Written by **Selwyn Duke** on March 29, 2013

The Supreme Court and Faux-marriage Fallacies

With cultural defenders such as some of our conservatives, who needs liberals? One could draw this conclusion when observing the Proposition 8 case currently before the Supreme Court.

So far we have we heard arguments about the "sociological" impact of faux marriage and, from pro-marriage (conservative) lawyer Charles Cooper, about awaiting "additional information from the jurisdictions where this experiment is still maturing," as if the case is just a matter of whether the Court should be an agent of social engineering at this time and in this instance. Justice Anthony Kennedy, who could be the swing vote in the case, weighed in on both sides of the debate, saying, "There's substance to the point that sociological information is new. We have 5 years of information to weigh against 2,000 years of history or more." But he also claimed that California's "40,000 children with same-sex parents…want their parents to have full recognition and full status" and asked Cooper, "The voice of those children is important in this case, don't you think?" My answer?

No, it isn't.

The only voice that matters is the Constitution's. The whole point in having rule of law is that its application is not dependent upon what the "voice" of a given group of Americans might say at any given time (or upon some smaller group's conception of what that voice demands), regardless of how sympathetic that group may be. Would you want First Amendment rights to be negotiable based on how a compelling "voice" may be able to tug on heartstrings?

And the Constitution is silent on marriage, meaning that the issue is the domain of the states. What, though, if the states legislate a marriage standard that has negative "sociological" impact? Well, what if a state institutes a poorly conceived driver's test or productivity-stifling tax laws and regulations? The proper remedy is the ballot box. The Constitution prohibits unconstitutional ideas — not merely bad ones — and these two categories often don't intersect. Thus, a justice's legitimate role is not arbiter of sociological impact, but only of constitutionality. Yet many today behave as if "bad" is synonymous with "unconstitutional" and as if both are defined as "whatever I don't happen to like."

But then we come to the equal-protection matter. Shouldn't homosexuals have the right to marry if

other Americans enjoy that right? Yes, they should.

They have a right to form that union with a member of the opposite sex that we call marriage.

This isn't just rhetoric. It is in fact a point that gets to the very heart of the matter, and traditionalists ignore it at their own peril.

Before you can debate whether or not there is a right to a thing, you have to know what that thing is. What is marriage? If we agree that it's the union between a man and woman, then there is no argument because no one is trying to stop any adult American from entering into such a union. Ah, but the anti-marriage (liberal) side will reject this time-honored definition, and this brings us to the point: The marriage debate is not a matter of rights.

It is a matter of definitions.

It also brings us to the Achilles heel of the anti-marriage side. They attack traditionalists with the notion that the time-honored definition of marriage is exclusive and discriminatory, but then defend themselves by saying that their agitation for faux marriage won't lead to polygamy and other conceptions of "marriage" being legalized. But what is implicit in these claims is contradictory. For if they're putting forth an alternative definition — such as marriage being the union of any two adults — they're also being exclusive and discriminatory, as any definition excludes what doesn't meet it. Yet if they don't put forth an alternative definition and exclude something, they are including everything. And everything encompasses every conception of "marriage" imaginable. This definitional failure would also contribute to the destruction of the institution because the closer marriage gets to meaning anything, the closer it gets to meaning nothing.

This brings us to traditionalists' great mistake: falsely accusing the other side of redefining marriage. They've done no such thing because they haven't, in fact, consistently propounded any alternative definition. To do this would be, once again, to relinquish their illusory high ground of inclusivity and the bigotry hammer they use against traditionalists. So if the anti-marriage side isn't redefining the institution, what are they actually doing?

They are "undefining" it.

To reiterate, this is a process by which marriage is rendered meaningless and is ultimately destroyed. This definitional problem is why the Left has very smartly framed this issue as a matter of rights. And, tragically, traditionalists have fallen into the trap of arguing it on this basis, of letting the left define nothing — except the debate.

So the relevant questions here are obvious. If the Left cannot say what marriage is, how can they be so sure about what it isn't? If they cannot put forth what they're sure is the right definition of it, how can they say with credibility that the time-honored one is wrong?

This also should inform judicial decisions. If the Supreme Court were to reflexively accept the time-honored definition of marriage, it would simply say that homosexuals already have a right to marry — to form a union with a member of the opposite sex — and that's that. Barring this, however, it seems that before the justices could rule on laws pertaining to this thing called marriage, they'd have to rule on what this thing is in the first place, something clearly beyond their scope. And why should they even consider redefining the institution when the movement represented by the plaintiffs before them hasn't even bothered to do so?

This is also why, when crafting pro-marriage laws and amendments, framers should not use language

stating that “marriage will be limited to a man and a woman”; rather, it should read, “Marriage is defined as the union between one man and one woman.” This makes clear that it isn’t people being limited — but an institution. This matters because people have rights; institutions don’t. If you extend legal recognition to some Americans’ marriages, you may have to extend it to all marriages. But this doesn’t mean that if you extend legal recognition to one conception of marriage, you have to extend it to all conceptions.

Of course, winning the debate in the realm of reason won’t hold sway with people awash in the effluent of emotion. But it certainly doesn’t help if conservatives conserve nothing but yesterday’s liberals’ victories, one of which is to convince us to speak of “gay marriage” and “traditional marriage,” as if the former actually exists and the latter isn’t a redundancy. So remember that this debate isn’t about rights but definitions, and something that doesn’t meet the definition of “marriage” doesn’t exist as a marriage. And you cannot have a right to that which doesn’t exist.

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