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Same-Sex Marriage and the Constitution: Let's Change the Law the Right Way

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Same-Sex Marriage and the Constitution(s)

Let's change the law the right way

BY JAMES DWYER

As a citizen of Virginia, I support extension of legal marriage to same-sex couples. I believe it would be better for gays and lesbians, and for the people of Virginia as a whole, if the heterosexual majority voluntarily did this through the legislative process; I am not sure there is much dignitary gain for sexual minorities, or much improvement in our civic life, to have a few judges force the commonwealth to make this change. But I leave it to the LGBT community to make that strategic choice, whether to continue with litigation rather than political advocacy.

As a legal scholar, however, I am dismayed at the unprincipled nature of the Norfolk federal court's constitutional analysis. Unprincipled judicial decisions usually do more harm than good in the long run. Undergirding the court's entire opinion are two crucial assumptions: that a state marriage certificate is as much a matter of fundamental right today as it was a quarter-century ago when the Supreme Court declared that such a right exists and, relatedly, that at stake for the same-sex couple plaintiffs in the case are "the right to make a public commitment to form an exclusive relationship and create a family with a partner with whom the person shares an intimate and sustaining emotional bond" and "the ability to make deeply personal choices about love and family." Those assumptions are patently false.

The legal and social environment for intimate relationships in America has changed dramatically since the Supreme Court's last marriage decision. A quarter-century ago, legal marriage was a precondition to legally having an intimate life with a romantic partner and to forming a family; it was a crime for unmarried heterosexuals to "cohabit." And that was why, according to the court, state issuance of a marriage certificate was then a matter of fundamental right, because intimacy and family formation are such important aspects of adult life. Today, legal marriage is no longer a precondition to cohabitation or family life for heterosexuals or homosexuals, so it is implausible today to say anyone has a fundamental right to a state-issued marriage certificate. Unquestionably, Virginia could eliminate legal marriage altogether without violating the fed-

eral constitution.

The plaintiffs in the Norfolk litigation were, even prior to the court's decision, legally free to choose someone of the same sex as an intimate partner, to cohabit and form a family with that person and to have a non-legal wedding ceremony in Virginia publicly declaring their love and commitment. Moreover, they actually were able to get legally married; they would simply have had to drive to Maryland to do it. After they legally married in Maryland, the federal government would have treated them as legally married for all purposes, even though they lived in Virginia. All that was actually at stake for them was this state's conferral of a special legal status. That is not trivial, but the practical and symbolic differences it makes (especially since people can accomplish for themselves, by executing certain documents, what some state laws do by default for married people, such as conferring rights of inheritance and proxy decision-making) are simply not the stuff of fundamental rights under constitutional law doctrine. It was disingenuous of Judge Allen to mischaracterize what was at stake and to ignore the dramatic changes that have occurred in the legal and social situation of sexual minorities in recent decades and that must alter the constitutional analysis.

As a citizen, I call on the people of Virginia to act now to change our marriage laws voluntarily, before higher federal courts demean us and cheat us of that opportunity by ordering us to do so (as will otherwise inevitably soon occur). Though I do not think anyone today has a fundamental constitutional right to a marriage certificate, and although I recognize Virginia could have some legitimate reason for offering the special legal status of marriage to (more-or-less) only couples presumed capable of casual procreation (to incentivize them to reproduce only after committing to stay together), I believe we have a moral and political obligation to support such an act of fairness and expression of respect for a group that has historically been horribly mistreated in many ways in this country and in this state. Let's do this the right way.

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