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The Ever-Shrinking Case for a Constitutional Right to Same-Sex Marriage

James G. Dwyer
William & Mary Law School, jgdwye@wm.edu

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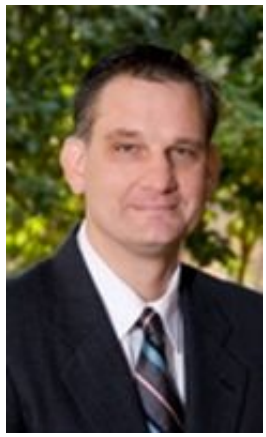
JURIST Guest Columnist James Dwyer of William & Mary Law School argues that the many incremental successes the same-sex marriage movement has had actually make it more difficult plausibly to argue now that every state is constitutionally required to issue marriage certificates to same-sex couples. The legal and factual premises on which Virginia Attorney General Mark Herring relies are simply not true today ...



In declaring Virginia's exclusion of same-sex couples from its marriage laws unconstitutional, and announcing that his office would not defend the law, Virginia Attorney General Mark Herring explained that because the law infringes a fundamental right, gays and lesbians need legal marriage for "orderly pursuit of happiness," homosexuals constitute a subordinated group insufficiently protected by the political process, courts should subject the law to strict scrutiny. Such an argument would have been persuasive at the beginning of this century, but not today.

On New Year's Eve 1999, a same-sex couple wanting legally to tie the knot could not secure legal marital status anywhere in the US, could not obtain the federal or state benefits that attach to legal marriage and indeed in many states were vulnerable to criminal prosecution for having an intimate relationship. At that time, it made sense to say the state interfered profoundly with the liberty, privacy and equal citizenship of homosexuals. Even then, however, a same-sex couple anywhere in the US could have held a wedding ceremony, without state-issued license, and declared love and commitment to each other; the First Amendment would have precluded any

state from prohibiting such private gathering and expression. Further, in practice, such a couple would have been free to share a home and intimate life, to act as a family, even in a state that criminalized homosexual conduct, because states generally did not enforce such laws.

Today both the legal and social climates for homosexuals are vastly different from what they were in 2000. Today, as a result of Lawrence v. Texas, every adult in the US has a recognized Constitutional right to live with and share an intimate relationship with another consenting adult of the same sex or a different sex, whether married to each other or not. Moreover, today any same-sex couple living anywhere in America can get legally married. Such a couple could not secure a state-issued marriage license and certificate in Virginia, or in thirty or so other states, but a couple that lives in Virginia could drive to Maryland or fly to Boston and get legally married there. As a result of the Supreme Court's decision in Windsor v. US and a subsequent IRS Revenue Ruling, the federal government would thereafter treat the couple as legally married, even though they return to Virginia to live. They could file their federal income tax forms as a married couple and enjoy all the benefits the federal government confers on spouses.

The one way this couple's situation would differ from that of a heterosexual married couple in Virginia is that state agencies would not treat them as legally married. They might be better off in some ways as single persons (e.g., higher welfare payments or lower taxes), worse off in other ways (e.g., if not treated as spouses for health insurance or inheritance purposes). Even assuming it a net financial disadvantage to be denied Virginia's recognition of their marriage, that hardly amounts to infringement of a fundamental right. No one has a fundamental right to a particular tax-filing status, to piggyback on another person's employment for material benefits or to inherit.

There is also a stigma resulting from state non-recognition. I would not presume to judge the stigma's severity as sexual-orientation minorities experience it, but as a matter of constitutional doctrine avoiding such stigma is also not a matter of fundamental right. Members of religious minorities for whom polygamy is a sacred obligation must also feel some stigma from state refusal to recognize their plural intimate relationships, and likewise with individuals who want to marry their first cousin in states that refuse to issue marriage licenses to people in such "consanguineous" relationships. It is unlikely any court would treat that stigma as so threatening to basic wellbeing as to implicate a fundamental right.

The Supreme Court has said legal marriage is a fundamental right, in several decisions Attorney General Herring cites. All of those decisions, however, are now, doctrinally, ancient history. The last Supreme Court marriage decision was a quarter century ago. At that time, in most of the US, only married people could legally "cohabit"—that is, live together in a non-platonic way. The Court's opinions emphasized that legal marriage was a pre-condition for lawfully creating a family —forming close personal attachment, procreating and raising children together—an aspiration

sensibly characterized as an aspect of fundamental wellbeing and human right. Legal marriage is simply no longer such a pre-condition for creating and enjoying a family. If the Justices are honest when they squarely address The Big Question ("Must every state in the US confer marriage certificates on same-sex couples?) they will acknowledge that it is no longer warranted to characterize receipt of a state marriage certificate as a matter of fundamental right.

The importance of what is actually at stake for homosexual individuals today is thus insufficient as a doctrinal matter to trigger strict scrutiny of state marriage laws. The alternative route to strict, or at least "heightened" scrutiny, of state laws, is to show discrimination against a "suspect" or "quasi-suspect" class of people. In explaining why he will not defend Virginia's marriage law, Attorney General Herring also suggested that an additional reason for subjecting that law to heightened judicial scrutiny is that it discriminates based on gender and sexual orientation.

Though some scholars and some lower courts have treated heterosexist marriage laws as gender discrimination, which the Supreme Court has usually subjected to heightened scrutiny, it is unlikely a majority of Supreme Court Justices would treat these laws as gender discrimination. It is far less clear that such laws, which apply equally to men and women, are "about" subordination of women than it was clear that Virginia's anti-miscegenation law, struck down in Loving v. Virginia, was about subordination of blacks.

As for sexual orientation, the Court has thus far declined to hold that homosexuals constitute a suspect or quasi-suspect class, and as with the fundamental-right argument, the argument that homosexuals constitute such a class has been undermined by the very success of the gay-rights movement. There is a fancy legal test for determining whether a group constitutes a suspect class, but at base the point of declaring a group such is that the group members need courts to protect them from a political process grossly unresponsive to their interests. In 2013 alone, five states changed their marriage laws to include same-sex couples, through the political process, without court compulsion. National polls now show most Americans support gay marriage. Though homophobia and discrimination persist, the situation of homosexuals today is nothing like that of blacks following abolition, when the Fourteenth Amendment and its Equal Protection Clause were added to the Constitution, or even like that of blacks in the Jim Crow era, when the Court established that it would subject racially discriminatory laws to strict scrutiny.

Many judges, including Supreme Court justices, are averse to designating new suspect classes that get stronger judicial protection against discriminatory legislation, because doing so has a long-term impact on separation of powers and democratic decision making in ways difficult to predict. Many lower courts have sidestepped the suspect-class issue by holding that laws denying state recognition to same-sex couples' relationships are unconstitutional even under rational basis review. This amounts to saying not merely "the state has legitimate reasons for doing so

but they are not sufficiently compelling," but more starkly: "this serves no legitimate purpose whatsoever." Most Americans might believe that, on balance, the right thing to do is to grant homosexuals legal marriage. I myself do. But it might be only a small minority who would accept a Supreme Court pronouncement that it is entirely irrational and illegitimate for a state's elected officials to say:

> "We are not required to have a legal status called marriage. We have nevertheless done so historically because we hoped that by creating this special status, and by conferring financial benefits and special recognition in exchange for a promise of fidelity, we can induce some couples who are presumptively capable of procreating through sexual activity to produce children only within an enduring, committed relationship. We are not yet prepared to give up on that hope, and we simply have no reason to offer those costly benefits to couples for whom accidental procreation is not possible."

Though members of an elite class, the justices are not oblivious or insensitive to the general public's perception of their honesty and rationality.

Finally, there is a yet-unrecognized intermediate position between the status quo and a Supreme Court mandate that every state must issue marriage certificates to same-sex couples. It is the position currently prevailing as to common law marriages and marriages between first cousins. In some states a couple can become legally married by informal agreement and cohabitation, in others not. In some states, first cousins can secure a marriage license, in others not. But all states that do not have common law marriage treat as married any couples who migrate there after becoming legally married informally in a state that does have common law marriage. Likewise, if two first cousins legally marry in Virginia, where it is permitted, but move to or already live in a state where it is not (Virginia has no residency requirement for marriage), the other state will respect the marriage certificate Virginia issued. The Supreme Court might avoid The Big Question by issuing a ruling on Full Faith and Credit requiring all states to recognize same-sex marriage certificates issued in other states. A federal district court recently imposed such an order on Ohio. Or a state might avoid a judicial mandate that it issue marriage certificates to same-sex couples by deciding legislatively that it will henceforth give effect to such certificates other states issue. Many legislators would regard this as a big concession, and same-sex couples might still feel some sting of state denigration, but both sides might prefer this compromise to a loss in the courts.

James Dwyer is Arthur B. Hanson Professor of Law at William & Mary Law School. Prior to beginning his academic career, James practiced law in Washington, DC, and worked in New York State Family Court as Law Guardian and Assigned Counsel.

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