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D.C. Circuit Nominee Caitlin Halligan: Same-Sex Marriage

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Posted on January 31, 2011 4:40 PM

Let's begin our review of D.C. Circuit nominee Caitlin Halligan's record by examining the March 2004 opinion on same-sex marriage that Halligan issued in her capacity as solicitor general of New York.

Halligan's opinion has three parts. First, she construes New York's Domestic Relations Law ("DRL") to require that a marriage performed in New York be between persons of opposite sex. Second, she outlines at length the "serious constitutional concerns" that her reading of the DRL supposedly raises. Third, she advises, based on a single trial-court ruling (which ended up being reversed), that New York law "presumptively requires that parties to [same-sex] unions must be treated as spouses for purposes of New York law." (Oddly, Halligan's own summary of the opinion in her Senate questionnaire response discloses the first part of her advice but not the second or third.)

Halligan's opinion doesn't undertake to resolve definitively the "serious constitutional concerns" that it raises. That said, the opinion in several respects reveals a decided slant in favor of a constitutional right to same-sex marriage.

For example, Halligan raises the possibility that a state interest in "promoting procreation" might justify traditional marriage but then hastily rejects that possibility. Here's the entirety of what she has to say on the matter:

> With respect to procreation, the DRL declares voidable a marriage in which either party "[i]s incapable of entering into the married state from physical cause." This provision, however, has long been construed to refer to physical incapacity to consummate marriage, not incapacity to bear children. [Page 10 (citations omitted).]

If I'm discerning her implicit line of reasoning correctly, her argument is that because infertility in a couple isn't a ground for voiding a marriage, the DRL clearly doesn't reflect a state interest in promoting procreation. But as I've discussed before, the state interest in promoting marital

procreation—in helping to ensure that children are raised by their father and mother—is advanced even when a husband and wife can't procreate together (because one of them is infertile), as the marital obligation of fidelity helps ensure that the fertile spouse doesn't have children outside the marriage. Further, infertility is frequently not something that can be determined with complete accuracy, and there are plenty of compelling privacy reasons why the state wouldn't be testing fertility. In any event, whether or not one agrees with my points, Halligan's dismissive treatment doesn't even give the matter serious consideration.

Halligan likewise dismisses out of hand the possibility that the state's interest in the "welfare of children" might support traditional marriage. She evidently finds it dispositive that "the DRL already permits the same-sex partner of a child's biological parent, who is raising the child together with the biological parent, to become the child's second parent by means of adoption." (Page 10.) In other words (if I'm reading her correctly), her position is that a court couldn't possibly find that traditional marriage serves New York's interest in the welfare of children since New York permits the same-sex partner of a child's biological parent to become the child's second parent by means of adoption.

I don't discern the supposedly compelling force of this argument. Neither, as it happens, did New York's highest court when it ruled in 2006 (by a 4-2 vote) that traditional marriage does *not* violate the New York constitution. In its words:

> The Legislature could find that unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples, and thus that promoting stability in opposite-sex relationships will help children more. This is one reason why the Legislature could rationally offer the benefits of marriage to opposite-sex couples only.

Halligan also aggressively maintains that the Supreme Court's jurisdictional dismissal (for want of a substantial federal question) of a same-sex marriage claim in *Baker v. Nelson* (1972) "no longer carries any precedential value with respect to the federal Equal Protection Clause" (pp. 12-13) and has only "limited" precedential value under the federal Due Process Clause (p. 14). Again, her dismissive treatment is entirely one-sided and fails even to acknowledge the serious counterarguments.

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