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### July 2, 2013: Is Opposition to Gay Marriage Irrational?

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Title: Is Opposition to Gay Marriage Irrational?

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7/2/2013—There is a blog thread running through a law professor site discussing the dissent by Justice Alito in the DOMA case, *US v. Windsor*. Justice Alito wrote that it was rational for Congress to oppose gay marriage. Justice Kennedy, in the majority opinion, had written that the exclusion of lawful, state-recognized, gay marriages represented a mere desire to harm an unpopular group and was therefore a violation of due process. The mere desire to harm an unpopular group is not a legitimate state interest and is irrational and therefore unconstitutional.

So the question became whether there could be a legitimate reason to oppose gay marriage other than this kind of irrational dislike of gays. Not only did Justice Alito say that there could be, he suggested what it was. He wrote that there were two conceptions of marriage: one, an institution fostered by the government to promote the rearing of children and thus limited to a man and a woman and the other an institution of love and affection between two persons. The former is the classic understanding and the latter is the current, modern understanding. But it is arrogant, I think that is the word that Justice Alito used, for law professor types to argue that holding the first view is irrational.

Ruth Ann Dailey wrote in the *Pittsburgh Post-Gazette* that conservatives resent hearing that their opposition to gay marriage is irrational. This dispute is a good example of how hard it is for Americans who disagree with each other to listen to each other. Irrationality in law is supposed to mean a policy that has no legitimate justification. It is indeed an insult to say that somebody is irrational in their political positions.

Although they should know better, the law professors in this blog thread are arguing over just this point: whether opposition to gay marriage is irrational. I am not sure I understand what it means to say that millions of my fellow Americans are in fact irrational.

The other aspect of this thread is that Justice Alito's position is religious and thus in some sense a violation of the establishment clause. He was said to represent the position of the Catholic Church. The idea was that any deep opposition to gay marriage must be based on religious tenets.

This is another will matter of deep division. People do not normally know why they oppose this or that. I oppose the death penalty and I always have. Undoubtedly, some of that opposition comes from my religious training. People oppose unfair treatment of gays. Undoubtedly some of that opposition comes from religious training that says all people should be treated with dignity. Getting into the reason that someone holds this of that position is usually not very helpful. In any event, Justice Alito would certainly deny that he was merely mouthing the policy of the Catholic Church.

As readers of this blog know, I strongly support gay marriage and I have for years. But I never wanted the courts to do it. I oppose the *Windsor* decision because I think the federal government should have just as much right as the states to decide how federal resources are spent. But as to the underlying question of gay marriage itself in court, I cannot say that opposition to gay marriage is either inherently religious or irrational.

Back in 1967, the question was not sexual orientation, but race. Virginia still made it a crime for whites and blacks to marry. The Supreme Court simply held, in *Loving v. Virginia*, that this was an unconstitutional use of race. Supporters of gay marriage assert that all the reasons people use for opposing gay marriage are essentially the same as the reasons used to oppose interracial marriage. In a sense I guess they are right. Opposition to interracial marriage was based on a kind of social conservatism and on a prejudice against a group.

On the other hand, lots of places had not banned interracial marriage. Gay marriage, in contrast, is a huge social experiment. Marriage has generally been between genders all over the world for thousands of years. So, the feeling that maybe gay marriage is a bad idea is surely a reasonable bit of social conservatism. I don't agree with it but I understand it.