the weekly Standard

The Federal Marriage Amendment Is Hopeless

But federal law can succeed in protecting marriage where a constitutional amendment is destined to fail.

by Dennis Teti

11/19/2003 12:00:00 AM

THE MASSACHUSETTS SUPREME COURT has legalized same-sex marriage for the first time in this country. Most suspect the U.S. Supreme Court will throw a blanket of federal constitutional protection around this precedent.

Faced with the judicial deconstruction of marriage, angry conservative spokesmen and panicky lawmakers have rushed to embrace the Federal Marriage Amendment (FMA), a constitutional amendment to ban homosexual unions. These well-intentioned religious and pro-family leaders believe the high court will strike down anything less imposing. But trying to change the Constitution to resolve a fundamental social conflict is a deeply mistaken strategy. Not only will it almost certainly fail to be ratified; it will end up enshrining these "marriages."

There must be a more deliberate response. For three years President Bush has been saying that he believes in traditional marriage between a man and a woman. At his press conference following the Lawrence v. Texas anti-sodomy decision, he suggested that the administration is considering alternatives to a constitutional amendment. With firm leadership, the Republican majority in Congress could enact legislation right now to close the door on unisex marriages before the Supreme Court rules.

THE SLIM POPULAR MAJORITY now in opposition to "gay marriage" is not nearly sufficient to ratify a constitutional amendment. The Framers designed the constitutional amendment route to be difficult. Two-thirds of each house of Congress must first approve the amendment language, which then must be ratified by legislatures in at least 38 states--usually within seven years. (The alternative procedure, a constitutional convention, has never been tried.)

If every Republican senator voted for the FMA, 16 Democrats would have to be found to support it. In the House some 60 Democratic votes would be needed in addition to a unanimous Republican vote.

If some political miracle allowed the FMA to pass Congress and escape to the states, a higher series of hurdles awaits. Any 13 state legislatures can defeat it by either taking no vote or rejecting it. It is theoretically possible for two percent of the American people, strategically distributed in 13 small states, to kill an amendment favored by the other 98 percent. A small, energized minority would have little trouble doing so.

BUT LOGISTICAL CHALLENGES ASIDE, proponents of a marriage amendment seriously misunderstand the Framers' intention concerning constitutional changes. The founding generation vigorously debated these procedures (e.g., Federalist Papers 43 and 85, and the anti-Federalist Old Whig Essay I). The same Framers who democratized national elections and legislative enactments designed the amendment process to be partly national and partly federal--requiring a consensus of states, not merely majoritarian/democratic. And they set it up to take a long time so that deliberation, not anger or passion, would control the outcome.

The history of using constitutional amendments to resolve basic social problems is daunting. Like opposition to homosexual unions, the movements to abolish slavery, alcoholic consumption, and polygamy were centered in Christian churches. The anti-slavery struggle took over 60 years to ratify the Thirteenth Amendment, and only after civil war forged a consensus of sorts. During those decades many federal laws were enacted to limit the growth of slavery. The temperance movement began in the 1820s but the first prohibition amendment was not introduced until 1876, after which they were proposed almost every year. An amendment was ratified in 1919 after 90 years of work, only to be repealed in 1933.

The social conflict most like gay marriage involved the Mormon practice of polygamy in the western territories. Americans overwhelmingly opposed plural marriage. The first Republican party platform in 1856 denounced polygamy and slavery as "twin relics of barbarism." President Grant proposed an anti-polygamy amendment in his 1875 State of the Union message, and for decades thereafter, amendments were introduced. Before World War I, 26 states had petitioned for a constitutional convention. Yet legal recognition of polygamy was crushed not by amendment but by a series of limited executive actions and federal laws that were sustained by the Supreme Court.

SOME CONSERVATIVES RESIST federal legislation on gay marriage because, they contend, family regulation belongs to the states, not the federal government. (Of course if these conservatives support FMA, they don't really object to the shift.) In fact the horse has been stolen from the barn. Lawrence v. Texas dragged same-sex marriage into the federal arena. If the Supreme Court blesses the Massachusetts decision, gay marriage will be nationalized to stay.

For example, instead of directly forbidding same-sex partners to marry, a federal marriage privilege protection measure would make it a criminal offense for state or local officials acting "under color of law" to issue a marriage license to persons of the same sex. Constitutional authority to pass this measure comes from the Fourteenth Amendment, buttressed by the Republican Guarantee clause (S. 4 of Art. IV) and the Necessary and Proper clause (par. 18, S. 8 of Art. I).

To appreciate this, consider the nature of the marriage relationship as understood from antiquity through centuries of thought and experience that shaped its meaning in American legal practice: *The marriage union is a relationship characterized by privilege.* Each spouse is recognized to have a *privilege* "to have and to hold" the person of the other. The privilege is exclusive: No one else may claim a right to join that union.

The marriage privilege is prior to government in the sense the Declaration of Independence speaks of regarding inalienable rights: "among these [implying there are others] are life, liberty, and the pursuit of happiness." Families exist by nature to perpetuate the species, or natural rights themselves would disappear. Government's purpose is not to dispense rights but

to "secure" rights created by "Nature and Nature's God." To do this, governments enforce laws placing limits on how people exercise their natural rights and privileges. For instance, the rights to liberty and life can be constrained by jailing or executing criminals. The marriage privilege also must be regulated because the family is central to the well-being of society. No nation has ever claimed that a person should be permitted to marry anyone he or she chooses. The legal requirement of a marriage license grants a social privilege *par excellence*, a relationship to be enjoyed only by specific persons permitted and protected by law.

So deeply embedded in our society is this privilege that a thick network of legal rights and duties has been woven to reinforce it--over a thousand federal and 400 state laws by a rough count from the General Accounting Office. They comprehend everything from parents' duties to their children, adoption, estates and inheritances, survivor benefits, immigration rights, domestic violence protections, and divorce settlements, to customs claims, lease renewals, tax laws, judicial evidentiary immunity, and many other areas. No other privileged relationship has been so marked out by legal benefits and obligations to prove its centrality for free society.

As Stanley Kurtz demonstrated in Beyond Gay Marriage, the movement to redefine marriage to include homosexual unions brings in its wake demands to legalize polygamy, polyamory (group marriages), triple parenting, incestuous partnerships, and worse. Expanding marriage to include same-sex partnerships implies the abolition of the marriage privilege, as proponents of these various arrangements clearly understand. Andrew Sullivan and other gay activists are angered by what they say is the equation of gay marriage with other unnatural unions, but no one has claimed these differing sexual arrangement are the same. The real issue in common among these relationships is the principle that is supposed to legitimize gay marriage: personal affectional preference. But marriage is not capable of being radically redefined. Reason itself, fixed in the nature of the relationship, imposes limits. Transcend the limits, and, as Kurtz shows, the marriage union dissolves as a social and legal institution.

For most of its history, the Supreme Court held that traditional marriage forms a family unit which is the fundamental building block of free society. The forms of self-government could not survive without it, so any weakening of the marriage privilege undermines free government. To preserve republicanism, the federal government is obligated (Art. IV, S. 4) to strengthen its basis in the marriage union.

The states' power to enact marriage laws presupposes the purpose of securing the marriage privilege, not weakening it. By the terms of the Fourteenth Amendment, the states may not do so. Here is why.

MOST OF US KNOW the Fourteenth Amendment's Due Process and Equal Protection provisions. Constitutional jurisprudence is filled with cases involving state actions denying one or the other. In a landmark 1873 opinion known as Slaughter-House Cases, however, the Supreme Court refused to recognize the butchers' business in Louisiana as a federally protected "privilege" under the Amendment's Privileges or Immunities Clause. The Amendment had been ratified after the Civil War to allow the federal government to protect the civil rights of ex-slaves. The case had nothing to do with marriage as a "privilege." The consequence of Slaughter-House was to turn to the other great provisions to enforce civil rights and liberties.

Although the Court abandoned the Privileges or Immunities Clause after 1873, we are not without guidance as to what might be included. In a circuit court opinion in 1823, Supreme Court Justice Washington said that the privileges and immunities of state citizens "are, in their

nature, fundamental; [they] have, at all times, been enjoyed by the citizens of the several states which compose this union, from the time of their becoming free, independent, and sovereign," adding that "it would perhaps be more tedious than difficult to enumerate" what they are. The privilege of marriage precisely fits this description, especially since it was always thought to be basic to society's well-being.

In a 1923 case called Meyers v. Nebraska, which struck down state laws forbidding foreign language courses in primary schools, the Supreme Court, referring to the Fourteenth Amendment, said: "the right of the individual . . . to marry . . . and generally to enjoy those privileges long recognized at common law [is] essential to the orderly pursuit of happiness by free men." Not only did the Meyers opinion infer that marriage is a protected "privilege," it cited Slaughter-House to support the inference.

Same-sex marriage proponents admit the traditional understanding of marriage as monogamous and heterosexual, which is why they call for it to be redefined. Of course, to stretch the limits of the marriage union beyond a man and a woman is by definition, a change in its nature. Those who assert that redefining marriage would be a good thing cannot also claim that redefinition would not change marriage as we have understood it: changing it is their whole purpose. But any fundamental state-imposed change would "abridge"--weaken or limit--the marriage privilege within the meaning of the Fourteenth Amendment. A new constitutional amendment would be needed to allow the states to redefine or abolish marriage. Short of that, the Fourteenth Amendment imposes on Congress the duty to defend the privileges of American citizens against state actions to change their meaning.

ENACTING A MARRIAGE PRIVILEGE PROTECTION STATUTE in the current Congress would give Republicans a significant advantage in next year's elections. Compared to the lengthy process of ratifying the FMA, they would have taken immediate action to protect traditional marriage. This would not stop gay marriage from being an issue in the election campaigns. Rather, it would bring the question to the forefront.

The long delay connected with getting an amendment through Congress would allow incumbents to obscure their position. Neither Republican nor Democratic lawmakers want to vote on divisive issues like gay marriage. Some in both parties would say they support traditional marriage, yet find a multitude of objections to the amendment: the idea of changing the Constitution, the need for more expert testimony, etc. Even now the amendment's sponsors don't agree with each other about the proposed text's meaning and whether it should be changed. Opponents will have a field day with the "vague" language. If President Bush took a leadership role, the marriage privilege protection statute could be brought to a vote before November 2004. Every senator and representative would be on record, and the party division would not be buried in platform statements.

If Republicans, supporting traditional marriage, keep the White House and increase their legislative advantage, important judicial consequences would follow. The late constitutional scholar Alexander Bickel taught that constitutional interpretation is a kind of colloquy among the three branches. When the judiciary veers too far from the common sense of the Constitution, the other branches open a conversation with the judges.

We badly need a colloquy like this today. Historical precedents suggest the justices might not disregard a clear assertion of legislative will on such a basic issue. Neither a weak "sense of Congress" resolution nor a fanciful constitutional amendment that will be dead on arrival can

do much to advance this conversation. Enforceable law is Congress' authoritative means to voice its position. With an election mandate to protect the marriage privilege, Congress and the White House would give the high court incentives and an opportunity to rethink its agenda. Should the justices persist, the conflict will intensify, not go away. A constitutional crisis--much like the New Deal crisis--would be almost inevitable.

Those who favor a constitutional amendment to protect marriage object to ordinary legislation, claiming the Supreme Court will certainly strike down a federal statute. President Franklin Roosevelt gave this classic response to such arguments:

> [There are] *those who honestly believe the amendment process is the best and who would be willing to support a reasonable amendment if they could agree on one. To them I say: we cannot rely on an amendment as the immediate or only answer to our present difficulties. When the time comes for action, you will find that many of those who pretend to support you will sabotage any constructive amendment which is proposed. . . . Even if an amendment were passed, and even if in the years to come it were to be ratified, its meaning would depend upon the kind of justices who would be sitting on the Supreme Court bench. An amendment, like the rest of the Constitution, is what the justices say it is rather than what its framers or you might hope it is.*

Changes in the Constitution never happen merely because voters are angry. The Framers designed the process to insure that momentary passions don't damage a Constitution that must endure for centuries. Amendments are possible when the political conflict is over and a consensus is established. Losing a fight over the FMA, which is virtually certain, will only give ammunition to those who would claim popular support for same-sex marriage. Enacting a marriage privilege protection law can advance the effort to forge a consensus that will preserve marriage and constitutional republicanism.

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