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A Libertarian Case for Marriage?

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It was inevitable that these disparate groups would come into conflict at some point, when the animating principles that govern each group's worldview compete at the level of public policy and public debate. Nothing exposes the basic conflicts between moral conservatives and libertarians like the issue of sexuality.

Thus, the issue of same-sex marriage threatens to divide the conservative movement, with moral conservatives contending for the sanctity of marriage as the society's most essential institution, and libertarians arguing for the unfettered freedom of individuals to engage in whatever consensual sexual activities they may choose, without fear of government interference.

The classic libertarian case for the legalization of same-sex marriage came in the form of a commentary by Richard A. Epstein published in the July 13, 2004 edition of *The Wall Street Journal*. Epstein, a well-known and respected Professor of Law at the University of Chicago, also serves as a Senior Fellow of the Hoover Institution, an institution that has welcomed both moral conservatives and libertarians. Epstein sees the controversy over same-sex marriage as driving "an unhappy wedge between the majoritarian and libertarian wings of conservative legal thought." He argues that conservatives, following their usual instincts, should be arguing for minimal government interference in the lives of individual citizens. Speaking as an advocate for constitutional libertarianism, Epstein argues that the state "must always put forward some strong justification to limit the freedom of association of ordinary individuals." Of course, he expands this principle to the right of persons to associate themselves in the institution of marriage, regardless of gender.

In the end, Epstein argues that conservatives and libertarians should simply decide to "live and let live," allowing same-sex marriage as a concession to the concept of individual liberty. As he sees it, "All gay-marriage advocates want to do is to enjoy the same rights of association that are held by other people." He goes further to argue that the state has no compelling interest in defining marriage as an exclusively heterosexual institution, since the state must make such arguments "without resort to claims of public morals." In one astounding statement, Epstein declares: "The claim for same-sex marriage is no weaker than any other claim of individual rights on personal and religious matters." Any other rights?

Professor Epstein's article is a classic statement of the libertarian position. "The path to social peace lies," he argues, "in the willingness of all sides to follow a principle of live-and-let-live on deep moral disputes."

More recently, in the current issue of *Policy Review*, Jennifer Roback Morse, also a Research Fellow at the Hoover Institution, answers Epstein with a libertarian argument against the legalization of same-sex marriage. Morse, whose work

in defense of the family is well recognized, sees marriage as far more than a voluntary contract uniting two individuals in an economic unit. "Marriage is a naturally occurring, pre-political institution that emerges spontaneously from society," she asserts. Nevertheless, "Western society is drifting toward a redefinition of marriage as a bundle of legally defined benefits bestowed by the state. As a libertarian, I find this trend regrettable."

Morse's concept of libertarianism sees individual liberty as grounded in an organic set of relationships. Thus, an "organic view of marriage is more consistent with the libertarian vision of a society of free and responsible individuals, governed by a constitutionally limited state. The drive toward a legalistic view of marriage is part of the relentless march toward politicizing every aspect of society."

In her article, entitled "Marriage and the Limits of Contract," Jennifer Roback Morse refutes the notion that libertarianism asserts no foundation for the very liberties it seeks to espouse and protect. She rightly sees the encroaching state as the most significant threat to individual liberty, and, with other libertarian theorists, she proposes a view of society that recognizes the fact that "free and responsible individuals" must enjoy protection from the over-weening power of the state—protections precisely like marriage.

Morse sees the debate over same-sex marriage as "a parenthetical issue" in the more basic controversy over "the meaning of love, marriage, sexuality, and family in a free society." The push for gay marriage is simply "part of this ongoing process of dethroning marriage from its pride of place."

Of course, a debate over marriage requires some stable definition of the term. Morse defines marriage as "a society's normative institution for both sexual activity and the rearing of children." She recognizes that many on the left see no need for such an institution in the first place, arguing that no single arrangement "should be legally or culturally privileged as the ideal context for sex or childbearing."

In framing her argument, Morse reminds libertarians of their concern for the sanctity of economic contracts in the marketplace. She urges her fellow libertarians to see marriage as deserving of the same "respect and attention" libertarians grant to the market. Her point is clear: "My central argument is that a society will be able to govern itself with a smaller, less intrusive government if that society supports organic marriage rather than the legalistic understanding of marriage."

When Jennifer Roback Morse speaks of an "organic" understanding of marriage, she points to the fact that marriage "emerges spontaneously from society." She paints a picture of a society in which persons of the opposite sex are attracted to one another, join themselves in marriage, procreate and raise children. "The little society of the family replenishes and sustains itself. Humanity's natural sociability expresses itself most vibrantly within the family. A minimum-government libertarian can view this self-sustaining system with unadulterated awe."

Without doubt, the Christian argument for marriage goes far beyond the claim that the institution "emerges spontaneously from society." After all, we believe that marriage is God's gracious gift, the central institution for human happiness, and a covenant that displays His own glory in the midst of creation. At the same time, we can appreciate Morse's insistence that marriage is not the creation of government. "Government does not create marriage any more than government creates jobs," she insists. Though government may claim a power to create or destroy marriage, Morse argues that marriage, as an organic institution, predates government and claims a higher authority than the state.

By contrast, "The new idea about marriage claims that no structure should be privileged over any other. The supposedly libertarian subtext of this idea is that people should be as free as possible to make their personal choices. But the very nonlibertarian consequence of this new idea is that it creates a culture that obliterates the informal methods of enforcement."

Though the state does not create marriage, it does bear a responsibility to respect and to protect the institution. As Morse understands, the state cannot assume "that any laws the state happens to pass will work out just fine." A disruption or subversion of marriage can lead to social chaos. Just ask the social engineers who have tried to subvert marriage elsewhere.

Sex is central to marriage, and Morse asserts that the sexual urge is what first drives individuals to consider marriage, and then to accept its responsibilities. A society that would liberate the sexual urge from the constraints, weakens its own foundation.

In particular, Morse wants to warn her fellow libertarians that the destruction of marriage—a necessary consequence of adopting same-sex marriage—will invite the state to extend its reach into the most intimate realm of private affairs and to assume the duties and privileges that should belong to marriage and the family. “The alternative to my view that marriage is a naturally occurring pre-political institution is that marriage is strictly a creation of the state,” she acknowledges. “If this is true, then the state can recreate marriage in any form it chooses. Implicit in this view is the decidedly non-libertarian view that the state is the ultimate source of social order.”

Jennifer Roback Morse is on to something of great importance here. She recognizes what so many of her fellow libertarians ignore or miss. Once marriage is defined as nothing more than a creation of state power, the state can manipulate that institution to its own ends. Furthermore, Morse recognizes that many on the left see the government, rather than families, as the first resort in the provision of social services and in the raising of children. Once marriage is destroyed or marginalized as a mere creation of the state, the state can take on its privileges and assert its powers.

Morse also recognizes that “the deconstruction of marriage into a series of temporary couplings with unspecified numbers and genders of people” has been made possible only by the language of individual choice and the concept of personal autonomy. As she recognizes, such rhetoric “has a powerful hold over the American mind.” Nevertheless, she is brave to resist this tide. “It is simply not possible to have a minimum government and a society with no social or legal norms about family structure, sexual behavior, and childrearing. The state will have to provide support for people with loose or nonexistent ties to their families. The state will have to sanction truly destructive behavior, as always. The destructive behavior will be more common because the culture of impartiality destroys the informal system of enforcing social norms.” As she concludes, “A free society needs marriage.”

Christians hold to an even deeper understanding of marriage—one that roots the institution in something deeper than “organic” vision. Nevertheless, Jennifer Roback Morse’s arguments represent a brilliant and useful refutation of precisely the sort of libertarian arguments we now confront in the public square. Her article deserves careful attention from all who value and honor the institution of marriage. We can extend full agreement to her claim that “a free society needs marriage.” To that we must add what we also know—humanity needs marriage, by God’s design.

