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Inside:

THOUGHTS ON A FEDERAL MARRIAGE AMENDMENT

by Steven W. Fitschen

In the wake of the latest United States Supreme Court abomination, there has been a renewed call to amend the United States Constitution in order to protect marriage. In the case of *Lawrence v. Texas*, the Court declared that there is a constitutional right to engage in homosexual sodomy. This was bad enough. But as Justice Scalia pointed out in dissent, the legal reasoning the Court employed has opened the door for the legalization of homosexual marriage.

Therefore, the question has arisen: Should we pursue an amendment to the United States Constitution to prohibit homosexual marriage? Most Christians and other conservatives are in favor of protecting marriage this way. However, some good folks have objected to this plan. Some do not actually object to an amendment; they just do not like the language that has currently been proposed. I agree with that concern. I, too, would like to see stronger language. However, the purpose of this article is to answer the concerns of those who do not favor an amendment at all.

The basic objection is that to do so somehow violates first principles. The objections are phrased variously, but two common themes predominate: First, marriage has never been the purview of the Federal government, *i.e.*, we would be violating principles of federalism. Second, we should not resort to the alteration of our basic frame our government for those things that have traditionally been dealt with statutorily.

I believe, however, that a resort to first principals instructs us that an amendment is an appropriate remedy, rather than counseling against it. After providing some background, I will discuss five lines of reasoning that all point in the same direction.

BACKGROUND

In the otherwise abominable *Planned Parenthood v. Casey* abortion regulation decision, Justices O'Connor, Kennedy, and Souter noted that our Constitution is a covenant: "Our Constitution is a covenant running from the first generation of Americans to us and then to future generations." Although they did not understand covenant principles, their assertion was surely correct. Indeed, twenty-four years ago, in November 1979, that more than 100 scholars convened for a series of workshops on covenants and politics at Temple University's Center for the Study of Federalism. One of those scholars, Donald S. Lutz, later summarized the connection between covenants and our Constitution:

> Viewing the United States Constitution as the critical expression of the American constitutional tradition, we move back in time,

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Publisher:
Steven W. Fitschen

Production Manager:
Lisa Marie Massato

Production Assistant:
Michael Fitschen

seeking the less differentiated, more embryonic expression of what is in that document. Our search takes us to the earliest state constitution, then to colonial documents of foundation that are essentially constitutional such as the Pilgrim Code of Law, and then to proto-constitutions such as the Mayflower Compact. The political covenants written by English colonists in America lead us to the church covenants written by radical Protestants in the late 1500s and early 1600s, and these in turn lead us back to the Covenant tradition of the Old Testament. The American constitutional tradition derives much of its form and content from the Judeo-Christian tradition as interpreted by the radical Protestant sects to which belonged so many of the original European settlers of British North America.

Given this fact, we should expect biblical principals to help us evaluate our question—and indeed they do. Most germane to the discussion at hand is the concept of the "limited modifiability" of a covenant. This biblical principle is enshrined in the amendment process itself. Thus, it is appropriate to examine a biblical example of covenant modification. In particular, it will be most helpful to examine an example of a fundamental change in a nation's political and legal structure. After all, that is the main concern of many of those who are worried about a constitutional amendment—that we may be about to pursue a fundamental change in the political and legal order.

A BIBLICAL EXAMPLE

While the Bible may contain several good examples of a fundamental alteration of a covenant, I wanted to be sure to use one that is not mere "proof-texting." I believe the following example involving the Mosaic covenant qualifies. To understand this example, I want to clarify that the Mosaic covenant includes all the various commandments given by God in the Torah.

In particular, it includes the commandments about the distribution, inheritance, alienage, and redemption of individual parcels of land the Promised Land. In Numbers 26, God commanded Moses to take a census of the Israelites, *by their father's houses*, which were determined strictly by following the lineage from father to son—strictly the male blood lines. The land was to be divided accordingly. This, of course, had enormous social, economic, and political consequences. One need only consider the vast amount of the Biblical text devoted to the description of the boundaries of the various land allotments to understand this. Similarly, the redemption of the land in the Year of Jubilee demonstrates that the apportionment of the land to the proper persons and tribes was of vital interest to God. Yet in Numbers 27, the daughters of Zelophehad came to Moses seeking a modification of this aspect of the covenant. They wanted to be able—as females—to inherit land, too. Moses brought their petition to God and God modified the inheritance laws. Thus, even something that is this central to the political and legal structure of the nation could be modified. Therefore, even for those who believe that allowing the Federal government a role in regulating marriage constitutes a fundamental change in our political and legal structure—and as will be shown below, this is not really true—biblical principles of covenant would allow this.

INTENT OF THE FRAMERS

Similarly, the Framers believed that even the most basic components of the Constitution should be subject to modification. This matches the biblical principle just examined. Many of the

Founders undoubtedly knew that covenantal principles generally applied to the new federal Constitution. After all, the very term "federal" is derived from *foedus,* Latin for covenant.

This modifiability even includes matters that go to the most cherished elements of federalism. George Washington put it like this in his Farewell address: "If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way the Constitution designates." It is also well documented that this was the view of the ratifiers of the constitution and that ratification likely would not have occurred were it not for a belief that *any* defects (excepting only those discussed in the next section) could be corrected through amendment. Indeed, scholarship suggests that if the fundamental aspects of the Constitution were not thought amendable, the required number of states may well have never ratified it.

Therefore, we see once again that even those who are persuaded that the federal government has not previously had a role in regulating marriage should not be concerned that the distribution of power between the federal and state governments would be changed by a marriage amendment. The Framers and Ratifiers believed that such a course of action should be, indeed must be, open to the people.

THE TEXTUAL MESSAGE

The text of the Constitution itself indicates that such an amendment is permissible. Article V states in its entirety:

> The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided, that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate.

Under the well known rule of legal interpretation of *"expressio unius est exclusio alterius"* (the mention of one thing rules out other things not mentioned), the two exceptions enumerated in Article V are the only two types of amendments that are off-limits. Clearly, a proposed marriage amendment does not implicate either of the exceptions. (The cryptic reference to "the first and fourth clauses in the ninth section of the first article" dealt with slavery and taxing issues.) Thus, an amendment, whereby marriage is defined for the entire nation, is permissible even if it changes the regulation of marriage from a state to a federal issue.

THE PRE-EXISTING DUTY TO DEFINE MARRIAGE

I next address the argument that marriage has traditionally been a state matter, not a federal one. This is simply not true. What is true is that the states have regulated both what lawyers call *malum in se* and *malum prohibitum* aspects of marriage.

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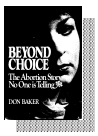

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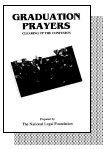

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Malum prohibitum are those things that are wrong only because some human legislating body says it is wrong. That is why different states have different age requirements, different parental and/or judicial consent requirements, different consanguinity requirements, different blood test requirements and different paper work requirements.

Malum in se are those things that are wrong because God says they are wrong. Admittedly, many (or even most) legislators have no idea where this old distinction comes from, but fortunately it has lingered in the law. That's why all states prohibit incest, polygamy, and homosexual marriage (so far).

It is also true that the federal government has never sought to regulate in the *malum prohibitum* area. This undoubtedly has led to the impression that it has not been involved in the marriage issue at all.

However, as mentioned above, this is simply not true. In the case of *Ramsey v. Murphy*, the Supreme Court had before it a statute of the United States that stripped the right to vote from polygamists in the Utah territory. In that case, the Court said that the law was a not only constitutional, but a *good* law, because it was directed to people who were trying to become part of the United States. The Court wrote:

> For, certainly, no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate states of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement. And to this end no means are more directly and immediately suitable than those provided by this act, which endeavors to withdraw all political influence from those who are practically hostile to its attainment.

The opinion of the federal government, as expressed through the Supreme Court, was that any territory that wanted to become a state must be dedicated to marriage being limited to one man and one woman for life.

If this were all that we had on the subject, it could perhaps be dismissed. After all, it is not an example of the federal government *legislating* on the issue. But it is not all that we have. The enabling acts (the laws that allow new states to join the Union) of Utah and many other Southwestern states expressly declared that outlawing polygamy was a term of statehood.

This in-and-of-itself would be enough to show that the federal government has stepped in to make sure that no state will allow any *malum in se* marriages. However, there is more. We can also discern that Congress and the Supreme Court took this stance because they had a pre-existing duty to protect marriage.

We can discern this by comparing Utah's enabling act to those of other states. Enabling acts are typically entitled "An act to enable the people of _____ to form a constitution and state government, and for the admission of such state into the Union, on an equal footing with the original states." Yet the terms of each was not on its face "equal." For example, Louisiana's Enabling Act states that its constitution shall be "consistent with the constitution of the United States." Other

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states' enabling acts require their constitution to be consistent with (or not repugnant to) "the constitution of the United States and the principles of the Declaration of Independence." Utah's Enabling Act has this latter language and goes even further because it also states that "polygamous or plural marriages . . . are forever prohibited."

How are these differences explained? Do these different versions really constitute equal footing? Yes they do. The first two versions—that citing the U.S. Constitution and that citing both the Constitution and Declaration—are easily explained. These two documents are driven by the same principles. Many people use the analogy that the Declaration is the charter of our nation and the Constitution is its by-laws. But we must see that outlawing polygamy is also inherent in the principles of the Declaration and the Constitution—it is repugnant to the "Laws of Nature and of Nature's God" and thus the federal government has a pre-existing duty to prohibit any state from allowing it. The same is true of homosexual marriage.

An enabling act containing an explicit reference to outlawing polygamy is exactly equal to an enabling act not containing such a reference. The reason is that polygamy is implicitly outlawed by every enabling act, invoking as they do the Constitution and/or the Declaration. Only when a situation arose that required an explicit reference to polygamy was such a reference included. But all states are subject to the U.S. Constitution and the Declaration and the federal government has a pre-existing duty to prevent a perversion of marriage under those principles.

HISTORICAL PRECEDENT

Finally, we may consider what others have done who have come before us. One example is provided by the Eleventh Amendment. It was proposed and ratified as a direct result of the Supreme Court's decision in *Chisolm v. Georgia*. In that case, the Supreme Court held that a state could be sued by the citizen of another state or of a foreign country. The Framers clearly believed that they had drafted the language of the Constitution so as to preclude this very possibility. Nonetheless, the Supreme Court declared that it was possible.

Immediately, work was begun on an amendment to undo the Supreme Court's decision. This amendment is best understood as what scholars call an "explanatory" amendment. In other words, the whole people of the United States, through the amendment process, said in effect: "We never intended this and now we will explain what we have meant all along."

This is exactly what the people of the United States need to say to the Supreme Court right now. We need to say, "Our constitution was always intended to be in conformity with the law of nature and nature's God; it was never intended to permit homosexual marriage."

CONCLUSION

I hope it is clear that a resort to first principals shows that a federal marriage amendment is permissible. Furthermore, it now looks like it is necessary. Therefore, I hope and trust that all of our friends will support such an amendment, as well as all of the National Legal Foundation's other efforts.

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