Legislatures Should Curb Judicial Supremacy Over Marriage

by Phyllis Schlafly

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It’s Roe v. Wade all over again, as the Supreme Court is poised to invent a new right to same-sex marriage found nowhere in the four corners of the Constitution. Fortunately, the Founders gave us checks and balances against this overreaching in power.

The Framers understood the tendency of a branch of government to expand, and they empowered both Congress and the States with the legislative tools necessary to avert the encroachment. A branch of government will transgress its boundaries until the other branches exercise their authority to restrain the breach.

When the Supreme Court ruled that the State of Georgia should give land back to an Indian tribe, President Andrew Jackson reportedly responded by saying, Chief Justice "John Marshall has made his decision, now let him enforce it." Both Georgia and Jackson then ignored and declined to enforce that act of judicial supremacy.

President Abraham Lincoln, himself an esteemed attorney, reacted similarly when the Court subsequently overstepped its bounds in the Dred Scott case. He rejected submission to "that eminent tribunal."

It is the duty of legislatures to step up and limit the federal judiciary’s expansion of power, particularly on marriage, a matter central to state sovereignty. Both Congress and the States should fulfill their obligations to safeguard the Constitution and the American people against a usurpation in power by the Supreme Court over marriage.

Congress should enact laws denying funding and withholding jurisdiction from enforcement of any redefinition of marriage by the federal judiciary. Congress has repeatedly withdrawn power from the federal courts over many other topics, ranging from Medicare reimbursement to the clearing of underbrush in South Dakota, and marriage is certainly no less important an issue.

On the Second Amendment, Congress passed and President Clinton signed the ‘‘Protection of Lawful Commerce in Arms Act," which abruptly shut down pending litigation against gun manufacturers for crimes committed with guns. That legislation properly ended judicial activism against guns.

On the Establishment Clause, President Clinton signed the Consolidated Appropriations Act of 2001, which had passed by unanimous consent, including a provision to deny funding for the enforcement of an order to remove a Cross from public land. Courts do not enforce their own orders, and the withholding of funding to enforce overreaching federal orders is a proper curb on judicial supremacy.

Congress should also exercise its special authority under Section Five of the Fourteenth Amendment to clarify that States retain full authority to limit marriage between one man and one woman. Unlike the first ten amendments to the Constitution, which depend on the federal courts for enforcement, the Fourteenth, which contains the equal protection clause relied on by same-sex marriage advocates, gives Congress the power to enforce its provisions against the States.

Republican presidential candidates should make clear that, if elected, they will not allow the executive branch to bully States into adopting same-sex marriage against the will of their residents.

States should act on their own to protect their sovereignty over marriage, without waiting for Congress or the election of a new president. Good bills have already been introduced in South Carolina (H3022) and Texas (HB 623) to ensure that no taxpayer dollars, including official salaries, are spent on same-sex marriages that are prohibited by state law there.

The costs of same-sex marriage include billions in new entitlements, consumption of family court resources, and lawsuits for alleged discrimination. The elected branches of federal and state government, which retain the "power of the purse," should not have to foot the bill for those costs, and the Constitution ensures that they can cut off the money.

Forty-two years ago this week, a 7-2 majority of the Supreme Court invented a new constitutional right to abortion and many politicians mistakenly thought that settled the issue. But the advantage in the polls formerly enjoyed by the pro-abortion side has completely disappeared.

Moreover, even the Court that had declared a "right" to abortion subsequently held that Congress and the States retain power to cut off money for abortion, and to regulate

that dirty business to promote the health of its victims. Likewise, States have full authority to cut off money for the homosexual agenda today.

History may soon repeat itself with a judicial mistake of similar magnitude, but the Constitution allows Congress and the States to counteract it. They should immediately enact laws to "check and balance" this brazen power grab by the judicial supremacists over marriage.

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