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There is No Constitutional Right to Marriage ... Of Any Kind

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edited by Alex Ferraro

JURIST Guest Columnist Richard Kelsey, of George Mason University School of Law, discusses the Supreme Court's recent actions on same-sex marriage ...

The Constitution provides no citizen of any gender or orientation a Constitutional right to marriage. The Constitution is silent on the issue of marriage. It is not mentioned, and therefore it is not a power delegated to the federal government to regulate. For lawyers, judges and in particular, Supreme Court justices, the inquiry on this issue should end there—right where silence demands judicial inaction.

The Constitution is an elegant document that is rigid in its respect for federalism. Its framework of powers is encased in a document designed to require overwhelming support to change. So hard is it to amend the Constitution, it has only been done 27 times in our history. Since 1971, it has been amended properly only once, and inconsequentially. Mostly, the Constitution has been amended repeatedly and improperly by the Supreme Court ... a job to which it is not tasked and for which it is ill-equipped.



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The Supreme Court's mandate is determining the Constitutionality of laws. It is not charged with creating new rights in the Constitution. The difference is stark. In *Roe v. Wade*, it took over 65 pages for the court to create a right to abortion where the Constitution is silent on the issue. The Constitution is only six pages long. A competent jurist could read it and find no mention of abortion. In *Plyler v. Doe*, the court found a Constitutional right for illegal aliens to receive a K-12 free public education. The right does not exist. This begs the question of whether or not the Supreme Court is competent or merely rogue. Justice Robert Jackson once famously wrote, "[w]e are not final because we are infallible, we are infallible only because we are final."

In considering Constitutional questions, our Supreme Court often first considers its own opinions about the Constitution, rather than looking at the document itself. That's the problem. The document should be the primary source. The court need only apply the principles of statutory interpretation and construction in order to resolve many Constitutional claims. One principle of statutory interpretation is not to read into a law words not there. For example, the words "marriage," or "gay marriage" do not exist. Another principle of interpretation mandates that when determining the meaning of a statute, one must consider the plain meaning of the words. If the words don't exist, one need not consider any meaning, plain or otherwise. Finally, when considering the meaning of a line in any statute, one must consider the entire statute to make sure the interpretation is internally consistent. This brings us back to the elegance of our Constitution, its design and the mandate of federalism.

Judicially creating a right to marriage ignores the Constitution, eviscerates the 10th Amendment and is an improper judicial amendment of the Constitution. It defies all principles of interpretation or construction. For the Supreme Court to create a Constitutional right to marriage, it must first ignore and render dead the 10th Amendment, that pesky little part of our Bill of Rights that states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The people and the states have Constitutional rights. We have all the rights not delegated to the federal government. One of those countless rights is to permit us to determine whom, if anyone, ought to be given the right to marry and therefore accrue whatever benefits and burdens such license shall carry. The Supreme Court cannot create a

Constitutional right to marriage without first violating the rights of the people under the 10th Amendment.

There are innumerable opinions written by smart lawyers that purport to find, after 148 years in existence, that the 14th Amendment suddenly sprouted a right to certain types of marriage. Some attempt to convert the 14th Amendment words "protections of the laws" to an affirmative right to equality of outcome under every law. In essence, 14th Amenders argue that the 14th Amendment gives birth to rights as peoples' morals and judgments change. These people see the Constitution not merely as a living document, but as a transformer, throwing off rights as necessary to meet needs. This view of the 14th Amendment would have one Amendment swallow the entire Constitution by empowering judicially-inspired legislation that ignores the separation of powers. To accede to this view, one would have to believe the 14th Amendment created gay marriage nearly 150 years after the great civil war of the 19th century fought over gay marriage. This judicial jujitsu is a Constitutional fraud on a country that no longer understands the importance of distributed power conceived in our federalism.

Shifting attitudes are a natural change on many issues from marriage to taxes. When attitudes change, people are empowered to make laws that reflect their respective moral choices. That self-governance is the hallmark of the civil society, and it is done legislatively. Replacing political choices with judicial fiat runs afoul of the Constitution and fundamentally changes how our system of law-making works. If a law is to be wrong, it ought to be subject to a vote by the people, and not be handed down by the votes of a few people, adorned in robes, and based on wisdom outside our founding documents.

The Supreme Court's recent tomfoolery has served to mandate gay marriage laws in some states while not in others. Ironically, the Constitution envisioned different laws in different states. The difference is the Constitution considered that such differences in state laws would be the product of laws passed by the people. Through the Court's recent inaction, rejecting ripe appeals on gay marriage bans, it created by judicial inaction a patch-work system of rights that invalidated legislative action and substituted it for judicial activism. Ironically, the Court's inaction brought gay marriage to states that banned it, while leaving it banned in states that neither banned nor permitted it. It's a fascinating outcome, if it were not for the reality that the result is judicial politicking that re-writes our system of federalism.

In 1972, in a moment of lucidity, the Supreme Court rejected a 14th Amendment-based appeal on gay marriage. The case sprang to life when a gay man attempted to obtain a marriage license in Minnesota. The Supreme Court of Minnesota rejected all of the Constitutional arguments made by the Plaintiff. The US Supreme Court found a "want of federal jurisdiction" in rejecting the appeal. (One federal court just ruled that Baker still controls.) Many "Constitutional" scholars suggest that whatever precedential value the court's action had in Baker, it was eviscerated in the US v. Windsor. The Windsor case is more accurately described as the defense of states' rights case. In Windsor, the court found that a federal law could not trump the rights of states to determine what marriages it would recognize. In that instance, New York chose to recognize gay unions, and thus permit the benefits of heterosexual marriage. In short, the court rightfully upheld the rights of states to make marriage determinations, and it rejected federal interference. The Court noted:

The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens. See *Williams v. North Carolina*, 317 U.S. 287, 298 (1942) ("Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders"). The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the "[p]rotection of offspring, property interests, and the enforcement of marital responsibilities." *Ibid*. "[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce." *Haddock v. Haddock*, 201 U. S. 562, 575 (1906).

Windsor serves only to re-affirm that the people have the right to define marriage as the people see fit, absent some other superseding federal right. In fact, according to Windsor, the Constitution prevents federal intrusion on that right of the people under the 10th Amendment unless a Constitutional right is implicated.

Why did the Supreme Court duck an opportunity to resolve whether or not bans on gay marriage are Constitutional? The answer is simple; neither the Constitutional wing nor the Transformer wing of the Court knew for sure exactly how Justice Kennedy would come down on the issue. Accordingly, neither side wanted to grant the writ and do its job. In short, eight weak justices played politics with the Constitution, leaving the entirety of the breadth of the 14th Amendment, the life of the 10th Amendment, and the future of marriage rights in the hands of one man. That, the Constitution, never envisioned.

Richard Kelsey is currently an Assistant Dean at George Mason University School of Law, a former law clerk for the Circuit Court Judges of Arlington County, and previously practiced law as a commercial litigator.

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