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The Federal Marriage Amendment and the Strange Evolution of the Conservative Case against Gay Marriage

The idea for a Federal Marriage Amendment (FMA) did not suddenly dawn upon Senate Republicans in the summer of 2004, when debate on the amendment began in earnest on the floor of the U.S. Senate. Despite the passage of the federal Defense of Marriage Act in 1996, conservatives have long worried about what they believe are the threats to traditional heterosexual marriage posed by the courts. Their fears peaked in 2003, when the courts struck twice: the U.S. Supreme Court ruled in *Lawrence v. Texas* that state homosexual sodomy laws are unconstitutional, while the Supreme Judicial Court of Massachusetts in *Goodridge v. Department of Public Health* ordered state officials to issue marriage licenses to same-sex couples.

In July 2004, the FMA, sponsored by Sen. Wayne Allard (R-CO), reached the Senate

floor. As introduced, the amendment read: "Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be con-

strued to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman." After four days of debate, Republican senators failed to persuade enough of their colleagues to support the FMA; the Senate fell 12 votes short of the 60 needed to invoke cloture on the motion to proceed to the amendment.

The Republican strategy to pass the FMA consisted of pressing two claims on the Senate floor: first, that traditional heterosexual marriage protects and fosters the wellbeing of children; second, that same-sex matrimony would spell the end of marriage itself. Strikingly, senators avoided moral criticisms of homosexual conduct and relationships. Republican senators sought to shift the focus of the debate away from homosexuals and toward children; instead of advancing a morally perfectionist case against gay marriage, they relied on what seemed to be less controversial and more widely acceptable claims about children's welfare.

We believe there were a number of reasons for the remarkable prominence of arguments

based on children's welfare, as we explain below. But one surely was the lack of public outcry against the *Lawrence* decision, which reflected shifts in public opinion toward acceptance or at least tolerance of homosexuality. In the aftermath of *Lawrence*, the Republicans' objective was to establish a new reasoned basis for limiting marriage to heterosexuals: to justify the FMA without condemning private homosexual conduct between consenting adults.

In setting forth the first of their claims, Senate Republicans were clearly influenced by the writings of Maggie Gallagher, the president of the Institute for Marriage and Public Policy and a contributor to the *Weekly Standard*.¹ Sen. Orrin Hatch (R-UT) echoed Gallagher's arguments when he assured his colleagues that "this amendment is not about discrimination. It is not about prejudice. It is about safeguarding the best environment for our children" (CR, July 9, 2004, S7880). The sociological data, argued Sen. John Cornyn (R-TX), show that children who grow up outside the structure of traditional heterosexual marriage are "at higher risk of a host of social ills"; such children are, for example, more likely to drop out of school, abuse drugs or alcohol, and commit crimes (CR, July 9, 2004, S7880). Thus, concluded Sen. Jim Talent (R-MO), "it is best for kids, if possible and where possible, to have a mom and a dad. And that is one thing that two people of the same sex cannot give children" (CR, July 13, 2004, S7960).

Even if true, this first claim, by itself, fails to make a case against same-sex marriage. If traditional heterosexual marriage is the ideal setting for raising children as Republican senators claimed, the government is still not justified in depriving same-sex couples of the benefits of marriage. That same-sex relations fall short of the ideal for parenting does not render them shameful, let alone immoral. Why, then, should the government regard homosexual marriages as unworthy of recognition? Since every state except Florida allows individual gays and lesbians to adopt children, many homosexuals and their partners already shoulder the responsibilities of parenthood.² Wouldn't their children be better off living with married, rather than unmarried, gay couples?³ Shouldn't the government extend

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the protection of marriage to all children, including those with homosexual parents or guardians?

To render such questions moot, Republican senators added a further claim to their argument: same-sex matrimony would place the institution of heterosexual marriage in course of ultimate extinction. Citing the work of Stanley Kurtz, a research fellow at the Hoover Institution who, like Gallagher, has written in the *Weekly Standard*, Senate Republicans alleged that the redefinition of marriage would further disassociate marriage from parenthood in the mind of the public.⁴ Once this radical separation of marriage and parenthood becomes embedded in the culture, argued Sen. Sam Brownback (R-KS), society will come to view marriage “as simply the expression of mutual affection between two consenting adults.” But if this is the case, then a couple will have “no reason to marry before children are born rather than after.” In fact, the senator concluded, “why should they marry at all?” (CR, July 12, 2004, S7927). Of course, “People will continue to hook up,” Sen. Rick Santorum (R-PA) reminded his colleagues, but marriage will become “a social convention without meaning” (CR, July 12, 2004, S7927). It will become, predicted Sen. James Inhofe (R-OK), “little more than an optional arrangement, not the presumptive locus of family life” (CR, July 13, 2004, S7967).

But what is the evidence for these claims about the effects of recognizing gay marriage? Following Kurtz’s recently published articles, Republican senators pointed to the experiences of four European nations that have experimented with government recognition of same-sex unions. The Scandinavian countries of Denmark, Norway, and Sweden legalized gay registered partnerships in 1989, 1993, and 1994, respectively; the Netherlands legalized full gay marriage in 2000. According to Kurtz (2004a, 29; 2004b, 26), the effects of recognizing same-sex unions on the broader culture are clear: all three countries suffer from higher rates of cohabitation, out-of-wedlock births, and family dissolution.

With both claims in place, Senate Republicans proceeded to frame the issue of same-sex marriage as a matter involving the welfare of children. Because traditional heterosexual marriage provides the ideal environment for child-rearing, explained Sen. Mitch McConnell (R-KY), the “ultimate victims” of marriage’s demise are children (CR, July 14, 2004, S8088). Sen. Gordon Smith (R-OR) thus urged his colleagues to pass the FMA for the sake of “children here and those yet unborn” (CR, July 9, 2004, S7873). Likewise, Sen. Cornyn called for a halt to the redefinition of marriage, which he claimed threatened to place “more and more children at risk through a radical social experiment” (CR, July 14, 2004, S8063). By arguing that gay marriage harms children, Republican senators sought to make a widely acceptable case for the FMA, one that avoids “gay-bashing” and appeals to broad segments of the public.

We agree that the demise of marriage would be detrimental to the interests of adults as well as children. We believe, and one of us has argued at length elsewhere (Macedo 1995), that marriage encourages stable commitments between loving partners and thus promotes their good. In addition, two-parent households seem, in general, to provide the best settings for children (see, e.g., McLanahan and Sandefur 1994). But we have ample grounds to doubt Kurtz’s dire predictions about the consequences of same-sex marriage, which depend upon highly speculative claims about the Scandinavian and Dutch experiences. Insofar as marriage has weakened in these European nations, it is far from clear that recognition of same-sex partnerships played any role. Kurtz admits that rates of cohabitation and out-of-wedlock birth began to worsen prior to government recognition of same-sex relationships. Kurtz

himself (2004a, 28) lists a number of other factors that he believes are responsible for marriage’s decline: “[c]ontraception, abortion, women in the workforce, spreading secularism, ascendant individualism, and a substantial welfare state.” So why single out gays?

In fact, Kurtz’s research suggests that the main cause of marriage’s decline in Europe may be the growing acceptance of marriage substitutes like civil unions for heterosexuals rather than the expansion of marriage to include gays and lesbians. The real problem, according to Kurtz and the senators who cited him, is not same-sex marriage *per se*, but rather heterosexual cohabitation and illegitimate births. What could convince heterosexual couples to forgo marriage and bear children out-of-wedlock? The sheer spectacle of gays marrying? That’s possible but hardly likely. A more plausible explanation is the availability to heterosexuals of what Kurtz (2004b, 29) calls “a flexible and morally neutral range of relationship options.” In Scandinavia as well as in the Netherlands, the government legally recognizes and grants benefits to cohabiting heterosexual partners. For heterosexual couples, marriage substitutes may often be as good as (and perhaps more convenient than) the real thing. It should come as no surprise, then, that fewer couples choose actual marriage over “marriage-lite.”⁵

Furthermore, Scandinavian same-sex registered partnerships were, for a long time, poor substitutes for marriage; only recently have countries begun to repeal prohibitions against joint adoption by gay registered partners.⁶ In this respect, registered partnerships in Scandinavia were inferior to even civil unions in the U.S.⁷ To refer to Scandinavian registered partnerships as “de facto gay marriages,” as Kurtz insists on calling them in his articles, is thus deeply misleading. Given that Scandinavia, until only recently, prohibited gay couples from adopting and still, to this day, prohibits them from marrying, we find it strange that Kurtz blames “gay marriage” for the separation of marriage and parenthood. We can only wonder what Kurtz thinks of the message about marriage and parenthood already being sent in America, where gay couples are barred from adopting in only four states—yet are barred from marrying in all but one.⁸

Kurtz, and the senators who cited him, fail to establish a significant causal link between gay marriage and marital decline in Europe. At most, the growing recognition of same-sex partnerships and the rare endorsement of same-sex marriage constitute one factor among many causing fewer heterosexual marriages and more out-of-wedlock births. Of course, it is also possible that recognition of gay partnerships has been irrelevant, or even a factor tending to strengthen heterosexual marriage. In any event, it is difficult to see how those who worry about marital decline could be justified in focusing on gays and lesbians and ignoring changes in laws governing heterosexual relationships.

It is patently unfair for Senate Republicans to single out same-sex marriage for government disapproval. As Sen. Hillary Clinton (D-NY) told her colleagues, “if we were really concerned about marriage...[w]e should have been in this Chamber trying to amend our Constitution to take away at the very first blush the idea of no-fault divorce” (CR, July 13, 2004, S7995). In a nation still battling prejudice against homosexuality, gays and lesbians serve as easy targets for politicians aspiring to appear strong on family values. But political expediency provides poor grounds indeed for continuing to treat a minority unfairly.

At bottom, the case against same-sex marriage relies on highly speculative and selective calculations that give little or no weight to fundamental fairness. Sen. Santorum’s off-handed calculus of social consequences reveals this nicely:

Sweden allowed same-sex unions. There are 8 million people in Sweden. How many same-sex unions? There were 749. Is it worth it that now 60 percent of first-born children born in Sweden are born out of wedlock? Is this worth it, 749? By the way, the breakup rate of those marriages is two to three times what it is in traditional marriage. Is it worth it? (CR, July 13, 2004, S7981)

Failing to identify any direct harm to children from gay marriage, the senator resorted to a cost-benefit analysis involving speculation about indirect effects. For Sen. Santorum, these indirect effects include not only the disassociation of marriage from parenthood, but also the destabilization of marriage by gay infidelity. In order to make his argument work, the senator must discount the interests of gays and lesbians in access to a basic opportunity defined by law. He must also ignore that heterosexual divorce and extra-marital sex appear to bear most of the responsibility for the weakening of marriage; the word for this is “hypocrisy.” The rhetoric about children’s welfare, the speculative assertions about the dire effects of recognizing same-sex partnerships, and the failure to address heterosexual responsibility constitute an invitation to Americans to ignore the equal standing of a long-despised group of individuals. The Republican stance cannot be squared with any sense of fairness or public reasonableness. It denies the basic right of gays and lesbians to be treated as equals: to be accorded what Ronald Dworkin (1977) called “equal concern and respect.”

Kurtz’s argument furnishes no principled case against same-sex marriage. Why, then, did Republican senators abandon the “old” basis for traditional heterosexual marriage laws—that is, the morally perfectionist case against homosexual conduct? To be sure, the Supreme Court in *Lawrence* struck down criminal statutes based upon a moral distinction between heterosexual and homosexual conduct. But senators have every right to interpret the Constitution for themselves, and it is especially hard to see why they should be bound by the Court when amending the Constitution. With the FMA, conservatives had an opportunity to counter the increasing acceptance of homosexual conduct and limit what some believed were the implications of the Court’s opinion in *Lawrence*.

Of course, the most able advocates of the “old” basis are not U.S. senators, but rather “new natural lawyers”—moral and legal philosophers such as John Finnis, Robert P. George, and Gerard V. Bradley. Marriage, as they conceive it, is a two-in-one-flesh communion; as such, it provides a non-instrumental reason for two persons to engage in reproductive-type acts. Because “sodomitical” and masturbatory sex acts are not reproductive in type, such acts are non-marital. Moreover, they contend, such acts are immoral; by engaging in them, persons reduce the body to a mere instrument of pleasure, damaging the integrity of body and mind. Homosexual relations are thus inherently non-marital and immoral; no matter how loving and committed they may be, they will never achieve the moral perfection of marriage.⁹

The new natural law has been criticized both for applying a double standard against homosexual couples and for maintaining an extremely narrow view of valuable sexual activity (see Macedo 1995). Nevertheless, it remains the most elaborate intellectual case against same-sex marriage based on the intrinsic immorality of homosexual relations. Only one Republican senator, however, referred to anything resembling the new natural law. At the close of his speech on the Senate floor, Sen. Inhofe, a Presbyterian, read two Bible passages from which natural law inquiry takes its cue. “We can dance around it and try to cater to certain groups,” Sen. Inhofe explained, “but I find something that has served me well for a number of years when something like this comes up, and that is to go back to

the law, go back to the Scriptures.” He proceeded to read Genesis 2: 18, 21–24 and then Matthew 19: 4–6, repeating the words of Jesus: “Have you not read that He who made them at the beginning made them male and female, and for this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh? So then, they are no longer two but one flesh.” Sen. Inhofe concluded his floor statement with this final revelation: “The reason I read these two Scriptures is because they were quoted at a very significant event that took place 45 years ago. It was when my wife and I were married” (CR, July 13, 2004, S7968).

Sen. Inhofe may seem here to grasp and advance the new natural law’s teaching of marriage as a two-in-one-flesh communion of persons. But the senator’s own words belie such an interpretation. Rather than putting forward a public justification for the FMA, Sen. Inhofe made explicit the *personal* significance of his remarks, referring to what “has served *me* well” and what was quoted “when *my* wife and *I* were married.” The senator, moreover, endorsed alternative lines of argument against same-sex marriage in the course of his floor statement, including Kurtz’s “end of marriage” argument. Even Sen. Inhofe, therefore, does not seem to have advanced the sorts of arguments associated with Finnis, George, and Bradley.

The new natural lawyers might reply that Sen. Inhofe and other Senate Republicans nonetheless possess “inarticulate knowledge” of the moral precepts justified by natural law. (George and Wolfe 1997) The senators, in other words, know that same-sex marriage is wrong, but they are unable to explicate the difficult philosophical arguments against it. During the debate, some senators did evince an “inarticulate knowledge” of marriage. Sen. Brownback, for instance, insisted, “We know that marriage is between a man and a woman. It is written in our hearts...you know this is the way it is to be” (CR, July 13, 2004, S8010–11). And Sen. Talent even appealed to the “inarticulate knowledge” of the public by framing the debate as one “about whether you really think that marriage, as we have understood it for thousands of years, is important in some sense, even if you cannot explain it, to the kind of society we live in. I think so. I know most of the people think so” (CR, July 13, 2004, S7961).

Even if Republican senators possess an undeveloped understanding of natural law, inarticulate gestures in this direction do not amount to an adequate public justification for legislation. Political representatives should make their moral reasons explicit whenever they legislate, and, in particular, whenever they amend the fundamental law of the nation. The inability or refusal of lawmakers to express the principles underlying their proposals inhibits the sort of deliberation that democratic politics should promote. By legislating on matters of which they lack “articulate knowledge,” elected officials risk enshrining popular prejudices into the law. In this case, the failure of articulateness goes hand in hand with a failure of basic fairness: the grounds for objecting to gay marriage seem to furnish even more powerful reasons to legislate against heterosexual divorce.

It may be true that Republican senators lack the philosophical training to defend the natural law teaching on marriage. But we believe that most politicians would have no interest in articulating it even if they could. As Sen. Inhofe’s remarks suggest, the new natural law is closely tied to religious teaching. On Capitol Hill, however, there is a conscious effort, including among Republicans, to avoid adopting the sort of “intolerant” and “moralistic” tone often associated with the “Religious Right.” One Republican legislative assistant admitted that his senator eliminated references to Judeo-Christian values that appeared in the original draft of his floor statement on the FMA.¹⁰ Another Republican aide spoke of her senator as “a religious man” who took a position against gay marriage

first and “put words to it” later—words that never mentioned the influence of his faith.¹¹ And yet another staffer conceded that, while her Republican senator’s religious views were important in determining his stance on same-sex marriage, the senator could not reveal them and risk appearing “homophobic” before his constituents.¹²

In the eyes of politicians, the new natural law is not only too religious but also too perfectionist. In American politics, talk of individual rights and liberties dominates talk of moral perfection and virtue. For this reason as well, the new natural law rests uncomfortably with legislators and their staffs. When asked whether their senator believed homosexual conduct to be immoral, no legislative aides could respond for none had ever discussed the matter.¹³ One legislative assistant even questioned whether the morality of homosexual conduct was in any way relevant to the same-sex marriage debate.¹⁴ Legislators and their staffs on Capitol Hill seem to lack both the capacity and the motivation to advance a morally perfectionist case against same-sex partnerships.

Given America’s changing attitudes toward homosexuality, this inability and reluctance is not surprising. Only 30 years ago, 73% of Americans judged sexual relations between two adults of the same sex to be “always wrong,” as the natural law teaches. Today, barely a majority, 53%, hold that belief.¹⁵ Moreover, what Ramesh Ponnuru (2003, 24) calls an “anti-anti-gay” bloc has emerged in the United States. Though many members of this bloc oppose same-sex marriage, they also oppose politicians who engage in anything that resembles “gay-bashing.” Realizing this, Senate Republicans made clear that they did not cast judgments on homosexual conduct by supporting the FMA. “Gays and lesbians have the right to live the way they want to,” insisted Sen. Allard (CR, July 9, 2004, S7872). Likewise, Sen. Jeff Sessions (R-AL) maintained, “I do not believe it is appropriate for me to judge someone else’s behavior. That is between them and their Lord” (CR, July 13, 2004, S8008).

In addition, few politicians are eager, to the say the least, to embrace the broad sweep of the new natural law’s proscriptions. The new natural law prohibits divorce, heterosexual sodomy (even between married partners), and pre-marital, extra-marital, and contracepted sex. As Ponnuru (2003, 25) observes, Republicans face a dilemma: “If the argument is made openly, and cast as a case for traditional sexual morals in general, a large part of the public will flinch. If the argument is made so as to single out gays, the logic vanishes.”

For Senate Republicans, then, the lessons of *Lawrence* were political rather than legal. These lessons were epitomized by the experience of one of their own. In April 2003, Sen. Santorum caused an uproar when he remarked, in reference to the impending *Lawrence* decision, “If the Supreme Court says that you have the right to consensual [sodomitical] sex within your home, then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery. You have the right to anything.” Many commentators accused Sen. Santorum of “equating” homosexual conduct with bigamy, polygamy, incest, and adultery, and the senator, a devout Catholic, quickly became a symbol of religious bigotry and intolerance.¹⁶ Consequently, despite his strong interest in matters relating to the family, Sen. Santorum was not a lead sponsor of the FMA. A reduced role for the senator, Republicans hoped, would spare the party from the harsh criticism to which he was subjected.¹⁷ The case against same-sex marriage, they decided, would focus on marriage and children, not morality and homosexuals. Sen. Santorum’s experience shaped the Republican strategy for the Federal Marriage Amendment: suppress religious and morally perfectionist arguments, avoid “gay-bashing,” and appeal to widely acceptable values. But the selectivity of the Republicans’ concern about children’s welfare, and their unprincipled focus on gays and lesbians, marks their legislative strategy as cynical, opportunistic, and inconsistent with the equal respect and fairness that majorities owe to minorities if they are to govern legitimately.

Notes

1. See, e.g., Maggie Gallagher, “What Marriage Is For,” *Weekly Standard*, August 4–11, 2003, 22–25.

2. Currently, Florida is the only state that has an explicit law against adoption by gays and lesbians as *individuals*. Four states—Florida, Mississippi, Oklahoma, and Utah—explicitly prohibit adoption by gays and lesbians as *couples*. “Laws & Legislation in Your State,” Human Rights Campaign, <http://www.hrc.org>.

3. Jonathan Rauch argues this point in *Gay Marriage: Why It Is Good for Gays, Good for Straights, and Good for America* (New York: Times Books, 2004), 75.

4. See Stanley Kurtz, “The End of Marriage in Scandinavia,” *Weekly Standard*, February 2, 2004, 26–33 as well as “Going Dutch?,” *Weekly Standard*, May 31, 2004, 26–29.

5. For a discussion of the implications of “marriage-lite,” see Rauch, 29–54.

6. Denmark repealed its joint adoption prohibition in 1999; Sweden followed in 2003. See William N. Eskridge, Darren R. Spedale, and Hans Ytterberg, “Nordic Bliss? Scandinavian Registered Partnerships and the Same-Sex Marriage Debate,” *Issues in Legal Scholarship*, Single-Sex Marriage, Article 4 (2004): 3, <http://www.bepress.com/ils/iss5/art4>.

7. For information about the legal provisions of civil unions in the State of Vermont, see “The Vermont Guide to Civil Unions,” Office of the Secretary of State, State of Vermont, <http://www.sec.state.vt.us/otherprg/civilunions/civilunions.html>.

8. See note 2 above.

9. For an account of the new natural law, see Robert P. George and Gerard V. Bradley, “Marriage and the Liberal Imagination,” *Georgetown Law Journal* 84(1995):301–20.

10. Personal interview by Frederick Liu, July 26, 2004; for a more elaborate account of the deliberations surrounding the Federal Marriage Amendment, see Frederick Liu, “Marriage, Moral Values, and the U.S. Senate: The ‘Deliberative Deficit’ in American Democracy” (senior thesis, Princeton University, 2005).

11. Personal interview, July 26, 2004.

12. Personal interview, July 27, 2004.

13. Personal interviews, July 26–28, 2004 and November 8, 2004.

14. Personal interview, July 26, 2004.

15. National Opinion Research Center poll quoted in “Attitudes about Homosexuality and Gay Marriage,” compiled by Karlyn Bowman and Bryan O’Keefe, American Enterprise Institute, July 6, 2004, http://www.aei.org/docLib/20040708_Hmosexuality4.pdf.

16. See, e.g., Editorial, “Adultery, Incest, Whatever,” *Washington Post*, April 24, 2003, and Editorial, “Rally Round Intolerance,” *New York Times*, May 4, 2003.

17. Personal interview with Republican staffer, July 30, 2004.

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