

What Alabama's Roy Moore Got Right

By BRIAN EPSTEIN FEBRUARY 16, 2015 3:30 AM 481 Comments



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Roy Moore, the chief justice of the Alabama Supreme Court, [escalated the conflict over same-sex marriage](#) last week, when he ordered probate judges in the state not to issue marriage licenses to same-sex couples, even after a federal judge struck down Alabama's ban on the practice. In a recent radio interview, Moore said that he would continue to resist federal intervention: "There's nothing in the U.S. Constitution that authorizes the Supreme Court of the United States or any federal court anywhere to misinterpret the word marriage to include something outside that." The government, he added, does not have the power to "redefine marriage."

Moore may seem, to the progressively minded, little more than a provocative and out-of-touch bigot. That he surely is. Still, he does know how to seize a headline. And with this issue, he is also displaying mastery of an age-old trick: cloaking a lie in the truth.

Because Moore is right: we *are* redefining marriage. And, strictly speaking, he is also right that courts do not have the power to accomplish this redefinition.

The phrase "redefining marriage," of course, is conservative political code. Those words signal the following claims: Marriage is defined as traditional marriage, that is, between a man and a woman. If the Supreme Court were to allow same-sex marriage, that would be a change in the definition.

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And if you concede that, then Moore's overall view seems almost to follow as a matter of logic. We can't just change definitions at will: that's not how language works. And certainly, a court has no power to change the definitions of words by fiat. At best, the courts can introduce a new word to refer to this new form of marriage. Maybe they can call it "schmarriage." If they do that, they can attach whatever legal rights they want to it. Just don't call it marriage.

The common progressive reaction is simple: reject the phrase "redefining marriage." It is biased, according to this reaction, to take marriage to be defined as traditional marriage. If the Supreme Court sanctions same-sex marriage, it will be expanding the class of people to whom an existing institution applies. When women received the right to vote, that did not redefine "voting": it was just expanding the same institution to include more people. When a state raises the drinking age, that does not redefine "drinking." Similarly for marriage.

But it's all a setup. In this debate, the progressives lose, because their reaction is a mistake. Marriage is not like voting or drinking. In some circles, it plays better to tell ourselves that we are doing nothing more than taking an existing institution and making it more fair. Deep down, though, we know that this is not accurate. The old institution of marriage does not treat people equally and with respect. That is why we as a society are replacing it with a new and more equal institution. This is a good thing, whatever Moore says. Progressives should be honest about this fact, and embrace it.

Another thing we should be honest about is that courts do not create institutions. Here Moore is also right, strictly speaking. The courts do not have the power to redefine marriage because it is society as a whole that builds institutions. The courts are one contributor among many.

Our best theories of institutions support these conclusions. First, we should clarify that the issue is not mostly about language or definitions. We can all agree that the word "marriage" refers to a particular social institution. The question at hand is not about the word, but about the institution that the word refers to. Is the institution that includes same-sex couples the *same* institution as before, or is it a newly created one? To resolve this, we need to think about the nature of institutions.

What, then, is an institution, and how do we draw its boundaries? How far can a particular institution bend? Institutions are a product of society, so if we want answers about how we carve them out, we need to look at society. We need to answer questions like these: How do people typically understand the institution? What have they actually done, historically, in their practices? (How people have acted can differ from how they *think* they have acted.) What are the roles and functions the practices play in the society? These kinds of social facts anchor the institutions we have.

How the courts interpret the law changes what the law is. But their greater power is indirect: Their decisions affect what people believe.

For marriage, the answers to all these questions have been changing over the last few decades. But the old institution of marriage was anything but gender-neutral. A century ago, most Americans would not have regarded same-sex marriage as conceivable. If you could rewind to 1915 and ask people their understanding of marriage, they might say something along the lines of that year's edition of Webster's: "Marriage, n., 1. The act of marrying, or the state of being married; legal union of a man and a woman for life, as husband and wife." The widespread understanding of marriage also had much more to do with religion than it does today.

Historical actions and practices have also been almost exclusively restricted to opposite-sex marriages. Then there are the roles or functions of marriage.

Many recent legal arguments turn on whether same-sex marriages serve particular social functions: to reinforce stable households, to mark social respect for a couple, and to give protection to children and caregivers. But if we are considering the institution of marriage, we shouldn't overlook less appealing social functions as well. For instance, until recently, one of the plausible functions of marriage was to reinforce traditional gender roles.

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All these answers line up in the same direction. Together, they generate an unsurprising profile of marriage. At its core — in belief, in practice, in function and in law — the old institution of marriage applied exclusively to opposite-sex couples.

Which is why the old institution is now being replaced with a better one. It is not just the courts that are making this happen. The courts do have a lot of influence. Directly, how the courts interpret the law changes what the law is. But their greater power is indirect: Their decisions affect what people believe, since the courts are treated with enormous respect and deference. In time, these spreading beliefs cascade into practices, and ultimately into the social functions of marriage. Still, even before the courts started to weigh in, things were changing. In the last decades, changes in belief, practice and function have been paving the way for changes to the law. We are well underway in discarding the old institution and building a new one.

As for the word "marriage": Roy Moore is right that the Supreme Court cannot mandate how we use a word, any more than it can create a social institution on its own. But as with other institutions, the court can influence the language, because of the respect and deference it receives. In any case, linguistic change is already underway, with or without the court. The reference of words in a language tends to be stable; but sometimes the reference of a word will change. The word "Madagascar," for instance, is a stock example given by philosophers of language: at one time, it referred to a territory on the main landmass of Africa. Later on (allegedly because of a mistake by Marco Polo) its reference changed, to name the large island off the coast. In our time, the word "marriage" is now undergoing a reference change. This is happening because of us, not the courts: we are making a social decision to apply an old word to a new institution. And why not? After all, it's a better word than "schmarriage."

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