Remarks of Hon. John Hostettler

CPAC

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I. Introduction

It is an honor to share the stage with two renowned experts on marriage.

II. A Quiet Revolution

The topic of discussion for this panel asks the question, "Who appointed Judges God?"

As you know, for the past 50 years our Federal judiciary has engaged in a quiet revolution.

Rejecting a century and a half of American jurisprudence, the courts have progressively worked to establish a new form of government where they are completely independent – free from checks and balances and unaccountable to the people.

With growing boldness, judges are chipping away at our constitutional republic constructed on a three-tiered system of government that is ultimately accountable to its citizens.

Along the way, the courts opined that children may not pray in public schools.

The courts decided that states may not protect their preborn citizens.

The courts judged that the display of the Ten Commandments on the courthouse lawn and the mention of God in the Pledge of Allegiance violates a letter that Thomas Jefferson wrote to a group of Baptists in Danbury, Connecticut and thereby must be prohibited.

By increasing their sphere of influence and assuming duties limited to the legislative branch, the courts have effectively established an oligarchy, a form of government where a handful of people wield the power.

That's not just my view.

Thomas Jefferson, in 1820, said that judges "have the same passions for party, for power, for privilege of their corps," as anyone else and he added that their power is made "more dangerous as they are in office for life and not responsible, as the other functionaries are, to the elective control."

He further stated "To consider the judges as the ultimate arbiters of all constitutional questions [is] a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy."

He rightly observed that, "The Constitution erected no such tribunal, knowing that to whatever hands confided, with the corruptions of time and party, its members would become despots."

As students of history, political science and human nature – and from first-hand experience with Great Britain – our Founders understood the corruptive influence of power.

That explains their determination to erect a government with divided authority.

The Constitution they crafted reserves distinct, unambiguous roles for each of the three branches and reserves for the states the powers not delegated to the federal government.

That fact has been forgotten by too many of today's scholars, journalists, judges and politicians.

When the courts issue an unconstitutional opinion, when they assume constitutional powers reserved for the other branches of government, we are told that the Congress, the executive branch and ultimately the people must acquiesce.

This is nonsense.

But this nonsense sometimes finds its way into a State of the Union Address.

The President, in his State of the Union Address of January 20, 2004 stated the following:

"A strong America must also value the institution of marriage. ... Activist judges, however, have begun redefining marriage by court order, without regard for the will of the people and their elected representatives. On an issue of such great consequence, the people's voice must be heard."

Truer words have never been spoken. You heard today from my fellow panelists why America must value marriage.

You already know that activist judges have not stopped being activists. That they have their progressive brush at the ready to wipe away the wisdom of millennia of human history and redraw the human family by redefining marriage.

And they will do it – to be sure – with no regard for the people and less for those of us who serve you in the halls of Congress.

"So," you ask, "where did the President's speechwriters run aground?"

Continuing in the President's eloquent defense of traditional marriage, he curiously added the following,

"If judges insist on forcing their arbitrary will upon the people, the only alternative left to the people would be the constitutional process."

Judges cannot FORCE their WILL - arbitrary or otherwise - upon the people.

Writing in Federalist #78 Alexander Hamilton said, "[T]he judiciary is beyond comparison the weakest of the three departments of power."

He further expounded, "The judiciary, ... has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; ..."

Therefore, one answer to the question is clear. Not only did the Framers of the Constitution not appoint Judges God, they barely made the Judiciary relevant.

III. The Solution(s)

Therefore, we are left to ask, “Did the Framers anticipate this potential usurpation by unelected, unaccountable idealogues who would fall victim to their own ‘passion ... for ... power’, as Jefferson put it? And did they include in the Constitution mechanisms to check that ‘passion?’”

To put it in its current context, when the President in his State of the Union Address suggested that “the only alternative left to the people would be the constitutional process," what process or processes could he have meant?

While there are others, I would like to share with you three today.

First, the President may not execute a court order that is inconsistent with the Constitution.

Article II, Section 3 states that the President “...shall take Care that the Laws be faithfully executed,...”

While Constitutional scholars and federal judges alike will opine that decisions of the federal court - and especially the Supreme Court - are the supreme law of the land, that is not what the Supremacy clause of the Constitution says.

Article VI is clear when it says, “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land;...”

To be sure, the Federalists could have placed a provision in the Supremacy clause that equated a decision of the Supreme Court with the Constitution itself - as is the case made by Constitutional scholars and federal jurists today.

Yes they could have said that. And that provision would have been the “silver bullet” that the Anti-Federalists used to kill the ratification of the Constitution.

It is therefore, clear in Article I, Section 7 and Article V, that it is the Legislature – the Congress – that makes laws.

And with no mention of the Judiciary in either location in the Constitution, their function is truly one of “merely judgment.”

And because theirs is a function of “merely judgment,” Hamilton concluded in Federalist #78 that the Judiciary “must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”

So, with no aid of the executive arm for the efficacy of the Court’s judgment that the Constitution grants a right to homosexual marriage, the judgment is moot.

Second, Congress may withhold funds for the enforcement of an Unconstitutional court order.

Article I, Section 9 sets out Congress’ spending power.

Now while Congress has exercised that authority to the future economic detriment of my and your children, it follows from this authority that if Congress does not fund a thing, that thing does not happen.

With that in mind, last year I offered two amendments to a bill that funds the Justice Department to specifically address the activity of the U. S. Marshal Service whose task it is - among others - to execute orders of the Judiciary.

One amendment I offered prohibited any federal funds from being used to enforce a federal court order to remove the Ten Commandments from the Alabama State Courthouse.

The second amendment I offered prohibited federal funds from being used to enforce a federal court decision banning

the Pledge of Allegiance in schools because it mentions God.

To my pleasant surprise both amendments passed the House overwhelmingly.

While these amendments have not been accepted by the Senate and made it into law, had the President signed a bill into law that contained these provisions, two things would have happened – or not happened depending on your point of view.

First, no federal law enforcement could have been used to remove Chief Justice Roy Moore's monument to the Ten Commandments.

Secondly, no federal action could have been taken to stop children who attend California's public schools from voluntarily reciting the Pledge of Allegiance to the American flag as part of a statewide program to encourage patriotism.

It follows that should the Supreme Court – or any federal court for that matter – opine that the Constitution grants homosexuals the right to have their marriage license obtained in, say, Massachusetts to be recognized in, say, Indiana, this member of Congress will be quick to try again what has already worked twice in the House of Representatives.

And that is I will move to defund the Court's attempt to redefine marriage for Hoosiers.

Finally, Congress can limit the jurisdiction of federal courts on the question of the Defense of Marriage Act (DOMA).

In October of 2003 I introduced H. R. 3313, The Marriage Protection Act, which removes jurisdiction from certain federal courts over questions pertaining to the 1996 Defense of Marriage Act, better known as DOMA.

DOMA says that no state is required to give full faith and credit to a marriage license issued by another state if that relationship is between two people of the same sex.

It also defines the terms "marriage" and "spouse" for purposes of federal law as terms only applying to relationships between people of the opposite sex.

DOMA is good law and passed with broad support, but many Americans are concerned that an activist federal court will find some way to overturn it in order to create a fundamental "right" to homosexual marriage.

The Marriage Protection Act addresses that possibility by removing the Supreme Court's appellate jurisdiction, as well as inferior federal courts' original and appellate jurisdiction,
over DOMA's full faith and credit provision.
It also removes appellate jurisdiction from the Supreme Court and inferior federal courts over DOMA's marriage definition.

Simply put, if federal courts don't have jurisdiction over marriage issues, they can't hear them.

And if they can't hear cases regarding marriage policy, they can't redefine this sacred institution and establish a national precedent for homosexual marriage.

This is the sort of legislative check the Framers not only intended but made explicit provision for in the Constitution itself.

Article I, Section 8 and Article III, Sections 1 and 2 of the Constitution grant Congress the authority to establish inferior federal courts, determine their jurisdiction and make exceptions to the Supreme Court's appellate jurisdiction.

As a Conservative, I believe the Framers were correct to place the jurisdiction of marriage in the individual states.

And as Conservatives we must give the Framers enough credit to have known that each state may not treat marriage the same.

But, as is the case always with federalism, the Framers believed that the individual states would do a better job with an issue such as marriage than would a central government.

Thirty-eight states already passed laws that reflect DOMA's protections to plainly state they will not recognize homosexual marriages performed in other states.

By exercising this Constitutional legislative authority we can preserve each state's traditional right to determine its own marriage policies without federal court interference.

IV. Conclusion

In conclusion, I couldn't have agreed with the President any more than when he said in his State of the Union Address that, "[o]ur Nation must defend the sanctity of marriage."

I hope it is encouraging to you that we can defend the sanctity of marriage with the tools the Framers provided in the Constitution.

And while they may consider their opinions to be equivalent to divine revelation, we can do it without the blessing of the Judiciary.

Thank you and God Bless.