Written by **Jack Kenny** on June 29, 2015

Congress Must Push Back Against "Judicial Putsch" on Marriage

I was having lunch at the Oar House in Portsmouth, New Hampshire, when I heard the latest news from the Whorehouse in Washington, D.C. The Supreme Court of the United States has ruled that same-sex "marriage" is a constitutional right.

The ruling is patently absurd. The federal Constitution says absolutely nothing about marriage, an institution governed from time immemorial by religious custom, common law, and local and state laws. The 10th Amendment, considered a dead letter by many of the Washington elite, sums up the constitutional scheme that had been established in 1787: "The Powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The "States respectively" and "the people" have spoken on this artificial controversy over the nature and meaning of marriage. In 31 states people voted to preserve marriage as an institution that defines and protects a union of man and woman. After years of propaganda and tons of money had been poured into a campaign for "marriage equality," voters in three states enacted an equality between perversion and marriage. In other states where homosexual marriage has been legalized, it has been by acts of legislatures in a few states, but most often by judicial decree. Congress has attempted to keep the judiciary out of it, but the Defense of Marriage Act was struck down by the Supreme Court, California's Proposition 8 was left undefended by California officials and now, the nation's high court has let the other shoe drop with a deafening thud.

The Court has made outrageous decisions before, having declared in pre-Civil War days that the black man had no rights that white men were required to respect. In 1973, at a time when the federal government was using the newly created Endangered Species Act to trample on human property rights for the convenience of the kangaroo rat and the Preble's Meadow jumping mouse, the Court ruled that States many not legislate protection for pre-natal human life. Now, in a world in which every human creature comes into being through a heterosexual union, the Court in a 5-4 decision has told us we many not have a preference in our laws for heterosexual over homosexual unions. It has been called by dissenting Justice Antonin Scalia a "judicial putsch," but is worse, far worse, even than that. It is proof positive that for the Court's majority, moral, intellectual, and legal absurdity is a bottomless abyss.

The fig leaf is, of course, the 14th Amendment guarantee that states may deny none of their citizens the "equal protection of the laws." So when it comes to marriage, the state may not define it by gender.

Somehow the state may legislate inequality in other matters of conduct. There is no "equal protection of the laws" for con men, libelers, perjurers, tax cheats, forgerers, wife beaters, or child abusers. Come to think of it, there is no equal protection of the laws for those who prefer to drive 90 miles per hour in a 55 miles-per-hour zone or for those who prefer driving, European-style, on the left rather than the right side of the road. Indeed, to call to mind the timeless dictum of Justice Holmes, there is no equal protection of the laws for someone who falsely cries "Fire!" in a theater.

Justice Scalia has long been widely criticized for being a "textualist," one who believes that the Constitution means what it says and not whatever text might be found in the aspirations and imaginations of ambitious lawyers and judges. The 14th Amendment, adopted in 1868, says nothing, of course, about marriage or homosexuality, or heterosexuality for that matter. It does say that its liberty guarantees shall be enforced by Congress through "appropriate legislation." It says nothing about implementation by judicial decree.

The Constitution also says, in Article III, Section 2, that Congress may limit the jurisdiction of the Supreme and other federal courts. It is time for members of Congress to stop wringing their hands and talking about the imperial judiciary. It is, rather, time for our representatives and senators in Washington to push back against the "judicial putsch." It is time for Congress to tell the Court that the Congress will define what the 14th Amendment means, as the Amendment itself says. It is past time to enact the power given in Article III, Section 2 to put marriage off limits to the federal judiciary.

It will be argued that if such action had been taken half a century ago, the Supreme Court would have been prevented from striking down state bans on interracial marriage. But those who were so prevented in some states could have been married in others that had no such ban. Until Friday's Supreme Court decision, the same was true of those seeking a same-sex "marriage." It is time even liberals and "progressives" acknowledged that deciding social issues by judicial decree is the most anti-democratic of practices.

Most people might believe that the differences between man and woman are more clearly defined and emphasized by both God and nature than differences in pigmentation among men and women, respectively. At the least, those who believe in the sanctity of marriage should be protected from the zeitgeist requiring bakers, photographers, and others who have moral and religious objections to "gay weddings" to provide services for those ersatz weddings, despite their most deeply held beliefs. At the very least Congress should act to ensure the Court does not further erode those liberties.

In short, Congress must act and act now to curb the imperial judiciary.