Edmund Burke once remarked that the seasoned political man, "who could read the political sky, will see a hurricane in a cloud no bigger than a hand at the very edge of the horizon, and will run into the first harbor." The statesman who deserves his title is one who can see, at a distance, a crisis deepening, and if he is artful, he may take steps early to avert it. In the middle of July the legislature of Massachusetts brought us to a new level in the building crisis over marriage.

In the fall of 2003, the Supreme Judicial Court swept past the constitution and laws of the Commonwealth to install same-sex marriage. The Senate in Massachusetts has begun a critical second step now: It voted just a week ago to repeal a 1913 law that barred the marriage of people visiting from other states, seeking a form of marriage that would not be allowed under the laws in the states in which they resided. Massachusetts, ever leading the nation, will now “nationalize” same-sex marriage by spreading that form of marriage to all other states in the Union.

The engine for nationalizing same-sex marriage will be found in the Full Faith and Credit Clause of the federal constitution (Art. IV, Sec. 1). That is the clause giving us reason to expect that a marriage contracted, say, in Illinois will be honored in California. But the states may refuse to honor certain kinds of marriages--say, incestuous marriages--if they have incorporated in their laws, a moral objection to those kinds of marriages. In 1996, however, the U.S. Supreme Court knocked out that prop supporting the authority of the states when it came to same-sex marriage. In the case of Romer v. Evans, the court essentially held that it was no longer legitimate for a state to incorporate in its laws an adverse moral judgment on the homosexual life. That decision sharpened the crisis at the time, and it sparked the move in Congress to shore up the authority of the states in refusing to accept same-sex marriage. The measure was passed into law that same year and called the Defense of Marriage Act, or DOMA.
When the Supreme Court in Massachusetts voted to install same-sex marriage, one of the dissenters noted that DOMA would offer a serious barrier to the law proclaimed that day in Massachusetts. For along with everything else, DOMA defined the meaning of marriage in the federal code: every mention of “marriage” would refer only to the legal union of a man and a woman as husband and wife. Same-sex couples may be married in Massachusetts, but they could not have their marriages respected in federal law when it came, say, to taxes and social security. Ever since then, the forces working for same-sex marriage have taken it as their strategic goal to have DOMA challenged and struck down in federal court. But in 2004, the public recoiled from this audacious move by the judges to impose same-sex marriage. That moral passion of the public is credited with bringing out, in Ohio, a turnout that enabled George W. Bush to carry the state and gain reelection.

But Bush, in the aftermath, did nothing to build on those moral sentiments of the public. For their own part, the gay-lesbian activists held back in prudence, waiting for the political storm to pass and the passions of the public to subside. And subside they did. Without a national leadership willing to lead, the convictions of the public have suffered erosion over the last four years. My own hunch is that the election of Barack Obama will be taken by the judges, federal and state, as a green light: the moment when judges can take the initiative again and achieve their greatness as judges by bringing about a new order of things. In the law schools, the vast majority of professors have already shown their willingness to weigh in with briefs, supporting the move to strike down DOMA. With the new law in Massachusetts, the stage will be set for that challenge in the federal courts, and the outcome is virtually predictable. If Obama is elected.

John McCain was one of those Republican leaders in the Senate who was reluctant to join Rick Santorum in supporting a Federal Marriage Amendment, to protect marriage against this concert of the judges. McCain has said that, if DOMA were struck down, he would support that move to a federal amendment. That may be a familiar conservative reaction: do not anticipate a problem before it is upon us. But by that point, it will be too late. What was needed here was a different kind of conservatism, the statecraft of Edmund Burke—the statecraft of alerting the public earlier to the danger and by acting earlier, preventing the danger from turning into a crisis running with its own momentum. McCain might announce, even now, that if the legislature passes
that bill in Massachusetts, that will be crossing the line, the move that brings him to support a federal amendment on marriage, and brings marriage back into the presidential campaign. That prospect might induce the gay activists to hold back again. But that is not going to happen. McCain does not see the spot on the horizon, perhaps because he does not really see why marriage may be as important as war in determining our character as a people, in shaping the terms on which life is begotten and nurtured, and offspring turned into citizens.

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