

The Right Wing Screams for the Wambulance Over Gay Marriage Ruling

By Walter Olson
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The right has a history of hyperventilating over social issues it doesn't like. But do recent critiques of Supreme Court decisions on gay marriage go too far?

When the Supreme Court last week declined to rule on lower court rulings striking down bans on same-sex marriage, the familiar cries from the right over judicial activism were [just the start](#). Former Arkansas governor Mike Huckabee said he [hoped state officials would defy](#) the federal courts, and threatened to leave the Republican Party unless it did more to resist gay marriage. The dean of Liberty University's law school foresaw the "[end of western civilization](#)."

Then there was Matthew Franck at National Review, who [described the series of marriage cases](#) as "a slow-motion *Dred Scott* for the 21st century."

That was a good way to get commentators' attention. *Dred Scott v. Sandford* was the decision that 1) entrenched slavery and 2) set the nation on a path to Civil War. Slavery and the Civil War having been more horrible than most things happening in America lately, libertarian lawyer/author Timothy Sandefur [has proposed](#) that comparisons to *Dred Scott* should trigger American law's version of the Internet's "[Godwin's Law](#)" under which whoever brings in Hitler has lost the argument.

Following a [storm](#) of [criticism](#), Franck dug in on the comparison in [two](#) further [posts](#). It wasn't, he said, that he'd meant to liken gay marriage to slavery—critics were unreasonable to suggest any such thing. No, he'd had in mind other parallels—parallels, to be sure, that critics soon assailed as [arbitrary](#) and [flimsy](#) in the extreme—of which the most interesting was his claim that the marriage rulings, like *Dred Scott*, pose a "comprehensive threat to republican government."

Note what he's asserting here. It's one thing to object to a Supreme Court decision as restricting what laws the democratic process can make. That's what Supreme Court decisions do, at least when they recognize constitutional rights that curtail government power. (Conservatives, like liberals, have their favorite Court decisions that do this, on topics that include [freedom of education](#), [gun liberty](#), and [freedom of campaign speech](#).) It's another thing to claim a given decision will make it impossible for republican government itself to function in the future in some sort of "comprehensive" way.

It happens that *Dred Scott* is one of the very few Supreme Court decisions you could describe without hyperbole as doing this, since in a nation closely divided between slave and free, it entrenched the slave power in a way that tended to paralyze political action in general. In the cataclysm that followed, the survival of republican government indeed was in peril.

So will letting Rebecca and Rhonda get hitched paralyze republican governance in the United States in some similar way? Franck has not, as they say, spelled out a mechanism by which this could happen.

By his third post, Franck acknowledges that he might as easily have likened the marriage decisions to many other cases that legal scholars in the tradition of the late federal judge, law professor, and unsuccessful Supreme Court nominee Robert Bork have criticized as activist over the years, such as *Lochner v. New York* (striking down limits on working hours in bakeries) or *Griswold v. Connecticut* (striking down laws against contraceptives). Well, yes. *Griswold* was undeniably an incursion on democratic powers with a definite whiff of activism. But *Griswold* provoked only passing public controversy when handed down in 1965 and no significant movement has ever arisen to reverse it. Not the message Franck meant to send, I think.

I suspect he chose the *Dred Scott* comparison precisely because of its overblown, grandiose nature. The American people cared so much about the principles raised in that case that they were willing to go to war over them. Today, by contrast, there are few signs that most Americans on either side wish to enlist in the contemplated culture war over these issues.

Even as the ranks of culture warriors on the right diminish, their zeal seems to intensify. Indeed, the chatter for the past year on the anti-gay fringe [has been of resistance](#). Pat Buchanan greeted last week's ruling with a call for "[massive civil disobedience](#)." Now that the rulings are [reaching into core conservative states](#) in the South and West, so goes the thinking, surely the American heartland will at last rise up and Do Something. What that something will be—who it will hurt, and who will do the hurting—remains somewhat vague.

Huckabee, Buchanan, and their co-thinkers need to keep the rhetorical level up not because doing so will convince anyone in the middle, but because the warlike spirit might otherwise begin to flag among their own dwindling troops.

Where will they turn if it turns out there is no [John Brown](#) on the way, nor any [Harper's Ferry](#) raid to look forward to?

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