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Why the Supreme Court justice might decide we've been thinking about gay marriage all wrong.

By Sonja West

Anthony Kennedy (R) and Stephen Breyer await the start of a hearing on March 14, 2013 in Washington, D.C.

Photo by Win McNamee/Getty Images

Supreme Court watchers have long made a **national sport** out of parsing Justice Anthony Kennedy's every word. From issues as diverse as the death penalty, terrorism, and gay rights, Kennedy has been the only conservative justice to vote with the court's more liberal wing. It's not surprising, therefore, that as we wait for the court's decision on same-sex marriage bans, the search for clues to Kennedy's thinking has shifted into high gear.

What is surprising, however, is that in this quest for insights into Kennedy's frame of mind, pundits have virtually ignored one of the few things he flat-out told us about his views on same-sex marriage.

In March, during the oral argument about California's same-sex marriage ban, Kennedy said that he was "trying to wrestle" with a "difficult question" about the constitutionality of same-sex marriage. The question on his mind was whether prohibitions on same-sex marriage are a form of gender discrimination. The lawyer defending the ban, Charles Cooper, responded that this was a case about sexual orientation, not gender, and the argument quickly moved in a different direction.

But we shouldn't dismiss Kennedy's question about gender discrimination too hastily. The court's precedents on gender might offer Kennedy the conservative compromise he is looking for: a way to recognize a constitutional right for same-sex marriage in a limited way.

The gender-discrimination argument is not complicated. Imagine Alice applies for a license to marry Charlie and it is granted. Yet if Bob applied for a license to marry Charlie, he would be denied. The crucial difference between Alice and Bob is, of course, their gender—not their sexual orientation. In fact, as we all know, homosexuals have **long been free to marry** members of the opposite sex. Thus, Kennedy is wrestling with the possibility that Bob is being discriminated against because he is a man and not because he is gay. And, if so, should the court apply the same level of heightened protection it traditionally applies whenever the government treats men and women differently?

Kennedy wouldn't be the first to see the denial of marriage licenses to same-sex couples as gender discrimination. A plurality of the Supreme Court of Hawaii accepted this argument **in a 1993 case** and held that the state's ban on same-sex marriage violated the state's constitution (although a constitutional amendment allowing marriage to be limited to opposite-sex couples was later upheld.) Judge Stephen Reinhardt of the 9th Circuit Court of Appeals similarly held **in a 2009 order** that denying a federal employee the ability to name his husband as his beneficiary

amounted to sex-discrimination because the designation would have been allowed had he been a woman. Law professor Andrew Koppleman made the same argument in a New York University **law review article**, explaining, "[a]s a matter of definition, if the same conduct is prohibited or stigmatized when engaged in by a person of one sex, while it is tolerated when engaged in by a person of the other sex, then the party imposing the prohibition or stigma is discriminating on the basis of sex."

A standard response to the gender-discrimination argument is that it's not discrimination if both genders are denied the same benefit. In other words, because all men can only marry women and all women can only marry men, everyone is being treated equally. But this response is easily rebutted.

Laws that once prohibited interracial marriage were often described in the same "everybody loses" terms. Take, for example, Virginia's anti-miscegenation law, which the Supreme Court declared unconstitutional in 1967 in *Loving v. Virginia*. The Virginia law declared it a crime if "any white person intermarry with a colored person, or any colored person intermarry with a white person." Virginia argued to the Court that because the law punished "equally both the white and the Negro participants in an interracial marriage," there was no Equal Protection violation. White people were free to get married, just not to nonwhites and vice versa. The court disagreed, and declared the law to be racially discriminatory.

During the arguments over California's Proposition 8 banning gay marriage, Cooper's response to Kennedy's question offered another common, yet flawed, retort to the gender-discrimination argument. Cooper said that this case involves a gender-based classification only "in the sense that marriage itself is a gendered institution, a gendered term." The government in the Hawaii case similarly argued "the right of persons of the same sex to marry one another does not exist because marriage, by definition and usage, means a special relationship between a man and a woman."

Surely Kennedy could easily see through this kind of circular logic. Marriage is a "gendered term" that "by definition and usage" involves only members of the opposite sex precisely because we have always prohibited same-sex couples from marrying. In *Loving*, there was a similar reliance on the so-called natural state of marriage. The trial court judge declared "there was no cause for" interracial marriage because "God created the races ... and did not intend for the races to mix." But it proves nothing to say that marriage is innately one way and must remain that way when—whether because of alleged divine order or legal fiat—it has never had the opportunity to be any other way. Marriage is no more an inherently gendered institution than an inherently racial one.

The gender-discrimination framework may appeal to Kennedy in other ways, too. During oral argument, he expressed worry about the court about moving too far too fast. Bouncing between metaphors of entering "uncharted waters" or going off a "cliff" with its decision, Kennedy expressed a desire for the court to proceed cautiously "in light of the newness" of the issue.

This approach could help Kennedy with these concerns. He doesn't have to break new legal ground by declaring a constitutional right to be free from discrimination based on sexual orientation. Instead, Kennedy could turn to the much more developed path of our constitutional protections against gender discrimination. The outcome (constitutional protection for same-sex marriages nationwide) would be revolutionary, but the basis for it (gender discrimination) would be familiar.

The reach of these cases is also naturally circumscribed. A gender-discrimination ruling on marriage would not, for example, determine how much constitutional protection a person might receive if he was fired from his job because of his sexual orientation. Kennedy could save that case for another day. It also does not give fodder to the slippery-slope argument **about polygamy**, which presents a problem of numbers and not gender.

Another advantage, at least perhaps in Kennedy's worldview, is that his opinion need not hinge on a constitutional right to privacy. Kennedy could side-step any icky feelings he might get from wading into privacy rights, which tend to include family-based freedoms like the right of procreation, childrearing, contraception, and abortion. Instead he could rest easy that a gender-discrimination decision would put this case squarely in the Equal Protection chapter of future constitutional law textbooks.

Of course, we will know soon enough if Kennedy is really writing the court's opinion on gay marriage or not. But if he does, and if he chooses to rely on the traditional framework of gender discrimination, we can't say he didn't try to warn us.

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