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CONGRESSMAN JOHN HOSTETTLER

Eighth Congressional District of Indiana

Contact: Michael Jahr 202-225-4636

"The ultimate arbiter [of the Constitution] is the people of the Union..." – Thomas Jefferson, 1823

Constitution Provides Key to Protecting Marriage

By Rep. John Hostettler May 19, 2004

Bowing to the demands of four unelected members of its state supreme court, Massachusetts recently began issuing marriage licenses to men who want to marry men, women who want to wed women.

As other states and municipalities follow Massachusetts' lead, this cultural battle will inevitably end up in federal court. And unless action is taken, it's probably just a matter of time before a federal judge rules that homosexual "marriages" should be recognized nationwide.

As we've seen in decisions ranging from abortion to the public expression of religion, judges clearly no longer feel an obligation to connect their opinions to the U.S. Constitution or the laws of the land. In fact, the courts have started citing the laws and judicial proceedings of *foreign* governments to defend their findings.

And they insist their rulings are final.

That would come as news to our nation's founders, who envisioned a government of the people, not a government of black-robed rulers. The Constitution they designed established a government of divided authority with clear, unambiguous roles reserved for each of the three branches.

But today we're told that when the court violates the Constitution there is no recourse short of amending the Constitution. Congress, the executive branch and the people must simply live with its decision.

This is a myth. Judges can't force their will upon the people because the Constitution doesn't provide them with a single tool to make their rulings become reality. Unconstitutional judicial decisions only have effect if Congress and the president allow them to.

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Alexander Hamilton, in a 1788 essay promoting adoption of the U.S. Constitution, says it well: "[T]he judiciary is beyond comparison the weakest of the three departments of power. The judiciary has no influence over either the sword or the purse. . . and can take *no active resolution whatever*. It may truly be said to have neither force nor will but merely judgment; ..." [emphasis added.]

The Founders, in their wisdom, recognized that power corrupts. So they established Constitutional mechanisms to prevent one branch from assuming too much authority. They allowed the court, within parameters, to make judgements, but left lawmaking, funding and enforcement to the stronger, elected branches.

The Constitution grants three specific powers to the Legislature and Executive that were not granted to the Courts.

The first is the power to enforce the law, which is granted exclusively to the president in Article II, Section 3.

In other words, without the aid of the executive branch, a court ruling granting a right to homosexual marriage is moot, especially since the Constitution *prohibits* the president from executing a court order inconsistent with the Constitution.

The Judiciary, as Hamilton said, is left with "merely judgment" that "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."

The second constitutional power denied the courts is the legislative spending power granted exclusively to Congress in Article 1, section 9. Simply put, if Congress does not fund a thing, that thing does not happen.

So if a federal court opines that the Constitution grants homosexuals the right to have their Massachusetts' marriage license recognized in Indiana, Congress can simply deny the funds to enforce that decision. The House did this very thing last year when it overwhelmingly passed amendments I offered denying funds to enforce court decisions banning the Pledge of Allegiance and the public depiction of the Ten Commandments.

The third power granted to Congress and denied to the courts is the authority to limit the jurisdiction of federal courts on specific topics.

The Framers of the Constitution made explicit provision for this type of check in the Constitution itself. Article I, Section 8 and Article III, Sections 1 and 2 grant Congress the authority to establish inferior federal courts, determine their jurisdiction and make exceptions to the Supreme Court's appellate jurisdiction.

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I believe this authority is the most effective way to prevent the federal courts from creating a federal "right" for homosexuals to marry each other. So I introduced the Marriage Protection Act (H.R. 3313), which removes jurisdiction from certain federal courts over questions pertaining to the 1996 Defense of Marriage Act, better known as DOMA.

DOMA says that no state is required to give full faith and credit to a marriage license issued by another state if that relationship is between two people of the same sex. It also defines the terms "marriage" and "spouse" for purposes of federal law as terms only applying to relationships between people of the opposite sex.

DOMA is good law and passed with broad support, but an imaginative federal court could easily opine that a fundamental "right" to homosexual marriage exists somewhere in the U.S. Constitution and order Hoosiers to recognize a marriage license granted to homosexuals "married" in Massachusetts.

The Marriage Protection Act addresses that possibility by removing the Supreme Court's appellate jurisdiction, as well as inferior federal courts' original and appellate jurisdiction, over DOMA's full faith and credit provision.

Simply put, if federal courts don't have jurisdiction over marriage issues, they can't hear them. And if they can't hear cases regarding marriage policy, they can't redefine this sacred institution and establish a national precedent for homosexual marriage.

Thirty-eight states already protect traditional marriage under DOMA. By exercising this Constitutional legislative authority we can preserve each state's traditional right to determine its own marriage policies without federal court interference.

There is a radical element in America working to change our dictionaries, our Bibles, our traditions and our laws. But it's not the institution of marriage that needs redefining. It is our understanding of the federal courts and the limitations placed on them by the U.S. Constitution. Equipped with knowledge, the American people can reclaim the governance that is rightfully theirs.