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Marriage equality: protect or promote?

Posted By Robert A. Levy On August 25, 2011 @ 8:20 am In Featured,Same-Sex Marriage | Comments Disabled

The following piece is written for our same-sex marriage symposium [1] by Bob Levy, who is chairman of the board at the Cato Institute and a board member at the Institute for Justice, Federalist Society, and George Mason law school. Bob received his Ph.D. from American University and JD from George Mason. His latest book is The Dirty Dozen: How 12 Supreme Court Cases Radically Expanded Government and Eroded Freedom.

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Contrasting *Lawrence v. Texas* with *Perry*, Brian Raum contends in his post ("If you can't beat 'em, join 'em [2]") that "the central holding in *Lawrence* is perfectly reasonable because the law need not promote everything it protects." Brian continues, "The Constitution contains an equal protection clause, not an equal promotion clause."

That's certainly correct insofar as it depicts the constitutional objective – to protect, not promote. Thomas Jefferson established that principle in the Declaration: "[T]o secure these Rights, Governments are instituted among Men." The primary purpose of government is to secure individual rights – in part, by preventing some persons from harming others.

Yet Brian suggests that Kris Perry's goal, expedited by Judge Walker, was to promote same-sex marriage rather than protect a right to marriage equality. That suggestion is totally unsubstantiated. No part of Judge Walker's holding actively encourages, much less expresses a preference for, same-sex marriage. Indeed, Brian's distinction between promotion and protection cuts the other way: Proposition 8 supporters, not homosexual couples, seek to have their lifestyle endorsed by the state, to the exclusion of an alternative lifestyle.

Here's the threshold question: Whose rights have been violated and must therefore be protected by government when a homosexual couple marries? Answer: Nobody's rights have been violated; no one is harmed by the union of two consenting gay people. Accordingly, a ban on same-sex marriage has one overriding objective – not to protect rights, but to elevate – i.e., promote – heterosexual over homosexual unions.

There is, however, an important lesson to be learned from *Lawrence*, with implications for *Perry*. As Brian noted, Justice Anthony Kennedy's opinion in *Lawrence* repeatedly references "liberty." That was the focus – not whether a particular right is deemed "fundamental." The bifurcation of our rights into fundamental and non-fundamental categories, dating from the New Deal, has garbled our Fourteenth Amendment jurisprudence and yielded court opinions that simply cannot be harmonized with one another.

Consider, for example, *Lawrence* and the Due Process phase of *Raich v. Gonzales*, the medical marijuana case. (I draw here from a *Wall Street Journal* op-ed by Randy Barnett, who litigated the *Raich* case.) Because the conventional approach to judicial review is to scrutinize government regulations only if they infringe on a fundamental right, the Ninth Circuit felt it necessary to categorize the right at issue in *Raich*. To qualify as "fundamental," the right has to be either "implicit in the concept of ordered liberty" or "deeply rooted in the Nation's history and traditions." How the right is defined – narrowly or broadly – makes all the difference and, in effect, dictates the outcome of the case.

Raich claimed a fundamental right to "mak[e] life-shaping medical decisions that are necessary to preserve the integrity of her body, avoid intolerable physical pain, and preserve her life." She asserted that right in a state, California, where medical marijuana is legal and she had a doctor's order. But the Ninth Circuit portrayed the right as the use of narcotics for medical purposes. Raich lost. Medical marijuana, said the court, is *not* required for ordered

liberty, nor is it deeply rooted in our nation's traditions. If the court had adopted Raich's characterization of the right – the liberty to pursue and preserve a less painful life – she would have won.

In *Lawrence*, by contrast, Texas lost because the Supreme Court characterized the regulation as barring a "relationship … within the liberty of persons to choose." If the Court had said the case was about gay sex, the right would *not* have been deemed fundamental and the state would have prevailed.

Which representation is correct? They're both right. Raich was trying to live with less pain and also using medical marijuana. Lawrence was exercising his liberty to pursue a private, consensual relationship, but also engaged in gay sex. Similarly, Kris Perry's right could be characterized as marrying another woman, which would *not* be deeply rooted in our traditions; or it could be characterized as Judge Walker did, as "choosing a spouse and forming a household," which *is* deeply rooted.

So a court can rule how it wants, based simply on its description of the right. That's the foolishness of bifurcating our rights into fundamental and non-fundamental categories. All rights – enumerated and unenumerated; fundamental and non-fundamental – must be rigorously protected by the courts.

If and when the Supreme Court considers *Perry*, the litmus test should be liberty, as in *Lawrence*. The Court should abandon its incoherent hierarchical ranking of rights.

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