SCOTUS Blog

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Marriage equality: religious freedom, federalism, and judicial activism

Robert Levy, Chairman of the Cato Institute, refutes thematic objections commonly made against same-sex marriage.

The following piece is written for our same-sex marriage symposium 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.

Rather than discuss specific legal questions raised by *Perry* and *Windsor* – on which other participants will no doubt write at length – I'd like to comment briefly on three jurisprudential issues that are central to the debate over same-sex marriage: religious freedom, federalism, and judicial activism.

Religious freedom

Social conservatives observe that our Declaration of Independence speaks of unalienable rights endowed by our creator. That suggests, according to the conservative thesis, reliance on the Judaeo-Christian tradition, which does not endorse a right to same-sex marriage.

Yes, Thomas Jefferson and several other Framers were deists: They believed in God as creator, although not necessarily in a God who interacts with mankind on a continuing basis. But for constitutional purposes, that belief is irrelevant. Our constitutional framework does not hinge on whether rights come from God or from another source. In either event, they do not come from the king; they are not granted by government. The constitutional baseline is that each individual possesses rights. We start with those rights – whether God-given or natural – then protect them by delegating limited powers

to a government bound by a written Constitution. That Constitution does not separate religion from our lives; it *does* separate religion from government.

Moreover, the right to same-sex marriage is not a constraint on religious beliefs or practices. The First Amendment ensures that churches, synagogues, and mosques are free to choose which marriages they want to recognize. Some religious institutions will sanction same-sex marriages; some will not; a third group might call them domestic partnerships. No church would be compelled to implement a policy contrary to the beliefs of its congregants; and congregants would be free to join the church whose views they found congenial. The gay marriage controversy is not about private religious practices; it's about government's role in issuing marriage licenses.

Nor should we be concerned that religious institutions will lose government benefits if they don't perform or recognize gay marriages. Legislatures can grant religious exemptions. For example, Catholic organizations are not denied charitable status simply because they refuse to perform abortions, even though courts have held that abortion rights are constitutionally protected. Orthodox Jewish and Muslim temples are not denied government benefits because they restrict women from engaging in certain pursuits. Even if an organization discriminates (*e.g.*, a Catholic church that hires only Catholics to run a soup kitchen), funding would likely be denied only if the sponsored activity dispensed service in a preferential manner (*e.g.*, if the soup kitchen served only Catholics). Accordingly, a religious institution could reject gay marriage without jeopardizing government benefits, except perhaps those benefits tied directly to marriage ceremonies.

<u>Federalism</u>

Conservatives also ask, why not leave the same-sex marriage question up to each state. That would be compatible with time-honored notions of federalism: The states serve as experimental laboratories and disaffected residents have the option to vote with their feet.

Clearly, federalism allows states to decide whether to recognize both same-sex and conventional marriages, or assign a different label, or privatize marriage altogether. But federalism does not excuse compliance with the Equal Protection Clause. That's the crucial change rooted in the 1868 ratification of the Fourteenth Amendment, which significantly altered the balance between federal and state governments. The federal government is now authorized to intervene if a state violates constitutionally secured rights. Although states have broad discretion in fashioning rules for marriages, the U.S. Constitution sets the outer limit. States may not discriminate, without justification, by recognizing heterosexual but not homosexual marriages.

No justification has been shown. How about procreation? No. Infertile persons are permitted to marry even though they cannot procreate. Child rearing? No. Studies show that children do just as well when raised by same-sex parents. Promoting traditional marriage? No. Allowing gay marriages does not deter heterosexual

marriages. Conserving government resources? No. The Congressional Budget Office found that recognizing same-sex marriages would save money. We'll have fewer children in state institutions, lower divorce rates, and less promiscuity.

Recall that the essence of federalism is dual sovereignty – shared authority between federal and state governments to shield individuals from concentrations of power. Justice Anthony Kennedy's June 2011 opinion in *Bond v. United States* for a unanimous Court put it this way: "The limitations that federalism entails are not therefore a matter of rights belonging only to the States. States are not the sole intended beneficiaries of federalism. … Fidelity to the principles of federalism is not for the States alone to vindicate." Federalism first and foremost "protects the liberty of the individual from arbitrary power." The object is personal freedom, including the freedom to engage in a marital relationship that visits no harm on innocent third parties.

As an aside, many of the conservatives who invoked federalism in support of California's Proposition 8 hypocritically embraced a Federal Marriage Amendment, which defined marriage throughout the country as "the union of a man and a woman." That amendment, if ratified, would have prohibited states from recognizing same-sex marriage within their own borders, even if desired by the state's citizens – a regime fundamentally at odds with principles of federalism.

Judicial activism

A third thematic objection to the trial court's decision in *Perry* is that it represents judicial activism. Do we want judges – even singularly brilliant judges – to reverse centuries of experience, as Vaughn Walker did in his August 2010 opinion? Doesn't activism of that sort denote an unwarranted conceit that judges can evaluate time-honored conventions and practices better than the voters acting through their elected representatives?

Two responses: First, the legal process isn't only about a judge exercising his singular brilliance. It's about a 220-year-old Constitution framed by geniuses, then interpreted by a judge with advice from adversarial parties of varied viewpoints, followed by an appellate process before a three-judge panel, then the possibility of review by the full appellate court, backed up by nine justices on the Supreme Court.

Second, the criticism of Walker's opinion conflates common law and constitutional law. Common law comprises a set of principles and rules deriving their authority from usages, customs, and traditions between and among private parties. Constitutional law, by contrast, involves a written document setting out the organization and powers of government, and regulating the relations between government and the governed. Reason is the driving force. And should we determine from experience that the Framers got it wrong, we can obtain redress through the amendment process.

Further, even if we were to consider experience, the only experience that's constitutionally relevant involves consenting parties. When government is one of the

parties, consent isn't required, and often doesn't exist – as we know from our experience with school segregation until the 1954 *Brown* decision and the ban in many states on interracial marriages until the 1967 *Loving* decision.

More generally, the role of the judiciary is to bind legislatures, executives, and temporal voting majorities with the chains of the Constitution. Since 1789, the Supreme Court has overturned roughly 150 acts of Congress and maybe 1200 state and municipal laws. I haven't examined each of those cases, but I'm confident that Americans who believe in constrained federal and state government powers, coupled with expansive individual liberty, have been well-served by the Court's invalidation of (mostly) oppressive laws.

Alexander Hamilton in Federalist 78 argued for a vigorous judiciary: "[A] limited constitution … can be preserved in practice no other way than through the medium of courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void." James Madison shared that view: "[I]ndependent tribunals … will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution."

Indeed, rubber-stamp judicial deference to voters and the political branches is just another form of living constitutionalism, which conservatives usually decry. Rational basis review is often tantamount to an "evolving" Constitution that reflects whatever the electorate presently desires. Politics replaces constitutional text. That process is not significantly different than what transpires when truly activist judges – i.e., those whose decisions are based on their own policy preferences – disregard the written commands of our founding documents. In both instances, a "living" version of the Constitution trumps the version that the Framers actually wrote and ratified.

Judicial engagement – as differentiated from judicial activism – is essential to safeguard rights that majoritarian rule has left unprotected. That's the role that judges are supposed to fill. When Kris Perry's rights are violated by Californians and the state's political process hasn't yielded an adequate remedy, the courts can and should intervene. Judges have a responsibility to invalidate all laws that do not conform to the Constitution. Our courts would be derelict if they endorsed unconstitutional acts merely because they were compatible with transitory expressions of public sentiment. Proposition 8, because it violates the Equal Protection Clause, cannot be allowed to stand regardless how large the majority that voted in favor.