

THE NECESSARY AMENDMENT

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Within the next two or three years, the Supreme Court will almost certainly climax a series of state court rulings by creating a national constitutional right to homosexual marriage. The Court's ongoing campaign to normalize homosexuality—creating for homosexuals constitutional rights to special voting status and to engage in sodomy—leaves little doubt that the Court has set its course for a right to marry. This is but one of a series of cultural debacles forced upon us by judges following no law but their own predilections. This one, however, will be nuclear. As an example of judicial incontinence, it will rival *Roe v. Wade*, and will deal a severe and quite possibly fatal blow to two already badly damaged but indispensable institutions—marriage and the rule of law in constitutional interpretation.

The wreckage may be subtler but more widespread even than that. Such a decision would ratify, in the most profound way, the anarchical spirit of extreme personal and group autonomy that is the driving force behind much of our cultural degradation. Call it what you will—moral chaos, relativism, postmodernism—extreme notions of autonomy already suffuse our culture, quite aside from any assistance from the courts. But judicial endorsement, which is taken by much of the public to state a moral as well as a legal truth, makes the anything-goes mentality even harder to resist. The principle undergirding radical autonomy is essentially unconfineable. Thus, Justice Byron White, Senator Rick Santorum, and William Bennett have all made the point that the rationale for same-sex marriage would equally support group marriage, incest, or any other imaginable sexual arrangement.

That surely is the meaning, insofar as it has a discernible meaning, of the imperialistic “mystery passage” first articulated by three justices in a case upholding the right to abortion and repeated in the majority opinion creating a right to homosexual sodomy:

[Our] law affords constitutional protection to . . . the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [which] are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty [protected by the Constitution] is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.

Reading these words, it is hard to know what there is left for legislatures to do, since each individual is now a sovereign nation.

The only real hope of heading off the judicial drive to constitutionalize homosexual marriage is in the adoption of an amendment to the Constitution. The language of the amendment now before Congress is this:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution nor the constitution of any state shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

The amendment is intended primarily to stop activist courts from redefining marriage in any way they see fit, as the Supreme Judicial Court of Massachusetts has recently done. The first sentence, however, also limits legislatures by defining marriage as the people of the United States and of the West have known it.

Given that the stakes riding on the outcome of the effort to adopt the Federal Marriage Amendment (FMA) are so high, it is surprising that so many social conservatives have expressed opposition. Though these are men for whom I have the highest regard, in this instance I think they are mistaken. Their mistake, it seems to me, derives from a conservative constitutionalism which, though laudable in the past, is now, most unfortunately, obsolete. Walter Bagehot, writing of the English constitution in the nineteenth century, said, “[I]n the full activity of an historical constitution, its subjects repeat phrases true in the time of their fathers, and inculcated by those fathers, but now no longer true.” So it is with us. Michael Greve correctly places the same-sex marriage issue in a wider context: “[T]he broader, more menacing problem is judicial usurpation. . . . [W]hat truly grates is the notion of having [homosexual marriage] dictated by willful, contemptuous judges.” Conservative constitutionalism today requires taking back the original Constitution to restore the constitutional order and representative government. If that requires amending the Constitution to recall the judges to their proper function, so be it. There is no other remedy available to save or, more accurately, to restore a republican form of government.

The conservative columnists George F. Will and Charles Krauthammer, however, seem to me to illustrate Bagehot’s maxim. Will has written that “amending the Constitution to define marriage as between a man and a woman would be unwise for two reasons. Constitutionalizing social policy is generally a misuse of fundamental law. And it would be especially imprudent to end state responsibility for marriage law at a moment when we require evidence of the sort that can be generated by allowing the states to be laboratories of social policy.” To his point about the unwisdom of putting social policy in the Constitution, it is fair to reply that the entire document can be seen as expressing social policy, and certainly parts of the Bill of Rights, such as the guarantee of the free exercise of religion, do exactly that. The real difficulty with Will’s position, however, is his notion that the states will be allowed to be laboratories of social policy. They will not; the Supreme Court, as in the case of *Roe*, will simply replace the social policies of all of the states with its own policy.

The most likely route to that ruling is the following. A homosexual couple will marry in Massachusetts, move to another state (say, Texas), and claim the status and benefits of marriage there. They will cite the Full Faith and Credit Clause of Article IV of the Constitution, which declares that states must accept the public acts of every other state. Texas will refuse recognition, relying on the federal Defense of Marriage Act (DOMA), passed in reliance on Article IV’s further provision that Congress may prescribe the effect of such out-of-state acts. The couple will respond with a challenge to DOMA under the federal Due Process and Equal Protection Clauses. The Supreme Court will then uphold their challenge by finding a federal constitutional right to same-sex marriage that invalidates DOMA. The FMA would prevent this almost-certain outcome.

Instead of state-by-state experimentation, we are going to have a uniform rule one way or the other: homosexual marriage everywhere or nowhere. The choice is that stark and judges are forcing us to make it.

Charles Krauthammer agrees that “there is not a chance in hell that the Supreme Court will uphold” DOMA. He concludes, nonetheless, that “I would probably vote against the amendment because for me the sanctity of the Constitution trumps everything, even marriage.” His point would be well taken if it were not much too late to worry about the sanctity of a document the Supreme Court has been shredding for fifty years. Surely the Court’s diktats, which are themselves profoundly unconstitutional, are not sacred. As matters now stand, the “sanctity of the Constitution” is a smoke screen providing cover for judicial activism. Taking action through authentically constitutional means to prevent yet another constitutional travesty shows greater respect for the document than standing by while five of nine justices chisel into the tablets of the law the caprices of the elite class to which they respond. An amendment preventing one instance of judicial depredation would at least represent a democratic choice—indeed a choice by supermajorities, given the requirement of a two-thirds vote in each house of Congress and then ratification by three-quarters of the states.

There is one other objection expressed by Krauthammer, however: “I would be loath to see some future democratic consensus in favor of gay marriage (were that to come to pass) blocked by such an amendment.” That objection could, of course, be made to every provision of the Constitution; each and every one precludes some action by a future democratic consensus. If, for example, a national majority should want to make foreign-born naturalized citizens eligible for the presidency or to abolish jury trials in complex lawsuits, that democratic consensus would be frustrated by the Constitution.

Michael Greve suggests a constitutional amendment that would preserve the value of state experimentation while heading off the Supreme Court creation of homosexual marriage:

The United States Constitution shall not be construed to require the federal government, or any state or territory, to define marriage as anything except the union of one man and one woman. The United States Constitution shall not be construed to require any state or territory to give effect to any public act, record, or judicial proceeding respecting a relationship between persons of the same sex that is treated as a marriage under the laws of another state or territory.

This amendment would leave states free to give effect to the acts of other states or not, as they see fit. Greve suggests that state legislatures could control the choice through legislation allowing or forbidding their courts to honor out-of-state homosexual marriages.

There seem both legal and sociological problems with this proposal. The language leaves out of account what state courts may do with state constitutions. A state supreme court could very well hold—and a number of them certainly will—that its state constitution contains a right to homosexual marriage or, alternatively, that its constitution mandates recognition of such marriages contracted elsewhere. It is not a sufficient answer that the citizenry could respond by amending the state constitution. In many states the amending process is quite difficult and time-consuming; and a state supreme court’s ruling will itself affect the balance in the electorate. The cultural aristocracy—the news

media, university faculties, many churches, foundations, television networks, and Hollywood—will continue, as they have already been doing, to propagandize massively and incessantly for the normality of homosexuality and the right to marry. It may be doubted that many states will muster supermajorities overruling their courts in the face of this cultural tsunami. There seems no way to guard against state court activism on this issue, which we have already seen in Hawaii, Vermont, and Massachusetts, except by a federal amendment that binds state as well as federal courts.

As seems inevitable in discussions about reining in runaway courts, some have suggested that instead of amending the Constitution, Congress should deny all federal courts jurisdiction to deal with the marriage issue. Congress has power under Article III of the Constitution to make exceptions to the appellate jurisdiction of the Supreme Court and to remove lower court jurisdiction. This proposal, though endorsed by a commentator as sound as Arnold Beichman, is, as always, a nonstarter, and merely diverts some Congressmen from addressing the problem seriously. If the Supreme Court allowed its jurisdiction over a particular subject to be abolished, which is by no means a certainty, the result would be to leave jurisdiction in the state courts. Article VI provides that “the Judges in every State shall be bound” by the Constitution and laws of the United States, and there is no power in either Congress or the state legislatures to take away that jurisdiction. The result, if Congress acted and the Court acquiesced, would be the same as under the constitutional amendment suggested by Michael Greve, except that state courts could rely upon both the federal and state constitutions to invent, as the courts of Massachusetts and Hawaii have under their state constitutions, a right to same-sex marriage.

Amending the United States Constitution to save it and marriage from freebooting judges would be extremely difficult in the best of circumstances, but it is made immeasurably more difficult because so many people ask: How does homosexual marriage affect me? What concern is it of mine or of anybody else what homosexuals do? The answer is that the consequences of homosexual marriage will affect you, your children, and your grandchildren, as well as the morality and health of the society in which you and they live.

Studies of the effects of same-sex marriage in Scandinavia and the Netherlands by Stanley Kurtz raise at least the inference that when there is a powerful (and ultimately successful) campaign by secular elites for homosexual marriage, traditional marriage is demeaned and comes to be perceived as just one more sexual arrangement among others. The symbolic link between marriage, procreation, and family is broken, and there is a rapid and persistent decline in heterosexual marriages. Families are begun by cohabiting couples, who break up significantly more often than married couples, leaving children in one-parent families. The evidence has long been clear that children raised in such families are much more likely to engage in crime, use drugs, and form unstable relationships of their own. These are pathologies that affect everyone in a community.

Homosexual marriage would prove harmful to individuals in other ways as well. By equating heterosexuality and homosexuality, by removing the last vestiges of moral stigma from same-sex couplings, such marriages will lead to an increase in the number of homosexuals. Particularly vulnerable will be young men and women who, as yet uncertain of and confused by their sexuality, may more easily be led into a homosexual life. Despite their use of the word “gay,” for many homosexuals life is anything but gay. Both physical and psychological disorders are far more prevalent among homosexual

men than among heterosexual men. Attempted suicide rates, even in countries that are homosexual-friendly, are three to four times as high for homosexuals. Though it is frequently asserted by activists that high levels of internal distress in homosexual populations are caused by social disapproval, psychiatrist Jeffrey Satinover has shown that no studies support this theory. Compassion, if nothing else, should urge us to avoid the consequences of making homosexuality seem a normal and acceptable choice for the young.

There is, finally, very real uncertainty about the forms of sexual arrangements that will follow from homosexual marriage. To quote William Bennett: “Say what they will, there are no principled grounds on which advocates of same-sex marriage can oppose the marriage of two consenting brothers. Nor can they (persuasively) explain why we ought to deny a marriage license to three men who want to marry. Or to a man who wants a consensual polygamous arrangement. Or to a father to his adult daughter.” Many consider such hypotheticals ridiculous, claiming that no one would want to be in a group marriage. The fact is that some people do, and they are urging that it be accepted. There is a movement for polyamory—sexual arrangements, including marriage, among three or more persons. The outlandishness of such notions is no guarantee that they will not become serious possibilities or actualities in the not-too-distant future. Ten years ago, the idea of a marriage between two men seemed preposterous, not something we needed to concern ourselves with. With same-sex marriage a line is being crossed, and no other line to separate moral and immoral consensual sex will hold.

We are in a time of deep moral confusion about sex and particularly about homosexuality. Consider: the Catholic Church is berated for putting homosexual men in charge of boys while the Boy Scouts are punished for not putting homosexual men in charge of boys. At the same time, as Mary Eberstadt points out, the rightness or wrongness of pedophilia (involving boys, not girls) is “demonstrably not yet settled within certain parts of the gay rights movement.” Eberstadt reports that the taboo against pedophilia is weakening. Some homosexual activists, such as the North American Man/Boy Love Association, are working to that end. Nothing, one is tempted to say, is any longer unimaginable, and what is imaginable is doable.

Is passing the FMA worth the energy and the political risk for politicians, especially when it may well be a losing battle? Social conservatives, Max Boot notes, have been fighting and losing culture wars for decades. That is obvious, but his recommendation that we acknowledge defeat on the issue of homosexual marriage and move on to other issues is bad advice. This issue seems to me so important that a fight against it, whatever the odds, is mandatory. Abandoning resistance here might nevertheless be seen by some as an intelligent strategy, but that would be true only if there were a more defensible line to fall back to. It is difficult to see what line that might be. The cultural left, including homosexual activists, will keep pressing for more. The BBC, as a foretaste of what is to come, has ordered its staff not to use the words “husband” and “wife,” since that might seem to indicate that marriage is preferable to other sexual arrangements. In Canada, a pastor has been charged under a hate speech law for publishing instances of the Bible’s disapproval of homosexuality. Church leaders who imagine they can negotiate immunities from laws applying to the rest of the population are almost certainly fooling themselves. Liberal autonomists have little or no respect for religion, except to the extent that some clergy can be recruited to advance their causes in the name of religion. The Catholic Church will be a particular target of attack, as it already has been in California, where the state supreme court ruled that Catholic Charities

had to provide prescription contraceptive coverage in its health insurance plan for employees.

Boot's advice to cut and run on this issue thus ignores the fact that there are fewer and fewer places to run to. The autonomous drive toward cultural degradation will not leave us in peace, ever. Boot may be right to predict that Republican support for a marriage amendment would make the party "look 'intolerant' to soccer moms whose views on this subject, as on so many others, will soon be as liberal as elite opinion already is." But if that is true, it means that we will lose all the cultural battles of the future, as the soccer moms trail along behind elite opinion. If Republicans refuse to fight cultural battles on that reasoning, they will look cowardly to conservatives, which could be equally disastrous. It would be better to try to convince the soccer moms, who would not be at all happy if their children and grandchildren cohabited instead of marrying, or "married" persons of the same sex.

Finally, it is worth considering that a vigorous campaign for the FMA could have a salutary effect on the American judiciary. The debates, win or lose, might also lead the public to a more realistic view of the courts. As William F. Buckley, Jr. has written on another occasion, "The public—under the tutelage of its moral and intellectual leaders—is being trained, as regards the Supreme Court of the United States when it is interpreting the Constitution, to accept its rulings as if rendered *ex cathedra*, on questions of faith and morals." Thus, a constitutional amendment "done athwart the will of the Court for the first time in modern history . . . would deliver the Republic from a presumptuous ethical-legal tribunal." "The public," Buckley argues, "needs to experience a release from a subtle thralldom to judicial morality." Quite right.

Conservative opinion leaders must recognize that the illegitimacy of the rampant judicial constitution- making that is before their eyes changes all the old rules about the place of amendments in our polity. The comfortable shibboleths about a heavy presumption against amending the Constitution no longer have much relevance to the brute facts of our political life. So profound is the departure from a republican form of government that the presumption must now be in favor of amending the Constitution whenever the Court runs wild. Homosexual marriage presents just such an occasion, but if our politicians wait until the Supreme Court has done the inevitable, it will probably be too late for an effective response. Catastrophes ought not to be faced in a spirit of resignation.

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