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Victory by litigation would be hollow: Front Burner

By James Dwyer Guest columnist

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Extending legal marriage to same-sex couples is morally right, but a judicial declaration of constitutional entitlement is the wrong way to do it. It is wrong strategically, because a judicial victory cannot deliver the public statement of dignity that the marriage movement primarily seeks, and in fact eliminates its possibility. Instead of a majority of a state's people embracing their gay brothers and sisters as equal and welcome fellow citizens, five inside-the-beltway individuals will force change on the state, implicitly sending the opposite message: Your fellow citizens do not respect you.

A victory at the Supreme Court will also be wrong because it will be unprincipled. What judges — afraid of being on the "wrong side of history" — have failed to acknowledge is that the movement's prior victories have actually undermined its case for a constitutional right to legal marriage.

First, *Lawrence v. Texas* greatly deflated the practical significance of legal marriage by rendering it no longer prerequisite to enjoying intimacy and family life with a person of one's choice. That made it now implausible to characterize legal marriage as a matter of fundamental right. A state marriage certificate is now merely a ticket to certain financial benefits and conveniences (obviating the need to execute such documents as health-care proxies, wills and standby guardianships as to children), not the sort of thing the court has treated as a fundamental right.

Second, the movement's legislative victories in many states, the majority support it now enjoys in the nation as a whole, and its enormous financial backing collectively render implausible the argument for protected-class status in an equal-protection analysis.

If the court recognizes these realities and conducts an honest and reasoned analysis, it will have to apply merely rational basis review, presuming the validity of opposite-couple-only marriage laws. This places the burden on same-sex couples to show there is no rational connection between limiting legal marriage to opposite-sex couples and any legitimate state purpose.

And family-law scholars all know that a central purpose of states' maintaining a legal status of marriage has long been to try to induce heterosexuals to abstain from sex until they are in a permanently committed relationship, so they would not have accidental pregnancies. *First comes love, then comes marriage, then comes baby in the baby carriage. Wait till marriage.* This admonition I heard often while growing up, and the state can legitimately continue to promote it, for the purpose of trying to limit the huge costs that nonmarital births generate for society. This purpose would not be served by extending legal marriage to same-sex couples.

The purpose also is not served by extending legal marriage to infertile couples, but under rational basis review, that imperfect fit is irrelevant, and anyway, states have a perfectly good reason for not trying to exclude the infertile — namely, not wanting to incur the financial cost and intrusiveness of universal fertility testing. Judges' misconstruing of this state purpose (e.g., mischaracterizing it as an aim of getting single people who already have children to make a commitment to each other), assisted by generally bad lawyering on the part of attorneys defending state law, has been crucial to their reaching outcomes favorable to the movement.

Because rational and clear-eyed constitutional analysis would lead to upholding the Sixth Circuit decision, we can expect another argle-bargle majority opinion by Justice Anthony Kennedy, the movement's hero, joined by four other justices for whom outcomes are more important than legal principles. If only they could see that the outcome they will thereby create actually deprives sexual minorities, and the rest of us, of something extremely valuable — namely, an opportunity for collective expression of respect, solidarity and regret for past injustices.

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