Written by **Selwyn Duke** on September 1, 2014

The Utah Polygamy Ruling and the Tale of the Slippery Slope

"Same sex marriage leads away from polygamy, not for it," said the Brookings Institution's Jonathan Rauch in 2012. Joining him was the *Economist*, which wrote just last year that "gay marriage" to polygamy was "A not-so-slippery slope." But more and more it seems that these and other crystal-ball watchers have slipped on their own prognostication.

Headline Aug. 28, 2014: "Federal Judge Opens Door Further to Group Marriage." That's from *Breitbart's* Austin Ruse, who reports:

> **The polygamist reality TV stars of "Sister Wives" can sleep easy tonight as a Federal Judge in Utah has struck down at least part of the State's ban on polygamy.**
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> The Utah ban made it illegal and punishable by up to five years in prison for anyone to cohabit with someone they are not legally married to. This part of the law was struck down by Federal Judge Clark Waddoups last December. At the time, the Judge let stand the part of the statute that makes it illegal to have more than one marriage license.

> In his latest ruling this week, the Judge found that Utah County Attorney Jeff Buhman had violated the constitutional rights of the Brown family [of the "Sister Wives" show] when he investigated them for bigamy.

Of course, this opening of a door to polygamy was entirely predictable and had been predicted, by me and many others. How could anyone know? Because ideas have consequences, arguments accepted get recycled, and precedents are called precedents because they precede.

Consider, for instance, the slogan "Marriage equality!" The acceptance of this "principle" would inevitably lead to the recognition of not just faux marriage ("gay marriage") but also polygamy because, wrote scholars Robert P. George, Sherif Girgis, and Ryan T. Anderson last year, "if marriage were simply about recognizing bonds of affection or romance, then two men or two women could form a marriage just as a man and woman can. But so could three or more in the increasingly common phenomenon of group ('polyamorous') partnerships. In that case, to recognize opposite-sex unions but not same-sex or polyamorous ones would be unfair — a denial of equality."

To support their point, the authors then cite people who actually welcome the slippery slope's start:

> University of Calgary Professor Elizabeth Brake supports "minimal marriage," in which people distribute whichever duties they choose, among however many partners, of whatever sex.
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> NYU Professor Judith Stacey hopes that redefining marriage would give marriage "varied, creative, and adaptive contours …" and lead to acceptance of "small group marriages." In the manifesto

> "Beyond Same-Sex Marriage," 300 leading "LGBT and allied" scholars and activists call for the recognition of multiple partner relationships.
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> Influential columnist and "It Gets Better" founder Dan Savage encourages spouses to adopt "a more flexible attitude" about sex outside their marriage. Journalist Victoria Brownworth cheerfully predicts that same-sex marriage will "weaken the institution of marriage."

Yet even this doesn't cut to the heart of the matter. Some, like those above, speak of "redefining" marriage with anticipation; others speak of redefining it with trepidation. But the reality is that it isn't being redefined at all. As I wrote early last year:

> [Marriage engineers] 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.
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> 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.… So if the anti-marriage side isn't redefining the institution, what are they actually doing?
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> They are "undefining" it.

And only definitions define — and limit. "Undefintions" exclude nothing.

This definitional matter also brings us to what the marriage debate actually concerns. Consider: What are marriage engineers talking about when speaking of "equality," that of persons or institutions? If the argument is that homosexuals have a right to marry, well, yes, they certainly do.

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

As I also wrote in the above-cited piece:

> 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.
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> It is a matter of definitions.

This is why an "undefinition" is unacceptable. Asking if there is a right to an undefined thing is like asking if you want to play an undefined game, eat an undefined substance, or marry an undefined entity.

But what if "gay marriage" actually existed as a separate and legitimate species of marriage? What if it had its own special definition because it was its own particular thing? Even if that got you around the

definitional problem, it isn't a legally sound argument or one that avoids the slippery slope. This is for a simple reason: People have equality under the law.

Institutions don't.

The mere fact of existence cannot and does not confer legality upon an institution (slavery is a good example). To imply otherwise is to tacitly set a precedent whereby any conception of "marriage" under the sun would have to have its "equality" under the law. And note here that polygamy has infinitely more of a historical claim to institution status than does faux marriage.

This is why the courts' role in the marriage debate has been wrong-headed from the get-go. Except in instances in which a state constitution defines marriage, judges should have simply taken a hands-off approach and said:

1. It is not the courts' role to define, redefine, or "undefine" marriage.
2. Institutions don't have equality under the law.
3. It is the people's right, through their elected representatives, to create a *legal* definition of marriage.
4. All the courts can do is ensure that, whatever the marriage institution is defined to be, everyone will have equal access to it.

This hasn't happened, however. Instead, judges have not only gotten involved in deciding whether there's a right to they know not what, they've even debated matters such as whether or not legalizing faux marriage is in children's best interests. But as astute critics would point out, it's none of the courts' darn business what is and isn't good for children. Determining this is the role of families, churches, and everyone else who establishes the norms of the wider society.

Yet the larger problem is that Americans long ago accepted unconstitutional governance, complicit in which are courts that make law instead of just ruling on its constitutionality. But this is no surprise. If citizens can confuse a movement toward "undefinition" with an effort at redefinition, and institutions with people when discussing rights, it's no surprise they could mistake a court representing nine for a legislature representing 317 million.

Photo: Sister Wives