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Judicial Supremacists *vs.* 'We, the People'

Republican Party platforms have frequently stressed the central importance of the traditional family based on a married husband and wife, because that is the only way to achieve a self-reliant, self-supporting economic unit that minimizes the need for a welfare state.

For example, recent platforms have stated that "Republicans recognize the importance of having a father and a mother in the home" (2000); "Families — not government programs — are the best way to make sure our children are properly nurtured" (1976); a loss of the traditional family produces consequences that "not only lead to more government costs, but also to more government control over the lives of its citizens in all aspects" (2012); "fracturing the family into isolated individuals [leaves] each of them dependent upon — and helpless before — government" (1992).

The first Republican platform after *Roe v. Wade*, in 1976, denounced that pro-abortion, anti-family decision. The first Republican platform after Lyndon Johnson's Great Society, in 1968, denounced the then-new practice of providing welfare benefits to unmarried mothers because it "erodes self-respect and discourages family unity and responsibility."

And the very first Republican platform of all, in 1856, affirmed traditional marriage by declaring it the "duty of Congress to prohibit in the Territories those twin relics of barbarism — Polygamy, and Slavery."

More recently, every Republican Party platform since 1996 has opposed the legal recognition of same-sex unions at any level of government, both state and federal. The necessity of providing legal privileges for husband-wife unions was reaffirmed in the platforms of 2000, 2004, 2008, and 2012, and in 2013 by a special resolution declaring that marriage is a "relationship that only a man and a woman can form."

The first Republican president, Abraham Lincoln, won the Republican nomination, and then the presidency, primarily on the basis of his compelling refutation of the Supreme Court's *Dred Scott* decision, and on his public commitment not to enforce that sweeping decision beyond the individual parties to that tragic case. After his election, Lincoln stood by that promise.

Like Andrew Jackson before him, Lincoln insisted that Congress and the President were co-equal branches of government with the duty to interpret the Constitution within their own spheres of divided power.

Alexander Hamilton promised in the *Federalist Papers* (No. 78) that the judiciary was the "least dangerous" branch of the federal government because it "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."

In the last presidential cycle, Newt Gingrich won the pivotal South Carolina primary after declaring that he would reject a Supreme Court ruling that extended legal rights to enemy combatants held at Guantanamo. Newt had already issued an excellent 54-page position paper entitled "Bringing the Courts Back Under the Constitution."

Unfortunately, the Republican "donor class" and the high-priced consultants who led the party down to defeat in the last two presidential elections are back again with the same losing advice to avoid what former Indiana governor Mitch Daniels called "the so-called social issues."

What those big donors and strategists don't seem to realize is that Republican fiscal policies (lower taxes and balanced budgets) can happen only if we honor the traditional family, founded on the marriage of husband and wife, as the indispensable foundation of a free society.

We're looking for a presidential candidate to say that the way to give us the limited government, lower taxes, and balanced budgets we all seek is to restore the legal system that protects traditional marriage so that families are self-supporting, not dependent on government handouts.

What Will the Court Do to Marriage?

Dozens of briefs were filed in the Supreme Court Marriage case, which gave the Justices much good advice. One brief filed on behalf of 57 Republican members of the U.S. House and Senate was written by a brilliant young lawyer, D. John Sauer, who is a grandson of my friend Dr. Dean Sauer, an influential conservative activist in the 1950s and '60s. That brief outlines **seven principles of constitutional adjudication** declared by the Supreme Court in the last 25 years, and it shows how each of those principles counsels against a sweeping decision redefining marriage for all 50 states.

The first is the principle of **federalism**, which Justice Kennedy has said "was the unique contribution of the Framers to political science and political theory." It was "the insight of the Framers," Kennedy continued, "that freedom was enhanced by the creation of two governments, not one."

For that reason, the Court has been reluctant to project its authority into areas of traditional state concern, especially family law, "an area that has long been regarded as a virtually exclusive province of the States. . . . The Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations."

Second is the idea that the states are "**laboratories of democracy**" for devising solutions to divisive domestic issues, especially those where, as Justice Kennedy said, "the best solution is far from clear." The "laboratories of democracy" slogan was coined 100 years ago by the famous Justice Louis Brandeis, and it was reaffirmed last year. The Supreme Court used that phrase when it upheld Michigan's voter-passed initiative banning racial preferences in the name of affirmative action.

Third, the Court said it should be cautious when asked to rule in an "**unchartered area**" that lacks "guideposts for responsible decision-making." If marriage no longer requires both a husband and a wife to be legally valid, there's no clear boundary that separates marital status from other domestic relationships that are not entitled to public support.

Fourth, the Court should be reluctant to redefine marriage in the absence of a close **nexus between the right asserted** (same-sex marriage) **and the constitutional provision (equal protection of the laws)**. The equal protection clause has never been applied to marriage, which is why the Supreme Court ruled in 1972 that there is no "substantial" basis of such a claim.

The pro-gay marriage advocates like to cite the famous *Loving* decision that overturned a ban on interracial marriage, but *Loving* was actually not about marriage. It was a decision against racial discrimination, which the Court said was the "central meaning" and "central purpose" of the Fourteenth Amendment.

Fifth, the Court said it should **respect the "earnest and profound debate"** in which the states are engaged on the issue. It should not short-circuit the democratic process with a ruling that pretends to settle the debate once and for all.

Sixth, the Supreme Court generally prefers **incremental change** to constitutional rights, rather than sweeping and dramatic ones. In support of this principle, the brief quotes the "notorious RBG" herself, Justice Ruth Bader Ginsburg, who famously criticized the abortion decision (*Roe v. Wade*) because "the political process was moving in the early 1970s, not quickly enough for advocates of quick, complete change, but . . . heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict."

Seventh, the Court should weigh the relative "**novelty**" of the asserted claim of a new constitutional right against the "novelty" of government restrictions on that right. On this point, there's no question that the "novelty" award goes to the idea of same-sex marriage, which nobody thought was even possible until a couple of years ago.

The pro-gay media have tried to make gay marriage seem normal, saying it's now "allowed in 37 states." In fact, same-sex marriage was enacted by only 11 state legislatures, and only three of those laws were ratified by popular vote. In the other states, same-sex marriage was imposed by unelected judges — in some cases, by only a single judge whose decision was never upheld by a higher court. Judges are now being asked to impose the same rule on the U.S. Territories of Guam and Puerto Rico.

The foregoing seven principles are not the most important reasons for upholding traditional marriage, but they should be persuasive to the judges who hold the power to decide. If they don't, the other branches of government should use their constitutional powers to check and balance a bad decision.

Justice Kennedy Learns a New Word

Supreme Court Justice Anthony M. Kennedy used a new word during the Supreme Court's oral argument about Marriage. He said, "The word that keeps coming back to me in this case is **millennia**." He was referring to the thousands of years in which the public has honored marriage as the union of a man and a woman.

"And suddenly," Justice Stephen F. Breyer said, "you want nine people outside the ballot box" to change that by judicial fiat. That sounds like somebody is seeking government by judicial supremacists instead of by "We the people."

The verdict of history that extends even farther back than the U.S. Constitution is why Kennedy said "the word

that keeps coming back to me in this case is millennia." Chief Justice John G. Roberts Jr. added, "Every definition that I looked up, prior to about a dozen years ago, defined marriage as unity between a man and a woman as husband and wife."

It was not only the longevity of the husband-wife definition of marriage that troubled the Justices, but also its universality. Justice Samuel A. Alito Jr. pointed out that, "until the end of the 20th century, there never was a nation or a culture that recognized marriage between two people of the same sex." Alito noted that in ancient Greece, for example, only opposite-sex couples could be married even though same-sex relationships were openly tolerated. That proves the definition of marriage is not borne of prejudice or "animus" against homosexuals.

The same is true of the non-Western societies of Asia, Africa, and the Middle East. Incidentally, have you noticed that only Christian small business people have been harassed and sued for refusing to participate in same-sex marriages, even though our fast-growing immigrant populations of Muslims, Hindus, and other faiths are also opposed to that concept?

The use of same-sex marriage to attack Christian businesses, but not businesses run by members of other religions, demonstrates what is really driving the demand for a new constitutional right to same-sex marriage. It is simply the latest attempt to destroy Christian institutions and discredit Christian beliefs.

The best precedent for what the Supreme Court should do about gay marriage is the assisted suicide case of 1997 known as *Washington v. Glucksberg*. At a time when assisted suicide was illegal in every state, a lawsuit asked the Supreme Court to rule that suicide with a doctor's assistance is a form of individual liberty protected by the Fourteenth Amendment to the Constitution.

The Court unanimously declined the invitation to create a new constitutional right. Then-Chief Justice Rehnquist wrote in his majority opinion that judges should limit their rulings to "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition."

Two years ago, when the Supreme Court heard California's Proposition 8 case, Justice Scalia famously asked gay marriage attorney Ted Olson, "When did it become unconstitutional to exclude homosexual couples from marriage? 1791? 1868 when the 14th Amendment was adopted?" After much hemming and hawing Olson finally admitted, "I can't answer that question."

Asking the Court to impose a new rule that is not "objectively, deeply rooted in this Nation's history and tradition" means that our beloved Constitution would be "subtly transformed into the policy preferences of the members of this Court."

What is Judicial Supremacy?

Judicial supremacy is when the judges grab power to elevate themselves above the other branches of government. In other words, judicial supremacists are people who think judges are supreme in our system of government, despite how our Founders created three co-equal branches of government and said that the judiciary is the "least dangerous" branch. Yet judicial supremacists think that judges can make law, not merely enforce it.

When John Roberts was going through his confirmation hearings a decade ago for Chief Justice, he testified that: "Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role." Yet liberals are demanding that the Court "make the rules" by redefining marriage in a way that our Founders never expected. People do not go to ballgames to watch the umpires, but liberals are demanding that courts fundamentally transform our culture.

Within hours after the Supreme Court announced it would decide whether the Constitution requires every state to recognize marriages between persons of the same sex, the *New York Times* published an editorial gleefully predicting the inevitable outcome. When its ruling comes down in June, the *Times* assures us, the Supreme Court will "end the debate once and for all." No, it won't. The debate will have only started with grassroots Americans.

But if the justices follow their own precedents, as they are supposed to do, the court will fail to deliver the result that the *Times* and most pundits have declared is a done deal. After all, no previous Supreme Court decision has ever questioned the authority of the states to define marriage as the union of husband and wife.

Once before, a gay couple from Minnesota asked the high court to rule that their state's husband-wife definition of marriage violated the U.S. Constitution. The question then was identical to the one the Supreme Court has agreed to decide this year: "Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?"

Despite the presence of such liberal judicial activists as William Brennan, Thurgood Marshall and Harry Blackmun, the Court in 1972 summarily rejected the Minnesota gay couple's appeal "for want of a substantial federal question." In other words, the court unanimously thought the claim was so outlandish that it didn't even warrant a formal hearing.

Some have questioned whether a one-sentence decision from 43 years ago should really be binding today. But that's not the only precedent that should

prevent federal courts from requiring the states to change the definition of marriage.

A series of cases have established the principle known as the "**domestic relations exception**" to federal court jurisdiction. That principle explains why federal courts do not accept cases involving divorce, alimony, child custody or support, which are exclusively heard in state courts.

That principle was recognized as early as 1859, but its clearest statement comes from a Supreme Court decision in 1890, which said: "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." That ringing declaration was reaffirmed by the Supreme Court in 1992 and again in 2004.

Religious Freedom Won't Survive Gay Marriage

A Supreme Court decision that strikes down state marriage laws wouldn't just be a defeat for marriage. It would also limit our First Amendment right to the free exercise of religion. A group of religious organizations, speakers, and scholars made this point in an *amicus* brief sent to the Supreme Court in the marriage case. Their brief is an important reminder that same-sex marriage affects many people, not just gay couples.

Christians have expressed views that are not welcomed by powerful people since the very beginning. At the onset of Christianity, that meant preaching in opposition to the customs of Rome. Many believers met gruesome deaths because of their faithfulness. But whether a society accepts their views or not, Christians are still charged with preaching the Word, and that includes the truth about marriage.

Our Founding Fathers recognized the dangers of religious persecution, so they guaranteed in the Bill of Rights that all Americans can freely exercise their faith. They view religious freedom as a natural right, essential to everyone's full participation in our political process.

Religious freedom is now at risk. As the elites in politics and the media come out in favor of same-sex marriage, they try to silence different viewpoints. Defenders of traditional marriage don't just face the wrath of the cultural powers-that-be, but now must also fight the overpowering weight of our government. The First Amendment was adopted to prevent this from happening, and has always sheltered unpopular groups in our society.

A decision recognizing same-sex marriage would assist the efforts of those who want to silence supporters of traditional marriage.

Our First Amendment guarantee of religious freedom would be no match for the same-sex marriage revolution. Supporters of same-sex marriage want to place this new right above all others, including the First Amendment.

Marriage Is About Children, Too

Marriage isn't just a union of two people. It's an institution that shapes our entire society. That's the message one hundred scholars are sending to the U.S. Supreme Court in a "friend of the court" brief in the gay marriage case called *Obergefell v. Hodges*. These scholars specialize in many different fields, from theology to medicine, and represent a variety of political and social viewpoints. But they all agree on the importance of keeping marriage between a man and a woman.

As this amicus brief points out, the judges who have overturned state marriage laws accept the claim that "my marriage won't affect your marriage." But marriage is about more than two individuals. Traditional marriage is an ideal that guides how we think about family and raising children.

History, social science research, and common sense have taught us a few truths about the best way to raise a family. Children do best when they grow up raised by their biological father and mother. They benefit from the stability that marriage provides, and need both the father's masculine and the mother's feminine presence.

These advantages add up to a brighter future. Children raised by their mother and father commit fewer crimes and do better in school. And when these children grow up, they are more likely to marry and maintain intact families, and give their kids the same family advantages they had.

With these benefits that come only from marriage between a man and a woman, it's no surprise that most states are eager to keep the traditional definition of marriage. Supporters of same-sex marriage like to paint their opponents as irrational, but it would be far more irrational for the Supreme Court to toss out the historic and successful definition of marriage. A rash decision in this case would undermine the family unit which holds our civilization together and helped to build a prosperous and successful middle class that is the envy of the rest of the world.

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