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Will the Court Do the Right Thing? The Right Way?

by Glenn C. Smith

Now that the U.S. Supreme Court has announced that it will decide the constitutionality of state same-sex-marriage bans, several important and interlocking questions move to center stage:

Initially, there is the question of whether the justices will give different answers to the two distinct questions the Court posed in granting review to *Bourke v. Beshear*, a split Sixth Circuit decision upholding same-sex marriage bans in Kentucky, Michigan, Ohio and Tennessee. One issue is whether states must recognize same-sex marriages granted by other states – an issue superficially more like ground already trod in *United States v. Windsor* (2013), which invalidated the federal Defense of Marriage Act's refusal to recognize same-sex marriages granted by some states. The other, broader issue goes directly to whether states can withhold *their own* marriage licenses from same-sex couples.

If a majority gives a unitary answer, will it agree with almost all lower federal courts, which view same-sex-marriage equality as required by the U.S. Constitution? If so, will the majority coalesce behind one intellectually honest theory?

Ultimately, one difficult question broods over them all: What role should federal courts play in the controversy? Unelected federal judges who are not politically accountable need to be perceived as appropriately restrained in approach and respectful of democratic institutions. The two-judge *Bourke* majority placed this judicial-role question in stark relief by asking at the outset "whether to allow the democratic processes begun in the States to continue...or to end them now…." Throughout its opinion, the majority then beat the judicial-restraint drum, while underscoring the link between deference to democratic decisions and the low-level "rational basis" standard used to review most governmental line drawing.

Some (if not most) asserted justifications for same-sex-marriage bans are too threadbare to survive even this deferential standard. But rational-basis review does not require state legislators or voters to follow the most enlightened views of social science or society. At least one justification (for example, the view that the opposite-sex marriages are more worthy of governmental sanction because they at least provide the *possibility* of parenting by one male and one female parent) could survive because the government's view is, as the formula goes, "at least debatable."

But plausible low-level rationality should not be the end of the story. Powerful reasons should persuade the Court to make same-sex-marriage equality the law of the land.

There is great wisdom and poignancy in the *Windsor* majority's conclusions about the debilitating impact of same-sex-marriage bans. True, *Windsor* did not rule on their constitutional merits; in fact, *Windsor* emphasized that federalism concerns usually recommend following state judgments about marriage qualifications.

But on the fundamental civil-rights and fairness dimensions, the *Windsor* majority was right on target in linking same-sex-marriage rights ultimately to personal "dignity and integrity." Bans "demean" constitutionally protected "moral and sexual choices" and "humiliate[ ] tens of thousands of children now being raised by same-sex couples."

Further, modern jurisprudence and experience teach that there has to be a limit to the right of democratic majorities to insist on going their own way when that undermines the basic liberties of Americans. Whether it was the Court striking down racial segregation in education in *Brown v. Board of Education* (1954) or laws against interracial marriage in *Loving v. Virginia* (1967), at some point majority rule bows to minority rights in a governmental system where the Constitution's rule of law is supreme.

If a Court majority does decide to "do the right thing" as I see it, a series of questions would then revolve around whether the majority decides to do so the *right way*.

As noted above, it would be intellectually dubious for a majority to find same-sex marriage bans truly "irrational" by ruling out all the conceivably "legitimate" interests – including plausible, but retrograde sociological theories. But same-sex-marriage bans are highly vulnerable under either Equal-Protection "intermediate scrutiny" (which requires that a same-sex-marriage ban "substantially" further "important" interest under an "exceedingly persuasive justification") or Substantive-Due-Process "strict scrutiny" (requiring that a first-order "compelling" interest be advanced without going farther than necessary).

The challenge for the majority would be getting to either level of heightened scrutiny in light of doctrinal barriers erected by previous Courts.

Strict scrutiny would require including the right to same-sex marriage as part of a "fundamental" liberty right "deeply rooted" in America's "history and tradition." Assertions of a general, relatively timeless "right to marry" broad enough to include same-sex couples face an uphill climb given the centuries-old "marriage is between a man and a woman" tradition embodied in state bans. In several other lines of Substantive-Due-Process cases, a majority read the tradition at issue relatively narrowly – especially when justices perceived that past traditions were *hostile* to the broad claim.

An easier, middle-ground approach would instead be for a majority to analogize sexual-orientation discrimination to gender discrimination.

The Court has never officially validated any account of why gender discrimination deserves heightened scrutiny. But various commentators and judges have discerned relevant criteria. Sexual orientation jibes well with them.

Our country has a long, sorry history of sexual-orientation discrimination, just as with gender discrimination. Sexual orientation is similarly an "immutable" characteristic not chosen by the victim of discrimination. As a matter of pure numbers, sexual-orientation minorities are even less able to defend themselves in the majoritarian political process. (Ironically, defenders dispute this by pointing to the spectacular turnaround of public opinion on the same-sex marriage issue!) Finally, sexual orientation seems even more worthy of skeptical scrutiny on a fourth criterion: the extent to which the status fails to reflect real differences relevant to governmental policy objectives.

Going the intermediate-scrutiny route would also pay big dividends beyond the immediate context by providing better remedies for other kinds of sexual-orientation discrimination, such as in employment.

Ironically, this latter advantage could make the Court majority leery of opening up intermediate scrutiny to sexual-orientation discrimination. The Court has declined such gate-opening requests for other worthy statuses – apparently fearing that it couldn't draw meaningful lines and avoiding wholesale interference with legislative judgments.

Thus, the majority might be tempted to do again this year what it did in *Windsor* and *Romer v. Evans* (1996), an earlier sexual-orientation discrimination case: use an ill-fitting "animus" theory. This move avoids hands-off rational-basis review by finding the challenged law based on nothing more than irrational prejudice against "a politically unpopular group." The "animus" theory can become intellectually dubious by forcing the Court to ascribe unproven dark motives to legislators (see Justice Scalia's *Windsor* dissent, accusing the majority of arrogantly equating the Court's "respected coordinate branches, Congress and the Presidency" with "a wild-eyed lynch mob"). Indeed, with four different state laws at issue – backed by four different sets of legislative histories in play, "animus" might be especially cumbersome here.) Alternatively, the animus theory can seem to too easily equate imposition of important burdens on a group with irrational prejudice (thus creating an exception seeming to swallow the rational-basis rule).

If a Court majority does the right thing and categorically declares state same-sex-marriage bans unconstitutional, will the majority enhance intellectual honesty and strike a blow against broader discrimination by using the intermediate scrutiny approach? Although "only time will tell," we will probably only have to wait a few months for an answer.

Smith teaches constitutional law and Supreme Court simulation courses at California Western School of Law in San Diego. He is the co-author of CONSTITUTIONAL LAW FOR DUMMIES.