Written by **Selwyn Duke** on June 26, 2015

Supreme Court Rubber Stamps Same-sex "Marriage" — Time for Nullification

Has our nation traded the rule of law for the rule of lawyers? Critics would say so. And this week's Supreme Court rulings — most notably Friday's 5-4 decision on faux marriage — could be their Exhibit A.

Friday's ruling, stating that same-sex couples have a "right" to "marry" in all 50 states, went down precisely as critics had predicted — and feared. Justice Anthony Kennedy sided with the Court's four most liberal judges — Elena Kagan, Sonya Sotomayor, Ruth Bader Ginsburg, and Stephen Breyer — in the promotion of faux marriage; he also wrote the majority opinion. Justices Antonin Scalia, John Roberts, Clarence Thomas, and Samuel Alito were on the opposing side, with each writing his own dissent.

Scalia was scathing in his denunciation of the majority opinion, calling the Court a "threat to American democracy," characterizing its opinion as "lacking even a thin veneer of law," and writing that it "is couched in a style that is as pretentious as its content is egotistic." Chief Justice Roberts, known for his own activist lawyercraft in the Court's infamous ObamaCare decisions, wrote that the "court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us." Roberts perhaps felt particularly strongly about today's decision as he read a summary of his dissent from the bench, the first time he has done so during his almost decade-long tenure. And putting matters in no uncertain terms, he said to faux marriage advocates, "By all means celebrate today's decision.… But do not celebrate the Constitution. It had nothing to do with it."

What the decision did have to do with, as per Roberts' allusion, were the five majority justices' feelings on what is "good" for society. While marriage is clearly a state matter, Justice Kennedy dismissed this reality with an appeal to emotion, saying that the "cautious" approach was insufficient because, for same-sex couples "and their children the childhood years will pass all too soon." Of course, many argue that being raised by a homosexual couple isn't good for children, but, as a constitutional matter, this is as irrelevant as Kennedy's judgment. The Constitution has no Good for Children Clause; such determinations are to be made by the people and expressed through their state representatives.

In the majority decision, which cites the Constitution's due process clause, Kennedy continued with the emotional arguments. He wrote of same-sex couples, "Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right." This actually gets at the consistently missed

central point of the matter: What is this "oldest institution"? As I wrote in an April piece titled "Supreme Fallacy: Courts Have No Business Even Considering Marriage":

> 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."

This is why an "undefinition" is unacceptable. As I wrote last year, addressing the idea that faux marriage must be recognized by the government based on a 14th Amendment equal-protection argument:

> 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 [to polygamy and beyond]. 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.

Interestingly, Kennedy beats around the bush of the definitional problem — inadvertently, apparently, and oblivious to it — seamlessly transitioning between one definition and another without ever directly addressing the question of what marriage "is." He also wrote:

> From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons.

Kennedy states that the "lifelong union of a man and a woman always has promised nobility and dignity to all persons," but concludes a mere two sentences later speaking of the more nebulous "two people." How does he manage this transition? Does the operative definition of marriage involve a male-female union or just any "two persons"? And how does the promise inherent in an opposite-sex union relate to the supposed promise of a same-sex union? Kennedy doesn't say. In what could be called instinctive juridical sleight-of-hand, he slips the whole matter by all and sundry — most notably himself.

This is just one of the majority opinion's "showy profundities" that are "profoundly incoherent," as Scalia put it. But however profound the reasoning used against those given to incoherent profundities, they cut no ice because, as Ben Franklin observed, "You cannot reason a man out of a position he has not reasoned himself into." So what are we left to do with a Court to which, as Scalia said in his dissent to Thursday's ObamaCare ruling, "Words no longer have meaning"?

Reporting on Friday's Court decision, the Associated Press wrote, "The court's 5-4 ruling means the remaining 14 states [that refused to recognize faux marriage], in the South and Midwest, will have to stop enforcing their bans on same-sex marriage."

Actually, no, it doesn't.

There are other options.

Thomas Jefferson wrote in 1819 that if a certain practice ever became status quo, our Constitution will have become a *felo de se* — a suicide pact. That practice is judicial review, the idea that the courts have the final say on law's meaning and that their determinations must constrain all three branches of government.

And judicial review has become status quo.

Does this mean we must commit suicide?

Jefferson explained the problem with judicial review, writing, "For intending to establish three departments, co-ordinate and independent, that they might check and balance one another, it has given, according to this [judicial review] opinion, to one of them alone, the right to prescribe rules for the government of the others, and to that one too, which is unelected by, and independent of the nation.… The constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist, and shape into any form they please."

Jefferson also pointed out, correctly, that "Our judges are as honest as other men and not more so. They have with others the same passions for party, for power, and the privilege of their corps." Have we not seen this truth on full display the past week, with the Court repeatedly proving itself to be merely a rubber stamp for a radical leftist agenda? Summing up the profound danger of judicial review in 1820, Jefferson minced no words in calling it "a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy." That oligarchy reigns.

It's instructive to note here the origin of judicial review. No, it's not in the Constitution. Nor was it passed by Congress, signed by a president, or voted on by the people. Rather, it was declared to be a power the Court should have in the 1803 *Marbury v. Madison* decision. That's right:

The Supreme Court gave the Supreme Court ultimate-arbiter power.

The Supreme Court made the Supreme Court into a de facto oligarchy.

But must a nation meant to be of, by, and for the people watch the rule of law wither under the rule of lawyers? It must be remembered here that the Court has no enforcement power; it has no army, no gendarmes who can shackle the non-compliant. It enjoys its extra-constitutional power *at the pleasure of the other two branches of government*. And while judicial review isn't in the Constitution, the remedy for such usurpation is. Article III, Section 2 of the Constitution states:

> In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, *with such exceptions, and under such regulations as the Congress shall make*. [Emphasis added.]

In other words, Congress has the power to remove issues — such as marriage — from the Court's jurisdiction. And, in fact, a bill put forth in April by Congressman Steve King (R-Iowa) would do just that. As he wrote at his website, "My bill strips Article III courts of jurisdiction, and the Supreme Court of appellate jurisdiction, 'to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, any type of marriage.' Second, my bill provides that '[n]o federal funds may be used for any litigation in, or enforcement of any order or judgment by, any court created by an Act of Congress.'" Congress has the power to "just say no." It just has to be willing to act.

But what if it doesn't? Are Americans then destined to languish under the judicial oligarchy? Thankfully, we have another recourse, one Jefferson called the "rightful remedy": nullification.

This simply means that states can declare that since a given federal action is unconstitutional, they will not abide by it. This may seem radical to many, but it's nothing new. What do you think is happening with "sanctuary cities" and their refusal to enforce federal immigration laws or with localities that thumb their noses at federal drug laws?

Nullification is happening.

The New American's Joe Wolverton, II, J.D. provided more details last year, writing:

> States that nullify congressional acts or presidential decrees that violate the Constitution would not only be stopping the federal juggernaut at their state borders, they would also be signaling that the Constitution is so vitally important that it must be enforced.
>
> In the Kentucky Resolution of 1799, Thomas Jefferson called nullification the "rightful remedy" for any and all unconstitutional acts of the federal government.
>
> The federal government may exercise only those powers that were delegated to it. This is made clear by the 10th Amendment: "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." Simply stated, nullification recognizes each state's reserved power to nullify, or invalidate, any federal measure that a state deems unconstitutional.
>
> Nullification is founded on the fact that the sovereign states formed the union, and as creators of the contract, they retain ultimate authority to enforce the constitutional limits of the power of the federal government.

It should be noted that when the matter is fashionable resistance to the feds (e.g., to drug or immigration laws), the nullification is neither troubled over nor even called "nullification" — it's called politically correct. It's when it actually could preserve tradition and constitutional government that a "federal case" is made of it.

The reality is that that it's nullification or nothing. Judges do have the same "passions for party, for power, and the privilege of their corps" as others do, and they will not willingly relinquish the privilege of their excessive power. And constitutional arguments in court won't help, especially since many jurists actually hold the Constitution in low regard. Justice Ginsburg told Egyptian television in 2012 that she "would not look to the U.S. Constitution" when creating a governing document today because it's "a rather old constitution." The irony of an 82-year-old woman impugning the old and extolling the new may not be lost on one, but her view is common. It was echoed by Washington University professor David Law, who the same year, wrote the *Daily Signal*, "unfavorably compared the Constitution to "Windows 3.1.'" But if jurists will operate by the principle, as Ginsburg also once said, that the Constitution should not be viewed as "stuck in time" (it's not — it's stuck where it's supposed to be: in law), why should we accept that its interpretation is stuck in courts? If justices will view the Constitution as living and not limiting, why should we view lawyercraft as the last word?

If Jefferson is correct, our Constitution long ago became a suicide pact. But it doesn't have to be. That's up to us. Just say nullification.