GAY MARRIAGE AND THE FEDERAL JUDICIAL CONFIRMATION PROCESS

by

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The Federalist Society
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Last year saw momentous advances in civil rights for homosexual persons. First, in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), the U.S. Supreme Court struck down as unconstitutional a Texas statute outlawing homosexual sex acts under a rationale broad enough to make it unlikely that any State can successfully prosecute such acts. The decision, and the new right to homosexual intercourse it created, was all the more dramatic because to achieve it, the Court had to overrule its own recent precedent, *Bowers v. Hardwick*, 478 U.S. 186 (1986). Then, a few months later, in *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (2003), the Supreme Judicial Court of Massachusetts decided that the Commonwealth's laws allowing only persons of different sexes to be married violated the Massachusetts Constitution. In the course of its opinion, the Supreme Judicial Court referred extensively both to the result and to the interpretive methodology employed in *Lawrence* as justifying its result and approach. Emphasizing that its opinion marked a fundamental change in Massachusetts marriage law, the Court boldly declared that the Massachusetts Constitution not only forbids discrimination against homosexuals in this manner, but affirmatively requires that homosexuals be allowed, if not to marry, then to at least something closely akin to marriage. The Court left the details of fashioning an appropriate remedy in the first instance to the Massachusetts Legislature. Thus, without a majority of Americans, or even of Bay Staters, stating their policy preferences, homosexuals gained two important rights: the right to engage in homosexual sex acts anywhere in the Republic, and the right to marry, or something close to it, in the Commonwealth of Massachusetts.

Much has been written about these decisions, both pro and con. While both sides in this contentious cultural dispute make forceful arguments, we do not, in this piece, propose to cast our lot with either. Instead, we wish only to emphasize the effect that these decisions are sure to have on the process of confirming federal judges.

Our thesis can be summed up as follows. In our American democracy, the Constitution makes at least two things clear. *First*, the Legislative Branch is the one entrusted with enacting the laws under which we will live. Members of this branch are, periodically, popularly elected. *Second*, the Judicial Branch exercises the judicial power of the United States. Members of this branch are not elected, but appointed and enjoy lifetime tenure to guarantee their independence from ordinary political pressures. Americans, as citizens of this Republic, hold dear the right to elect those persons who will make the laws. Accordingly, when judges cross the line from adjudicating into lawmaking, it makes sense that Americans will seek to exercise something like electoral control over who can be a judge. That is, when these two distinct governmental powers are not kept within their constitutionally-ordained bounds, it is inevitable that the process for creating new federal judges will become regrettably politicized, thereby threatening the independence of the federal judiciary.

Indeed, we are already seeing this phenomenon. Although Republicans control the Senate, Democrats remain committed to keeping off the bench conservative nominees who they deem "out of the mainstream" (whatever that means). Accordingly, in the past year, a minority has taken the unprecedented step of simultaneously filibustering five Republican judicial nominees. Their strategy is working: already Miguel Estrada has decided that the game isn't worth the candle and has withdrawn from the confirmation process.

To be fair, although aggressive use of the filibuster—especially for lower-court nominees—is new, political action to keep "extremist" judges off the bench is not. During the Clinton administration, various judicial nominees never even made it to the floor of the Senate for a vote because the Republicans saw them as too "activist" (whatever that means).

The point is this: the days in which judicial appointments were seen primarily as a spoil to be awarded by the victorious Presidential candidate—when intelligence, judicial temperament, and experience were the only qualifications that mattered for confirmation—are long gone. When passionate political issues become the domain of the judiciary instead of the legislature (or of the State legislatures), the Senate Judiciary Committee Hearing Room is bound to be the next great battlefield of the culture wars. Indeed, our theory is not novel; prominent public figures from across the ideological spectrum, from Senator Charles Schumer to Supreme Court Justice Antonin

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Scalia, have endorsed it for years. But in light of *Lawrence* and *Goodridge*, the point, perhaps, merits renewed consideration.

I

To understand fully the import of *Lawrence*, some background is helpful. Prior to 2003, the relevant precedent was found in *Bowers*, a case involving a man prosecuted under a Georgia sodomy law prohibiting homosexual intercourse. He contended that the law violated the Constitution's Due Process Clause, and more specifically, his substantive due process rights. But the Supreme Court disagreed. Relying on its precedents, the Court explained that, under substantive due process, the work of state legislatures is reviewed with significant deference unless it impinges on a fundamental right. In the absence of a fundamental right, laws are sustained so long as there is a rational basis for their enactment. The Court in *Bowers* decided that there is no fundamental right to participate in homosexual intercourse, and that under deferential rational-basis review, the Georgia law passed Constitutional muster.

Although the Court in *Lawrence* expressly overruled *Bowers*, it left this central holding—that there is no fundamental right to homosexual intercourse—intact. It struck down a Texas statute outlawing homosexual intercourse not because it impinged upon a fundamental right. Instead, the Court emphasized that such conduct is "an exercise of . . . liberty," and concluded that the statute must yield because no "rational basis" supported it.

The Court began with some sweeping pronouncements on the nature of liberty: "Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions." The Court then phrased the issue before it as follows: "We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct [of homosexual intercourse] in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution."

To answer that question, the Court examined its precedents, and in particular, *Bowers*. The Court took the *Bowers* majority to task for "fail[ing] to appreciate the extent of the liberty at stake" in that case: "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said that marriage is simply about the right to have sexual intercourse." Without citation, the *Lawrence* Court explained, "[t]he statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals." Thus, the Court concluded,

> It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

To be sure, the *Lawrence* Court conceded that the majority in *Bowers* was "making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral." But, the *Lawrence* Court rejoined: "Those considerations do not answer the question before us . . . . The issue is whether the majority may use the power of the State to enforce these views on the whole society through the operation of the criminal law. '*Our obligation is to define the liberty of all*, not to mandate our own moral code.'" (Emphasis added.) And emphasizing "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex," the Court decided that, under its definition of liberty, homosexual intercourse is constitutionally protected.

The Court's opinion in *Lawrence* is remarkable for many reasons. But whatever one's view of homosexual conduct, its approach is particularly interesting. In a self-governing Republic, one might think that when the opposing sides have drawn battle lines over such a hotly-contested issue, a court might recognize that the continued existence of a long-standing law like that at issue in *Lawrence* ought to be left to the political arena. Justice Thomas recognized as much in his separate dissent, in which he opined that the sodomy law at issue was "uncommonly silly," and that were he a "member of the Texas Legislature, [he] would vote to repeal it," but that "as a member of [the Supreme] Court [he was] not empowered to help petitioners and others similarly situated." But instead, the Court decided that it was best positioned to end the controversy by creating a new constitutional right. Indeed, the Court opined,

> Had those who drew and ratified that Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in

> fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Yet, even accepting the Court's conclusion that there is an "emerging consensus" that criminal liability ought not attach to homosexual conduct, and that times can blind us to certain truths such that only later generations can recognize oppressive laws for what they truly are, one may still reasonably ask: why is it proper for the Court to declare a new right to homosexual intercourse as a Constitutional matter? The Court took upon itself the task of "defin[ing] the liberty of all." But if there truly is an "emerging consensus" that statutes like that at issue in *Lawrence* ought not exist, it would be better for the body politic to rid itself of such statutes. For more than the good of self-government is at risk when judges step into the fray and perform the task themselves: as Justice Scalia pointed out in his dissent,

> [o]ne of the benefits of leaving regulation [of homosexual intercourse] to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion. The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts—and may legislate accordingly. The Court today pretends that it possesses a similar freedom of action. . . . [But its decision] dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.

Of course, before the ink was dry, the *Lawrence* Court did attempt to cabin the scope of this new right. Indeed, just before setting forth its holding, that "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual," the Court emphasized what it was *not* deciding. "The present case," the Court pointed out, "does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution." And perhaps most importantly, for present purposes, "[i]t does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." This attempted limitation on the scope of *Lawrence* was tested only months later, when the Supreme Judicial Court of Massachusetts issued its opinion in *Goodridge*.

II

Goodridge involved fourteen individuals from five Massachusetts counties. Each was involved in a committed relationship with another of the plaintiffs. (That is, the plaintiff group was comprised of seven couples.) Each couple had been together for some years, and several were even raising children. Yet, each plaintiff wanted something more: "to marry his or her partner in order to affirm publicly their commitment to each other and to secure the legal protections and benefits afforded to married couples and their children." But, Massachusetts' marriage statutes did not provide for the marriage of same-sex individuals. Accordingly, although each couple applied for a marriage license, none received one—and accordingly, none was able to marry.

The plaintiffs then brought suit, alleging that Massachusetts' marriage scheme, and specifically its "exclusion of . . . qualified same-sex couples from access to marriage licenses, and the legal and social status of civil marriage, as well as the protections, benefits and obligations of marriage, violated" various provisions of the Massachusetts constitution. A trial judge granted summary judgment to the State defendants. But on a granted request for direct appeal, the Supreme Judicial Court of Massachusetts reversed.

The Court's opinion in *Goodridge* reads much like the *Lawrence* opinion. It, too, begins with a paean, not to liberty, but instead to the institution of marriage, which it describes as a "vital social institution" which "brings stability to our society," imposing "weighty legal, financial, and social obligations," but also bestowing "an abundance of legal, financial, and social benefits." It then frames the question to be decided as follows: "whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry." The Court answered this question in the negative, concluding, like the Court in *Lawrence*, that the government had failed to identify "any constitutionally adequate reason for denying civil marriage to same-sex couples."

Like the Supreme Court in *Lawrence*, the *Goodridge* court thought itself obliged "to define the liberty of all, not to mandate our own moral code." (citing *Lawrence*.) Accordingly, like the *Lawrence* Court, the Court believed it irrelevant that "[m]any people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral," while others "hold equally strong religious, moral, and ethical convictions that same-sex couples are entitled to be married." What mattered, the Court thought, was that because the Massachusetts marriage law acted to "bar[] access to the

protections, benefits, and obligations of civil marriage, a person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our community's most rewarding and cherished institutions." The Court thought this unjust, and accordingly, despite recognizing that its decision marked a judicial "change in the history of [Massachusetts] marriage law," held Massachusetts' legal marriage regime violated the Commonwealth's constitution. (Whether the violation was of the equal protection clause, or of substantive due process, did not really matter; in either event, the Court concluded, the law flunked the rational basis test.)

The *Goodridge* court's reliance on *Lawrence* was extensive. To begin, the Court read *Lawrence* as affirming "that the core concept of common human dignity protected by the Fourteenth Amendment to the United States Constitution precludes government intrusion into the deeply personal realms of consensual adult expressions of intimacy and one's choice of an intimate partner." To be sure, the Court admitted, *Lawrence* left open the question of whether federal law requires same-sex marriage—because, of course, that was "not a[t] issue." Nonetheless, the Court opined, *Lawrence* "reaffirmed the central role that decisions whether to marry or have children bear in shaping one's identity," and indeed, that "[w]hether and whom to marry, how to express sexual intimacy, and whether and how to establish a family . . . are among the most basic of every individual's liberty and due process rights."

In fact, *Lawrence* seems to have emboldened the *Goodridge* court to go even further than the *Lawrence* court itself was prepared to go. While *Lawrence* requires legal ambivalence as between homosexual and heterosexual sex, the *Goodridge* court expressed outright moral disapprobation for those who think homosexual marriage morally wrong. The opinion even compares such persons to racists and mysogynists. Emphasizing that marriage is a "civil right," and citing *Loving* v. *Virginia*, 388 U.S. 1 (1967) (in which the Supreme Court found unconstitutional a statute banning interracial marriage), the *Goodridge* Court equated the Virginia Statute in *Loving* with Massachusetts' marriage scheme: "In this case, as in . . . *Loving*, a statute deprives individuals of access to an institution of fundamental legal, personal, and social significance—the institution of marriage—because of a single trait: skin color in . . . *Loving*, sexual orientation here. As it did in . . . *Loving*, history must yield to a more fully developed understanding of the invidious quality of the discrimination." "Recognizing the right of an individual to marry a person of the same sex will not," the Court opined, "diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race." Moreover, the Court noted that under the common law, "a woman's legal identity all but evaporated into that of her husband," justifying one commentator's observation that "the condition of a slave resembled the connection of a wife with her husband, and of infant children with their father."

With these lines of reasoning established, the *Goodridge* Court rejected the Commonwealth's proffered justifications for its traditional marriage law: (1) providing a "favorable setting for procreation"; (2) ensuring the optimal setting for child rearing; and (3) preserving scarce State and private financial resources. The Court discarded the first out of hand, noting that this approach "singles out the one unbridgeable difference between same-sex and opposite-couples, and transforms that difference into the essence of legal marriage," and in the process "confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently inferior to opposite-sex relationships and are not worthy of respect." As to the second, the Court concluded—without citation to any relevant social, psychological, or other study—that "[t]here is . . . no rational relationship between the marriage statute and the . . . goal of protecting the 'optimal' child rearing unit," because there was no evidence offered to the Court that "forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children." And the third justification fell with the State's contention that same-sex couples are more financially independent than married couples and thus more needy of the public marital benefits, such as tax benefits or private marital benefits like employer-sponsored health plans. This contention, the Court explained, ignores the twin facts that many same-sex couples have children, and thus need these benefits just as much as opposite-sex couples, and the advantages are not conditioned on financial interdependence.

In conclusion, the Court explained, "[t]he history of constitutional law is the story of the extension of constitutional rights and protections to people once ignored or excluded. . . . This statement is as true in the area of civil marriage as in any other area of civil rights." The marriage ban "works a deep and scarring hardship on a very real segment of the community for no rational reason."

The Court, however, did not strike down the Massachusetts marriage laws. Instead, it re-defined the common-law meaning of marriage to include same-sex couples, a remedy it thought "entirely consonant with established principles of jurisprudence empowering a court to refine a common-law principle in light of evolving constitutional standards." The Court "constru[ed] civil marriage to mean the voluntary union of two persons as

spouses, to the exclusion of all others," but left it to the Legislature to fashion an appropriate remedy in the first instance, taking "such action as it may deem appropriate in light of this opinion."

Finally, like the *Lawrence* court, the *Goodridge* court attempted to cabin the scope of the new right it created. It stressed that the plaintiffs before it "do not attack the binary nature of marriage, the consanguinity provisions, or any of the other gate-keeping provisions of the marriage licensing law."

III

These legal developments will inevitably make the issue of gay marriage yet another flashpoint in the ongoing judicial confirmation wars. The current confirmation process for federal judges is one of the most polarized arenas in contemporary American politics. Injecting another issue on which many Americans have passionately-held political views will only raise the temperature in the already boiling Senate hearing rooms and force both parties to take ever-more-extreme measures to further their ideological agendas.

In many ways, the brewing culture war over gay marriage resembles the early 1970's, when abortion rights were first becoming central in the American political consciousness. As political forces in favor of liberalizing existing anti-abortion laws became more organized and vocal, they began to make gains in some states. Conventional wisdom suggests that, left to the ordinary political process, abortion rights advocates may have succeeded in passing laws permitting abortions in most states—though with varying conditions and limitations. Before the political process in most states could begin to react to the growing cultural issue, however, the Supreme Court stunted the political discourse by constitutionalizing abortion rights in *Roe v. Wade*, 410 U.S. 113 (1973). As a direct result, anti-abortion groups organized in opposition, but because the core of the abortion debate had been taken off the table by the Supreme Court, there was little these groups could do through the electoral process. In the three decades since *Roe*, there have been intermittent skirmishes around the edges of abortion rights, but the central holding of *Roe*—reaffirmed in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)—continues to be the governing law of the land.

The real battles over abortion rights have taken place not before the general voting public, but instead, before judges. Not coincidentally, abortion rights have at the same time become the single most contentious issue in the judicial confirmation process. Robert Bork's skepticism over a constitutional right to privacy—the cornerstone on which constitutional abortion rights were erected—was the central criticism of his nomination to the Supreme Court. Bork had a substantial paper trail on privacy rights; when privacy and abortion became confirmation battlegrounds, he had no choice but to fight. The prominence of abortion rights in that confirmation battle led Presidents Reagan and Bush to attempt to evade such battles by subsequently nominating individuals with little or no record on abortion. Similarly, during the Clinton administration, conservatives used any evidence that a nominee was strongly in favor of abortion rights to argue that he or she was as an "activist" who needed to be kept off the bench. And more recently, opponents of President George W. Bush's judicial nominees have gone to extraordinary lengths to paint them as anti-abortion. For example, when confronted with one nominee with no record on abortion rights at all, liberal opponents seized on a passing, innocent citation to *Roe v. Wade* in a decade-old speech as evidence that the nominee had "cast a disparaging eye" on abortion rights in general. And whenever a nominee's public record touched on abortion rights in the slightest way, opponents would spin that record into one of vehement opposition to abortion rights. Thus, Texas Supreme Court Justice Priscilla Owen's series of opinions on the Texas parental notification statute—one of the remaining regions where the ordinary political process can exercise some populist control over abortion rights—became "proof" that she was completely opposed to *Roe v. Wade* and could not be trusted to follow the governing law of that case and its progeny.

Through administrations of both parties, then, political warfare over judicial nominations has steadily intensified, with the issue of abortion rights always at the center. The result has been a confirmation process stalled by unprecedented filibusters of five judicial nominees, all of whom were perceived by their opponents as anti-abortion. The pattern is clear: when important cultural issues are removed from the voting booth to the courtroom, the passionate political debate over those issues is similarly transferred from elections to the judicial confirmation process. There is little reason to think this pattern will not be repeated with respect to the emerging issue of gay marriage.

Indeed, there is plenty of evidence that it is already become another hotly-debated issue in the judicial confirmation wars. For one thing, many of the organizations that wield significant influence in the confirmation process are passionately interested in the issue of gay marriage. For example, controversial Democratic Judiciary Committee staff memos leaked to the press reveal that in at least one instance, the coalition of liberal groups involved in the process was "checking with the gay rights groups" about their stance on a particular nominee. While the groups involved were not specifically identified, those gay rights groups would likely fight any nominee believed to be opposed to gay marriage. On the conservative side, several of the organizations active in the judicial

confirmation process are explicitly religious in nature and can be expected to represent their constituencies' passionate opposition to gay marriage.

For another thing, a nominee's views on gay rights have already contributed to the acrimony of Senate-judicial-confirmation proceedings on at least two occasions. *First*, Michael Mosman, President Bush's nominee to the U.S. District Court for the District of Oregon, came under fire for his perceived views on gay rights. Before his nomination, Mosman had served as the U.S. Attorney for that district and had a long and distinguished career as and advocate and prosecutor. But various groups opposed his nomination to the bench when allegations surfaced that, while clerking for Justice Powell at the Supreme Court many years before, he authored a bench memo in support of the outcome in *Bowers* that persuaded Justice Powell to vote as he did in that case. (Justice Powell was, of course, the crucial swing vote in that 5-4 decision, and in his later years expressed concern that he had voted the wrong way.) While Judge Mosman was eventually confirmed, it was only after he had a series of meetings with gay rights groups in which he reportedly assured them that he supported their cause, or at least was not hostile to it.

Second, critics blasted Alabama Attorney General William Pryor—President Bush's nominee to the Eleventh Circuit—for his alleged hostility to gay rights. In fact, they even went so far as to filibuster his nomination. The evidence of Pryor's alleged hostility, however, was somewhat unusual; Pryor had cancelled a planned family vacation to Disney World after learning that his family's trip would coincide with "Gay Day" at the theme park. To some, it may seem silly to treat a nominee's decision about when to take his family vacation as evidence of the character, learning, and skill that should be the central concerns of the nomination process. To passionate advocates, however, that decision became another weapon in the ongoing battle to shape the future of the federal bench.

In light of *Lawrence* and *Goodridge*, the judicial confirmation wars are bound to focus increasingly on the issue of gay marriage. Unfortunately, such a focus is likely to further poison an already unhealthy process. For one thing, the inordinate attention paid to passionate issues like gay marriage distracts attention away from the more pressing needs of the federal judiciary. The staggering growth in caseloads over the past two decades has led to a judiciary that is stretched thin; under present circumstances, even one vacancy on a court can dramatically increase the burden of sitting judges and delay the administration of justice. What the judiciary desperately needs is legally talented and wise men and women to serve in the courts. The judicial confirmation process would do best to limit examination of a President's nominees to whether they are unfit, be it because they lack these qualities, or because their appointments were "from State prejudice, from family connection, from personal attachment, or from a view to popularity"—the defects identified by Hamilton in the *Federalist Papers*, Number 76. Instead, by focusing on difficult political issues, the confirmation process all but ignores potentially serious concerns about temperament or legal ability that can have a far greater effect on the day-to-day operations of the courts. When those political issues provide an alleged justification for longer and longer periods between nomination and confirmation—whether from a majority's stalling on hearings and votes or a minority's procedural delays and filibusters—judicial vacancies are prolonged and the administration of justice is denied by delay.

Even worse, the past two decades of judicial confirmation battles have demonstrated that a politicized judicial confirmation process is incapable of examining the nuances of legal doctrine and arguments that are the work product of the judiciary. In any concrete legal dispute, numerous legal issues can be overlapped with each other, and subtle factual differences can be outcome-determinative. Only rarely will the two sides in a case map neatly into familiar left-right political camps. Unfortunately, the distinctions and qualifications that are inherent in legal craft—a craft in which any acceptable nominee should excel—are bleached out of a political process accustomed to sound bite-sized morsels of argument. Thus, zealous advocates can readily manipulate a candidate's record to get their desired political spin, and a Senate that is constantly addressing countless issues of importance to the country cannot always separate the facts from the fiction—even if it wanted to.

Consider how the legal complexities of a statute like the federal Defense of Marriage Act (DoMA) would be lost in a judicial confirmation debate focused on gay marriage. DoMA purports to exercise Congress' authority under Article IV, section 1 (not exactly a provision studied in every high school civics class) to define the effect under the Full Faith and Credit Clause of any state law that would recognize "a relationship between persons of the same sex that is treated as a marriage." Under DoMA, states remain free to authorize civil unions or gay marriages as they see fit, but no other state need recognize those policies and give them effect. To a nonlawyer—and even to most lawyers—the choice-of-law technicalities of the Full Faith and Credit Clause are soporific, if they are comprehended at all. In the context of a judicial confirmation proceeding, those technicalities would be ignored altogether in favor of splashier statements about gay marriage. Thus, if a nominee wrote a scholarly article examining the history of the Full Faith and Credit Clause and arguing that DoMA was constitutional under Article IV, section 1, it is quite likely that liberal proponents of gay marriage would denounce the nominee for her opposition to gay rights. Because gay marriage is such a passionate issue in the culture wars, all attention would be

focused on the nominee's supposed anti-gay position, when it might in fact be the case that the nominee generally favors gay marriage but nonetheless thinks, as a legal matter, that DoMA is a permissible exercise of Congressional power. For, in the judicial-confirmation wars, legal arguments tend to be seen merely as the continuation of politics by other means.

Finally, making gay marriage an issue in the confirmation wars will only further politicize the process and threaten the independence of the federal judiciary. The confirmation process has already become so ugly and personally costly to nominees that many outstanding individuals will likely decline the honor of being nominated in the first place. And one nominee, Miguel Estrada, has already withdrawn his nomination after being blocked in a partisan filibuster. If political issues are the focus of every confirmation process, then only politically-minded and ideologically-committed individuals will be willing to suffer through it so they may serve on the bench. Unfortunately, such nominees are more likely to allow their political commitments to influence their judging, in which case other passionate political issues will be removed from the ordinary political discourse and will become yet more ammunition for the confirmation process. In effect, an overly-politicized confirmation process creates a vicious cycle in which the judiciary itself becomes politicized, thereby justifying further politicizing the confirmation process, and on and on. The effect will be to wrest governance of the Republic out of the hands of We the People, in favor of a handful of unelected judges and the behind-the-scenes activists who control who does and does not get confirmed.

* * * *

The first premise of the American Republic is that the People, through their elected representatives, make the laws that govern our society. When our most important laws are made by unelected judges, however, it is only natural that political passions will be vented in the judicial confirmation process — a forum less well-suited to such political discourse than the ordinary electoral process. Given the recent judicial activity on issues of homosexual rights in *Lawrence* and *Goodridge*, there is good reason for concern that this area will become yet another battleground in the judicial confirmation wars. Indeed, that is already coming to pass.

The *Goodridge* Court may well have been correct in its assessment that, at least in recent decades, "[t]he history of constitutional law is the story of the extension of constitutional rights and protections to people once ignored or excluded." But it is important to recognize that the creation of these new rights by judges is not without cost. Indeed, judicial encroachment of this kind into the legislative sphere has caused, and will continue to cause, collateral damage by imperiling the institutional independence of the federal judiciary and depriving the federal bench of legally-talented men and women who are badly needed to ensure the timely administration of justice.

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