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The Culture of Freedom and the Future of Marriage

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"It is not controversial to contend that in the United States, constitutional law serves as a decisive battleground in the struggle over freedom's moral and political meaning," asserts Peter Berkowitz. "It is another matter to assess the impact of the battleground on the battle, to clarify the current balance of power, and to anticipate the battles to come."

Berkowitz, a professor of law at George Mason University School of Law and a fellow at Stanford University's Hoover Institution, addresses the future of the U.S. Supreme Court and the concept of freedom in a fascinating essay published in the current issue of *Policy Review*. In "The Court, the Constitution, and the Culture of Freedom," Berkowitz argues that an expansive concept of human liberty lies behind the Supreme Court's tradition of jurisprudence. He goes on to argue that this progressive understanding of human freedom is likely to mean that the nation's high court will one day decide that access to same-sex marriage is nothing less than a right guaranteed under the U.S. Constitution.

Berkowitz begins by establishing that, "To say of some law or action or institution that it is constitutional is not to offer very high praise." After all, the constitution has been understood to guarantee an individual's right to various actions and expressions that the majority would find distasteful at the least. The U.S. Constitution is the nation's supreme law. "Because it is a liberal constitution, one whose first purpose is to protect personal freedom, the supreme law of the land avoids taking a stand on the supreme issues," Berkowitz explains. "It does not aim to instruct people on the virtues, or the content of happiness, or the path to salvation. That's not because it supposes that virtue is irrelevant, happiness has no content, or salvation is a delusion. Rather, the Constitution presupposes that the people, as individuals and through the various associations and groups they form, will pursue these goods. And it lays down a framework within which we, as a people, can maintain a society where each has the liberty to pursue, consistent with a like liberty for others, virtue, happiness, and salvation in the way each regards as fitting."

That said, the role of the U.S. Supreme Court in interpreting the Constitution represents an enormous power to reshape the entire culture. Berkowitz observes that the vast majority of formal written opinions handed down by the Court are of little interest to the big questions of life. Most deal with technical questions and matters of interest only to practicing lawyers and the parties directly related to the cases.

Nevertheless, many of the most divisive moral, political, and social questions of our times have been decided, at least with respect to the law, by the U.S. Supreme Court. The Court has exerted a vast influence over American life, and it threatens to expand this reach even farther.

Berkowitz understands that the textual issue at stake in the Court's most controversial decisions tends to be located in "the grandest clauses of the Fourteenth Amendment." These clauses include the due process clause which declares that no state "shall deprive any person of life, liberty, or property, without due process of law." Similarly, the equal protection clause declares that no state may "deny to any person within its jurisdiction the equal protection of the laws." The original purpose of the Fourteenth Amendment was to protect African Americans against denial of their rights by state governments. Nevertheless, the Supreme Court has expanded these clauses into an entire culture of freedom—and that culture of freedom has been radically expanded over the last several decades.

Setting aside that historical context, Berkowitz argues that “there are plausible arguments for deriving substance, or particular rights, from the due process and equal protection clauses.” He acknowledges that the Supreme Court, at least at first, was reluctant to derive such rights from these clauses. He cites an 1872 case in which the Court declared that the expansion of rights through these clauses was forbidden. But, a little more than thirty years later, the Court changed its mind, setting a precedent for future courts to follow.

Berkowitz then considers the implications of this shift in the Court’s decision-making by looking at the issues of abortion, affirmative action, and same-sex marriage.

Berkowitz’s analysis of the Court’s abortion cases is both important and insightful. He carefully traces the Court’s decisions related to matters of sex and reproduction, observing that a majority of justices determined that no law could be judged constitutional “which denied individual liberties the Court regarded as fundamental or essential to the very idea of freedom under law.”

Berkowitz looks closely at the Court’s 1973 decision of *Roe v. Wade*. Interestingly, Berkowitz asserts that both sides in the abortion debate framed their arguments in terms of freedom and liberty. Both camps are “pro-personal freedom” he asserts, and the competing arguments on the question of abortion are framed in terms of individual freedom. On the one hand, proponents of abortion argue for a woman’s freedom to abort an unwanted pregnancy. Opponents of abortion argue for the freedom and liberty rights of the unborn child. Berkowitz argues that in *Roe v. Wade* and successive cases (especially *Planned Parenthood v. Casey*), the Court’s majority has tried to strike a balance between these freedoms.

Berkowitz concedes that *Roe* “has been subject to devastating criticism,” but he goes on to argue that the decision still defines constitutional interpretation.

The *Roe* decision was an expansion of the concept of freedom the Court declared in *Griswold v. Connecticut* in 1965. In that case, Justice William O. Douglas declared that the Constitution guarantees “a zone of privacy” for married couples. Later decisions expanded that zone of privacy to individuals. But if *Roe* expanded *Griswold*, *Casey* expanded *Roe*. Berkowitz cites the oft-quoted expression found in Justice Anthony Kennedy’s majority opinion. “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life,” Kennedy asserted. This represented a sweeping and virtually limitless claim of individual liberty—a claim the Court would certainly find impossible to imply in other areas of the law.

As Berkowitz explains, “For what the Court appeared to be saying was not only that each individual had the right to determine for himself or herself what constituted personhood and the meaning of life, but also that the supreme law of the land had an obligation to give legal effect to each individual’s determination.” Even as Berkowitz acknowledges the impossibility of applying this principle wholesale, he asserts: “That such a notion received expression at all suggests the direction in which the justices’ thinking about autonomy is headed.”

Next, Berkowitz looks at the Court’s decisions in the area of affirmative action, arguing that the Court has once again attempted to expand freedom. He insightfully observes that liberals and conservatives often switch arguments depending on the issue at stake. In the Court’s most recent decisions concerning affirmative action, the justices have chosen the most expansive definition of human freedom, even as other legitimate conceptions were available. “That a Court on which sit seven justices appointed by conservative presidents made these choices is testimony to the power of the progressive interpretation of liberalism,” he asserts.

Berkowitz then turns to look at the issue of same-sex marriage. As he observes, “fifteen years ago, very few gay men or lesbians, whatever other grievances they harbored, thought or felt themselves to be deprived of civil rights because the law restricted marriage to a man and a woman. Nor did it occur to their fellow citizens that such a right existed.”

Nevertheless, Berkowitz asserts that “today a substantial and growing minority of the public supports same-sex marriage, and even more favor civil unions.”

In considering the issue of same-sex marriage, Berkowitz argues that opponents are now at a unique disadvantage. As he sees it, opponents of same-sex marriage will find themselves defenseless before the U.S. Supreme Court because the case against same-sex marriage is not deeply rooted in an expansion of liberty. As Berkowitz traces the trajectory of the Court, he suggests that same-sex marriage becomes something of an inevitability, given the Court’s previous decisions.

Of course, he can point directly to the Court's 2003 decision in *Lawrence v. Texas*. In a scathing dissent, Justice Antonin Scalia declared that the majority's decision effectively meant the end of all morals legislation in the nation. Berkowitz basically agrees with Scalia's judgment and goes on to suggest that there is no reason to believe that the Supreme Court will alter its trajectory.

As he sees it, should the issue find its way to the Supreme Court, "the ability of proponents of same-sex marriage to make their case straightforwardly in the language of freedom and the inability of opponents to frame their legitimate concerns in that language will likely result in same-sex marriage's being enshrined in the supreme law of the land." We should note that Berkowitz blames conservatives for creating the context in which such claims for liberty can be made. He reasons that conservative acceptance of a supposed constitutional right to contraception, of cohabitation before marriage, and of no-fault divorce undermines any credible claim that marriage must be a heterosexual institution defined by the capacity for human reproduction.

"The American constitutional order speaks the language of freedom," Berkowitz summarizes. "All of the great moral questions of the day eventually get translated into that language and partisans must turn it to their advantage, or almost certainly their cause will go down to defeat."

At this point the Christian worldview offers a much-needed corrective. The Bible grounds human freedom not in a sweeping claim of human autonomy, but in the fact that human beings are made in the image of God. Thus, the biblical concept of freedom comes with limits set from the very beginning by our Creator. We are not given the right, as Anthony Kennedy so sweepingly expressed, to define our own concept of existence "and of the mystery of human life."

Peter Berkowitz's analysis of the U.S. Supreme Court, the Constitution, and the culture's commitment to an ever-expanding understanding of freedom should help Christians to think seriously about the true nature of freedom and its limitations. His article will certainly inform the way we understand today's cultural conflicts over issues such as abortion and same-sex marriage—but it should also serve as a catalyst for how we should understand a Christian description of human freedom. As this article makes clear, we now face two rival visions of human freedom and its meaning. The future of our culture depends upon which vision shapes the policies of the future.

