Written by **Selwyn Duke** on April 30, 2015

Supreme Fallacy: Courts Have No Business Even Considering Marriage

Would you want a panel of five judges deciding what is a proper diet, car, or military weapon for our nation? To echo what the lawyer in the White House once said about himself when responding to an abortion question, such things are above lawyers' pay grade. Yet with the Supreme Court considering the issue of faux marriage, we face a similar prospect:

Five lawyers in black robes may — extra-constitutionally — decide what marriage is for 317 million people.

Some have pointed out that the courts should never have taken faux marriage cases in the first place. As *Hot Air* put it, "There is no right to legal recognition of same-sex relationships in the U.S. Constitution. Marriage has always been left up to the states in this country — and the Supreme Court should continue to recognize this legal reality, as it did in the *Windsor* case last year." And except insofar as a given state constitution deals with marriage, the same can be said of state courts: It's a state legislative issue.

Others will now say this is a matter of equal rights, but let's consider that argument. What if someone told you that homosexuals already have the right to marry — meaning, they have a right enter into a conjugal union with a member of the opposite sex — as that's what marriage is? Of course, faux-marriage advocates will protest and dispute this definition. This brings us to the universally ignored crux of the matter:

The marriage debate is *not about rights*.

It is about *definitions*.

After all, how can you decide if there's a right to a thing *unless you first determine what that thing is*?

Are the courts supposed to say "There is a right to we know not what"?

The marriage debate cannot be about rights because no one — anywhere — disputes that all adult Americans have a right to "marry." Some disagree, apparently, on what "marriage" is.

Yet if the courts aren't going to use the definition operative in Western civilization (and beyond) for millennia, what are they supposed to do? Are a handful of judges qualified to redefine marriage?

Ironically, neither liberals nor conservatives help in this regard. Liberals might reject the time-tested marriage definition, but they never take pains to put forth their own hard, fast, unabashedly and consistently stated definition. One reason for this is interesting. Since definitions limit and exclude, to do so would render them guilty of precisely what they accuse traditionalists of: being exclusionary and discriminatory. They would lose their illusory high ground and a handy cudgel with which they hammer their opponents. So they want to have it both ways.

They want to claim, at least tacitly, that the right marriage definition is wrong while also refusing to tell

anyone what definition is right.

But if they don't know what definition is right, how can they be so sure the traditional one is wrong?

And how are conservatives culpable? Not only do they consistently fail to make the above points, but they actually accuse the Left of trying to "redefine" marriage. This gives them far too much credit because, again, they've made no real attempt at redefining marriage.

They are in the process of "undefining" it.

They do this by essentially saying that "marriage equality" means being allowed your own conception of marriage. And it's again an example of wanting it both ways:

Leftists wish to undermine marriage's correct definition, refuse to establish an alternative one, but then claim their actions won't lead to the government recognition of polygamy and other conceptions of "marriage."

If they refuse to re-establish some boundaries by redefining, however, this rings hollow. For how can you limit without presenting limitations? Moreover, how can they claim they aren't destroying marriage? If something can mean anything, it means nothing.

Some leftists may now say there's no need to redefine "traditional marriage" because faux marriage is an institution unto itself. But this does nothing to validate the constitutional equality argument. After all, the 14th Amendment guarantees equality under the law to individuals.

Not institutions.

Were it otherwise, any institution — including interspecies "marriage" — a group could conjure up would have to enjoy governmental recognition.

So judges' position should be simple: "The marriage issue concerns definitions, not rights, and no constitution empowers us to redefine marriage. Go talk to your state legislators."

This is all that matters from a constitutional standpoint. Despite this, individual judges have taken it upon themselves to upend tradition based on their whims and our modern trends. And note how recent a phenomenon faux marriage is. As Kyle Wingfield points out at the *Atlanta Journal-Constitution*:

- In 2000, no country allowed same-sex marriages.
- In 2004, George W. Bush's re-election bid was helped by a boost in GOP turnout as voters in 11 states approved gay-marriage bans.
- In 2008, Barack Obama, despite running to Hillary Clinton's left on other issues, said he opposed gay marriage.

And the subordination of tradition to fads is interesting. In 2014, 7th Circuit Court of Appeals judge Richard Posner exclaimed to a lawyer defending Indiana and Wisconsin faux-marriage "bans" (they're not actual "bans," just statutory refusal to recognize faux marriage), "How can tradition be a reason for anything?" Now, one might be better served asking, "How can trends be a reason for anything?" or, when told something is "the law," "How can the law be a reason for anything?" But the reality is that as with law, tradition isn't a reason for anything. But it reflects a reason.

Perhaps Judge Posner would have done well to remember that, as with a defendant in court, a tradition should be viewed as innocent until proven guilty. The reason for this concerns something called

Chesterton's Fence, explained by G.K. Chesterton as follows:

> In the matter of reforming things, as distinct from deforming them, there is one plain and simple principle; a principle which will probably be called a paradox. There exists in such a case a certain institution or law; let us say, for the sake of simplicity, a fence or gate erected across a road. The more modern type of reformer goes gaily up to it and says, "I don't see the use of this; let us clear it away." To which the more intelligent type of reformer will do well to answer: "If you don't see the use of it, I certainly won't let you clear it away. Go away and think. Then, when you can come back and tell me that you do see the use of it, I may allow you to destroy it."

A tradition exists for a reason; it may be a good reason or it may be a bad one, but saying you can overturn it without understanding that reason is akin to claiming you should remove a bolt from an airplane because you don't understand its purpose. When people say they don't "see the reason" for tradition, it's only an indictment of themselves: They don't see.

And whatever that reason is, it's the result of "democracy extended through time," to use Chesterton's characterization of tradition. It represents the explicitly-rendered judgments and tacit approval of countless millions who throughout the ages erected and preserved the tradition.

Are we to trade that for the whims of five lawyers in black robes?