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Keep same sex-marriage issue in the legislatures

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The New York Times today lambastes the Obama administration for failing to try and overturn the Defense of Marriage Act (DOMA) which held that the federal government would only recognize the marriages of one man and one woman. DOMA also kept states from having to recognize same-sex marriages contracted in other states that permit them.

The *Times* was especially upset that the Obama administration brief cited laws barring states from having to recognize marriages between relatives. The *Times* failed to note that the oddity here is that consanguinity is not much of a problem when assessing same-sex unions. But, then again, legal analogies, like other analogies, are never exact so the *Times* editorial board should calm down.

A more proximate analogy is that of laws against interracial marriage, which laws were finally declared unconstitutional by the U.S. Supreme Court in the most happily named court case ever, *Loving v. Virginia*, in 1967. Note that date. The laws against miscegenation were the last to be overthrown by the Civil Rights movement. Nor did the Court's first major civil rights case, *Brown v. Board of Education*, fall out of the sky. The U.S. Army had been integrated by Harry S. Truman. The Catholic schools in Washington, D.C. were integrated before *Brown v. Board of Education*. In short, there was a popular movement in favor of ending segregation before the Court got in on the action and the most important strides in the movement remained legislative strides, the Civil Rights Act of 1964 and the Voting Rights Act of 1965.

Whatever you think of the issue of gay marriage, the idea that the issue should be addressed by legislatures or popular referenda is infinitely preferable to the recourse to the courts that gay activists seek. Gay activists counter that you go to the courts to vindicate rights. But, most people do not view marriage as a right. "The old ball and chain" is more common view. They view it in many different ways, but historically, it has almost always had to do with the procreation of children. That has changed, of

course, as the pill and no-fault divorce have affected the institution profoundly, certainly more than extending marriage to same sex couples would do.

But, seeing marriage as a right begs the question so the same-sex marriage issue should remain in the legislatures. The Obama administration is right to keep the federal government out of it.

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