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VIII. Federalism

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THE ROBERTS COURT AND FEDERALISM

“The Chief Justice on the Spot”

The New York Times

January 9, 2009

Linda Greenhouse

A case sitting quietly in the Supreme Court’s in-basket promises to tell us more than almost any other about John G. Roberts Jr. and his evolution from spear carrier in the Reagan revolution to chief justice of the United States—and in the process set the direction of the debate over race and politics for years to come.

The question is whether Congress acted within its constitutional authority two years ago when it extended a central provision of the Voting Rights Act of 1965 for 25 years. An appeal challenging the act’s reauthorized Section 5, a provision that requires certain states and localities to receive federal permission before making any change in election procedures, awaits the justices when they return today from a holiday recess.

On the surface, this case appears an unlikely judicial bellwether. Extending the life of the “preclearance” provision, considered one of the civil rights movement’s crowning legislative accomplishments, is hardly novel. This was the fourth extension, in fact, and the second for a 25-year duration; the Supreme Court, which upheld the original Voting Rights Act in 1966, approved an earlier extension of Section 5 in 1980.

Nor does the issue appear fueled by the partisanship or ideological divisions that the current Supreme Court so often mirrors. The latest extension passed the Republican-controlled Congress overwhelmingly in 2006. President Bush promptly signed it into law, and a special panel of three federal

judges upheld it last May.

Given all that, what about this case makes it a potentially defining moment for Chief Justice Roberts?

To answer that question requires seeing the appeal, *Northwest Austin Municipal Utility District No. 1 v. Mukasey*, for the politically charged case it really is. The seeming unanimity that greeted the extension of Section 5 in 2006 was a facade, masking deep divisions over whether to continue requiring all or parts of 16 states, most in the South, to receive Justice Department or federal court permission before moving a polling place or changing a registration deadline. Was a measure approved 40 years ago as a remedy for the suppression of minority votes still appropriate?

Many Republicans, most notably some Southern senators, thought not. But they allowed the extension to pass on the assumption that the Supreme Court would eventually answer the question, relieving them of the political cost of dismantling an iconic statute. Days after the extension became law, the anticipated legal challenge was filed by a well-connected Texas Republican lawyer representing what is surely one of the most obscure jurisdictions to be covered by Section 5, a sewer district that serves 3,500 residents of Travis County, Tex.

The Republicans understood recent trends at the court to be working in their favor, and

they may be right. The case serves up to the court a fascinating brew of two of the most freighted issues in constitutional law, race and federalism—or, to put it another way, individual rights and constitutional structure.

The Roberts court has yet to come to rest on either, but this case will force it to do so: Voting Rights Act cases have a special provision that requires the Supreme Court to decide them. The court can't do what it does with 99 percent of the cases that reach it and simply deny review without comment. The chief justice will have to show his hand.

In cases dealing with race, he already has. "It is a sordid business, this divvying us up by race," he complained in a Texas redistricting case in 2006. The next year, he wrote an opinion rejecting a plan by which the school system in Louisville, Ky., sought to preserve the hard-won gains of integration by assigning students to schools based on race.

Because the Louisville schools had been released seven years earlier from decades of federal court supervision, the chief justice said the district no longer had the "compelling interest" that justified any use of race to keep the schools integrated. It was a position so extreme that Justice Anthony M. Kennedy, who is skeptical of all race-conscious government policies and agreed that the Louisville plan was unconstitutional, refused to sign the opinion.

The federalism issue at the core of the new case grows out of a series of cases from 1997 to 2003 in which the Rehnquist court applied a new level of scrutiny to Congressional action enforcing the guarantees of the Reconstruction amendments.

While previously Congress could do almost anything in the name of protecting

individual rights, the new doctrine requires it to demonstrate a "congruence and proportionality" between violation and remedy. The appeal now before the court argues that the extension fails that test, given "the utter absence of any present-day pattern of unconstitutional voting-rights deprivations of the type Section 5 was originally designed to address." The measure's defenders argue in response that because the law serves to deter just such violations, the Texas sewer district is trying to blame Section 5 for its own success.

The Roberts court has not resumed the Rehnquist court's federalism battles, and the chief justice's own views are unclear. But he does not come as a novice to the debate over the Voting Rights Act. As a young lawyer in the Reagan Justice Department, he wrote sharply worded memos on behalf of the administration's failed effort to block expansion of the act in 1982. Confronted with his paper trail during his Supreme Court confirmation hearing in 2005, he explained that he was simply expressing the administration's views.

Perhaps. But equally telling may be words written by his predecessor as chief justice. William H. Rehnquist, then an associate justice, dissented from a decision that upheld an earlier extension of Section 5. The law "requires state and local governments to cede far more of their powers to the federal government than the Civil War amendments ever envisioned," Rehnquist wrote in April 1980. Months later, the 25-year-old John Roberts arrived at his chambers as a law clerk. A 25-year relationship as mentor and protege ended only with Rehnquist's death days before his former law clerk was named to succeed him.

The new case, in other words, arrives at the intersection of John Roberts's past and the Supreme Court's future.

“Extended Civil Commitment of Sex Offenders Is Upheld”

The New York Times

May 18, 2010

Adam Liptak

In a broad endorsement of federal power, the Supreme Court on Monday ruled that Congress has the authority under the Constitution to allow the continued civil commitment of sex offenders after they have completed their criminal sentences.

The 7-to-2 decision touched off a heated debate among the justices on a question that has lately engaged the Tea Party movement and opponents of the new health care law: What limits does the Constitution impose on Congress’s power to legislate on matters not specifically delegated to it in Article I?

The federal law at issue in the case allows the government to continue to detain prisoners who had engaged in sexually violent conduct, suffered from mental illness and would have difficulty controlling themselves. If the government is able to prove all of this to a judge by “clear and convincing” evidence—a heightened standard, but short of “beyond a reasonable doubt”—it may hold such prisoners until they are no longer dangerous or a state assumes responsibility for them.

The challenge to the civil commitment law was brought by five prisoners. The case of Graydon Comstock was typical. In November 2006, six days before Mr. Comstock was to have completed a 37-month sentence for receiving child pornography, Attorney General Alberto R. Gonzales certified that Mr. Comstock was a sexually dangerous person.

Last year, a three-judge panel of the United States Court of Appeals for the Fourth

Circuit, in Richmond, Va., unanimously ruled that none of the powers granted to Congress in the Constitution empowered it to authorize such civil commitments. But the decision was stayed, and Mr. Comstock has remained confined in a federal prison.

At the argument of the case in January, Solicitor General Elena Kagan, now President Obama’s pick for the Supreme Court, said the law was needed “to run a criminal justice system that does not itself endanger the public.” She said 105 people had been confined under the law.

Ms. Kagan pointed to the Constitution’s “necessary and proper” clause as granting Congress the power to pass the law, though the clause is not ordinarily thought of as a source of free-standing authority. The clause gives Congress the right “to make all laws which shall be necessary and proper for carrying into execution” its other powers.

Justice Stephen G. Breyer, writing for himself and four other justices, said the clause provided Congress with the needed authority as long as the statute in question was “rationally related to the implementation of a constitutionally enumerated power.”

Congress has the undoubted powers, Justice Breyer said, to enact criminal laws in furtherance of its enumerated powers and to create a prison system to punish people who violate those laws, though neither power is explicitly mentioned in the Constitution. “The civil commitment statute before us represents a modest addition,” he added,

comparing it to medical quarantine.

Justice Breyer took pains to make clear that the court was not ruling on the separate question of whether such confinement violated the Constitution's due process clause.

Two justices, Samuel A. Alito Jr. and Anthony M. Kennedy, voted to uphold the law but did not adopt Justice Breyer's general approach.

In his concurrence, Justice Alito said he was concerned about both "the breadth of the court's language" and "the ambiguity of the standard that the court applies."

But he said the civil confinement law passed constitutional muster. "Just as it is necessary and proper for Congress to provide for the apprehension of escaped federal prisoners," he wrote, "it is necessary and proper for Congress to provide for the civil commitment of dangerous federal prisoners who would otherwise escape civil commitment as a result of federal imprisonment."

"This is not a case in which it is merely

possible for a court to think of a rational basis on which Congress might have perceived an attenuated link between the powers underlying the federal criminal statutes and the challenged federal criminal provision," Justice Alito added, saying there was in this case at least "a substantial link."

Justice Kennedy added that the majority did not pay enough heed to the 10th Amendment. Under the amendment, he wrote, "the Constitution delegates limited powers to the national government and then reserves the remainder for the states (or the people), not the other way around, as the court's analysis suggests."

Justice Clarence Thomas, joined by Justice Antonin Scalia, dissented in the case, *United States v. Comstock*, No. 08-1224.

"The fact that the federal government has the authority to imprison a person for the purpose of punishing him for a federal crime—sex-related or otherwise—does not provide the government with the additional power to exercise indefinite civil control over that person," Justice Thomas wrote.

“Bad News for Federalism? Some Preliminary Reflections on *Comstock*”

The Volokh Conspiracy

May 17, 2010

Ilya Somin

I tend to agree with Eugene that today’s Supreme Court decision in *United States v. Comstock* is very bad news for constitutional federalism. However, the ultimate import of the decision is hard to gauge because the majority opinion is ambiguous on at least one crucial point: whether Necessary Proper Clause cases are governed exclusively by the ultradeferential “rational basis” test, or whether courts should also weigh the presence or absence of five other factors the Court relied on in upholding the statute under which *Comstock* was detained.

I. The “Rational Basis” Test.

The big problem is not just that the Court ruled that Congress had the power to detain “sexually dangerous” federal prisoners who have already completed their sentences. By itself, this is a relatively minor policy (except, of course, for the people detained). The really dangerous element of the majority opinion is that it adopts the highly deferential “rational basis” test for assessing assertions of power under the Necessary and Proper Clause, holding that “in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.”

As Justice Kennedy points out in his concurring opinion (where he rejects this part of the Court’s holding), this highly deferential approach is extremely problematic:

The terms “rationally related” and “rational basis” must be employed with care, particularly if either is to be used as a stand-alone test. The phrase “rational basis” most often is employed to describe the standard for determining whether legislation that does not proscribe fundamental liberties nonetheless violates the Due Process Clause. Referring to this due process inquiry, and in what must be one of the most deferential formulations of the standard for reviewing legislation in all the Court’s precedents, the Court has said: “But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.” *Williamson v. Lee Optical of Okla., Inc.*, 348 U. S. 483, 487–488 (1955). This formulation was in a case presenting a due process challenge and a challenge to a State’s exercise of its own powers, powers not confined by the principles that control the limited nature of our National Government. The phrase, then, should not be extended uncritically to the issue before us.

II. Is the Real Standard Actually a Five Factor Test?

There is one aspect of the majority’s reasoning that may give hope to advocates of judicial enforcement of federalism. Near the end of the Court’s opinion, Justice Breyer lists five factors that determined the outcome:

We take these five considerations together. They include: (1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope. Taken together, these considerations lead us to conclude that the statute is a "necessary and proper" means of exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others.

This immediately raises the question of what happens in a case where one or more of these considerations cuts the other way. Like Randy Barnett, I particularly have in mind the Obamacare individual health care mandate, which is certainly not "narrow in scope" (it forces millions of people to buy a product they may not want), does not "accommodate state interests" to the extent the Court claims the *Comstock* legislation does, and may lack a comparable "long history of federal involvement" (the federal government has often regulated health care, but never by forcing individuals to purchase products).

The ultimate impact of *Comstock* will depend on whether the key holding is the imposition of the rational basis test (which could potentially be used to uphold almost anything), or whether it is the five factor test

quoted above, which is much less definitive. Only five justices signed on to the majority opinion; Justices Alito and Kennedy concurred on narrow grounds and made clear that they reject the rational basis test. If even one of the five decides that the multifactor test is the true operative standard (most likely Chief Justice Roberts), *Comstock* might turn out to be less dangerous than it initially seems.

III. My View of the Merits.

I think the Court got this one badly wrong, and that the challenged statute should have been invalidated. I explained my reasoning in this post, where I commented on the oral argument:

[Solicitor General Elena] Kagan fails to link the confinement of these individuals to any other enumerated power of the federal government. She tries to link it instead to "the Federal power to operate a criminal justice system." However, there is no separate enumerated power to operate a criminal justice system. Rather, Congress is only able to operate such a system in so far as it is necessary to implement one of its other powers (e.g.—to enforce punishments to deter people from violating federal laws that enforce one of those other powers). The power to incarcerate "sexually dangerous" inmates who have completed their sentences does nothing to assist in the enforcement of federal laws that are actually authorized by any of Congress' enumerated powers. . . .

Essentially, the government's argument rests on the assertion that Congress has the power to engage in any "beneficial" activity that is in some way connected to something it can do under its enumerated powers, even if that "beneficial" activity does nothing to facilitate the actual implementation of those powers. Pretty much anything Congress might want to do could be justified on those

grounds. As Comstock's lawyer put it in his part of the oral argument, "the government's argument essentially collapses into the notion, well, if it's a good idea, it must be necessary and proper to do it." If the Court accepts this reasoning, it would turn the Necessary and Proper Clause into a free-floating grant of unlimited power.

The above passage criticizes Solicitor General Elena Kagan's arguments for the government. But it applies also to the Court's opinion, which similarly tries to link the statute to Congress' authority to operate a criminal justice and penal system.

I also agree with most of the strong critique of the majority opinion in Justice Thomas' dissent (joined by Justice Scalia). Scalia's support for Thomas' position in this case

suggests that he may be having second thoughts about the very broad view of the Necessary and Proper Clause that he embraced in *Gonzales v. Raich*. It's also worth noting that the dissent extensively cites co-blogger Randy Barnett's excellent article "The Original Meaning of the Necessary and Proper Clause."

Overall, I think this is a very unfortunate decision, particularly in so far as Chief Justice Roberts endorsed the majority opinion. I am probably less optimistic than Randy Barnett. At the same time, there is a crucial ambiguity in the Court's reasoning that might reduce the decision's future impact. And the coalition between Roberts and the four liberals might prove to be more fragile than it currently seems.

HEALTH CARE

“Supreme Court May Weigh Coverage Mandate”

The Associated Press

March 29, 2010

Kara Roland

The same Supreme Court justices whom President Obama blasted during his State of the Union address this year may ultimately decide the fate of his crowning achievement as more than a dozen states have called on the courts to strike down the health insurance mandate of Democrats' health care overhaul—a move that would threaten the entire law.

Two major constitutional challenges have been levied against the new law, one by the state of Virginia, which enacted a law exempting its citizens from the federal health insurance mandate, and another by Florida and 12 other states. Legal scholars are divided on the merits of the cases, and even Congress—through its research service and its budget scorekeeper—has said it's an open question whether the provision could pass constitutional muster.

At issue is the scope of the federal government's power over states and individuals. Critics of the law say the requirement that all Americans buy insurance or pay a fine, if allowed, would mean that Congress has virtually boundless authority to compel actions. Proponents argue that legal precedents support an expansive reading of the legislative branch's license to regulate such activity.

“This is one of the most consequential lawsuits in our generation,” said Baker Hostetler lawyer David B. Rivkin Jr., who is serving as outside counsel to the 13 states

that have filed suit. “The fact you have so many different state attorneys general, Republicans and Democrats, from a variety of states coming together to do this just underscores how strongly they feel that the act infringes core constitutional interests of their respective states.”

The mandate, which doesn't take effect until 2014, is central to Democrats' goal of insuring about 32 million more Americans. The law would offer tax credits to low-income individuals and allow young adults to remain on their parents' policies longer.

Both of the state lawsuits challenge the federal government's authority under the Commerce Clause, which grants Congress the power to regulate commerce among the states. The Florida case also cites a violation of the 10th Amendment, which reserves those powers not spelled out under the federal government in the Constitution to the state governments, and argues that the health care law's expansion of state Medicaid programs threatens state sovereignty.

Among the arguments against the law is that because it does not allow for purchasing insurance across state lines—the insurance exchanges are state-based—the buying of health insurance does not constitute interstate commerce. In addition, the plaintiffs say, not purchasing health insurance does not constitute an economic activity.

“Thus far in our history, it has never been held that the Commerce Clause, even when aided by the Necessary and Proper Clause, can be used to require citizens to buy goods or services,” Virginia Attorney General Kenneth T. Cuccinelli II argues in his state’s lawsuit. “To depart from that history to permit the national government to require the purchase of goods or services would . . . create powers indistinguishable from a general police power in total derogation of our constitutional scheme of enumerated powers.”

While a requirement to buy health insurance might be new, some legal analysts say, Congress can in fact define an economic activity as something that results from not taking an action.

“The 1964 Civil Rights Act prohibits hotels and restaurants from discriminating based on race and thus prohibits inactivity,” said Erwin Chemerinsky, dean of the University of California Irvine School of Law, noting that law relied upon the Commerce Clause. “The Supreme Court has said that Congress can regulate economic activity that has a substantial effect on interstate commerce. Buying or refusing to buy insurance is economic activity. The effect on the economy is enormous.”

As an example, Mr. Chemerinsky cited cases in which the high court upheld Congress’ authority to regulate the amount of wheat that farmers grow for their own home consumption or prohibit the cultivation of marijuana for medicinal purposes.

“If that fits within the commerce power, surely the health industry does,” he said.

Mr. Rivkin, who served in various legal capacities for the Reagan administration and the George H.W. Bush administration,

strongly disagreed. If that were the case, he argued, there would be no limits to the government’s power as the Founding Fathers intended. He said the cases cited by Mr. Chemerinsky involve the cultivating of commodities and therefore clearly economic activities, unlike the refusal to purchase health insurance.

“The remarkable thing about an individual insurance purchase mandate is you are not being subject to a requirement by virtue of any economic activity you engage in—you’re not doing a damn thing; you just exist,” he said. “If this is upheld, then the federal government can do everything it wants subject only to the restrictions contained in the Bill of Rights.”

Democratic leaders and the White House have scoffed at the legal challenges. Last week, press secretary Robert Gibbs said administration attorneys advised him “we’ll win these lawsuits.”

Jack M. Balkin, a professor at Yale Law School, noted that the new law structures the mandate as an amendment to the tax code and includes a discussion of the impact on state commerce, suggesting that the administration will defend it by citing the Commerce Clause as well as Congress’ power to tax under the “general welfare” provision. That provision says the federal government may impose taxes—in this case, the penalty for those who don’t buy insurance would be the tax—in order to provide for the “general welfare” of the country.

Not everyone agrees with that reasoning.

“It is a taxation and spending power, not an open-ended general welfare clause,” said Michael W. McConnell, a Stanford law professor and former circuit court judge appointed by President George W. Bush.

“And by the way, ‘general’ had a very specific meaning in the late 18th century—it meant nationwide in scope, which is why some of the state-specific provisions are constitutionally dubious.”

Both lawsuits are in federal district courts, but analysts expect the issue to end up before the Supreme Court. If the high court were to rule in favor of the plaintiffs, the ramifications for Congress could be sweeping.

“It would be difficult for the court to hold that the law is outside of the power to tax and spend for the general welfare without calling into question various regulatory devices that both parties use in crafting legislation,” Mr. Balkin said. “Since the New Deal, both parties have used the taxing and spending power for a wide range of

regulatory purposes and this is what the challenge to the health care bill calls into question.”

However, the justices have not been averse to striking down congressional laws favored by Mr. Obama. The president used his State of the Union address to attack, with the justices present, a decision that struck down limits on corporate and union spending for political campaigns on First Amendment grounds.

In his speech, Mr. Obama warned of foreign influence over U.S. elections while Justice Samuel A. Alito Jr. silently mouthed that Mr. Obama was not telling the truth. Chief Justice John G. Roberts Jr., in response to a questioner at a speech some weeks later, called the president’s words “very troubling.”

“Health Care Law’s Enemies Have No Ally in Constitution”

The Boston Globe
May 21, 2010
Charles Fried

A recent 7-2 Supreme Court decision affirming the constitutional power of Congress to allow the indefinite detention of sexually dangerous child pornographers after the end of their federal sentences has the surprising effect of showing just how far-fetched are the constitutional objections to the new health care legislation.

One objection holds that the Constitution’s clauses giving Congress the power to regulate interstate commerce do not give Congress the power to impose a modest penalty (up to about \$700) on people who could—but do not—buy health insurance.

To see why this is a bad argument, consider the steps by which the Court held that Congress has the power to keep sexually dangerous child pornographers in confinement: The Constitution explicitly gives Congress the power to regulate interstate commerce. And it has long been the law that Congress can forbid commerce in things that might be harmful. Those who traffic (or possess, in the case of child pornography) such things can be prosecuted and imprisoned.

The recent Supreme Court ruling, *United States v. Comstock*, added that the power to imprison implies an obligation to protect the public from dangerous people even after they had served their sentences. There can be no doubt that insurance, and particularly health insurance, is commerce with interstate effects that Congress may regulate.

For the health regulation to work, though, it

is “necessary and proper”—the clause explicitly in play in *Comstock*—to nudge (with the \$700 penalty) the young and healthy to enter the insurance pool, and not to wait until they are old and infirm. Insurance just won’t work if you could wait until your house is on fire to buy it. But, say the objectors, this is not penalizing someone for doing something harmful; it’s penalizing him for not doing something, and that’s somehow different.

It is not. Congress has the power to enact the regulatory scheme and to design it in a way that is “necessary and proper” to its good functioning, and that means sweeping in the unwilling. But even granting Congress’s power under the commerce and “necessary and proper” clauses, is it not an offense to constitutional liberty to impose the \$700 penalty? Is the mandate not independently constitutionally “improper”?

That objection would complain that such a mandate violates some constitutional liberty even if enacted by a state (as Massachusetts has done). Here again, *Comstock* is instructive. The convicted child pornographer claimed that he was deprived of his constitutional liberty by continued detention after he had served his sentence, but the Supreme Court had decided many years ago that Kansas could, with proper procedural safeguards, do just that. And if it violated no liberty for Kansas to do it, then neither did it violate any liberty for Congress to do it.

A more telling precedent is the Supreme

Court's 1905 decision in *Jacobson v. Commonwealth*, which rejected a complaint against Massachusetts's compulsory vaccination law that it said infringed the "inherent right of every freeman to care for his own body and health in such way as seems to him best."

Whatever Jacobson's right to care for himself, he had none to impose risks on his fellow citizens. A healthy, young person who persists in staying out of the insurance pools imposes a burden on his fellow citizens also.

Finally there is the bogus complaint that the federal law unconstitutionally imposes financial and administrative burdens on unwilling states. The statute exempts unwilling states from participating, subjecting the citizens of those states to the federal scheme directly. There are sensible reasons for opposing the new federal health care system—for instance, it will add to the federal deficit and fail to control health care costs—but the Constitution is not one of them.

“Changing Stance, Administration Now Defends Insurance Mandate as a Tax”

The New York Times

July 16, 2010

Robert Pear

When Congress required most Americans to obtain health insurance or pay a penalty, Democrats denied that they were creating a new tax. But in court, the Obama administration and its allies now defend the requirement as an exercise of the government’s “power to lay and collect taxes.”

And that power, they say, is even more sweeping than the federal power to regulate interstate commerce.

Administration officials say the tax argument is a linchpin of their legal case in defense of the health care overhaul and its individual mandate, now being challenged in court by more than 20 states and several private organizations.

Under the legislation signed by President Obama in March, most Americans will have to maintain “minimum essential coverage” starting in 2014. Many people will be eligible for federal subsidies to help them pay premiums.

In a brief defending the law, the Justice Department says the requirement for people to carry insurance or pay the penalty is “a valid exercise” of Congress’s power to impose taxes.

Congress can use its taxing power “even for purposes that would exceed its powers under other provisions” of the Constitution, the department said. For more than a century, it added, the Supreme Court has held that Congress can tax activities that it could not reach by using its power to regulate commerce.

While Congress was working on the health care legislation, Mr. Obama refused to accept the argument that a mandate to buy insurance, enforced by financial penalties, was equivalent to a tax.

“For us to say that you’ve got to take a responsibility to get health insurance is absolutely not a tax increase,” the president said last September, in a spirited exchange with George Stephanopoulos on the ABC News program “This Week.”

When Mr. Stephanopoulos said the penalty appeared to fit the dictionary definition of a tax, Mr. Obama replied, “I absolutely reject that notion.”

Congress anticipated a constitutional challenge to the individual mandate. Accordingly, the law includes 10 detailed findings meant to show that the mandate regulates commercial activity important to the nation’s economy. Nowhere does Congress cite its taxing power as a source of authority.

Under the Constitution, Congress can exercise its taxing power to provide for the “general welfare.” It is for Congress, not courts, to decide which taxes are “conducive to the general welfare,” the Supreme Court said 73 years ago in upholding the Social Security Act.

Dan Pfeiffer, the White House communications director, described the tax power as an alternative source of authority. “The Commerce Clause supplies sufficient authority for the shared-responsibility requirements in the new health reform law,”

Mr. Pfeiffer said. “To the extent that there is any question of additional authority—and we don’t believe there is—it would be available through the General Welfare Clause.”

The law describes the levy on the uninsured as a “penalty” rather than a tax. The Justice Department brushes aside the distinction, saying “the statutory label” does not matter. The constitutionality of a tax law depends on “its practical operation,” not the precise form of words used to describe it, the department says, citing a long line of Supreme Court cases.

Moreover, the department says the penalty is a tax because it will raise substantial revenue: \$4 billion a year by 2017, according to the Congressional Budget Office.

In addition, the department notes, the penalty is imposed and collected under the Internal Revenue Code, and people must report it on their tax returns “as an addition to income tax liability.”

Because the penalty is a tax, the department says, no one can challenge it in court before paying it and seeking a refund.

Jack M. Balkin, a professor at Yale Law School who supports the new law, said, “The tax argument is the strongest argument for upholding” the individual-coverage requirement.

Mr. Obama “has not been honest with the American people about the nature of this bill,” Mr. Balkin said last month at a meeting of the American Constitution Society, a progressive legal organization. “This bill is a tax. Because it’s a tax, it’s completely constitutional.”

Mr. Balkin and other law professors pressed

that argument in a friend-of-the-court brief filed in one of the pending cases.

Opponents contend that the “minimum coverage provision” is unconstitutional because it exceeds Congress’s power to regulate commerce.

“This is the first time that Congress has ever ordered Americans to use their own money to purchase a particular good or service,” said Senator Orrin G. Hatch, Republican of Utah.

In their lawsuit, Florida and other states say: “Congress is attempting to regulate and penalize Americans for choosing not to engage in economic activity. If Congress can do this much, there will be virtually no sphere of private decision-making beyond the reach of federal power.”

In reply, the administration and its allies say that a person who goes without insurance is simply choosing to pay for health care out of pocket at a later date. In the aggregate, they say, these decisions have a substantial effect on the interstate market for health care and health insurance.

In its legal briefs, the Obama administration points to a famous New Deal case, *Wickard v. Filburn*, in which the Supreme Court upheld a penalty imposed on an Ohio farmer who had grown a small amount of wheat, in excess of his production quota, purely for his own use.

The wheat grown by Roscoe Filburn “may be trivial by itself,” the court said, but when combined with the output of other small farmers, it significantly affected interstate commerce and could therefore be regulated by the government as part of a broad scheme regulating interstate commerce.

“The Insurance Mandate in Peril”

The Wall Street Journal

April 29, 2010

Randy E. Barnett

A “tell” in poker is a subtle but detectable change in a player’s behavior or demeanor that reveals clues about the player’s assessment of his hand. Something similar has happened with regard to the insurance mandate at the core of last month’s health reform legislation. Congress justified its authority to enact the mandate on the grounds that it is a regulation of commerce. But as this justification came under heavy constitutional fire, the mandate’s defenders changed the argument—now claiming constitutional authority under Congress’s power to tax.

This switch in constitutional theories is a tell: Defenders of the bill lack confidence in their commerce power theory. The switch also comes too late. When the mandate’s constitutionality comes up for review as part of the state attorneys general lawsuit, the Supreme Court will not consider the penalty enforcing the mandate to be a tax because, in the provision that actually defines and imposes the mandate and penalty, Congress did not call it a tax and did not treat it as a tax.

The Patient Protection and Affordable Care Act (aka ObamaCare) includes what it calls an “individual responsibility requirement” that all persons buy health insurance from a private company. Congress justified this mandate under its power to regulate commerce among the several states: “The individual responsibility requirement provided for in this section,” the law says, “. . . is commercial and economic in nature, and substantially affects interstate commerce, as a result of the effects described in paragraph (2).” Paragraph (2)

then begins: “The requirement regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased.”

In this way, the statute speciously tries to convert inactivity into the “activity” of making a “decision.” By this reasoning, your “decision” not to take a job, not to sell your house, or not to buy a Chevrolet is an “activity that is commercial and economic in nature” that can be mandated by Congress.

It is true that the Supreme Court has interpreted the Commerce Clause broadly enough to reach wholly intrastate economic “activity” that substantially affects interstate commerce. But the Court has never upheld a requirement that individuals who are doing nothing must engage in economic activity by entering into a contractual relationship with a private company. Such a claim of power is literally unprecedented.

Since this Commerce Clause language was first proposed in the Senate last December, Democratic legislators and law professors alike breezily dismissed any constitutional objections as preposterous. After the bill was enacted, critics branded lawsuits by state attorneys general challenging the insurance mandate as frivolous. Yet, unable to produce a single example of Congress using its commerce power this way, the defenders of the personal mandate began to shift grounds.

On March 21, the same day the House approved the Senate version of the legislation, the staff of the Joint Committee

on Taxation released a 157-page “technical explanation” of the bill. The word “commerce” appeared nowhere. Instead, the personal mandate is dubbed an “Excise Tax on Individuals Without Essential Health Benefits Coverage.” But while the enacted bill does impose excise taxes on “high cost,” employer-sponsored insurance plans and “indoor tanning services,” the statute never describes the regulatory “penalty” it imposes for violating the mandate as an “excise tax.” It is expressly called a “penalty.”

This shift won’t work. The Supreme Court will not allow staffers and lawyers to change the statutory cards that Congress already dealt when it adopted the Senate language.

In the 1920s, when Congress wanted to prohibit activity that was then deemed to be solely within the police power of states, it tried to penalize the activity using its tax power. In *Bailey v. Drexel Furniture* (1922) the Supreme Court struck down such a penalty saying, “there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.”

Although the Court has never repudiated this principle, the Court now interprets the commerce power far more broadly. Thus Congress may regulate or prohibit intrastate economic activity directly without invoking its taxation power. Yet precisely because a mandate to engage in economic activity has never been upheld by the Court, the tax power is once again being used to escape constitutional limits on Congress’s regulatory power.

Supporters of the mandate cite *U.S. v. Kahriger* (1953), where the Court upheld a punitive tax on gambling by saying that “[u]nless there are provisions extraneous to

any tax need, courts are without authority to limit the exercise of the taxing power.” Yet the Court in *Kahriger* also cited *Bailey* with approval. The key to understanding *Kahriger* is the proposition the Court there rejected: “it is said that Congress, under the pretense of exercising its power to tax has attempted to penalize illegal intrastate gambling through the regulatory features of the Act.”

In other words, the Court in *Kahriger* declined to look behind Congress’s assertion that it was exercising its tax power to see whether a measure was really a regulatory penalty. As the Court said in *Sonzinsky v. U.S.* (1937), “[i]nquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts.” But this principle cuts both ways. Neither will the Court look behind Congress’s inadequate assertion of its commerce power to speculate as to whether a measure was “really” a tax. The Court will read the cards as Congress dealt them.

Congress simply did not enact the personal insurance mandate pursuant to its tax powers. To the contrary, the statute expressly says the mandate “regulates activity that is commercial and economic in nature.” It never mentions the tax power and none of its eight findings mention raising any revenue with the penalty.

Moreover, while inserting the mandate into the Internal Revenue Code, Congress then expressly severed the penalty from the normal enforcement mechanisms of the tax code. The failure to pay the penalty “shall not be subject to any criminal prosecution or penalty with respect to such failure.” Nor shall the IRS “file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section,” or “levy on any such property

with respect to such failure.”

In short, the “penalty” is explicitly justified as a penalty to enforce a regulation of economic activity and not as a tax. There is no authority for the Court to recharacterize a regulation as a tax when doing so is contrary to the express and actual regulatory purpose of Congress.

So defenders of the mandate are making yet another unprecedented claim. Never before has the Court looked behind Congress’s unconstitutional assertion of its commerce power to see if a measure could have been justified as a tax. For that matter, never before has a “tax” penalty been used to mandate, rather than discourage or prohibit,

economic activity.

Are there now five justices willing to expand the commerce and tax powers of Congress where they have never gone before? Will the Court empower Congress to mandate any activity on the theory that a “decision” not to act somehow affects interstate commerce? Will the Court accept that Congress has the power to mandate any activity so long as it is included in the Internal Revenue Code and the IRS does the enforcing?

Yes, the smart money is always on the Court upholding an act of Congress. But given the hand Congress is now holding, I would not bet the farm.

“A Tax Like Any Other”

The New York Times

March 28, 2009

Jack Balkin

The individual mandate, which amends the Internal Revenue Code, is not actually a mandate at all. It is a tax. It gives people a choice: they can buy health insurance or they can pay a tax roughly equal to the cost of health insurance, which is used to subsidize the government's health care program and families who wish to purchase health insurance.

What the opponents are really claiming is that it is unconstitutional to make Americans pay taxes.

People are exempt from the tax if they get health insurance through their employer or through Medicare, are poor, are dependents, are in the military, live overseas, or have a religious objection.

The new law keeps insurance companies from denying coverage because of preexisting conditions or from imposing lifetime caps on coverage. The individual mandate makes these popular aspects of health care reform possible.

Without an individual mandate people will wait until they become sick to buy health insurance, raising insurance premiums for others and undermining the ability to spread risk that is necessary for private insurance markets. Requiring people to make a choice between buying health insurance or paying a tax gives people incentives to act responsibly and not attempt to game the system.

The Constitution gives Congress the power

to tax and spend money for the general welfare. This tax promotes the general welfare because it makes health care more widely available and affordable. Under existing law, therefore, the tax is clearly constitutional.

The mandate is also not a “direct” tax which must be apportioned among the states by population. Direct taxes are taxes on land or “head” taxes on the general population. The individual mandate does not tax land. It is not assessed on the population generally but only on people who don't buy insurance and aren't otherwise exempt. It is a tax on behavior, like a tax on businesses that don't install anti-pollution equipment.

Many important and popular government programs are based Congress's ability to give incentives through taxation and redistribute tax revenues for public purposes. To strike down the individual mandate the Supreme Court would have to undermine many years of precedents justifying these programs that stretch back to the New Deal (and in the case of the rules for direct taxes, to the very founding of the country).

Opponents of the individual mandate insist that they are only defending individual freedom, but they are actually taking a far more radical position. They are really claiming that it is unconstitutional to make Americans pay taxes. The Supreme Court, however, will not be fooled, and they will reject this challenge.

“Doubts on New Health Law: State’s Challenge Goes Ahead”

SCOTUSblog

August 2, 2010

Lyle Denniston

Raising serious questions about the constitutionality of a key part of President Obama’s new health care reform plan, and finding no Supreme Court decisions specifically on the issue, a federal judge on Monday ruled that the state of Virginia’s court challenge to the plan may go forward. U.S. District Judge Henry E. Hudson of Richmond, VA, rejected the Administration’s plea to dismiss that case at the outset. . . .

The new law, the judge commented, “radically changes” health care coverage in the country. In passing it, he added, Congress broke new ground and extended “Commerce Clause powers beyond its current high watermark.” Both sides, the decision said, have turned up prior rulings, but they are “short of definitive.”

“While this case raises a host of complex constitutional issues,” the judge wrote, “all seem to distill to the single question of whether or not Congress has the power to regulate—and tax—a citizen’s decision not to participate in interstate commerce”—that is, a private decision not to buy health insurance. “Neither the U.S. Supreme Court nor any circuit court of appeals has squarely addressed this issue . . . Given the presence of some authority arguably supporting the theory underlying each side’s position, this Court cannot conclude at this stage that the [Virginia] complaint fails to state a cause of action. . . . Resolution of the controlling issues in this case must await a hearing on the merits.”

The Virginia lawsuit is one of at least three

major cases challenging the new Patient Protection and Affordable Care Act, one of the President’s main domestic policy initiatives. Virginia’s challenge was aimed only at a provision that requires individuals either to obtain a minimum level of health insurance coverage or pay a penalty if they do not do so. The law has two separate provision on that point: the mandate to buy health insurance, and the penalty for failure to do that. Virginia challenged only the mandate.

The state’s complaint made two basic constitutional arguments: first, that Congress does not have the authority, under the Commerce Clause, to require an unwilling private person to buy something from a private source, and, second, that, since there was no constitutional basis for Congress to pass the mandate, the law cannot be upheld as a valid use of Congress’ authority to put a tax on that individual, under the Constitution’s Necessary and Proper Clause.

As an alternative, the state contended that its rights as a sovereign state under the Constitution’s Tenth Amendment are violated by the new federal mandate, because it conflicts directly with a new Virginia law—passed explicitly to set up such a test case—that protects the citizens of Virginia from any such federal health mandate.

Judge Hudson is the first federal judge, at any level, to rule on any of the constitutional arguments now being aimed at the new federal program. While he did not resolve finally any of the issues, he found enough

strength behind the state's arguments that defeated the Administration plea to dismiss the case.

The Justice Department had contended that the state's Attorney General could not pursue the case at all, on the theory that a state cannot sue the federal government in a test over the powers each has over the state's citizens. The Department also argued that the lawsuit was premature, because the new buy-insurance mandate does not take effect until four years from now. Moreover, it asserted that the state is barred by federal law from seeking a court order against enforcing a federal tax.

On the constitutional issues, the Department argued that Congress had the authority under the Commerce Clause to regulate an individual's activity that has an effect on commerce among the states, and that the tax or penalty to enforce that mandate was a valid action under the Necessary and Proper Clause.

Judge Hudson found that the state Attorney General did have a legal right to file the case, in order to defend Virginia's own law protecting its citizens from such a health mandate. While the lawsuit might help protect Virginia's citizens, the judge concluded, its main aim is to defend the state's sovereign interest in passing and enforcing its own laws, duly enacted by its legislature.

The judge went on to conclude that the lawsuit was not premature, because the state must soon begin to take steps to comply with the federal mandate. The state, among other actions, would have to revamp its own health care program, specifically the Medicaid program of providing—with federal financial support—health care for the poor. The judge commented: “Unquestionably, this regulation radically

changes the landscape of health insurance coverage in America.”

On the constitutional arguments, the judge said the task was simply to decide whether Virginia had outlined a case that was “legally viable.” He found that Virginia had done so, although he did not rule finally on any dispute in the case except the state's legal right to bring the case to court.

The judge outlined both sides' arguments on the Commerce Clause issue, and commented that that part of the case “raises issues of national significance.” The two sides, he added, have taken “widely divergent and at times novel” positions on those issues.

Displaying some skepticism about the scope of the new mandate, Hudson said that “never before has the Commerce Clause and associated Necessary and Proper Clause been extended this far. At this juncture, the Court is not persuaded that [the Administration] has demonstrated that the complaint fails to state a cause of action with respect to the Commerce Clause element.”

Moving on to whether the penalty attached to the health insurance mandate is a valid use of Congress's legislative powers, the judge noted that the Administration had “appeared to concede” that if the mandate was beyond Congress's constitutional powers, then the penalty attached to failure to obtain insurance would necessarily fail.

The bottom line: the judge denied the Justice Department motion to dismiss the case.

In one of the specific legal issues that the judge said will have to be examined as the case moves forward is whether, in deciding whether the state's Tenth Amendment rights have been violated, a 1945 federal law

reserves to the states the authority to regulate the business of insurance. The McCarran-Ferguson Act of 1945 says that states have that authority unless Congress specifically says they do not. The Justice Department has argued that Congress has

taken over this authority, so states must yield, by preempting the regulation of a health mandate. “The demarcation between state and federal responsibility in this area,” Hudson said, “will require further development in future proceedings.”

“Two Cheers for Federal Court’s Virginia Health Care Suit Decision”

The Washington Examiner

August 5, 2010

Ilya Somin

Monday’s federal district court decision refusing to dismiss a lawsuit challenging the constitutionality of the Obama health care plan is an important step forward for opponents of the plan.

The suit by the state of Virginia focuses primarily on a challenge to the “individual mandate” element of the plan, which requires most American citizens and legal residents to purchase a government-approved health insurance plan by 2014 or pay a fine for noncompliance. A similar suit has been filed by 20 other state governments and the National Federation of Independent Business in a federal court in Florida.

Judge Henry Hudson wrote that the individual mandate “literally forges new ground and extends Commerce Clause powers beyond its current high watermark.” As he put it, “No reported case from any federal appellate court has” ruled that Congress has the power to “regulate a person’s decision not to purchase a product.” This undercuts the federal government’s argument that the individual mandate is clearly permitted under existing precedent.

The federal government claims that Congress has the power to impose it under the Commerce Clause, the Tax Clause, and the Necessary and Proper Clause. All three arguments have serious flaws.

The Commerce Clause gives Congress authority to regulate “Commerce . . . among the several states.” But the individual

mandate regulates that which is neither commercial nor interstate. A combination of state and federal law makes it illegal to purchase health insurance across state lines. At most, what we have here is commerce within a single state, not interstate commerce.

Moreover, the object of the mandate isn’t even commerce at all. Instead of regulating preexisting commerce, the bill forces people to engage in commercial transactions even if they had no previous involvement in interstate commerce in health insurance at all.

A series of deeply flawed Supreme Court decisions have expanded Congress’ Commerce Clause authority well beyond what the text of the Constitution permits. These cases allow the federal government to regulate almost any “economic activity.”

But, as Judge Hudson points out, even they do not give Congress the power to regulate mere inactivity—in this case, the simple fact of being a U.S. resident without health insurance.

The Tax Clause gives Congress the power to impose taxes to “pay the Debts and provide for the common Defence and general Welfare of the United States.” The government argues that the mandate counts as a “tax” because it imposes a financial penalty.

This ignores the obvious distinction between a tax and a financial penalty for refusing to

comply with a regulation. Last September, President Obama himself made the common sense point that “for us to say that you’ve got to take a responsibility to get health insurance is absolutely not a tax increase.” He was right. If the government’s argument is accepted by courts, Congress could require Americans to do almost anything on pain of having to pay a fine if they refuse.

Finally, the federal government argues that the mandate is authorized by the Necessary and Proper Clause, which gives Congress the power to “make all Laws which shall be necessary and proper for carrying into Execution” other powers Congress is granted by the Constitution.

But even if the mandate were “necessary,” which is far from certain, it is not “proper” under our constitutional system of limited federal authority. If the clause allows

Congress to adopt the individual mandate, the same logic would justify almost any other requirement Congress might impose on individuals, thereby gutting the idea of limited federal power.

This ruling does not conclusively decide the case in Virginia’s favor. It merely denies the federal government’s motion to dismiss the suit on the grounds that the state’s arguments are too weak to justify a full-scale consideration of the merits. The legal battle over the Obama health care plan is far from over.

Nonetheless, Hudson’s ruling is a victory for those who believe that the individual mandate is unconstitutional. It makes it difficult to argue that the lawsuits against the mandate are mere political grandstanding with no basis in serious legal argument.

GAY RIGHTS

“Judge Topples U.S. Rejection of Gay Unions”

The New York Times

July 8, 2010

Abby Goodnough & John Schwartz

A federal judge in Massachusetts found Thursday that a law barring the federal government from recognizing same-sex marriage is unconstitutional, ruling that gay and lesbian couples deserve the same federal benefits as heterosexual couples.

Judge Joseph L. Tauro of United States District Court in Boston sided with the plaintiffs in two separate cases brought by the state attorney general and a gay rights group.

Although legal experts disagreed over how the rulings would fare on appeal, the judge's decisions were nonetheless sure to further inflame the nationwide debate over same-sex marriage and gay rights.

If the rulings find their way to the Supreme Court and are upheld there, they will put same-sex marriage within the constitutional realm of protection, just as interracial marriage has been for decades. Seeking that protection is at the heart of both the Massachusetts cases and a federal case pending in California over the legality of that state's ban on same-sex marriage.

Tracy Schmalzer, a spokeswoman for the Justice Department, said federal officials were reviewing the decision and had no further comment. But lawyers for the plaintiffs said they fully expected the Obama administration to appeal. An appeal would be heard by the First Circuit, which also includes Rhode Island, Maine, New

Hampshire and Puerto Rico.

In the case brought by Attorney General Martha Coakley, Judge Tauro found that the 1996 law, known as the Defense of Marriage Act, or DOMA, compels Massachusetts to discriminate against its own citizens in order to receive federal money for certain programs.

The other case, brought by Gay and Lesbian Advocates and Defenders, focused more narrowly on equal protection as applied to a handful of federal benefits. In that case, Judge Tauro agreed that the federal law violated the equal protection clause of the Constitution by denying benefits to one class of married couples—gay men and lesbians—but not others.

Neither suit challenged a separate provision of the Defense of Marriage Act that says states do not have to recognize same-sex marriages performed in other states. But if the cases make their way to the Supreme Court and are upheld, gay and lesbian couples in states that recognize same-sex marriage will be eligible for federal benefits that are now granted only to heterosexual married couples.

“This court has determined that it is clearly within the authority of the commonwealth to recognize same-sex marriages among its residents, and to afford those individuals in same-sex marriages any benefits, rights and privileges to which they are entitled by

virtue of their marital status,” Judge Tauro wrote in the case brought by Ms. Coakley. “The federal government, by enacting and enforcing DOMA, plainly encroaches upon the firmly entrenched province of the state.”

Proponents of gay rights embraced the rulings as legal victories.

“Today the court simply affirmed that our country won’t tolerate second-class marriages,” said Mary Bonauto, civil rights project director for Gay and Lesbian Advocates and Defenders, who argued the case. “This ruling will make a real difference for countless families in Massachusetts.”

Chris Gacek, a senior fellow at the Family Research Council, a leading conservative group, said he was disappointed by the decision.

“The idea that a court can say that this definition of marriage that’s been around forever is irrational is mind-boggling,” Mr. Gacek said. “It’s a bad decision.”

Massachusetts has allowed same-sex couples to marry since 2004, and while more than 15,000 have done so, they are denied federal benefits like Social Security survivors’ payments, the right to file taxes jointly and guaranteed leave from work to care for a sick spouse.

In the *Coakley* case, the judge held that federal restrictions on funding for states that recognize same-sex marriage violates the 10th Amendment, the part of the Constitution that declares that rights not explicitly granted to the federal government, or denied to the states, belong to the states.

The Obama administration’s Justice Department was in the position of defending

the Defense of Marriage Act even though Barack Obama had called during the 2008 presidential campaign for repealing it. Scott Simpson, when arguing the case on behalf of the government in May, opened by acknowledging the administration’s opposition to the act, but saying he was still obliged to defend its constitutionality.

“This presidential administration disagrees with DOMA as a matter of policy,” Mr. Simpson said at the time. “But that does not affect its constitutionality.”

Some constitutional scholars said they were surprised by Judge Tauro’s opinions in the two cases.

“What an amazing set of opinions,” said Jack M. Balkin, a professor at Yale Law School. “No chance they’ll be held up on appeal.”

Professor Balkin, who supports the right to same-sex marriage, said the opinions ignored the federal government’s longstanding involvement in marriage issues in areas like welfare, tax policy, health care, Social Security and more. The opinion in the advocacy group’s case applies the Constitution to marriage rights, he said, undercutting the notion that the marriage is not a federal concern.

“These two opinions are at war with themselves,” he said.

The arguments concerning the 10th Amendment and the spending clause, if upheld, would “take down a wide swath of programs—you can’t even list the number of programs that would be affected,” he said.

By citing the 10th Amendment and making what is essentially a states’ rights argument, Professor Balkin said Judge Tauro was

“attempting to hoist conservatives by their own petard, by saying: ‘You like the 10th Amendment? I’ll give you the 10th Amendment! I’ll strike down DOMA!’”

Erwin Chemerinsky, the dean of the University of California, Irvine, School of Law, was more supportive of the logic of the two opinions, and said they worked together to establish a broad right of marriage for same-sex couples.

“The key issue in this case, and in all litigation about marriage equality for gays and lesbians, is, Does the government have a rational basis for treating same-sex couples differently from heterosexual couples?” he said. “Here, the court says there is no

rational basis for treating same-sex couples differently from heterosexual couples. Therefore, DOMA is unconstitutional, and conditioning federal funding on compliance with DOMA is unconstitutional.”

A central issue in the fight over the constitutionality of California’s same-sex marriage ban is whether laws restricting gay rights should be held to a tougher standard of review than the “rational basis” test, and so Judge Tauro’s decision takes a different path that would eliminate the need for that line of argument, Professor Chemerinsky said.

“There’s no need to get to higher scrutiny if it fails rational basis review,” he said.

“Be Careful What You Wish For Department: Federal District Court Strikes Down DOMA”

Balkinization
July 8, 2010
Jack Balkin

Today Judge Joseph Tauro in the federal district court in Massachusetts struck down section 3 of the Defense of Marriage Act (DOMA) in two opinions, *Gill v. Office of Personnel Management*, and *Massachusetts v. HHS*. Section 3 of DOMA requires that marriage, for purposes of federal benefits programs, must be defined as the union of one man and one woman, so that same sex marriages cannot take advantage of any federal benefits programs. *Gill* holds that this violates the equal protection component of the Fifth Amendment because there is no rational basis for denying same sex couples already recognized in a particular state from receiving federal benefits. *Massachusetts v. HHS* holds that federal programs that deny benefits to married same sex couples violate the Tenth Amendment because they intrude into a function exclusively reserved to states, namely the definition and regulation of marriage. It also holds that selective funding of only opposite sex couples is not within the federal spending power under the General Welfare Clause because it places an unconstitutional condition on the receipt of federal funds.

I am a strong supporter of same sex marriage. Nevertheless, I predict that both of these opinions will be overturned on appeal. Whether one likes it or not—and I do not—Judge Tauro is way ahead of the national consensus on the the equal protection issue. I personally think that discrimination against gays and lesbians is irrational, but a federal district court judge—who must obey existing precedents, and who is overseen by a federal judiciary and a Supreme Court

constituted as they currently are—is in a very different position than I am.

Perhaps more importantly, his Tenth Amendment arguments prove entirely too much. As much as liberals might applaud the result, they should be aware that the logic of his arguments, taken seriously, would undermine the constitutionality of wide swaths of federal regulatory programs and seriously constrict federal regulatory power.

To be sure, there is something delightfully playful and perverse about the two opinions when you read them. Judge Tauro uses the Tenth Amendment—much beloved by conservatives—to strike down another law much beloved by conservatives—DOMA. There is a kind of clever, “gotcha” element to this logic. It is as if he’s saying: “You want the Tenth Amendment? I’ll give you the Tenth Amendment!” But in the long run, this sort of argument, clever as it is, is not going to work. Much as I applaud the cleverness—which is certain to twist both liberal and conservative commentators in knots—I do not support the logic.

The arguments of Judge Tauro’s two opinions are at war with each other. He wants to say that marriage is a distinctly state law function with which the federal government may not interfere. But the federal government has been involved in the regulation of family life and family formation since at least Reconstruction, and especially so since the New Deal. Much of the modern welfare state and tax code

defines families, regulates family formation and gives incentives (some good and some bad) with respect to marriages and families. Indeed, social conservatives have often argued for using the federal government's taxing and spending powers to create certain types of incentives for family formation and to benefit certain types of family structures; so too have liberals.

In both opinions, Judge Tauro takes us through a list of federal programs for which same sex couples are denied benefits. But he does not see that even as he does so, he is also reciting the history of federal involvement in family formation and family structure. His Tenth Amendment argument therefore collapses of its own weight. If the federal government cannot interfere with state prerogatives in these areas, why was it able to pass all of these statutes, which clearly affect how state family law operates in practice and clearly give incentives that could further, undermine, or even in some cases preempt state policies?

(In one of the wildest parts of the *Massachusetts v. HHS* opinion, Judge Tauro resurrects Chief Justice Rehnquist's "traditional governmental functions" approach from *National League of Cities v. Usery*, which was specifically overturned in 1985 in *Garcia v. San Antonio Metropolitan Transportation Company* on the grounds that it was completely unworkable. The existence of Supreme Court authority, however, does not stop Judge Tauro; he simply notes that a First Circuit decision predating *Garcia* that used the concept to uphold the federal child support recovery law is still on the books, and who knows, maybe the Supreme Court will change its mind!)

Moreover, while insisting that marriage is a distinctly state prerogative, Judge Tauro argues that the federal constitution makes it

irrational for the federal government to discriminate between same and opposite sex couples. But if so then it follows that it would also be irrational for a state government to discriminate, because the test under the Fifth Amendment equal protection component and the Fourteenth Amendment's Equal Protection Clause (which applies to the states) is the same. Thus Judge Tauro is saying that marriage is none of the federal government's business, except, of course, when a federal court thinks otherwise. He is, in essence, laying the groundwork for an equal protection challenge to state marriage laws in virtually every state. This is not a result that is particularly respectful of state prerogatives!

Finally, Judge Tauro's attempt to limit federal power through the Tenth Amendment so that it does not interfere with state prerogatives might delight members of the contemporary Tea Party movement (at least if it wasn't aimed at DOMA), but it should give most Americans pause. The modern state depends heavily on the federal government's taxing and spending powers for many of the benefits that citizens hold dear, including Medicare, Medicaid, Social Security, and the newly passed provisions of the Affordable Care Act. These programs have regulatory effects on state family policies just as much as DOMA does. If DOMA's direct interference with state prerogatives is beyond federal power, then perhaps any or all of these programs are vulnerable—and unconstitutional—to the extent they interfere with state policies regarding family formation as well. Put differently, Judge Tauro has offered a road map to attack a wide range of federal welfare programs, including health care reform. No matter how much they might like the result in this particular case, this is not a road that liberals want to travel.

There is much to admire in Judge Tauro's

bravery in writing these opinions, and in his forthright declaration that the federal government's policy is unjust and unreasonable. His two opinions are wild, audacious, and fearless in their logic. But for

the same reason, they will and should be quickly overturned. I believe that the civil rights of gays and lesbians will someday be vindicated by legislatures and courts. But not in this way.

“Defense of Marriage Act’s Achilles Heel”

Los Angeles Times
July 14, 2010
Andrew Koppelman

Last week, a federal court in Massachusetts held unconstitutional the provision of the federal Defense of Marriage Act, known as DOMA, that denies federal benefits to same-sex spouses. The ruling relied on two arguments: that the law interfered with the rights of states guaranteed in the 10th Amendment, and that it violated the Constitution’s equal protection clause. The first of these arguments doesn’t make much sense, but the second is so strong that it has a good chance of being accepted by the U.S. Supreme Court.

Section 3 of DOMA requires that marriage, for all federal purposes, be defined as the union of one man and one woman. It was challenged by the attorney general in Massachusetts, where same-sex marriage is legal, and also in a separate suit by seven married same-sex couples and three widowers in the state who had been in same-sex marriages. The plaintiffs include the surviving spouse of Rep. Gerry Studds (D-Mass.), the first openly gay man to serve in Congress. After Studds’ death, his spouse was denied both health insurance and the normal survivor annuity—the only widower of a member of Congress to be refused these benefits.

In the case brought by Massachusetts, the court held that DOMA intrudes on “traditional government functions,” specifically the state’s right to define what marriage is. In the individuals’ cases, it held that there is no rational basis for denying federal benefits to same-sex spouses in marriages legally recognized in their states. The first of these arguments is silly, and

potentially mischievous. But the second is very strong, and can and should carry the day if, as is likely, the case is appealed all the way to the Supreme Court.

The trouble with the states’ rights argument is its implication that whenever a federal law uses the word “marriage” to define the scope of some federal program, it is obligated to follow state law. But an obvious counterexample exists: immigration. In most states, the government doesn’t involve itself in the reasons a couple marries, even if there’s no love involved and the marriage is primarily a business transaction or a matter of convenience. But when people marry for immigration purposes, the federal government has no trouble deeming the marriage “fraudulent,” even though it remains valid under state law. The Immigration and Customs Enforcement agency doesn’t interfere with traditional state functions because it leaves the state free to recognize, for its own purposes, any marriage it likes. But it won’t grant legal residency to immigrants it believes married only to secure the benefit.

The other part of the court’s ruling, however, held that DOMA lacked a rational basis because none of the government’s justifications for the law’s blanket discrimination made sense. It’s hard to see, for example, how the law would protect traditional marriage. Are same-sex couples going to be discouraged from marrying because they wouldn’t be entitled to be buried together in a veterans cemetery? Not likely. This irrationality, and the unprecedented burden it imposes—no class

of state-recognized marriages has ever before in American history been subjected to this kind of federal discrimination—led the court to infer an unconstitutional purpose: a bare desire to harm a politically unpopular group.

The case will probably be appealed. But will it be upheld? This Supreme Court is unlikely to conclude that same-sex marriage must be allowed in all states. But you can invalidate DOMA without going that far, by focusing on its unprecedented, blunderbuss character.

On the current Supreme Court, this case would probably depend on the swing vote of Justice Anthony M. Kennedy. (If he is still there when it is heard—appeals take years, and he turns 74 later this month.) In a 1996 decision striking down a Colorado law that repealed all antidiscrimination protection for gay people, he noted that it “has the peculiar property of imposing a broad and undifferentiated disability on a single named group.” This kind of imposition “is unprecedented in our jurisprudence,” and he declared that it “is not within our constitutional tradition to enact laws of this sort.” Similarly, in a 2003 decision invalidating a law banning homosexual sex, he observed that such gay-specific laws were very recent, originating in the 1970s. That same logic might well condemn

DOMA, but it would be unlikely to invalidate the marriage laws of individual states.

Even the states’ rights argument could be rehabilitated if, on appeal, Massachusetts focuses on the equality argument. The district court ruled in favor of the state for two independent reasons, only one of which relied on inherent state functions. The other, better argument was that a state can’t be required to violate the Constitution in order to get federal funds. If DOMA is unconstitutional because of the way it singles out gay people to beat up on, then states can’t be denied federal funds when they refuse to administer it. For example, if DOMA’s requirement that same-sex couples be excluded from veterans cemeteries is unconstitutional, then Massachusetts can’t lose its federal funding when it buries a same-sex couple in a state-administered veterans cemetery.

There’s a lesson here for lawyers. There is a temptation in litigation to make every argument you can possibly think of, hoping that something will persuade the judge. Here, though, that strategy has backfired: The judge bought both arguments, the bad one as well as the good one, and so his opinion ended up looking weaker than it really is.

“Ruling Against Prop. 8 Could Lead to Federal Precedent on Gay Marriage”

Los Angeles Times

August 4, 2010

Maura Dolan & Carol J. Williams

A federal judge declared California’s ban on same-sex marriage unconstitutional Wednesday, saying that no legitimate state interest justified treating gay and lesbian couples differently from others and that “moral disapproval” was not enough to save the voter-passed Proposition 8.

California “has no interest in differentiating between same-sex and opposite-sex unions,” U.S. District Chief Judge Vaughn R. Walker said in his 136-page ruling.

The ruling was the first in the country to strike down a marriage ban on federal constitutional grounds. Previous cases have cited state constitutions.

Lawyers on both sides expect the ruling to be appealed and ultimately reach the U.S. Supreme Court during the next few years.

It is unclear whether California will conduct any same-sex weddings during that time. Walker stayed his ruling at least until Friday, when he will hold another hearing.

In striking down Proposition 8, Walker said the ban violated the federal constitutional guarantees of equal protection and of due process.

Previous court decisions have established that the ability to marry is a fundamental right that cannot be denied to people without a compelling rationale, Walker said. Proposition 8 violated that right and discriminated on the basis of both sex and sexual orientation in violation of the equal

protection clause, he ruled.

The jurist, a Republican appointee who is gay, cited extensive evidence from the trial to support his finding that there was not a rational basis for excluding gays and lesbians from marriage. In particular, he rejected the argument advanced by supporters of Proposition 8 that children of opposite-sex couples fare better than children of same-sex couples, saying that expert testimony in the trial provided no support for that argument.

“The evidence shows conclusively that moral and religious views form the only basis for a belief that same-sex couples are different from opposite-sex couples,” Walker wrote.

Andy Pugno, a lawyer for the backers of the ballot measure, said he believed Walker would be overturned on appeal.

Walker’s “invalidation of the votes of over 7 million Californians violates binding legal precedent and short-circuits the democratic process,” Pugno said.

He called it “disturbing that the trial court, in order to strike down Prop. 8, has literally accused the majority of California voters of having ill and discriminatory intent when casting their votes for Prop. 8.”

At least some legal experts said his lengthy recitation of the testimony could bolster his ruling during the appeals to come. Higher courts generally defer to trial judges’ rulings

on factual questions that stem from a trial, although they still could determine that he was wrong on the law.

John Eastman, a conservative scholar who supported Proposition 8, said Walker's analysis and detailed references to trial evidence were likely to persuade U.S. Supreme Court Justice Anthony M. Kennedy, a swing vote on the high court, to rule in favor of same-sex marriage.

"I think Justice Kennedy is going to side with Judge Walker," said the former dean of Chapman University law school.

Barry McDonald, a constitutional law professor at Pepperdine University, said Walker's findings that homosexuality is a biological status instead of a voluntary choice, that children don't suffer harm when raised by same-sex couples and that Proposition 8 was based primarily on irrational fear of homosexuality "are going to make it more difficult for appellate courts to overturn this court's ruling."

Edward E. (Ned) Dolejsi, executive director of the California Catholic Conference, said he believed the judge's ruling was both legally and morally wrong.

"All public law and public policy is developed from some moral perspective, the morality that society judges is important," he said. To say that society shouldn't base its laws on moral views is "hard to even comprehend," he said.

In his decision, Walker said the evidence showed that "domestic partnerships exist solely to differentiate same-sex unions from marriage" and that marriage is "culturally superior."

He called the exclusion of same-couples

from marriage "an artifact of a time when the genders were seen as having distinct roles in society and marriage."

"That time has passed," he wrote.

Although sexual orientation deserves the constitutional protection given to race and gender, Proposition 8 would be unconstitutional even if gays and lesbians were afforded a lesser status, Walker said. His ruling stressed that there was no rational justification for banning gays from marriage.

To win a permanent stay pending appeal, Proposition 8 proponents must show that they are likely to prevail in the long run and that there would be irreparable harm if the ban is not enforced.

Lawyers for the two couples who challenged Proposition 8 said they were confident that higher courts would uphold Walker's ruling.

"We will fight hard so that the constitutional rights vindicated by the 138-page, very careful, thoughtful, analytical opinion by this judge will be brought into fruition as soon as possible," pledged Ted Olson, one of the lawyers in the case.

Other gay rights lawyers predicted that the ruling would change the tenor of the legal debate in the courts.

"This is a tour de force—a grand slam on every count," said Shannon Price Minter, legal director for the National Center for Lesbian Rights. "This is without a doubt a game-changing ruling."

Wednesday's ruling stemmed from a lawsuit filed last year by two homosexual couples who argued that the marriage ban violates their federal constitutional rights to equal protection and due process.

The suit was the brainchild of a gay political strategist in Los Angeles who formed a nonprofit to finance the litigation.

The group hired two legal luminaries from opposite sides of the political spectrum to try to overturn the ballot measure. Former U.S. Solicitor General Theodore B. Olson, a conservative icon, signed on with litigator David Boies, a liberal who squared off against Olson in *Bush vs. Gore*, the U.S. Supreme Court ruling that gave George W. Bush the presidency in 2000.

Gay-rights groups had opposed the lawsuit, fearful that the U.S. Supreme Court might rule against marriage rights and create a precedent that could take decades to overturn.

But after the suit was filed, gay rights lawyers flocked to support it, filing friend-of-court arguments on why Proposition 8 should be overturned.

Gov. Arnold Schwarzenegger and Atty. Gen. Jerry Brown refused to defend the marriage ban, leaving the sponsors of the initiative to fill the vacuum. They hired a team of lawyers experienced in U.S. Supreme Court litigation.

Proposition 8 passed with a 52.3% vote six months after the California Supreme Court ruled that same-sex marriage was permitted under the state Constitution.

At trial, the opponents of Prop. 8 presented

witnesses who cited studies that showed children reared from birth by gay and lesbian couples do as well as children born into opposite-sex families. They also testified that the clamor for marriage in the gay community had given the institution of marriage greater esteem.

The trial appeared to be a lopsided show for the challengers, who called 16 witnesses, including researchers from the nation's top universities, and presented tearful testimony from gays and lesbians about why marriage mattered to them.

The backers of Proposition 8 called only two witnesses, and both made concessions under cross-examination that helped the other side. The sponsors complained that Walker's pretrial rulings had been unfair and that some of their prospective witnesses decided not to testify out of fear for their safety.

When Walker ruled that he would broadcast portions of the trial on the Internet, Proposition 8 proponents fought him all the way to the U.S. Supreme Court and won a 5-4 ruling barring cameras in the courtroom.

The trial nevertheless was widely covered, with some groups doing minute-by-minute blogging. Law professors brought their students to watch the top-notch legal theater.

An estimated 18,000 same-sex couples married in California during the months it was legal, and the state continues to recognize those marriages.

“A Brilliant Ruling: Judge Walker’s Decision to Overturn Prop 8 is Factual, Well-Reasoned, and Powerful”

Slate

August 14, 2010

Dahlia Lithwick

Judge Vaughn R. Walker is not Anthony Kennedy. But when the chips are down, he certainly knows how to write like him. I count—in his opinion today—seven citations to Justice Kennedy’s 1996 opinion in *Romer v. Evans* (striking down an anti-gay Colorado ballot initiative) and eight citations to his 2003 decision in *Lawrence v. Texas* (striking down Texas’ gay-sodomy law). In a stunning decision this afternoon, finding California’s Proposition 8 ballot initiative banning gay marriage unconstitutional, Walker trod heavily on the path Kennedy has blazed on gay rights: “[I]t would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse,” quotes Walker. “[M]oral disapproval, without any other asserted state interest, has never been a rational basis for legislation,” cites Walker. “Animus towards gays and lesbians or simply a belief that a relationship between a man and a woman is inherently better than a relationship between two men or two women, this belief is not a proper basis on which to legislate,” Walker notes, with a jerk of the thumb at Kennedy.

Justice Kennedy? Hot sauce to go with those words?

But for all the lofty language about freedom and morality, nobody can fairly accuse Judge Walker of putting together an insubstantial or unsubstantiated opinion today. Indeed, the whole point of this legal exercise—the lengthy trial, the spectacularly detailed finding of facts (80 of them! with subheadings!)—was to pit expert against

expert, science against science, and fact against prejudice.

It’s hard to read Judge Walker’s opinion without sensing that what really won out today was science, methodology, and hard work. Had the proponents of Prop 8 made even a minimal effort to put on a case, to track down real experts, to do more than try to assert their way to legal victory, this would have been a closer case. But faced with one team that mounted a serious effort and another team that did little more than fire up their big, gay boogeyman screensaver for two straight weeks, it wasn’t much of a fight. Judge Walker scolds them at the outset for promising in their trial brief to prove that same-sex marriage would “effect some twenty-three harmful consequences” and then putting on almost no case.

Walker notes that the plaintiffs presented eight lay witnesses and nine expert witnesses, including historians, economists, psychologists, and a political scientist. Walker lays out their testimony in detail. Then he turns to the proponents’ tactical decision to withdraw several of their witnesses, claiming “extreme concern about their personal safety” and unwillingness to testify if there were to be “recording of any sort.” Even when it was determined that there would be no recording, counsel declined to call them. They were left with two trial witnesses, one of whom, David Blankenhorn, founder and president of the Institute for American Values, the judge found “lacks the qualifications to offer

opinion testimony and, in any event, failed to provide cogent testimony in support of proponent's factual assertions." Blankenhorn's credentials, methodology, lack of peer-reviewed studies, and general shiftiness on cross examination didn't impress Walker. And once he was done with Blankenhorn, he turned to the only other witness—Kenneth P. Miller—who testified only to the limited question of the plaintiffs' political power. Walker wasn't much more impressed by Miller, giving his opinions "little weight."

Then come the elaborate "findings of fact"—and recall that appellate courts must defer far more to a judge's findings of fact than conclusions of law. Here is where Judge Walker knits together the trial evidence, to the data, to the nerves at the very base of Justice Kennedy's brain. Among his most notable determinations of fact, Walker finds: states have long discriminated in matters of who can marry; marital status affects immigration, citizenship, tax policy, property and inheritance rules, and benefits programs; that individuals do not choose their own sexual orientation; California law encourages gay couples to become parents; domestic partnership is a second-class legal status; permitting same-sex couples to marry does not affect the number of opposite-sex couples who marry, divorce, cohabit, or otherwise screw around. He found that it benefits the children of gay parents to have them be married and that the gender of a child's parent is not a factor in a child's adjustment. He found that Prop 8 puts the force of law behind a social stigma and that the entirety of the Prop 8 campaign relied on instilling fears that children exposed to the concept of same-sex marriage may become gay. (Brand-new data show that the needle only really moved in favor of the Prop 8 camp when parents of young children came

out in force against gay marriage in the 11th hour of the campaign.) He found that stereotypes targeting gays and lesbians have resulted in terrible disadvantages for them and that the Prop 8 campaign traded on those stereotypes.

And then Walker turned to his conclusions of law, finding that under both the Due Process and Equal Protection clauses:

Proposition 8 fails to advance any rational basis in singling out gay men and lesbians for denial of a marriage license. Indeed, the evidence shows Proposition 8 does nothing more than enshrine in the California Constitution the notion that opposite-sex couples are superior to same-sex couples. Because California has no interest in discriminating against gay men and lesbians, and because Proposition 8 prevents California from fulfilling its constitutional obligation to provide marriages on an equal basis, the court concludes that Proposition 8 is unconstitutional.

Is that the end of it? Oh, no. Judge Walker is already being flayed alive for the breadth and boldness of his decision. The appeals road will be long and nasty. Walker has temporarily stayed the ruling pending argument on a stay. (Rick Hasen argues it may be wise for him to stay the order pending appeal for tactical reasons.) Any way you look at it, today's decision was written for a court of one—Kennedy—the man who has written most eloquently about dignity and freedom and the right to determine one's own humanity. The real triumph of *Perry v. Schwarzenegger* may be that it talks in the very loftiest terms about matters rooted in logic, science, money, social psychology, and fact.

“Prop. 8 Judge Makes Strange Charge”

San Francisco Chronicle

August 8, 2010

Nelson Lund

A federal judge in San Francisco ruled Wednesday that President Obama is a bigot. And not just the president. Joe Biden as well, and Hillary Rodham Clinton and Sandra Day O'Connor. And maybe you, too.

The judge didn't put it that way, of course. Technically, he ruled that an amendment to California's Constitution violated the U.S. Constitution by defining marriage as a union of one man and one woman. That amendment was approved by voters after a state court declared that a similar statute violated the state Constitution. The amendment then was challenged in federal court as a violation of the U.S. Constitution.

This was a strange ruling. The U.S. Supreme Court decided in 1971 that an identical challenge to the traditional definition of marriage was meritless. Nor has the Supreme Court ever suggested that its 1971 decision was wrong. Wednesday's ruling relied primarily on a constitutional doctrine that forbids laws having no conceivable rational purpose or no purpose except to oppress a politically unpopular minority group. After a lengthy trial, the judge found that the people of California must have adopted the traditional definition of marriage because of moral or religious contempt for homosexuals and their relationships.

It was a strange charge to make against the people of California. California has the most progressive domestic partnership law in the nation, which gives same-sex couples all the same substantive rights and privileges available to married couples. Why would the judge think that the only possible reason for

favoring the traditional definition of marriage was bigotry? He reasoned that every other possible explanation for the voters' decision was so ridiculous that only anti-gay feelings were left.

Until very recently, same-sex marriage was unknown in human history, and it is opposed today by many progressive leaders, like Obama and Clinton. Can this be explained only by irrational prejudice or religious zeal? No. Only unions between men and women are capable of producing offspring, and every civilization has recognized that responsible procreation is critical to its survival. After the desire for self-preservation, sexual passion is probably the most powerful drive in human nature. Heterosexual intercourse naturally produces children, sometimes unintentionally and only after nine months.

Without marriage, men often would be uncertain about paternity or indifferent to it. If left unchecked, many men would have little incentive to invest in the rearing of their offspring, and the ensuing irresponsibility would have made the development of civilization impossible.

The fundamental purpose of marriage is to encourage biological parents, especially fathers, to take responsibility for their children. Because this institution responds to a phenomenon uniquely created by heterosexual intercourse, the meaning of marriage has always been inseparable from the problem it addresses.

Homosexual relationships (and lots of others as well), have nothing to do with the

purpose of marriage, which is why marriage does not extend to them. Constitutional doctrine requires only one conceivable rational reason for a law, and the traditional definition of marriage easily meets that test.

The judge in this case thinks it was proved at trial that same-sex marriage will not amount to a sweeping social change. He thinks it is “beyond debate” that same-sex marriages will have no detrimental effects on the institution of marriage. Can anyone really believe that such things can be proved by witnesses in a courtroom?

Recently, a few states have begun to experiment with same-sex marriage. Maybe this will work out well, and the more cautious states eventually will catch up. But some experiments fail. Our democracy

allows different states to change their marriage laws and to abandon experiments that don't succeed. But if this judge's ruling is upheld on appeal, that will be that, and every state will be forced to conform, for good or ill.

Fortunately, Wednesday's decision is far from final. The judge's ruling will have no legal effect on any other cases. Even his ruling in this case might not (and should not) go into effect unless it is upheld on appeal. The judge's conduct during this case has already triggered rebukes from higher courts, and they are not likely to accept his bizarre conclusion that the traditional definition of marriage is the product of mass bigotry. So if you agree with Obama about preserving the traditional definition, you haven't yet been convicted of a moral crime.