What Will the Court Do To Marriage?

by Phyllis Schlafly

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If you get your news primarily from entertainment shows or social media, you might think that same-sex marriage has already been recognized as a constitutional right. In fact, the Supreme Court held just the opposite in 1972 and has since refused several opportunities to revisit that ruling.

A new hearing will be held on April 28, and defenders of the traditional definition of marriage are just now having their say. On Friday, dozens of briefs were filed in the Supreme Court, urging the Court not to take the step that liberals have declared to be inevitable.

The first of those pro-marriage briefs to reach my attention was filed on behalf of 57 Republican members of the U.S. House and Senate. It was written by a brilliant young lawyer, D. John Sauer, who is a grandson of my friend Dr. Dean Sauer, an influential conservative activist in the 1950s and '60s.

The brief outlines seven principles of constitutional adjudication declared by the Supreme Court in the last 25 years, and it shows how each of those principles counsels against a sweeping decision redefining marriage for all 50 states. Many of those principles have been supported by Justice Anthony Kennedy, whom everyone expects to provide the deciding vote for whatever the Supreme Court decides.

The first is the principle of federalism, which Justice Kennedy has said "was the unique contribution of the Framers to political science and political theory." It was "the insight of the Framers," Kennedy continued, "that freedom was enhanced by the creation of two governments, not one."

For that reason, the Court has been reluctant to project its authority into areas of traditional state concern, especially family law, "an area that has long been regarded as a virtually exclusive province of the States. . . . The Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations."

Second is the idea that the states are "laboratories of democracy" for devising solutions to divisive domestic issues, especially those where, as Justice Kennedy said, "the best solution is far from clear."

The "laboratories of democracy" slogan was coined 100 years ago by the famous Justice Louis Brandeis, and it was recently reaffirmed. Just last year the Supreme Court used that phrase when it upheld Michigan's voter-passed initiative banning racial preferences in the name of affirmative action.

Third, the Court said it should be cautious when asked to rule in an "unchartered area" that lacks "guideposts for responsible decision-making." If marriage no longer requires both a husband and a wife to be legally valid, there's no clear boundary that separates marital status from other domestic relationships that are not entitled to public support.

Fourth, the Court should be reluctant to redefine marriage in the absence of a close nexus between the right asserted (same-sex marriage) and the constitutional provision (equal protection of the laws). The equal protection clause has never been applied to marriage, which is why the Supreme Court in 1972 said there is no "substantial" basis of such a claim.

The pro-gay marriage advocates like to cite the famous "Loving" decision that overturned a ban on interracial marriage, but Loving was actually not about marriage. It was a decision against racial discrimination, which the Court said was the "central meaning" and "central purpose" of the Fourteenth Amendment.

Fifth, the Court said it should respect the "earnest and profound debate" in which the states are engaged on the issue. It should not short-circuit the democratic process with a ruling that pretends to settle the debate once and for all.

Sixth, the Supreme Court generally prefers incremental change to constitutional rights, rather than sweeping and dramatic ones. In support of this principle, the brief quotes the "notorious RBG" herself, Justice Ruth Bader Ginsburg, who famously criticized the abortion decision (Roe v. Wade) because "the political process was moving in the early 1970s, not quickly enough for advocates of quick, complete change, but . . . heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict."

Seventh, the Court should weigh the relative "novelty" of the asserted claim of a new constitutional right against the "novelty" of government restrictions on that right. On

this point, there's no question that the "novelty" award goes to the idea of same-sex marriage, which nobody ever thought was even possible until a couple of years ago.

The pro-gay media have tried to make gay marriage seem normal, saying it’s now "allowed in 37 states." In fact, same-sex marriage was enacted by only 11 state legislatures, and only three of those laws were ratified by popular vote. In the other states, same-sex marriage was imposed by unelected judges -- in some cases, by only a single judge whose decision was never upheld by a higher court.

The foregoing seven principles are not the most important reasons for upholding traditional marriage, but they ought to persuade the judges who hold the power to decide. If they don't, the other branches of government should use their constitutional powers to check and balance a bad decision.

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