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June 2, 2012: MASSACHUSETTS v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES

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6/2/2012—I can easily predict that the 1st Circuit case striking down a section of the Defense of Marriage Act on Thursday will be reversed by the US Supreme Court. That, after all, could just be judicial politics—conservative Justices voting against gay rights. What might be surprising is that it could be a unanimous decision. The justification for the Court of Appeals decision is a serious limitation on the spending power of the federal government. The court held that Congress could not decide on its own definition of marriage for purposes of providing federal benefits. The precedents relied upon were ones that most supporters of the decision probably opposed at the time—Morrison, which struck down the Violence Against Women Act, for example. I have little patience with these states rights cases and I care little for federalism arguments. But even conservatives have never argued that state law definitions could limit the discretion of the federal government to provide benefits in its own programs. The other problem with the decision is the one that the court said it was not deciding. The Supreme Court is not likely to agree that there is no justification for limiting marriage to a male and female other than some form of bias against gays. The analogy to racial limits on marriage has always struck me as inapt. Marriage did not have anything to do with race inherently, but it did have something to do with procreation inherently—even though people like myself, unable to procreate can still get married. In the end, my dissatisfaction with the decision is of a piece with my opposition to any judicial decisions about gay marriage. I want to see gay marriage supported by the voters. I am ready to vote for gay marriage in Pennsylvania right now. I don't think judicial imposition works. Remember, it was judicial imposition that has led to many states adopting constitutional amendments banning gay marriage. The refusal of the Pa. Supreme Court to recognize gay marriage is one of the reasons efforts to amend our constitution to ban gay marriage have not worked, thus leaving the matter to the voters and the legislature, where hopefully gay marriage will be adopted.