GAY MARRIAGE AND BURKEAN CONSERVATIVES

By Jonathan Rauch

Gay couples have tried to marry since 1970, but they got nowhere. Mainstream gay-rights organizations declined to take up the cause, which in any event seemed hopeless. The issue did not burst into the national agenda until the 1990s, when it became apparent that Hawaii’s Supreme Court might order gay marriage. Congress reacted with the Defense of Marriage Act, which declared that no state need recognize any other state’s same-sex marriages, and which defined marriage for federal purposes as a union of one man and one woman. Hawaii then backed down, and the issue receded. The real explosion came in 2003 and 2004, when the U.S. Supreme Court overturned sodomy laws and the Massachusetts Supreme Court allowed gay marriage. The result was a firestorm.

As it happened, this eruption occurred when conservatism itself had entered a period of disorientation and self-doubt. Politically speaking, conservatives’ problem was that their coalition was falling apart. The dissension has many elements, but for my purposes, suffice it to say that three strands, long braided together, were coming undone. Traditionalists, many but not all of them faith-based, cared about defending what they believe is a fixed moral order, and were not averse to using government power to reverse the misguided advances of the cultural left (advances, they correctly believed, which government power has done much to assist). Libertarians, generally secular, cared about restricting the power of government. They stood with traditionalists insofar as both opposed the statist (as they saw it) incursions of the big-government left, but they parted ways when it came to traditionalist social engineering.

Traditionalists had a very simple relationship with gay marriage: they hated it. Now, there is a traditionalist case for same-sex marriage, one which sees marriage’s deepest roots in its function rather than its boundaries, and which emphasizes the desire of marrying gay couples to carry forward the ancient tradition rather than to upend it. In fact, I subscribe to this case. But it is irrelevant for the purposes of this discussion because it got no traction at all with traditionalists. As they saw things, the concept of man-marries-man or woman-marries-woman was an egregious insult to the natural order, and the attempt to impose it by court order was a declaration of total war by the cultural left.

Libertarians, by contrast, had not much of a relationship with gay marriage at all. Their worry was about containing government power and protecting individual liberty, and it was not clear what gay marriage had to do with that.

A third school was initially quieter than either of the other two. These were incrementalists or, as I’ll be calling them, Burkeans. Gay marriage cuts to the heart of the Burkean brand of conservatism, but which way does it cut? This is the group I want to focus on, because this is the kind of conservatism with which I am in sympathy, and because these are the kind of conservatives who hold, as it were, the swing vote—
speaking, as they do, for the millions of compassionate but cautious denizens of the center and center-right who will ultimately decide the issue.

THE BURKEAN DILEMMA

One could write long treatises trying to define what I am calling Burkean conservatism (and Edmund Burke himself was a complicated figure). But here I will settle for saying that the Burkean temperament—for it is much more a temperament than an ideology—values continuity and tradition because they provide life with stability; appreciates institutions and norms because they provide life with structure; and respects the outcomes of gradual, bottom-up social evolution as revealing more about true human needs and capacities than humans often know themselves. Burkeans are especially wary of utopian social engineering, the characteristic program of the egalitarian left. Aspirations to remake human nature or human society along idealistic or rationalistic lines are doomed to fail at great cost, Burkeans believe. As Karl Popper once put it, “The attempt to make heaven on earth invariably produces hell.”

This is a distinctively conservative frame of mind, but it is not reactionary. For, wary as they are of radicalism, Burkeans are not opposed to change—not even, necessarily, top-down change. The Burkean outlook takes individual rights seriously and understands that social order serves no purpose if its result is oppression, immiseration, or the stunting of the human spirit. It also understands that social stability, far from being endangered by institutional change, positively depends upon it. Burkeans no more believe in a perfect status quo or an idyllic past, a utopian template to be returned to, than they do in a perfect revolution or an ideal human order, a utopian template to be progressed to. For them, the question is not whether society changes but how. The question is, more specifically: does society change in ways which maximally reconcile social order with individual liberty, or in ways which are heedless of either or both? Inherently, to be a Burkean is to perform a balancing act, which is what gives the philosophy both its complexity and its suppleness.

Now, for Burkean conservatives same-sex marriage is a particular conundrum because it presents so many competing narratives and so many uncertainties. In the Jonathan Rauch narrative, for example, same-sex marriage is a Burkean no-brainer. It is good for social order because it provides gay couples with caregivers and helps them build stable families that are integrated into their communities. Why, after all, would anyone want same-sex couples to raise their children out of wedlock? How can society possibly benefit from denying these couples (and their kids) the manifold increases in health, economic security, and happiness which marriage brings? Why not tie them to each other and their communities? Moreover, in the Rauch narrative, gay marriage also advances the causes of equality, liberty, and individual dignity. And still more: given the ways in which marriage has changed over the past century, gay marriage, in the Rauch view, is a natural, bottom-up evolution, whose deep social logic is revealed in the multiple ways in which gay couples are already acting and being treated as if married. On this narrative, what is not to like?
But then there is the Maggie Gallagher narrative, in which same-sex marriage is also a Burkean no-brainer, but of the opposite kind. In the Gallagher narrative, same-sex marriage breaks decisively with the millennia-old tradition that identifies marriage with heterosexuality and, through heterosexuality, with procreation. Never mind what else has happened to marriage before now; once gay marriage is socially and legally accepted, marriage’s ability to confer unique status on mother-father families will be shattered forever. Moreover, in this narrative, comparatively few real-world gay couples want marriage enough to avail themselves of it when it is offered; the demand for gay marriage has more to do with the efforts of egalitarian activists than grassroots couples. And, in the Gallagher story, an incremental or organic change is the last thing gay marriage is. Rather, it represents a sharp discontinuity, one which admittedly accords with some recent, individualistic notions of marriage but which scorns and shreds marriage’s much older, deeper logic—as witness the very fact that so many Americans, even today, regard the very concept of “gay marriage” as oxymoronic, something which law can create only in name, never in fact.

Confronted with these two starkly opposed narratives, what’s a Burkean to do?

Appropriately enough, what I think is the right answer—the most truly conservative answer, from a Burkean point of view anyway—has emerged not from political activism or academe but from the bottom up: that is, from the unfolding practical approach taken by the American public. This probably needs some explaining.

Right off the bat, the political activists involved in same-sex marriage eschewed Burkean principles, the left explicitly, the right implicitly but no less decisively. The left, of course, wanted maximal change as quickly as possible, in the form of nationally recognized gay marriage achieved through litigation. For reasons that need no elaborating, this way of getting to gay marriage would be a Burkean nightmare. Even a Burkean supporter of same-sex marriage, someone sympathetic to the activists’ cause (as I am), would fear (as I do) that so abrupt and heavy-handed a means would undermine the desired end by fomenting a fierce backlash and making gay marriage a bone of national political contention for decades to come—if it did not produce a federal constitutional amendment banning gay marriage for good.

The right, on the other hand, moved very quickly to its own maximalist position in the form of just such a constitutional amendment. The Federal Marriage Amendment, as it was initially called (it changed names later on), would outlaw same-sex marriage on every inch of American soil, permanently overruling any state or community that might want it. This may have been conservative from a traditionalist point of view, inasmuch as it sought to restore the status quo ante and engrave it in stone. But from a Burkean point of view it was no better than the leftist version of maximalism.

For one reason, the federal amendment banning gay marriage was preemptive in intent. Its stated rationale was to prevent the federal courts from imposing same-sex marriage on an unwilling nation, but of course the federal courts had done no such thing, and there was no sign that they intended to. A hallowed doctrine of constitutional conservatism—
the hallowed doctrine, really—is that if it is not necessary to amend the Constitution, it is necessary not to amend the Constitution. Self-described conservatives’ willingness to junk this principle was surprising and could set a precedent they might live to regret.

No less important, Burkeans understand that law can help manage social change but cannot prevent or repeal it. Writing a flat prohibition on gay marriage into the Constitution would not stop the emerging social equality of gay couples or reverse the rapid trend toward formation of gay families. Nor would it change the fact that a growing number of Americans, especially younger Americans, regard the denial of marriage to gay couples as a form of discrimination. Preemptively ruling in gay marriage might have all kinds of unforeseen consequences; but so might preemptively ruling it out. Instead of protecting the dignity of marriage, the real-world effect of a Federal Marriage Amendment might be to identify the institution of marriage with invidious discrimination in the minds of generations to come—this at a time when persuading young people of marriage’s value and relevance is already hard enough. And the demand for something like marriage for gay couples isn’t going away. The result of ruling out marriage for these couples might be to rule in alternatives such as marriage-like benefits for cohabiting couples—this at a time when the last thing marriage needs is a host of legally and socially sanctioned competitors.

Finally, a core element of Burkeanism, and in my own view its most appealing trait, is its deep appreciation of how ornery and unpredictable the real world is. We never know in advance what kind of social arrangements will work; we learn by experimenting and holding on to what succeeds. A preemptive nationwide ban on gay marriage, of course, would foreclose that process and prejudge the outcome. The country would never learn whether the Rauchian or the Gallagherian narrative was closer to the truth, a question which can only be settled empirically.

I believe the rush to amend the Constitution was symptomatic of the tendency toward radicalism which has dug American conservatism into its current hole. Admittedly, modern conservatives should feel no obligation to accept the whole progressive superstructure—now, often, a reactionary-liberal superstructure—just because it is there. But the idea of preemptively amending the Constitution against gay marriage was part and parcel of the revolutionary conservatism which dreamed of making government small enough to “drown in a bathtub,” as one prominent conservative activist put it, and which dreamed of transforming the Middle East with a surgical military intervention.

Reality, in any event, has had other plans. While polarized partisans of the cultural left and right were busy trying to push the country toward an all-in or all-out approach to gay marriage, the country was taking a very different course. It was looking for an incrementalist path that avoided all-in wagers and irrevocable turns.

Thus Massachusetts adopted same-sex marriage in 2004: by a judicial fiat, to be sure, but one which the legislature and electorate have proven unwilling to overturn. Connecticut, in 2008, likewise legalized same-sex marriage by judicial decision. Several other states are trying marriage-like arrangements for gay couples. Most states, on the other hand,
have banned gay marriage, and many have banned civil unions. The federal Defense of Marriage Act and longstanding constitutional doctrine, meanwhile, sequester the experiments by letting the states go their separate ways. This makes for some interstate confusion, especially regarding gay divorce, but it has the important advantage of letting experiments unfold in the places that are most hospitable to them, without betting the whole country.

Meanwhile, the national consensus has moved in the direction of civil unions for gay couples. Civil unions confer all or most of the legal incidents of marriage, but they withhold the word “marriage” and are treated as a formally distinct status. Gay opinion regards them as second-class citizenship, but they are a lot better than nothing, and they have the advantage of conferring most of the state-level protections and prerogatives of marriage with little or none of the controversy.

Neither local experimentation nor civil union is a perfect or foolproof stratagem. From a gay point of view, a marriage that is recognized in only one state, and not at all by the federal government, is not a full marriage at all. It leaves gay spouses without immigration rights, Social Security survivor benefits, protections against mutual incrimination, marital tax treatment, and many, many other federal incidents of marriage. Civil unions are not without risk, notably that they may help legitimize alternatives to marriage (though I am much less worried about this than I used to be, because it seems to be a non-issue in states with civil unions). In my own ideal world, the country would move faster toward full marriage rights—and full marital responsibilities—for gay couples.

But the quintessence of Burkeanism is that we do not live in an ideal world, and we should be thankful that we do not. On the whole, the path the country is taking is a grand vindication of the virtue of muddling through. Localizing gay marriage has taken the edge of hysteria off the issue and bought the country the time it needs to deliberate. Experimentation offers the opportunity to learn from experience, which is the only way social learning happens. Civil unions provide a way to give gay couples at least some of what they need and could easily be converted into marriages if society evolves in that direction. When all is said and done, the country adapts to a changing reality without rushing ahead of it.

So the question is not whether same-sex marriage is a conservative policy, but whether it is being implemented in a conservative way. In America, the answer is yes. Our practical country is, it turns out, more truly conservative than its avowed conservatives are.

Which, come to think of it, should not be all that surprising. You do not get to be the oldest yet most vigorous democracy in the world without a lot of Burke in your cultural DNA.