ROBERT P. GEORGE LECTURE SERIES: JUDICIAL USURPATION AND SEXUAL LIBERATION: COURTS AND THE ABOLITION OF MARRIAGE

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Judicial power can be used, and has been used, for both good and ill. In a basically just democratic republic, however, judicial power should never be exercised—even for desirable ends—lawlessly. Judges are not legislators. The legitimacy of their decisions, particularly those decisions that displace legislative judgments, depends entirely on the truth of the judicial claim that the court was authorized by law to settle the matter. Where this claim is false, a judicial edict is not redeemed by its good consequences. For any such edict constitutes a usurpation of the just authority of the people to govern themselves through the constitutional procedures of deliberative democracy. Decisions in which the courts usurp the authority of the people are not merely incorrect, they are themselves unconstitutional and unjust.

There were, and are, scholars and statesmen who believe that courts should not be granted the power to invalidate legislation in the name of the Constitution. In reaction to Chief Justice John Marshall's opinion in the 1803 case of *Marbury v. Madison*,[1] Thomas Jefferson warned that judicial review would lead to a form of despotism.[2] It is worth remembering that the power of judicial review is nowhere mentioned in the Constitution. The courts themselves have claimed the power based on inferences drawn from the Constitution's identification of itself as supreme law, and the nature of the judicial office.[3] But even if we credit these inferences, as I am inclined to do, it must be said that early supporters of judicial review, including Chief Justice Marshall himself, did not imagine that the federal and state courts would exercise the sweeping powers they have come to exercise today. Jefferson and the critics were, it must be conceded, more prescient.

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[1] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[2] *See* Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), *in* 11 WRITINGS OF THOMAS JEFFERSON, at 311-13 (Albert E. Bergh ed.) (1905) (criticizing claims by the judiciary of authority to bind the other branches of government in matters of constitutional interpretation ("making the judiciary a despotic branch")).

[3] *See Marbury,* 5 U.S. (1 Cranch) at 148.

As for Marshall's ruling in *Marbury*,[4] a good case can be made that the power he actually claimed for the courts was quite limited. Remember, what the Supreme Court decided in that case was that the Court itself was forbidden by the Constitution to exercise original jurisdiction putatively conferred upon it by the Judiciary Act of 1789.[5] Marshall reasoned that the Constitution, in Article III, fixed the Court's original jurisdiction, and Congress was powerless under the Constitution to expand it.[6] According to the contemporary constitutional scholar Robert Lowry Clinton, all this meant was that the Court was relying on its own interpretation of the Constitution in deciding what *it* could and could not do within its own sphere.[7] This was entirely consistent with it recognizing a like power of the other branches of government to interpret the Constitution for themselves in deciding what *they* could and could not do in carrying out their constitutional functions.[8]

However that may be, the power of the judiciary has expanded massively. This expansion began slowly. Even if we read *Marbury* more broadly than Professor Clinton reads it, treating it as a case in which the justices presumed to tell the Congress what it could and could not do, it would be another fifty-four years before the Supreme Court would do it again. And it could not have chosen a worse occasion. In 1856, Chief Justice Roger Brooke Taney handed down an opinion for the Court in the case of *Dred Scott v. Sandford*.[9] That opinion, which among other things declared even free blacks to be non-citizens, and Congress to be powerless to restrict slavery in the federal territories, intensified the debate over slavery and dramatically increased the prospects for civil war.[10]

Dred Scott was a classic case of judicial usurpation. Without constitutional warrant, the justices manufactured a right to hold property in slaves that the Constitution nowhere mentioned or could reasonably be construed as implying. Of course, Taney and those who joined him in the majority depicted their decision as a blow for constitutional rights and individual freedoms.[11] They were protecting the minority (slaveholders) against the tyranny of a moralistic majority who would deprive them of their property rights. Of course, the reality was that the judges were exercising what in a later case would be called "raw

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4 *Id.* at 180.

5 *Id.* at 174.

6 *See id.* at 138.

7 *See generally* ROBERT LOWRY CLINTON, MARBURY V. MADISON AND JUDICIAL REVIEW (1991).

8 *See id.*

9 Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

10 *See id.*

11 *See id.*

judicial power"[12] to settle a morally charged debate over a divisive social issue in the way they personally favored. It took a civil war and constitutional amendments (particularly the 14th Amendment), made possible by the Union's victory, to reverse *Dred Scott v. Sandford*.

The *Dred Scott* decision is a horrible blight on the judicial record. We should remember, though, that while it stands as an example of judicial activism in defiance of the Constitution, it is also possible for judges to dishonor the Constitution by refusing to act on its requirements. Judges who are more devoted to a cause than to the Constitution can, and sometimes have, gone wrong by letting stand what should have been struck down. In the 1896 case of *Plessy v. Ferguson*,[13] for example, legally sanctioned racial segregation was upheld by the Supreme Court despite the 14th Amendment's promise of equality. *Plessy* was the case in which the justices announced their infamous "separate but equal" doctrine,[14] a doctrine that was a sham from the start, and could only have been. Separate facilities for blacks in the South were then, and had always been, inferior in quality. Indeed, the whole point of segregation was to embody and reinforce an ideology of white supremacy that was utterly incompatible with the principles of the Declaration of Independence and the 14th Amendment to the Constitution. The maintenance of a regime of systematic inequality was the object, point, and goal of segregation. As Justice John Harlan wrote in dissent, segregation should have been declared unlawful because the Constitution of the United States is colorblind and recognizes no castes.[15]

Although more than half a century would pass before the Supreme Court got around to correcting its error in *Plessy* in the 1954 case of *Brown v. Board of Education*,[16] that did not prevent the Court from repeating the usurpations that brought it to shame in the *Dred Scott* case. The 1905 case of *Lochner v. New York* concerned a duly enacted New York statute limiting to sixty the number of hours per week that the owner of a bakery could require or permit his employees to work.[17] Industrial bakeries are tough places to work, even now. They were tougher—a lot tougher—then. Workers were at risk of pulmonary disease from breathing in the flour dust, and in constant jeopardy of being burned by hot ovens, especially when tired and less than fully alert. The New York state legislature sought to protect workers against

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12 Roe v. Wade, 410 U.S. 113, 222 (1973) (White, J., dissenting).

13 Plessy v. Ferguson, 163 U.S. 537 (1896).

14 *Id.* at 544.

15 *Id.* at 559 (Harlan, J., dissenting).

16 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

17 Lochner v. New York, 198 U.S. 45 (1905).

exploitation and abuse by limiting working hours, but the Supreme Court said "no."[18]

Citing an individual right to "freedom of contract" purportedly implied by the Due Process Clause of the 14th Amendment, the Justices struck down the law as an unconstitutional interference by the state in private contractual relations between employers and employees.[19] The Court justified its action with a story not dissimilar to the one it told in *Dred Scott*.[20] Again, it claimed to be protecting the minority (owners) against the tyranny of the democratic majority. It was striking a blow for individual civil rights and liberties. It was restricting government to the sphere of public business, and getting it out of private relations between competent adults, namely, owners and workers.

The truth, of course, is that it was substituting its own laissez-faire philosophy of the morality of economic relations for the contrary judgment of the people of New York acting through their elected representatives in the state legislature. On the controversial moral question of what constituted authentic freedom and what amounted to exploitation, unelected and democratically unaccountable judges, purporting to act in the name of the Constitution, simply seized decision-making power.[21] Under the pretext of preventing the majority from imposing its morality on the minority, the Court imposed its own morality on the people of New York and the nation.

Just as *Dred Scott* fell, *Lochner* would eventually fall. It would be brought down not by a civil war, but by an enormously popular president fighting a great depression. Under the pressure of Franklin Roosevelt's plan to pack the Supreme Court, the Justices in 1937 repudiated the *Lochner* decision, and got out of the business of blocking state and federal social welfare and worker protection legislation. *Lochner* itself was relegated to ignominy, as *Dred Scott* had been. Indeed, the term "Lochnerizing" was invented as a label for judicial rulings that usurped democratic law-making authority and imposed upon society the will of unelected judges under the pretext of giving effect to constitutional guarantees of liberty.

For many years, the Court took great care to avoid the appearance of Lochnerizing. In 1965, for example, when the justices in a set-up case called *Griswold v. Connecticut*[22] struck down a state law against contraceptives in the name of an unwritten "right to marital privacy," Justice William O. Douglas explicitly denied that he was appealing to

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18 *Id.*

19 *Id.* at 57.

20 *See* Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1856).

21 *See Lochner*, 198 U.S. at 54-55.

22 Griswold v. Connecticut, 381 U.S. 479 (1965).

the principle of *Lochner*.[23] Indeed, to avoid invoking *Lochner*'s claim of a so-called "substantive due process" right in the 14th Amendment, Douglas went so far as to say that he had discovered the right to privacy in "penumbras, formed by emanations" of a panoply of Bill of Rights guarantees that seem to have something to do with protecting privacy, such as the Third Amendment, which prohibits the government from quartering soldiers in private homes in peace time, and the Fourth Amendment, which forbids unreasonable searches and seizures.[24]

Griswold, though plainly usurpative, was not an unpopular decision. The Connecticut statute it invalidated was rarely enforced and the public cared little about it. The significance of the statute was mainly symbolic, and the debate about it was a symbolic struggle. The powerful forces favoring a liberalization of sexual mores in the 1960s viewed the repeal of such laws—by whatever means necessary—as essential to discrediting traditional Judeo-Christian norms about the meaning and significance of human sexuality. But the Court was careful to avoid justifying the invalidation of the law by appealing to sexual liberation or individual rights of any kind. On the contrary, Douglas's opinion defends the putative right to marital privacy as necessary to preserve and protect the institution of marriage. In Douglas's account of the matter, it was not for the sake of "sexual freedom" that the justices were striking down the law, but rather to protect the honored and valued institution of marriage from damaging intrusions by the state.[25] It's not about individualism, you see, it's about defending marriage. Otherwise uninformed readers of the opinion might be forgiven for inferring mistakenly that the ultraliberal William O. Douglas was in fact an archconservative on issues of marriage and the family. They would certainly have been justified in predicting—wrongly, as it would turn out—that Douglas, and those Justices joining his opinion, would never want to see the *Griswold* decision used to break down traditional sexual mores or facilitate non-marital sexual conduct.

A mere seven years later, however, in the case of *Eisenstadt v. Baird*,[26] the Court seemed to forget everything it had said about marriage in the *Griswold* decision, and abruptly extended the putative constitutional right to use contraceptives to nonmarried persons. A year after that, the Justices, citing *Griswold* and *Eisenstadt*, handed down their decision legalizing abortion in *Roe v. Wade*, and the culture war began.

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[23] *Id.* at 482.

[24] *Id.* at 484; U.S. CONST. amend. III; U.S. CONST. amend. IV.

[25] *Id.* at 485-86.

[26] Eisenstadt v. Baird, 405 U.S. 438, 454 (1972).

The *Roe* decision was pure Lochnerizing. *Roe* did for the cause of abortion what *Lochner* had done for laissez-faire economics, and what *Dred Scott* had done in the cause of slavery. The Justices intervened in a large scale moral debate over a divisive issue of social policy, short circuiting democratic deliberation and imposing on the nation a resolution lacking any justification in the text, logic, structure, or original understanding of the Constitution. Indeed, Justice Harry Blackmun, writing for the majority, abandoned *Griswold*'s metaphysics of "penumbras formed by emanations" and grounded the putative constitutional right to feticide in the Due Process Clause of the 14th Amendment,[27] just where the *Lochner* court had claimed to discover the putative right to freedom of contract. It was in *Roe* that dissenting Justice Byron R. White described the Court's ruling as an "act of raw judicial power."[28]

Having succeeded in establishing a national regime of abortion-on-demand by judicial fiat in *Roe*, the cultural left continued working through the courts to get its way on matters of social policy on which it faced significant popular resistance. Chief among these areas was the domain of sexual morality. Where state laws embodied norms associated with traditional Judeo-Christian beliefs about sexuality, marriage, and the family, left-wing activist groups brought litigation claiming that the laws violated Fourteenth Amendment guarantees of due process and equal protection, and First and Fourteenth Amendment prohibitions on laws respecting an establishment of religion. The key battleground became the issue of homosexual conduct. Initially, the question was whether it could be legally prohibited, as it long had been by laws in the states. Eventually, the question became whether homosexual relationships, and the sexual conduct around which such relationships are integrated, must be accorded marital or quasi-marital status under state and federal law.

In 1986, the Supreme Court heard a challenge to Georgia's law forbidding sodomy in a case called *Bowers v. Hardwick*.[29] Michael Hardwick had been observed engaging in an act of homosexual sodomy by a police officer who had lawfully entered Hardwick's home to serve a summons in a matter not involving a sexual offense.[30] Left-wing activist groups treated Hardwick's case as an opportunity to win the invalidation of sodomy laws by extending the logic of the Court's "right to privacy" decisions. This time, however, they failed. In a five to four decision written by Justice White, the Court upheld Georgia's sodomy statute as

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27 Roe v. Wade, 410 U.S. 113, 158 (1973).

28 *Id.* at 222 (White, J., dissenting).

29 Bowers v. Hardwick, 478 U.S. 186 (1986).

30 *Id.* at 188.

applied to homosexual sodomy.[31] The justices declined to rule one way or the other on the question of heterosexual sodomy, which the majority said was not before the Court.[32]

The *Bowers* decision stood until 2003 when it was reversed in the case of *Lawrence v. Texas*,[33] a case which set the stage for the current cultural and political showdown over the nature, definition, and meaning of marriage. In *Lawrence*, the Court held that state laws forbidding homosexual sodomy lacked a rational basis and were therefore nothing more than invasions of the rights of consenting adults to engage in the type of sexual relations they preferred.[34] Writing for the majority, Justice Anthony Kennedy claimed that such laws are insults to the dignity of homosexual persons.[35] As such, they are, he insisted, constitutionally invalid under the doctrine of privacy, whose centerpiece was the *Roe* decision.[36]

Justice Kennedy went out of his way to say that the Court's ruling in *Lawrence* did not affect the issue of same-sex marriage or whether the states and federal government were under an obligation to give official recognition to same-sex relationships or grant benefits to same-sex couples.[37] Writing in dissent, however, Justice Antonin Scalia said bluntly: "Do not believe it."[38] The *Lawrence* decision, Justice Scalia warned, eliminated the structure of constitutional law under which it could be constitutionally legitimate for lawmakers to recognize any meaningful distinctions between homosexual and heterosexual conduct and relationships.[39]

On this point, many enthusiastic supporters of the *Lawrence* decision and the cause of same-sex "marriage" agreed with Justice Scalia. They saw the decision as having implications far beyond the invalidation of sodomy laws. Noting the sweeping breadth of Justice Kennedy's opinion for the Court, despite his representations that the Justices were not addressing the marriage issue, they viewed the decision as a virtual invitation to press for the judicial invalidation of state marriage laws that treat marriage as the union of a man and a woman. Indeed, there was already litigation on this subject going forward in the states—it had begun in Hawaii in the early 1990s, where

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31 *Id.* at 196.
32 *Id.* at 198.
33 Lawrence v. Texas, 123 S. Ct. 2472 (2003).
34 *Id.* at 2483-84.
35 *Id.* at 2484.
36 *Id.*
37 *Id.*
38 *Id.* at 2498 (Scalia, J., dissenting).
39 *Id.*

a state supreme court ruling invalidating the Hawaii marriage laws[40] was overturned by a state constitutional amendment. *Lawrence* turned out to be a new and powerful weapon to propel the movement forward and embolden state court judges who were inclined to rule that laws treating marriage as the union of a man and a woman lacked a rational basis and were therefore invalid.

The boldest of the bold were four liberal Massachusetts Supreme Judicial Court justices who ruled in *Goodridge v. Massachusetts Department of Public Health* that the commonwealth's restriction of marriage to male-female unions was a violation of the state constitution.[41] The state legislature requested an advisory opinion from the Justices about whether a scheme of civil unions, akin to the one put into place a couple of years earlier by the Vermont state legislature when that state's Supreme Court had issued a similar ruling, would suffice. However, the four Massachusetts justices, over dissents by the three justices who dissented in the original case, said "The answer to the question is 'no,' civil unions will not do."[42] And so same-sex marriage was imposed by unelected and electorally unaccountable judges on the people of Massachusetts.

How are defenders of marriage as traditionally understood to respond to these developments? First, I believe, it is important to make it clear that what is going on in the state and federal courts is Lochnerizing on a massive scale. *Lawrence* and *Goodridge* are not *Brown v. Board of Education*.[43] They are not *Loving v. Virginia*,[44] which invalidated laws forbidding interracial marriages.[45] Contrary to the claims of their supporters, *Lawrence* and *Goodridge* do not vindicate principles of equality. Rather, they impose a particular set of cultural leftist doctrines about the nature, meaning, and moral significance of sexuality and marriage. What they create is not equality or neutrality; it is rather, a regime of law and public policy that embodies these sectarian doctrines. They shift the meaning of marriage *for everyone*. They do not expand eligibility for marriage, as supporters sometimes claim; rather, they *redefine* the institution and, strictly speaking, abolish it. The idea long embodied in our law of marriage as the one-flesh union of spouses consummated, actualized, and integrated around acts fulfilling the

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40 Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

41 Goodridge v. Mass. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003).

42 Opinion of the Justices to the Senate, 802 N.E.2d 565, 572 (2003).

43 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

44 Loving v. Virginia, 388 U.S. 1 (1967).

45 Attempts by supporters of "same-sex marriage" to draw an analogy between laws treating marriage as the union of a man and a woman and laws forbidding interracial marriages cannot be sustained. ROBERT P. GEORGE, THE CLASH OF ORTHODOXIES 88-89 (2001).

behavioral conditions of procreation, acts which are the biological foundation of the comprehensive, multilevel sharing of life that marriage is, literally is abolished.[46] The link between marriage and procreation and the nurturance and education of children in a familial context uniquely apt to serve their welfare is finally and decisively severed. And all of this is done without democratic deliberation or the resolution of disputed questions by the people acting through their elected representatives.

So there is a double wrong and a double loss. There is a crime with two victims: the first and obvious victim is the institution of marriage itself; the second is the system of deliberative democracy. But there will likely be a third victim: namely, federalism. For some same-sex partners "married" in Massachusetts will, in the nature of things, move to Indiana, and West Virginia, and North Dakota, and South Carolina, and Arizona. They will demand that these states accord "full faith and credit" to the legal acts of Massachusetts by honoring Massachusetts marriage licenses. These states will at least initially try to resist, invoking their own laws and the federal Defense of Marriage Act; but they will eventually lose. Liberal judges are determined to spread their gospel of sexual liberationism. They will strike down state and federal laws protecting the power of states to refuse to recognize out-of-state same-sex "marriages." They will stress the importance of the portability of marriage across state lines, and the need for people to be able to structure their lives on the assumption that if they are married in Massachusetts, they do not suddenly become unmarried when they visit Mississippi or move to Michigan.

Given what has become the entrenched understanding of the authority of courts exercising the power of judicial review, there is no alternative, in my judgment, to amending the Constitution of the United States to protect marriage. The Massachusetts state legislature has made an initial move towards amending the state constitution to overturn *Goodridge*, but the outcome is uncertain, and the process of amending the Constitution of the Commonwealth of Massachusetts is lengthy and arduous. Even if the pro-marriage forces in Massachusetts ultimately succeed, liberal judges in other states are not far behind their colleagues on the Supreme Judicial Court of Massachusetts. And hovering over the entire scene, like a sword of Damocles, is the Supreme Court of the United States which could, at any time, act on what Justice Scalia has rightly identified as the logic of the *Lawrence* decision to invalidate state marriage laws across the board. You may think: "They would never do that." Well, I would echo Justice Scalia: "Do not believe

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[46] *See* Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301-20 (1995).

it." They would. And if they are not preempted by a *federal* constitutional amendment on marriage, they will. They will, that is, unless the state courts get there first, leaving to the Supreme Court of the United States only the mopping up job of invalidating the Defense of Marriage Act and requiring states to give "full faith and credit" to out-of-state same-sex "marriages."

Supporters of marriage are not of a single mind about what a federal amendment to protect marriage should accomplish. In my judgment, the best approach is that embodied in the Federal Marriage Amendment (FMA) that has been proposed in the United States Senate by Wayne Allard[47] and in the House of Representatives by Marilyn Musgrave.[48] That amendment defines marriage in the United States as the union of a man and a woman; preserves the principle of democratic self-government on the issue of civil unions, domestic partnerships, and other schemes under which some of the incidents of marriage may be allocated to non-married persons; and respects principles of federalism under which family law is primarily the province of the states rather than the national government. Some conservative critics of the FMA fault the amendment for failing to ban civil unions and domestic partnerships. I myself oppose such schemes, but I do not think it is necessary or politically feasible to attempt to deal with this issue at the federal constitutional level. So long as marriage is protected by an understanding—implicit in the terms of the FMA—that states may not create "faux marriages" by predicating rights, benefits, privileges, and immunities on the existence, recognition, or presumption of sexual conduct or relationships between unmarried persons, I am content to leave the question of civil unions and domestic partnerships to the people of the states acting through the processes of deliberative democracy.

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47 S.J. Res. 40, 108th Cong. (2004) (defeated in the Senate by 50-48 vote on July 14, 2004).

48 H.J. Res. 56, 108th Cong. (2003).