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National Post

Gay marriage, democracy and justice

National Post

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Byline: James Stribopoulos

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Your editorial, *Gay Marriage ... Again*, (July 24) relies upon a selective reading of the Charter's guarantees.

First, your editorial only quotes from s. 24(1) in arguing that the invalidation of laws was not really foreseen by the Charter's drafters. That section entitles courts to grant "appropriate and just" remedies. Unfortunately, you read this section in isolation, when it should be read along with s. 52(1) which makes clear that the Constitution, including the Charter, "is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Make no mistake, in 1982 the politicians understood that the combined effect of ss. 24(1) and 52(1) was that unelected judges could and would periodically invalidate democratically enacted laws.

Second, you question the authority of the Ontario judges "to jot a right to same-sex marriage into the Charter's margins." But the right that these judges applied is expressly set out in s. 15(1). It provides that "every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." The drafters intentionally used the conjunctive "and" before "in particular." The wording was deliberate. The goal was to ensure that the list of prohibited grounds not be considered closed. Had the converse been intended -- as your editorial implies -- language foreclosing the list from ever expanding to include sexual orientation could have been used. This was consciously avoided.

The judges in this case created no new right. Rather, they did the very job that our democratically elected representatives gave them. They applied an existing and well-recognized right -- the right to equality before and under the law -- to a minority group that has been treated shabbily for far too long. By denying homosexual couples access to civil marriage, the law denied

them the equal benefit and protection of the law that all Canadians are constitutionally entitled to. Rather than attacking these judges, we should praise them for having the courage to vindicate the equality rights of an historically unpopular minority. In a healthy constitutional democracy, this is exactly what we should expect from the judiciary -- no more, no less.

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