involved but may also involve broader social costs. If the government believes that marriage has positive benefits for society,

114. See, e.g., ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* 127 (2000).

115. *Id.* at 129.

116. See *id.* at 130.

some or all of those benefits may attach to same-sex marriages as well. Stable relationships may produce more personal income and less demands on welfare and unemployment programs; it may create the best conditions for the rearing of children; and it may encourage individuals to invest and save for the future.

On the other side of the ledger, does prohibiting gay marriage create any social benefits that would outweigh the positive consequences of permitting it? We are not aware of any evidence that the marriage of two individuals of the same sex produces any tangible, direct harm to anyone either in the marriage or outside of it. As we understand it, the claim against gay marriage is that it produces negative externalities on those outside of the marriage. First is the contention that gay marriage undermines the institution of marriage, a point often advanced by opponents and mentioned by the Supreme Court itself in *Lawrence*.¹¹⁷ The causal link must be that allowing same-sex couples to marry will reduce the respect for the institution of marriage sufficiently that marriage among heterosexual couples will decline. We know of no empirical studies that bear out this relationship. Scholars have observed that the marriage rate in the United States itself has been in decline due to a number of factors.¹¹⁸ So far only two states, Massachusetts and Connecticut, have clearly permitted gay marriage, and only since 2003.¹¹⁹ We are unaware of any showing that their policy on gay marriage has caused the overall marriage rate in either state to decline. Even if such an effect were to occur, it might be outweighed by an increase in the marriage rate of gay couples. Useful information on this question might be obtained from studies in other nations that permit gay marriage, but different political, social, and cultural contexts may undermine their relevance. Until persuasive studies demonstrate negative effects of the Massachusetts and Connecticut policy, it seems to us premature to bar gay marriage.

A second rationale in favor of a ban is that gay marriage provides legitimacy to gay relationships, and this is offensive to significant portions of the American people. Here, the harm is not tangible but rather is psychological. Even though the marriage itself does no harm to third parties, these others experience a cost just by knowing that

117. See *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring).

118. See, e.g., Symposium, *Forty Years of Loving: Confronting Issues of Race, Sexuality, and the Family in the Twenty-First Century*, 76 FORDHAM L. REV. 2669, 2672 & n.18, 2682 (2008).

119. See *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Goodridge v. Dep't. of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

gay marriages exist in their state or nation. In his *Lawrence* dissent, Justice Scalia argued in a related vein that a prohibition on gay conduct fell within the legitimate state goal of expressing the beliefs of a state's citizens that certain conduct is immoral and unacceptable.¹²⁰ Texas' criminalization of homosexual sodomy was no different, he argued, than criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity.¹²¹ These statutes, he contended, outlaw conduct that does not directly harm the offended members of the citizenry or the individuals engaged in the forbidden activities.¹²² Indeed, those activities may even be seen as necessary for the individuals to define themselves, as with homosexual conduct.

Our approach to the policy issue of gay marriage adopts the harm principle, which urges against government prohibition of any private activity which does not harm any other.¹²³ It may be that some believe gay marriage to be immoral or offensive, but if it causes no direct harm to others beyond the psychological, we believe a legislature should not ban it. It may well be that the harm principle would similarly urge against laws banning adultery or prostitution. That, of course, would depend on whether there are measurable and real costs to these activities (and other types of conduct deemed immoral by the state). We do not reach these other issues in this article other than to acknowledge that our approach to gay marriage might carry this implication, which we might well accept as a matter of policy choice depending on the facts. Our position here is that without persuasive evidence about the direct harms caused by gay marriage, we would not choose a policy to ban it.

120. See *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting).

121. *Id.*

122. *Id.* at 590.

123. “[T]he only purpose for which power can be rightfully exercised over any member of a [civilized] community, against his will, is to prevent harm to others.” JOHN STUART MILL, ON LIBERTY 10–11 (David Spitz ed., W.W. Norton & Co. 1975) (1859). “The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.” *Id.* at 11.

