The Court's New Litmus Test

Aaron J Shuler
The marriage equality movement in California has provided some notable surprises, from California’s trend-setting progressiveness being upended by Proposition 8’s success to that ballot measure resulting in the formerly implausible partnership of old Bush v. Gore foes Theodore Olson and David Boies filing Perry v. Schwarzenegger in Federal District Court.

Given the United States Supreme Court’s current composition, it is difficult to see the five votes necessary to give an unlikely victory to an even more unbelievable hero to the gay rights movement in Theodore Olson. Few attorneys have more experience in front of the United States Supreme Court than Mr. Olson, however, and he has defied expectations in the past, as Mr. Boies can attest.

Justices Scalia and Thomas have essentially said that there is no federal constitutional right to same-sex marriage at least as recently as 2003 in their Lawrence v. Texas dissents. Justice Scalia may have predicted that striking down anti-same-sex sodomy statutes in Lawrence would embolden marriage equality proponents, but he did anything but endorse their reading of the Constitution.

Justices Roberts and Alito have replaced Justices Rehnquist and O’Connor since Lawrence. While their interpretations of the substantive due process clause of the 14th Amendment used in Lawrence and invoked in Perry are as of yet still scarce in the Court’s jurisprudence, it is safe to presume based on their work in the federal circuit courts that they will be voting with Justices Scalia and Thomas.

So far, Mr. Olson is 0 for 4.

It is more optimistic in the less conservative bloc of the Court, however, and Mr. Olson would appear to be counting on the votes of Justices Breyer, Ginsburg and Stevens. Justice Sotomayor is the newest member of the Court, but Mr. Olson knew about her before filing Perry, so he likely counts her as another vote for marriage equality.

Justice Kennedy is then left to yet again reprise his role as the Court’s swing voter. In addition to authoring Romer v. Evans in 1996, an equal protection win for gay equality, Justice Kennedy wrote the Lawrence opinion. In doing so, he called for an “equality of treatment and the due process right to demand respect,” as well as the right to “choose to enter upon a relationship” and “define the meaning of that relationship.”

However, Justice Kennedy also specifically noted that the Court’s Lawrence decision did not “involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”
So while *Lawrence* does not extend the right of formal recognition of relationships to homosexuals, Mr. Olson must also be counting on what Justice Kennedy did *not* say: namely, that homosexuals are *not* entitled to have their relationships formally recognized by the government.

If all of these assumptions come to fruition, Mr. Olson has made his five and can take his improbable seat next to Harvey Milk. But even if each of these ifs become an is, another variable may be lurking: Justice Stevens is 89 and only hired one law clerk for the fall term instead of the customary four, raising retirement suspicions.

Litigation normally takes years to reach the United States Supreme Court, making it likely that Justice Stevens will not hear *Perry*.

Considering that many see a strong likelihood that *Perry* will reach the High Court, Justice Stevens’ replacement’s ideas on the matter, if not his or her outright hypothetical vote, will likely be solicited. Given the contentiousness and profundity of the marriage equality issue, these inquiries could harden into another litmus test in the vein of *Griswold*’s right to privacy and *Roe*’s right to reproductive choice that nominees have had to navigate for the last 30-plus years.

Senate Republicans, freshly emboldened by acquiring their 41st seat, would likely threaten to filibuster any nominee that did not espouse the traditional marriage rhetoric.

But it might not even get that far.

Given the political capital Mr. Obama has already expended on health care, with battles on energy, education and taxes looming, he may be loath to engage the GOP, not to mention some members of his own party, on the gay rights issue for a nomination. His vigor in repealing Don’t Ask, Don’t Tell—notwithstanding the last week—and the DOMA, confirm as much.

Moreover, while President Obama has come out in favor of civil unions for homosexuals, he has publicly stopped short of countenancing marriage equality, even saying during his campaign for the presidency that he was not in favor of it. Whether that was political posturing or his constitutional opinion—keeping in mind that he taught constitutional law at the University of Chicago—may determine if the GOP plays obstructionist again.

Either way, whether it is Mr. Obama meeting with prospective judicial nominees or Jeff Sessions questioning a candidate in a senate confirmation hearing, a new litmus test on marriage equality may determine the next justice, and along with it Mr. Olson’s chances for realizing the hopes of millions of Americans.