

AT LAW

Stop Courts From Imposing Gay Marriage

Why we need a constitutional amendment.

BY ROBERT H. BORK

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Of all the contested terrain in the culture war, the subject of homosexual rights is the most awkward to discuss. Almost all of us know homosexuals who are decent, intelligent and compassionate people, and we have no inclination to wound them.

Yet "gay rights" have come to the fore and we must have a discussion, free of ad hominem accusations, about whether homosexual acts and relationships are to be regarded as on a par with the marital relationship of a man and a woman. The immediate problem is the homosexual activists' drive for same-sex marriage.

The activists want it as an expression of moral approbation of homosexual conduct. Many Americans have no desire to impose criminal sanctions on homosexual sodomy. Nevertheless, it is clear that most Americans do not want to create special rights for homosexuals or to consider their behavior morally neutral.

For that reason, the activists have concentrated their efforts on courts, knowing that judges have pushed, and continue to push, the culture to the left. One of the last obstacles to the complete normalization of homosexuality in our society is the understanding that marriage is the union of a man and a woman.

The activists breached that line when the supreme courts of Hawaii and Vermont, purporting to interpret their state constitutions, held that those states must recognize same-sex marriage. The Hawaiian electorate quickly amended their constitution to override that decision. The Vermont Constitution was extremely difficult to amend, and so the Legislature capitulated and enacted a civil-unions law, marriage in all but name, as the less repugnant of the alternatives the court allowed. More state courts are sure to follow.

Many court watchers believe that within five to 10 years the U.S. Supreme Court will hold that there is a constitutional right to homosexual marriage, just as that court invented a right to abortion. The chosen instrument will be the Equal Protection Clause of the 14th Amendment. After all, if state law forbids Fred to marry Henry, aren't they denied equal protection when the law permits Tom and Jane to marry? The argument is simplistic, but then the argument for the result in *Roe v. Wade* was nonexistent.

To head off the seemingly inexorable march of the courts toward the radical redefinition of marriage, the Alliance for Marriage has put forward the proposed Federal Marriage Amendment: "Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any state, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups."

The first sentence means that no legislature may confer the name of marriage on same-sex unions and no court may recognize a same-sex marriage contracted in another country. We would hope that if people understand the principle behind the amendment, they would not try to contrive counterfeit

forms of marriage. We would oppose such attempts, but are prepared to debate the matter in the political forum. So far as legislatures are concerned, the primary thrust of the sentence's prohibition is symbolic, reserving the name of marriage to its traditional meaning. But symbolism is crucial in cultural struggles.

The second sentence expresses the main thrust of the amendment. It recognizes that liberal activist courts are the real problem. If courts are prevented from ordering same-sex marriage or its equivalent, the question of arrangements less than marriage is left where it should be, to the determination of the people through the democratic process.

To try to prevent legislatures from enacting permission for civil unions by constitutional amendment would be to reach too far. It would give opponents the opening to say we do not trust the people when, in fact, we are trying to prevent courts from thwarting the will of the people. The history of the effort to obtain a constitutional amendment relating to abortion is instructive. There was a chance to get an amendment overturning Roe v. Wade and returning the issue to the state legislatures. Purists opposed to abortion would not settle for that. They demanded an amendment prohibiting abortion altogether. The result was that they got nothing. An amendment against judicial validation of same-sex marriages would similarly be doomed by pressing for too much.

Some proponents of gay marriage, such as Jonathan Rauch, have tried to split cultural conservatives by invoking federalism. Family law, he argues, has always been governed by the states. Though that is not entirely true, it is entirely irrelevant. A constitutional ruling by the Supreme Court in favor of same-sex marriage would itself override federalism.

Activists are already trying to nationalize same-sex unions: Same-sex couples will travel to any state that allows them to marry or have civil unions, relying on the constitutional requirement that states give full faith and credit to the judgments of other states to validate their status in their home states. They will attack the constitutionality of the federal Defense of Marriage Act, which seeks to block this. One way or another, federalism is going to be overridden. The only question is whether the general rule will permit or prohibit the marriage of same-sex couples.

Traditional marriage and family have been the foundations of every healthy society known in recorded history. Only in the past few decades of superficial liberal rationalism has marriage come under severe attack. The drive for same-sex marriage ordered by courts is the last stage of the assault. The Federal Marriage Amendment is an attempt, and perhaps the only hope, to preserve marriage as an institution of incalculable value.

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