Deseret News Readers’ Forum

Subject: My View (Gay Marriage Decision)

As a state legislator and appellate lawyer, I offer my views on why the recent federal district court decision legalizing gay marriage (Kitchen v. Herbert) is wrong and faces a likelihood of reversal on appeal.

First, as the U.S. Supreme Court observed in U.S. v. Windsor, striking down a federal law (DOMA) that conflicted with a state marriage statute, the definition and regulation of “marriage” is a matter reserved exclusively to the states. The Constitution delegates no authority to the federal government on the subject of marriage. Accordingly, the federal court in Kitchen should have abstained from exercising jurisdiction in the interest of preserving federalism and allowing Utah courts to decide matters of Utah marriage law in the first instance. Plaintiffs’ federal constitutional claims would still be subject to review by the U.S. Supreme Court if necessary.

Second, the Kitchen decision is based on the false premise that gay marriage is a new “fundamental right,” on the same level with those protected by the Bill of Rights. However, a claimed “fundamental right” must be “deeply rooted in this Nation’s history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist” without it. Gay marriage does not meet that threshold.

Moreover, “marriage” is of purely statutory origin. No one, whether gay or heterosexual, has a “fundamental right” to a legal status that is entirely discretionary with the state legislature. The Legislature is not required to adopt any marriage law at all and could, therefore, repeal its marriage law at any time. What may be considered “fundamental” is the right of all persons to determine their own sexuality, to choose a companion, to engage in private sexual relations, to procreate, and to direct the upbringing of offspring. Gay couples exercise all these rights without state interference and without need of a marriage license. But no federal judge can declare that gay couples have a “fundamental right” to a marriage license any more than they have a fundamental right to workers’ compensation benefits or any other statutory benefit for which they do not qualify.

Finally, the federal judge ruled in Kitchen that denying a marriage license to gay couples violates equal protection because the state legislature has no “rational basis” to distinguish between gay couples and heterosexual couples. However, the basis for distinction is simply the policy judgment that children do better in homes with a mother and a father who bring their unique female and male traits, talents, insights and abilities to the role of parenting. This policy judgment is not intended to denigrate gay couples or single parents who rear children—it is merely a statement of preference intended to encourage traditional marriage. That legislative policy judgment is legally sufficient to justify the disparate treatment in the marriage statute. Whether the federal judge agrees with that judgment, or whether the state presents empirical proof of its validity, or whether it may be false is legally irrelevant.

The entire purpose of the long-standing “rational basis” analysis is to protect legislative judgments from unwarranted encroachment by unelected judges. A court violates the constitutional separation of powers by substituting its judgment for the rational policy judgments of the people or their elected representatives. The federal judge in Kitchen reasoned that his judgment is superior because “a wealth of new knowledge about sexuality has upended these previous beliefs.” However, neither our constitutional structure of federalism and separation of powers, nor our traditional values of marriage and family can be so easily brushed aside.

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