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The Constitution, the Judiciary and Same-Sex 'Marriage'

SAME-SEX "MARRIAGE" LAWSUIT IN NJ

Marriage has been under attack in New Jersey since June 2002, when Lambda Legal Defense Fund (a national homosexual rights group) filed a lawsuit against the state on behalf of seven homosexual couples who were denied marriage licenses. Lambda argues that denying same-sex couples the benefits of marriage violates their constitutional right to equal protection. State Attorney General Peter C. Harvey stated that the couples suing the state were not seeking "equal access to marriage, but a *fundamental change in the meaning of marriage itself*," and "the power to define marriage rests with the Legislature."

The case, *Lewis v. Harris*, was heard on Dec. 7, 2004, in the New Jersey Superior Court, Appellate Division. On June 14, 2005, justices rendered a 2-1 decision upholding the definition of marriage, ruling that although "the right to marry is a fundamental right that is subject to the privacy protections of article I, paragraph 1, of the New Jersey Constitution, this right extends only to marriages between members of the opposite sex. Plaintiffs' claim of a constitutional right to State recognition of marriage between members of the same sex has no foundation in the text of the Constitution, this Nation's history and traditions or contemporary standards of liberty and justice."

Although both lower courts' decisions have made it clear that it is the role of the Legislature—not the courts—to address the definition of marriage, marriage still hangs by the thread of a single judge's decision. On July 22, 2005, this case was appealed to the New Jersey Supreme Court, which has a reputation as one of the most activist courts in the country. It is predicted that they may usurp the Legislature's role and rewrite marriage law, rather than interpreting existing law as did the lower courts.

ABSTRACT: This report explains how the U.S. Constitution intersects with the issue of same sex "marriage" now being debated in the courts. To promote a better understanding of our government and legal system, it explores topics such as constitutional rights, checks and balances, separation of powers, the role of the courts, selection of cases, legal precedent and the appointment of judges. Judicial activism is examined through examples of actual cases from Texas, Massachusetts and New Jersey, where courts have strayed from both precedent and legislative mandate.

In times past, the institution of marriage typically interacted with the court system only when someone wanted to end a marriage. Currently, however, marriage is being dragged into courts all across our country by same-sex "marriage" proponents suing states for the "right to marry." Is there a right to marry? Read on.

Don't Know Much About History...

We all learned it in elementary school. The branches of government. Separation of powers. Checks and balances. The Constitution. The Bill of Rights. Original Intent. Federalism. But something happened on the way to the courthouse ... we seem to have forgotten it all. Collectively, today's citizens seem no more conversant in basic American government than in neurosurgery.

Our history and the way our nation operates is not something best left to constitutional law scholars. We all need to understand the workings of our government because it is, in fact, our government.

That is the point of a democracy, after all. We are the citizens who comprise the electorate: we have the right to vote for representatives who will represent our interests. We don't elect the media, we don't elect federal judges, and we certainly don't elect activists and lobbyists who will use the media and sadly, the judiciary, to further their own ends whatever the cost.

The societal trend toward ignorance of the process of our system of government is disturbing—but it's not just the loss of a particular piece of knowledge. This ignorance has led to a very real abuse of the workings of our government through a misconception of rights and an overactive judiciary. Something is fundamentally amiss when courts make decisions that cannot be supported by prece-

dent or by current legislative mandate, and when one or two percent of the population foists its views upon the rest.¹

When in doubt, invoke the Constitution

Suppose your preteen says something he or she shouldn't and then claims the right to "free speech." There's nothing like a dinner-table discussion on what constitutes protected speech. His outburst is understandable given what we see and hear in the news daily. Everyone, it seems, has a constitutional right to something, don't they? No.

The Constitution is, for all its significance, rather bland. If you've reviewed the by-laws for your local parent-teacher organization, you won't find the Constitution much more exciting. Most people would be dismayed to find that the scintillating "rights" they read about in the paper aren't exactly addressed in the Constitution. So how did we arrive at having a right to abortion, a right to homosexual sex, or a right to publish pornography?

Over the last 60 years or so, the Supreme Court has inched away from its constitutional mandate of interpreting the law to actively legislating from the bench, bypassing the legitimate function of Congress and the state legislatures.²

The framers of the Constitution probably never envisioned that the courts would have such power over people's everyday lives or the operation of local government.³ So what can the courts do and what can't they do?

The Role of the Courts

- **The courts are not permitted to reach out to issues not properly placed before them, according to the Constitution.** Thus, a federal court cannot pass on the constitutionality of legislation unless a litigant can claim that he is injured by it—not simply that he disagrees.⁴ The Supreme Court of the United States is not supposed to simply render advice.

- **The courts cannot address political questions—such issues are the province of the executive or legislative branches.** "The Constitution's separation of powers provides the Court with its rationale for not invading the jurisdiction of the political branches."⁵

- **The courts cannot rule on issues that are not "justiciable,"** i.e., capable of being settled by law or by the action of a court.

- **The Supreme Court is the final authority on cases properly before it.** The executive and legislative branches must defer to its interpretations.⁶ This concept is often referred to as supremacy. Still, the finality of a Supreme Court decision is not entirely absolute: it is subject to changes that might take place by constitutional

amendment, or changes in statutes that the court has been asked to interpret. And certainly, earlier decisions can be overruled or reversed by later decisions.

- **The courts must be guided by the Constitution, and not influenced by personal agendas or values.** In a recent speech, Supreme Court Justice Antonin Scalia remarked that the Constitution says what it says and does not say what it does not say. He decried judges who use "abstractions" to interpret religious issues, rather than the Constitution itself.⁷

Citing *Roe v. Wade*, Scalia noted that "the court discovered in 1973 something that was in violation of the Constitution based on an abstract principle, a right of privacy that's not found in the Constitution."⁸

Scalia also pointed out that judges are not supposed to have their own agendas or use their positions to enforce their own values. True. So how does it happen? Part of the reason begins with the appointment process itself. The other part, of course, is the actual cases that find their way into the court system.

"History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures."

Justice Felix Frankfurter

Separation of Powers... and Marriage

Quick quiz: Marriage—is it a state or federal issue? Is there a true "case or controversy" involving same-sex "marriage" or is it merely a political question? Is there truly a justiciable issue involving same-sex "marriage" that the courts can resolve? Is there even a right to marry? Hint: these are not easy questions to answer.

"In our system of law, the powers of government are divided between the federal and state governments. The framers rightly left marriage policy, as so many other things, with the states.

Yet the fundamental definition of marriage is no mere policy issue. We're talking about the very integrity and meaning of one of the primary elements of civil society. Nor is this a matter for state-by-state experimentation. Society isn't harmed when high-tax states live side by side with low-tax states. The market adjusts to the inconsistency. Not so with marriage. A highly integrated society such as ours—with questions of property ownership, tax and economic liability, inheritance and child custody crossing state lines—requires a uniform definition of marriage."⁹

Let it be remembered
that civil liberty consists
not in a right to every
man to do just what he
pleases; but ...
[to do] whatever the
equal and constitutional
laws of the country
admit to be consistent
with the public good."

Chief Justice John Jay



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How is the government organized?

Let's review. Article 1 of the Constitution sets out what is needed for the legislative branch—two houses of Congress; Article 2, the executive branch (i.e., the president); and Article 3, the judicial branch. While the legislative and executive branches are described in some detail, the Constitution provides only the barest outline for the judicial branch. It was left to Congress to sort out the details.¹⁰

Even the power of “judicial review” does not appear anywhere in the Constitution. It arose from the Supreme Court's first written opinion, *Marbury v. Madison*.¹¹ But judicial review does not mean that the courts can circumvent the rule of law established by state legislatures and by the Congress.

How are cases selected?

Certain states provide a right to marry. But there are restrictions *for all* on whom they may marry. For instance, in Maryland, no one is permitted to marry a child, a close blood relative, a person who is already married, or a person of the same sex.¹² While these restrictions apply to all who seek to be married in that state, people of the same sex who seek to marry feel they are injured by these laws—thus, the “controversy.”

Do these individuals simply file lawsuits willy-nilly? Oh no. It is all very well orchestrated. The one or two percent of the population mentioned earlier does an excellent job in choosing its plaintiffs, sending them to the clerk's office to get a marriage license (knowing they will be rejected) and then filing the lawsuit. Justiciable? Maybe not. Political question? You bet. But once a marriage license has been denied, these matters can enter the court system.

How are judges appointed?

Now for the judges. How do they get there? For the record, the vast majority are extremely intelligent, extraordinarily hard-working individuals. They could be making much more money in private practice, but they have chosen public service. It is not our intent to disparage the majority of our jurists. However, particularly in the federal court system, far too much political wrangling influences the process.

Our Constitution grants the president the authority to appoint federal judges, and gives the Senate the duty to “advise and consent,” as a check on the president's power. Once the president nominates a

qualified person for a judicial opening, the Senate Judiciary committee holds hearings on each nominee. If approved, the nomination goes to the full Senate, which debates the nomination and either approves or rejects it.

Judicial activism unbalances our system of government.

Why the concerted effort to block President George W. Bush's nominees on ideological grounds? “[Judicial activism] is their whole game plan. ... What they [political ideologues] have left is the Supreme Court, and they can get [issues] through the Supreme Court that they can't get through any legislature in the country,” says Judge Robert Bork. “They are counting on activist judges that will make rulings that have nothing to do with the actual Constitution—but will move the culture in a left-liberal direction.”¹³

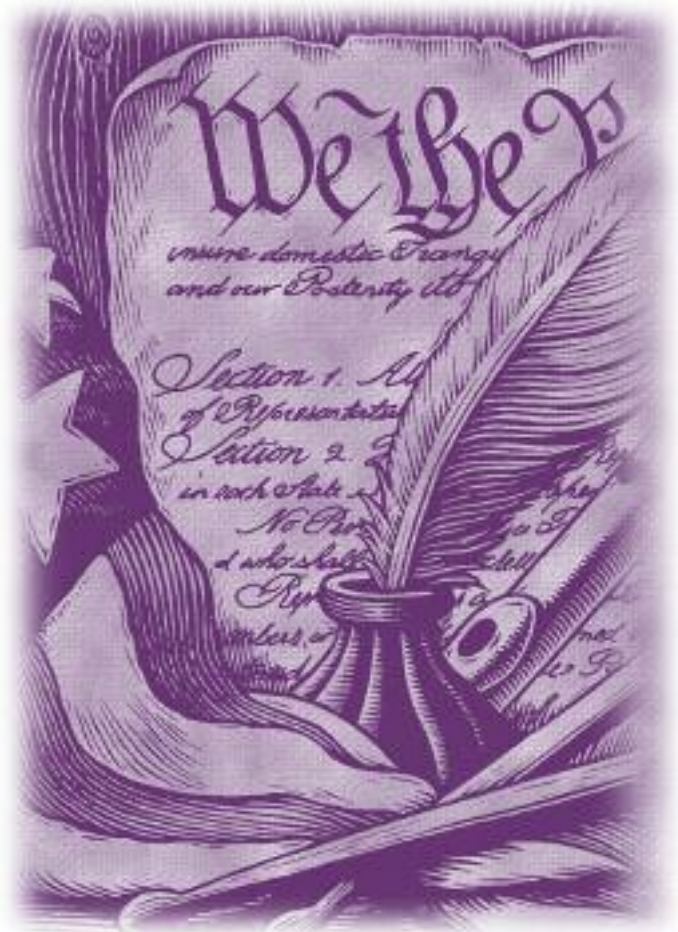
In theory, that is not supposed to happen. Extemporaneous thinking is wonderful, but not in the context of a court decision. Where's the harm? For starters, without any constitutional mandate whatsoever, judges have already banned public recognition of God, let loose a flood of pornography and redefined marriage in Massachusetts.

“The Constitution was intended, its very purpose was, to prevent experimentation with the fundamental rights of the individual.”

Chief Justice William Howard Taft

Constitutional Law: Precedent versus Activism

Rights? People have the right to expect that when they walk into a courtroom in this country, the decision will be based on some identifiable rule of law, not on the politics of the day.



Precedent-setting federal cases open the door to moral drift.

They are not just dusty old decisions. They are issued virtually every day from various courts in the land, and their impact is very, very real. On June 26, 2003, the U.S. Supreme Court considered the legality of homosexual behavior in *Lawrence v. Texas* and found that the Constitution guaranteed a right to sodomy.¹⁴ “With this ruling, our Founding Fathers must have rolled in their graves. Our august justices ‘made up’ this new constitutional right and used it to strike down the Texas law prohibiting sodomy.”¹⁵

As psychologist and author Dr. James Dobson notes, “very few Americans agreed with the decision, but they were never asked. They no longer determine their own destinies. The people have now been co-opted by an unelected and unaccountable judiciary, appointed for life, that determines all the great moral issues of our day. Each time the Supreme [Court] meets, it's as though they are holding a Constitutional Convention, because the foundational document becomes whatever any five of these justices say it is. This is called an oligarchy—a government by the few—and it is taking us ever further down the road to moral relativism.”¹⁶

New Jersey's Activist Court

But it is not just the U.S. Supreme Court. In New Jersey, a particularly energetic group of state Supreme Court justices have given us the *Mt. Laurel* decision (legislating affordable housing), the *Abbott* decision (legislating school spending), the *Lautenberg* decision (legislating elections) and many other judicial rulings that leave one wondering what tasks are left for our actual legislators.

The *Lewis v. Harris* case is presently before the Supreme Court of New Jersey. This suit, originally filed in 2002, involves seven same-sex couples who were denied marriage licenses. The trial court judge ruled in favor of the state, stating that same-sex "marriage" is not recognized or required by New Jersey statute, judicial decision, public policy or the state Constitution.

The *Lewis* plaintiffs appealed, and oral arguments were heard in December. On June 14, 2005, the appellate court rendered a 2-1 decision upholding the trial court opinion, and protecting marriage from radical redefinition. In July of 2005, the case was appealed to New Jersey's high court.

Massachusetts goes "through the door" with same-sex "marriage."

The highest court in Massachusetts was the first to grab the opportunity presented by the "open door" of *Lawrence v. Texas*. It ruled 4-3 in November 2003 that the state Legislature had to recognize the legitimacy of homosexual "marriage."¹⁷ Massachusetts began issuing marriage licenses in May 2004 to homosexuals. When those people

move to other states, are they legally married? Clearly, all it will take is the "right" case to find its way up to the U.S. Supreme Court. It hasn't happened yet, but there are cases like the *Lewis* case poised throughout the court system.

Preserving a More Perfect Union

The Constitution begins like this:

We the People of the United States, in Order to form a more perfect Union, establish Justice, ensure domestic Tranquility...

If rights are going to be created out of whole cloth, will the Constitution ultimately become irrelevant? Courts were never intended to be legislatures. We have a legislative branch. For the most part, it works just fine.

The courts must be reminded, by all of us, that there are limitations on their power and they cannot reach down and pluck out issues they would like to resolve.

Same-sex "marriage" may appear to be on the march, but not because "we the people" are in favor of it. Same-sex "marriage" proponents have made an end run around the legislative process, and our courts have allowed them to do so.

"Let's be clear about one thing. This debate has not arisen because there's been a large groundswell of public support for same-sex 'marriage,' for no such groundswell exists," says researcher and author Peter Sprigg. "We are sometimes accused of being 'divisive' for opposing same-sex 'marriage,' but nothing could be further from the truth.

"In fact, there are few political issues on

which Americans are so united as they are in believing that marriage is the union of one man and one woman. The only reason this debate is taking place at all is because small groups of homosexual activists have gone to court in an attempt to gain from a small band of judges what they know *they could never win* through the democratic process. They did it in Vermont and Massachusetts and succeeded, and they are trying to do it in Maryland [and New Jersey] as we speak."¹⁸

Will they succeed? Lawmakers, clergy and the general public need to understand what the *real* constitutional issues are. It is time to defend what has for millennia proven to be "a more perfect union."

After all, the argument over same-sex "marriage" is only secondarily about homosexuals ... it is first and foremost an argument over marriage itself.¹⁹ In practice, same-sex "marriage" will actually result in the creation of an alternative form of "legal coupling" available to homosexuals and heterosexuals alike.

Same-sex "marriage," as several European countries have vividly demonstrated, does not extend marital "rights."²⁰ Instead, it abolishes marriage and puts a new, flimsier institution in its place.²¹ We need to do all we can to keep marriage as a union between one man and one woman only. If we adopt any other definition, we do so at our peril.

"We have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution."

Chief Justice Warren E. Burger

ENDNOTES

1 Alan Sears and Craig Osten, *The Homosexual Agenda* (Nashville: Broadman & Holman Publishers, 2003), p. 17. Sears and Osten explain that while homosexual activists often claim that 10 percent of the population is homosexual, this figure has been discredited as based on defective data and methodology. A number of more reliable studies, including those funded by Planned Parenthood, have arrived at a figure between 1 and 2 percent.

2 Bruce Hausknecht, "The Battle over Federal Judges," *Focus on the Family*, Jan. 27, 2005 (<http://family.org/cforum/fosi/government/courts/supreme/a0035430.cfm>).

3 Robert S. Peck, *We The People: The Constitution in American Life* (New York: Harry N. Abrams, Inc., 1987), p. 48.

4 *Ibid.*

5 *Ibid.*, p. 49.

6 *Ibid.*

7 Keith Peters, "Scalia: Judges Should Abide by Constitution," *Focus on the Family*, Jan. 27, 2005 ([www.family.org](http://family.org)).

8 *Ibid.*

9 Edwin Meese III, "Marriage Amendment Protects Federalism," *The Heritage Foundation*, Web Memo #531 (www.heritage.org).

10 Peck, *We The People*, p. 51.

11 *Ibid.*, p. 53.

12 Peter Sprigg, "Same-sex Marriage is not a Civil Right," *Family Research Council*, Jan. 27, 2005 (www.frc.org).

13 Pete Winn, "They Are Counting on Activist Judges," *Citizen Link*, Feb. 16, 2005, interview with Judge Robert Bork (www.family.org).

14 James Dobson, *Marriage Under Fire* (Sister, Ore.: Multnomah Publishers, 2004), pp. 39-40.

15 *Ibid.*

16 *Ibid.*

17 *Ibid.*, p. 41.

18 Sprigg, "Same-sex Marriage is not a Civil Right" (emphasis added).

19 Sears and Osten, *The Homosexual Agenda*, p. 92.

20 See *Family Findings*, Vol. 5, Issue 2, "A Look at Scandinavia with an Eye on New Jersey" (published by the New Jersey Family Policy Council), for an in-depth discussion of the results of legalizing same-sex "marriage."

21 Sears and Osten, *The Homosexual Agenda*, p. 92.

ABOUT US:

Organized in 1995, the New Jersey Family Policy Council is a nonpartisan, nonprofit research and education organization. Our goal is to serve as a voice for families and traditional family values in the public policy arena. We are supported solely by private contributions which are tax deductible as provided by law. Our mailing address is P.O. Box 6011, Parsippany, NJ 07054. Phone: (973) 781-1414. Fax: (973) 781-1419. **Family Findings** is a publication of the New Jersey Family Policy Council and is intended to communicate research findings and perspectives on public policy issues that affect the family. Nothing written here should be construed as an attempt to aid or hinder the passage of any bill before Congress or the New Jersey General Assembly. Printed November 2005.