

FORUM

Ohio court redefines the future for gays, lesbians

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A funny thing happened in the Ohio Supreme Court last month: For the first time, the court mapped a future for lesbian and gay rights.

What makes this so surprising isn't the court's notorious conservatism. It's that the case in which it did so, *State v. Carswell*, wasn't, on its face, about lesbians or gay men, but rather unmarried women who are domestically abused.

The Carswell case only required the court to determine whether Ohio's new anti-gay marriage amendment nullified the legal protections unmarried victims of domestic abuse currently receive. The court declares there's no conflict between the two legal provisions, giving unmarried, heterosexual women comfort — even a boost. Their legal rights against sex-based violence at men's hands are, happily, secured. But so are the rights of victims of same-sex domestic abuse, including lesbians and gay men. Earlier decisions, undisturbed by Carswell, declared them entitled to the same freedom from domestic violence that unmarried heterosexuals have.

But Carswell doesn't stop there, at least its underlying logic doesn't. Although the court doesn't put it in these words, the basic reason it announces that the domestic violence law isn't a foul of the marriage amendment is that the amendment turns out not to mean what it says.

The amendment's first sentence is plain enough: "Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions." This, the court tells us, means no same-sex marriage.

The marriage amendment's second sentence (the part that the domestic violence law was said to violate) gets different treatment. The court expressly looks beyond the text for its meaning.

The sentence reads: "This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage." According to the court, this doesn't mean the state is barred from creating or recognizing any nonmarital, intimate relationship with the look, feel or smell of marriage. No matter that that's the most straightforward interpretation of the text and the one Justice Judith Lanzinger "reluctantly and regretfully" adopts in her lone dissent.

What, then, does this provision mean? Carswell ventures: It "means that the state cannot create or recognize a legal status for unmarried persons that bears all of the attributes of marriage — a marriage substitute." The court's only stated example: civil unions. That's what the second sentence of the amendment bans.

So, the marriage amendment, as in-

terpreted by the Supreme Court, now looks like this: The state may not define marriage except as it has traditionally been defined — one man, one woman, as husband and wife. Nor may it "create or recognize" a "marriage substitute" that bears all of the attributes of marriage.

The domestic violence law, on this view, is constitutionally acceptable. It doesn't grant "all of the attributes of marriage." Not even some. Only one.

Here's the boon for lesbians and gay men. Leave aside the view taken for granted elsewhere, that "civil unions" aren't the equivalent of marriage under law or in social life. Carswell, insisting they are, indicates that everything short of a civil union is now, legally, fair game. Domestic partnership programs offering health care and other limited benefits to state (including university) employees? Fine. They don't, after all, bear "all of the attributes of marriage." Doubt it? Ask any bride on any altar if she'd be satisfied with these instead of marriage vows.

Same-sex adoptions? Co-parenting agreements? Fine, fine and for the same reason. Health care proxies and hospital visitation rules? Estate and other inheritance rules recognizing surviving same-sex partners? Testimonial privileges for those in long-term, same-sex relationships? Palimony, if and when they end? (Guess what: They sometimes do.) Any cloud of constitutional doubt hovering over any of these — and other — legal rights the

marriage amendment blew in, Carswell has blown back out.

Progress must be incremental — step by step, law by law, legal right by legal right. But so long as the state stops short of a single, comprehensive package that "creates or recognizes a legal status for unmarried persons that bears all of the attributes of marriage — a marriage substitute," its recognition of same-sex relationships has the court's constitutional blessing.

It's true this doesn't give lesbians and gay men marriage or civil unions. That's unfortunate, and it should be recognized as the violation of constitutional equality and dignity guarantees that it is. But then, for now, it's precisely because they don't go that far that these other protections are acceptable under Carswell.

To this extent, at least, Carswell has reopened a future for lesbians and gay men in Ohio, which until recently seemed very, very bleak. Even better, it has done so while affirming women's equality rights. Not a bad day for a conservative court. You might almost think the message that lesbians and gay men are human beings with valid claims to first-class citizenship rights — heard and recently accepted by the U.S. Supreme Court — is finally making its way to Ohio. It's about time.

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