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Marriage Just Lets the State Back In

Kerry Howley

What do you do after you've won one of the most important Supreme Court cases in decades and shoved the state, kicking and screaming, out of your bedroom? Apparently, you beg the government to walk right back in. 'The Marriage Revolution' has arrived, and homosexuals are the unlikely heroes of the quest to revive a fading institution.

Lawrence v. Texas, the most important Supreme Court decision in decades, was a victory for all Americans who consider their private, consensual sexual behavior to be beyond the legitimate realm of state control. But in the wake of *Lawrence*, the gay political establishment immediately began agitating for government regulation of its constituents' personal lives! The ironic message to legislators is as clear as it is misguided: we don't want government to censor our sexual relationships, but we are happy to have the government regulate our personal relationships.

Marriage, people tend to forget, is a three-way contract in which the power of one party, the state, greatly outweighs that of the other two. While marriage has some of the attributes of an ordinary contract—spouses enter into it voluntarily; they can agree to dissolve it; they both must obey its terms—many of the normal rules of a contractual agreement don't apply. The government can determine the circumstances under which marriage and divorce are undertaken, and it can change the terms whenever it likes. In 1996, when 'no fault' divorce came under attack, several state legislatures considered making divorces much harder to obtain. Had these measures passed, couples who had entered into what they thought was a voluntary contract, subject to voluntarily dissolution, would have found themselves bound by a very different set of circumstances. To get married in America is to put oneself at the mercy of state legislators, many of whom believe that marriage is a social good, a sacred bond, and that divorce is a threat to social stability.

At present, Washington has concerned itself with formulating a relatively static definition of marriage. According to Senator Rick Santorum and House Majority Leader Bill Frist, marriage is, by definition, 'a relationship between a man and a woman.' If this sounds arbitrary, that's because it is. Marriage is whatever the state decides it is, at any given time, subject to change under any given administration.

That this Congress is threatening to write its definition into the Constitution is not particularly revolutionary. The Defense of Marriage Act, signed by President Clinton, essentially defined marriage as between a man and woman for the purpose of federal benefits. The proposed Constitutional amendment, proposed by the Republican majority, would force states to adopt the same definition. Future legislators might further restrict marriage, or might expand the ranks of the eligible. As long as marriage remains a government program, its future will be subject to political whim.

Given the peculiar provisions of the marriage contract, the entangling, complex nature of divorce law, and the increasing acceptability of cohabitational arrangements, heterosexual couples are finding marriage less and less desirable. The marriage rate has been dropping since 1970, while the number of cohabiting couples has increased over 1000 percent since 1960. According to the 2000 census, eleven million Americans live with an unmarried partner and 41 percent of those households are raising children. In Europe, often a harbinger of social change in the U.S., the turn away from marriage has been even more dramatic. The youth of France have shown a particularly strong aversion toward state-sanctioned marriage, and the situation is even more marked in Eastern Europe, where a deep mistrust of government, fueled by years under coercive communist regimes, has led young people to keep their relationships private.

This is not to say that monogamy is out of vogue. Even the ultra-conservative Rutgers Marriage Project concedes that 'high school seniors seem to believe in monogamy more than ever.' In 1975, according to a report authored by the project, sixty percent of students 'disagreed' or 'mostly disagreed' with the proposition that 'Having a close intimate relationship with only one partner is too restrictive for the average person.' By 1995, seventy percent of students disagreed. Many of the doomsday statistics we hear about 'single-parent families' include perfectly healthy couples that never sought the state's permission for their union. According to the Alternative to Marriage Project, an advocacy group for the unmarried, 41 percent of first births to supposedly single mothers are actually born to cohabiting couples. Though such unions are on average less permanent than traditional marriages, it is a mistake to equate a reluctance to embrace marriage with a refusal to commit. Marriage has simply ceased, quietly but definitively, to be an obvious step toward intimacy.

As entangling as marriage might be, it is still unarguably convenient for those deemed eligible. The best arguments for legal marriage, homosexual or otherwise, are not ideological but practical. They invoke the myriad of services and entitlements available to those who can claim that particular legal status—everything from health care to inheritance law to immunity from legal testimony. Such rights are of course key to

a secure, stable, monogamous relationship. When California resident Keith Brandowski was denied compensation for the death of his domestic partner in the 9/11 terrorist attacks, it looked to many like a clear case of discrimination against gay men. But the problem is larger. If Brandowski's partner had been a woman who had chosen not to involve the state in her relationship, the problem would have been the same. What's needed is a way to secure basic rights between committed individuals without ceding too much authority to the state.

Putting partners in control of the contractual agreement is a way simultaneously to maintain their autonomy over the commitment process and to ensure their security. This is the 'privatize marriage' proposal, popularized by the Cato Institute's David Boaz, in which adults can either draw up their own contract or choose from a number of ready-made generic contracts. The marriage agreement can therefore be tailored to the needs of specific relationships. In an arrangement where one partner stays home with children, it would probably be important to secure the economic stability of the homemaker in the event of divorce; for partners who will be gainfully employed, such a provision might not be necessary. Those with a religious commitment to marriage might make a separation difficult to obtain; others might terminate the arrangement with a simple signature. Rather than dictate the terms of the agreement, the state would merely ensure its enforcement. Religious institutions could continue to act as they always have, surrounding the marriages they accept with all the traditional trappings of ceremony and promises of permanence.

Privatization is an aggressively practical approach to the marriage problem, but for many homosexual couples, a legal marriage in the traditional sense would be a largely symbolic gesture. For those who see marriage as a magic ticket into mainstream society, state marriages for everyone are the only solution. But it is not at all clear that the problems of being homosexual in a homophobic nation will soften under state-sanctioned marriage. According to a poll taken by the National Opinion Research Center, 53 percent of Americans think that homosexual relations are 'always wrong'—regardless of whether they're undertaken by a conservative couple married in Canada or by a commune committed to free love. The majority of Americans seem to have problem with homosexuality as such, and many of them find the idea of homosexual marriage even more abhorrent.

In his 1995 book *Virtually Normal*, Andrew Sullivan writes, 'until gay marriage is legalized, this fundamental element of person dignity will be denied a whole segment of humanity.' Sullivan is a passionate and eloquent advocate for the gay community, but he has let his quixotic faith in state solutions eclipse his belief in individual dignity. It is not for government to bestow dignity on individuals, but to protect the basic dignity with which they are born. There's nothing remotely dignified

about begging the state to regulate one's personal affairs, and it is a belittling view of personhood that assumes that citizens cannot navigate their own romantic relationships.

Seen in this light, the movement to legalize gay marriage is a profoundly conservative one. It is a movement that looks to dated social conventions as a means to acceptance and seeks a static solution to social evolution. The legal arguments against same-sex marriage are largely incoherent, and the current firewall against it probably will not last. But the real victory for couples lies in rejecting the need for government regulation and **taking responsibility for their own commitments.**

GLBT¹ people **should not have to wait for** public opinion to evolve to feel that their **unions are legitimate. Heterosexual couples** should not have to welcome a definition of marriage that clashes with their values, or invite the state into their personal lives to obtain basic benefits. In 2003, American men and women, whether hetero- or homosexual, have more choices in more facets of life than ever before. Individuals are empowered to shape ever more aspects of their lives, from the provider of long-distance phone service to the number of children they have. We should not leave our most fundamental choices to the whims of politicians and bureaucrats, nor rest our dignity on the government's sanctioning of our relationships.

Note

1. Gay, lesbian, bisexual, and transgendered