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Contemporary consensus amendment

The U.S. Constitution needs amending to prevent state court judges from usurping legislative power to ordain same-sex "marriages" through exotic interpretations of state constitutions or statutes.

The Supreme Judicial Court of Massachusetts exemplifies the usurpation, and has provoked a proposed amendment to the state constitution to undo its judicial caper.

But curative political remedies are unsatisfactory. To apply them retroactively to dissolve homosexual marriages legally entered under a judicial roof would be both wrenching and unfair to the affected same-sex couples. Accordingly, a constitutional amendment to forestall state judicial outlandishness in same-sex "marriage" litigation is justified.

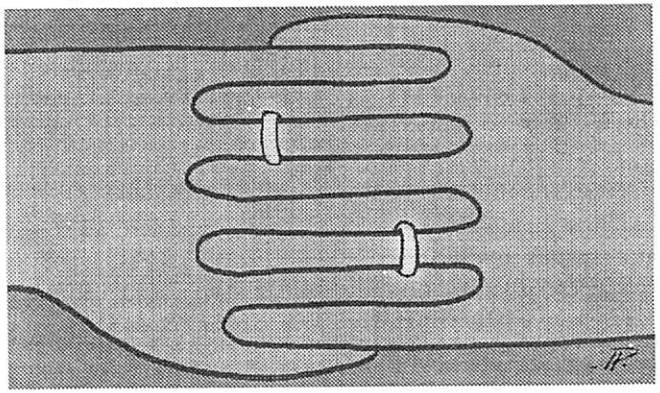
By insisting the subject remain with legislatures or the people through popular initiative or referendum, the contemporaneous consensus amendment would address a salient feature of democratic governance, the customary yardstick for determining whether an issue is worthy of enshrinement in the U.S. Constitution.

But for the Bill of Rights (a virtual codicil of the original Constitution), amendments have generally concerned major issues of self-government, republican architecture: federal-state relations; emancipation; the franchise; direct election of senators; a two-term presidency; presidential disability or succession; the electoral college; the federal power to levy an income tax; and, congressional compensation. The ill-fated Prohibition Amendment is the exception that proves the rule.

The raging controversy over same-sex "marriage" raises a nontrivial question of democratic governance: whether the policy will be determined by unrepresentative courts or by a contemporary consensus that finds expression in legislative bodies or popular initiatives or referenda.

Enlightened government generally resists abrupt changes except through commanding majorities. Same-sex marriage would mark a sharp break from centuries of celebrating matrimony as a union between man and woman to promote optimal procreation and child-rearing. Whether such a dramatic departure in marriage law should be taken is thus a decision more fit for legislatures than for courts.

Bans on same-sex marriages are persuasively distinguished from miscegenation laws held unconstitutional by the United States Supreme Court in Loving vs. Virginia (1967). Criminal penalties for interracial marriages were



then part of a larger network of white supremacy laws calculated to subjugate blacks, including discrimination in the franchise, education, employment, housing, law enforcement, and otherwise. Their odious purpose was white racial purity.

In contrast, contemporary prohibitions on same-sex marriages seek to further procreation and optimal emotional and psychological nurturing of children. Unlike Jim Crow laws, the prohibitions do not relegate homosexuals to subservience denied the franchise, equal educational opportunity or constitutional due process. Furthermore, social prejudices against homosexuals are receding daily.

A contemporaneous consensus amendment is necessitated by same-sex marriage exponents asking state courts to distort the original meanings of state constitutions, anti-discrimination or domestic relations statutes to prohibit the reservation of matrimony to opposite-sex couples. The provisions invoked before the courts were enacted in an era when discrimination based on sexual orientation was passe. To interpret them today as mandating recognition of same-sex "marriage" does violence to the meaning intended by their authors and improperly crosses the line between judging and legislating.

The Massachusetts Supreme Judicial Court is exemplary, where a narrow 4-3 majority fatuously interpreted the state constitution as intended to erase any distinction between opposite-sex and same-sex marriage applicants. A few years before the Massachusetts caper, the Hawaii Supreme Court had tortured the language of the Hawaii state constitution in favor of same-sex marriages. A state constitutional amendment swiftly followed to correct the judicial adventurism.

At present, a Massachusetts copycat suit is pending before the California Supreme Court occasioned by same-sex "marriage" licenses issued by the mayor of San Francisco despite a recent California initiative defining marriage as a union between husband and wife. New Mexico, New Jersey, New York, and Oregon are also ripe for avant-garde judicial decrees requiring official recognition of homosexual "marriages" performed within their respective jurisdictions or elsewhere.

Democratic governance principles, however, counsel support for entrusting that controversy to legislatures or popular vote. Both sides are fairly represented in public debate and legislative chambers. No artificial barriers impede the enactment of laws sanctioning same-sex marriages, a proposition corroborated by impressive state and municipal legislation that have banned discrimination based on sexual orientation, repealed prohibitions on homosexual sodomy and penalized as hate crimes violence motivated by homophobia.

Further, social change is invariably less jarring and more acceptable to the community when the agent is popular consensus forged from all viewpoints as opposed to unrepresentative courts listening only to a handful of litigants.

The contemporary consensus amendment should thus prohibit judges from interpreting any preexisting state constitutional provision or law as requiring official recognition of same-sex marriages. The prohibition would permit courts to implement new additions to state constitutions and statutes that expressly endorse homosexual marriage.

The demarcation line between old law and new law would, however, ensure that if same-sex marriage proponents prevail, they will do so by convincing popular majorities, not by persuading a handful of judges bent on social engineering.

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