The Fourth Choice

Ending the Reign of Activist Judges

by William J. Quirk

If you are looking for a reason to vote for Ralph Nader, the way both parties are handling the "gay marriage" issue should give you lots of data. John Kerry, when asked his opinion of "gay marriage," looks like a dog getting a bath, as Chris Hitchens puts it. Kerry says he personally opposes "gay marriage"—but he favors civil unions, which are exactly the same thing. The states, he says, should decide the issue, but he voted against the Defense of Marriage Act in 1996, which was specifically designed to allow each state to reject marriage licenses issued in other states. Even President Bush, who seems to have the advantage on the issue, is ill at ease. He vacillated for months and then proposed a constitutional amendment banning "gay marriage" but condoning civil unions: "The amendment," he said, "should fully protect marriage while leaving the state legislatures free to make their own choices in defining legal arrangements other than marriage." The status in other states of a New Hampshire civil union is left to the courts—the same "activist courts" who, the President said, were so irresponsible that they made the amendment necessary in the first place. Neither Kerry nor Bush has a coherent position.

How did the issue of "gay marriage" come to the fore of social and political debate? It is the last thing Americans want to think about, but the Massachusetts Supreme Judicial Court ruled in November (*Goodrich* v. *Department of Public Health*) that homosexuals have the right, under the state constitution, to marry and directed the legislature to pass laws within 180 days to accomplish that. The Massachusetts Senate asked the court if a bill giving same-sex couples the rights and benefits of "marriage" but calling their relationships "civil unions" would be good enough. The court, in February, ruled it would not: It is a "considered choice of language that reflects a demonstrable assigning of same sex, largely homosexual, couples to second-class status." President Bush called the court's February ruling "deeply troubling."

In late February, the President announced he would support a federal constitutional amendment banning "gay marriage" because "activist courts have left the people with one recourse." There is no assurance, the President added, that the "Defense of Marriage Act will not itself be struck down by activist courts." John Kerry said of the President: "He's trying to divide America . . . [he] always tries to create a cultural war." The *New York Times* editorialized that the President was putting "bias in the constitution." He was injecting "meanspiritedness and exclusion into the document embodying our highest principles and aspirations." All sides seems happily headed for another nasty, divisive culture-war battle.

Is such a battle necessary? Some on each side desire a national uniform rule either permitting or prohibiting "gay marriage." The majority of Americans (58 percent), however, believe the issue should be decided by the states. Both John Kerry and President Bush have, at times, said that it is appropriate that the states decide. What if it were possible, by a simple statute, passed by a simple majority in Congress, to assure that each state could choose for itself without fear of being overridden by a judicially imposed uniform national rule—and that no state could decide for any other? Could we just pass the statute and forget the issue (polling data show most Americans wish they had never heard of it) and move on to something else?

The answer is *Yes*, but it takes a little explaining. Last summer, the U.S. Supreme Court struck down Texas' antisodomy law, ruling that it violated personal liberty "in its spatial and more transcendent dimensions" (*Lawrence and Garner* v. *Texas*). The majority opined that homosexuals are "free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment," citing the European Court of Human Rights. Since, as the Court conceded, antisodomy laws "do not seem to have been enforced against consenting adults acting in private," it is unclear why the Court had decided to reach out and issue a ruling that was offensive to the majority of Americans. Justice Antonin Scalia, in a bitter dissent, wrote that the Court was taking "sides in the culture wars." Apparently, the Court wanted to educate and improve the country morally—to make the public aware that homosexuals are entitled to freedom, dignity, and "respect for their private lives." The Massachusetts Supreme Judicial Court took the lesson to heart in its November and February rulings.

The Supreme Court's effort to educate has been a total failure. Indeed, the more Americans have been forced to think about "gay rights," the less they have liked them. A *New York Times*/CBS News poll taken in July 2003 reported that 54 percent of Americans believe that homosexual relations should be legal. By December, that number had dropped to 41 percent. The December poll found that Americans oppose "gay marriage" by an almost 2-to-1 margin (61 to 34 percent). They also oppose civil unions 54 to 39 percent.

Do the wishes of a clear and large majority make any difference? Not if the issue stays in the federal courts. The course that "gay marriage" will follow is predictable. Within ten years, we will have a national rule requiring "gay marriage" or something only rhetorically different. First, a gay couple, "married" in Massachusetts, will move to South Carolina and insist that the state, pursuant to the Full Faith and Credit Clause of the Constitution, recognize their Massachusetts "marriage." The state, citing the federal Defense of Marriage Act (DOMA) will argue that it need not recognize the Massachusetts law. After four or five years of litigation, the Supreme Court will find

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that the Full Faith and Credit Clause trumps DOMA. If the amendment President Bush favors is adopted, the same scenario will play out with "civil unions." Proponents of traditional marriage will then put all their resources into urging Congress to propose a constitutional amendment for the states to ratify. The effort will likely fail in the Senate, where it will be vetoed by a one-third negative vote. The *New York Times*, a few days after it becomes clear that the amendment will not get out of Congress, will report a victory for "equal rights" establishing that "gays should be allowed to marry" (reprising their editorial of January 13, 2004). Around 2014, the majority of Americans will realize that, once again, it has lost. In the meantime, however, the Republican Party will have a delicious issue designed, as they say, to "energize the base." Would the base be "energized" if it understood that the Party, in 2004, had the power to give it a win?

The statutory check can act as a safety valve to relieve pressure on the Court and on society as a whole.

Are the Supreme Court's decisions the last word? What can the majority do if it believes the Court is seriously out of line—or likely to be? Most people believe there are three choices: They can grumble but accept the decision, take the easy way, decide to live with it even though they do not like it; they can try to change the composition of the Supreme Court (an approach that is indirect, takes a long time, and, if history is any guide, does not work); or they can try to amend the Constitution.

The third choice, at first glance, sounds like a reasonable approach. If the proposed change is really popular, why not amend the Constitution? Senate Majority Leader Bill Frist, after the *Lawrence* decision, proposed an amendment banning homosexual marriage. President Bush, last July, said he did not support an amendment at the moment because he was not sure it was "necessary." And, while the December *New York Times*/CBS News poll found strong support for such an amendment, it will never materialize.

The trouble with the amendment process is that Congress is the gatekeeper. Since World War II, seven amendments got out of Congress, and five were ratified. The two losers in the states were the Equal Rights Amendment and District of Columbia voting. Since the ratification of the Constitution, 10,000 amendments have been introduced, 33 have been passed out of Congress, and 27 have been ratified by the states. The casualty rate is so high because, before an amendment can be proposed to the states, it must pass two thirds of both houses of Congress. The House of Representatives, whose members are elected every two years, will approve any popular proposed amendment. One third of the Senate, by contrast, need not face the electorate for six years. Consequently, one third of the Senate can defeat any proposed amendment with a minimal risk of political retribution. If a proposed amendment gets out of the Senate, it needs to be ratified by three fourths of the states to become part of the Constitution. Three fourths of the states would almost certainly approve the amendment barring "gay marriage," but they will never get the chance, because Congress is institutionally hostile to limiting the power of any of the federal branches—which is exactly what most amendments seek to do. An amendment reversing a Supreme Court decision would, of course, be considered a sharp attack on the authority of that branch.

In recent decades, the ERA failed in the states, but most proposed amendments fail in the Senate. One-third minorities in the Senate have killed proposed amendments concerning term limits, school prayer, flag burning, busing, and a balanced budget. The states, quite likely, would have adopted those amendments if they had gotten out of Congress. The amendments may or may not be brilliant, but if three fourths of the states want to add them to the Constitution, it is hard to see why they cannot. That, however, is the nature of our amendment process. The process is so difficult that it is really a trap, wasting time and resources and, ultimately, frustrating those seeking the new amendment.

The big surprise is that the Constitution gives the majority a fourth choice. Previously known only to a few scholars, this fourth choice is a lot easier than the amendment process. Congress, by a simple statute, passed by majority vote, can effectively overturn any Supreme Court ruling. The decision itself, of course, binds the parties forever. The future impact of the case, however, is what people are worried about. Congress, under the Constitution, controls the Court's jurisdiction, and, if it believes a uniform national rule is not desirable, it can restore it to state authority. Congress could, for example, reenact the Defense of Marriage Act, restricting marriage to men and women, but adding one sentence: "This law is not subject to review by the lower federal courts or the U.S. Supreme Court." The issue would then return to the states, which is where President Bush and John Kerry, at times, have said it should be.

Article III of our Constitution provides that Congress determines the jurisdiction of the federal courts. Congress has the power to establish or abolish all federal courts except the Supreme Court, and the power to abolish includes the power to limit jurisdiction. Congress can also limit the Supreme Court's jurisdiction to "cases affecting Ambassadors, other public Ministers, and Consuls, and those in which a State shall be a party." The Supreme Court has jurisdiction in all other cases only if Congress grants it by statute. Congress can remove, as it often has, any class of case from the lower federal courts and from the Supreme Court's appellate jurisdiction. Congress can even, as it did in the Reconstruction *McCardle* case, remove the Supreme Court's jurisdiction over a case that has already been argued.

Constitutional litigation would still take place—but in the state courts. The *state* supreme courts would have the last word. The state courts naturally would consider any prior U.S. Supreme Court decisions with respect. But they would not, according to Article VI of the Constitution, be bound by them. They are bound by the Constitution, not by the decisions of the Supreme Court. Moreover, new cases would always present somewhat different facts and issues than those previously decided by the Supreme Court. Congress could always, if state-court decisions go off the tracks, restore federal court jurisdiction.

Change by the statutory route is straightforward. If the op-

ponents of a Supreme Court ruling can get Congress to enact a law removing federal-court jurisdiction and Supreme Court appellate jurisdiction, they can—by moving future constitutional litigation to the state courts—possibly change the outcome. They have at least changed the forum to one closer to home. If the opponents of a Supreme Court ruling cannot get a law passed to limit the Court's jurisdiction, they should relax, realize they are a minority, and attempt to persuade others to join them.

All sides should benefit from the availability of a democratic forum for debate. The Supreme Court would benefit, since it could no longer be accused of taking "sides in the culture war." Traditionally, abortion in the United States was a state issue. In 1970, New York, by a close vote, legalized abortion. By 1973, when the Supreme Court intervened in *Roe* v. *Wade*, 21 states had repealed or limited their criminal laws against abortion. The democratic progress toward consensus, however, stopped when the Court made the issue legal rather than political. Subsequently, because of the judicial setting, the positions of both sides stiffened into nonresolution. The travail that has followed could have been avoided if both sides had understood that the debate could be shifted from the courts to the Congress. Congress *today* could restore the issue to the states, which the enemies of *Roe*—such as the Republican Party—say they want. That raises an interesting question: Since the Republicans have a majority in both houses, and a President ready to sign the act, why do they not do it?

The Antifederalists, in our great 1787-88 constitutional debates, believed that a federal court would slowly, but steadily, enhance the powers of the national government of which it was a part. The other two federal branches, they also believed, having benefitted from the Court's centralizing rulings, would give the Supreme Court such a free rein that it might, in time, believe itself (in the words of the Antifederalist Brutus) "independent of Heaven itself." That all happened, as predicted.

As time went by, the representative branches discovered a new use for the Court. The hot-button cultural issues—so hazardous to a representative's reelection—could be shifted to the Court, which did not have to stand for reelection. Political-cultural issues are easily turned into legal issues. By this arrangement of convenience, the Court gains a lot of power as well as celebrity status. Public outrage, to them, is just water off a duck's back. The shift also worked very well for the representatives who, for practical purposes, are reelected for as long as they want the job. This, however, largely drains the political process of purpose and has brought the country into its present comical situation—where, if a political issue is at all controversial (campaign finance, school vouchers, status of foreigners captured in battle, *etc.*), the political branches may *propose*, but the last word, to approve or disapprove, is given by the unelected Court. This is not the constitutional system the Framers created for us.

We do not need to let the Supreme Court decide another issue in the culture war. The Constitution provides an easy, democratic check on the Court. The statutory check, as it becomes better known to the people, can act as a safety valve to relieve pressure on the Court and on society as a whole. The majority, as it begins to understand the fourth choice, can ask their representatives to start deciding hard issues again. Social change in a democracy, after all, should come through the give and take of the political process rather than through the decisions of nine wise people. c

A League of Bushes

by Ben C. Toledano

"A politician . . . one that would circumvent God."
—William Shakespeare

American Dynasty: Aristocracy, Fortune and the Politics of Deceit in the House of Bush
by Kevin Phillips
New York: Viking Press;
397 pp., $25.95

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Initially, Kevin Phillips intended his new book, *American Dynasty*, to be a study of

> the Bush-related transformation of the U.S. presidency into an increasingly dynastic office, a change with profound consequences for the American Republic, given the factors of family bias, domestic special interests, and foreign grudges that the Bushes, father and son, brought into the White House.

As his extensive research progressed, the scope of his effort broadened considerably and became a careful study of four generations of the Bush family's deep and active involvement in "crony capitalism," the petroleum business, national-security and intelligence organizations and operations, investment banking, influence-wielding and -peddling, and the incestuous relationship between industry and government, particularly as it involves military preparedness and actions.

Old habits die hard, especially where the use of moral terminology is concerned. In the 1850's, James Smith Bush, George W.'s great-great-grandfather, graduated from Yale and became an Episcopal minister in New York. There is limited reference to the Reverend Bush in Phillips' book, but we have every reason to believe that he was a moral and spiritual man. He was the last male member of the Bush family not to devote his life to business, finance, oil, money, and politics. Nonetheless, the four generations that succeeded him have continued to stress their integrity in the most moral of terms. Since they ask us to believe that they are men committed to honor, integrity, and duty, it is fair to look into how well they have succeeded. Phillips writes:

H. Ward Sterett

> Before the election of 1988, George H.W. Bush had visited that year's Christian Booksellers' Association convention in Dallas to talk about *George Bush: Man of Integrity*, a book that discussed the family's close relationship with evangelists Billy Graham and Jerry Falwell. In 1995, at George W.'s gubernatorial inauguration, Billy Graham had referred to "the moral and spiritual example his mother and father set for us all."

Graham, that sycophant and spiritual advisor to any U.S. president willing to use him, has played an important role in the Bush saga. During the summer of 1985, Graham was visiting the Bushes at Kennebunkport and was able to help bring the lost soul, George W., "to God and salvation." That was the beginning of what we might call a marriage made in Heaven. Most of us are familiar with George W.'s "born again" experience; however, not until I read Phillips' book was I aware of Number 41's transformation.

> The son was not the only family member listening to the Religious Right. Campaign officials who shrugged off George W.'s influence on his father were ignoring the transformation of George and Barbara Bush. By the end of the summer of 1986, they had invited Jim and Tammy Faye Bakker for a visit, telling them how much they enjoyed watching *The P.T.L. Club* on television. The vice president also appeared at Jerry Falwell's Liberty University, and discussed his own born-again "life-changing experiences" in a video that was shown to evangelical leaders.

It seems, however, that the Lord spoke to George the Father in the most universal of terms, certainly broad enough to include Sun Myung Moon's Unification Church. Notwithstanding Big George's avowed acceptance of Jesus Christ as his

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