Denigration as Forbidden Conduct and Required Judicial Rhetoric

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Steven D. Smith, *The Jurisprudence of Denigration*, **U.C. Davis L. Rev** (forthcoming, 2014), available at SSRN.

Steven D. Smith has written another characteristically challenging paper. I fear that the paper, "The Jurisprudence of Denigration," will be accepted without cavil by those who tend to disagree with decisions like *United States v. Windsor* or *Lawrence v. Texas*, and rejected without hesitation by those who champion those decisions. Either move would be unfortunate. This is a paper that says something important about the nature of modern constitutional and moral rhetoric surrounding hot-button social issues, and the uneasy position of judges and scholars as they attempt to find legally serviceable language with which to address social controversies in real time.

The paper's argument has wide-ranging implications but is blissfully clear and simple. In *Windsor*, Justice Kennedy argued that section 3 of the Defense of Marriage Act was the product of "a bare congressional desire to harm a politically unpopular group"—that it came from a "purpose . . . to demean," "injure," and "disparage." As Smith writes, "Justice Kennedy and the Court thereby in essence accused Congress—and, by implication, millions of Americans—of acting from pure malevolence." This "extraordinary claim" forms part of a "discursive pattern" by judges and scholars that Smith calls "the discourse of denigration." And it is wrong and dangerous. "Precisely contrary to its irenic and inclusivist intentions, by maintaining and contributing to that destructive discourse, the Supreme Court aggravates the conflict that is often described, with increasing accuracy, as the 'culture wars.'"

At this point I can envision the supporters of *Winsdor* hastily yanking on the cord and seeking to get off the bus. But they should stick around, because Smith has some larger, interesting claims to make. Those claims do not require one to abandon support for *Windsor* or LGBT rights, but simply to ask how the Court gets there. Kennedy may have been arguing, Smith suggests, "that to disapprove of homosexual conduct is to declare or deem persons prone to such conduct to be in some sense lesser or inferior beings." But that is a logical fallacy: "From the fact that a person is inclined to some behavior deemed immoral [by others], . . . it simply does not follow that the person is in any sense a lesser or inferior human being. And while those who disapprove of some behavior as immoral *may* believe that people who engage in the behavior are lesser human beings, they *need not* believe any such thing." Even if supporters of DOMA and similar laws actually *do* regard gays and lesbians as "in some sense lesser human beings," that still does not prove ineluctably that they are acting from a bare desire to harm those individuals.

Why, then, did Kennedy and the other Justices draw such a conclusion, in such strong language? The reason, Smith argues, lies in "the state of contemporary constitutional and moral discourse." Constitutional discourse is famously plagued by a lack of consensus about the relevant factors that influence constitutional decision-making. The Court, rather than take a strong unanimous stand on these issues (as if it could!), tends to frame its decisions "as straightforward deductions from the text, or perhaps from the doctrines, eschewing acknowledgment of the extra-textual factors that may actually be causing the Justices to deploy the texts or doctrines in the way they do." Because constitutional discourse is thus riven at a deep level and placidly technical on the surface, "the

insufficiencies of *constitutional* discourse push us to consider the current state of *moral* discourse."

At the level of moral discourse too, however, we find disagreement about basic premises, with "no way to achieve closure or resolution of the disagreements." At this point, we search for *some* "common ground from which to reason." And here, we find "widespread support" for one proposition: that "it is wrong to act from hatred or malevolence or ill-will toward others." Hence passages like the one in *Windsor*: "If the one non-question-begging normative proposition that virtually everyone agrees on is that it is wrong to act from hatred or ill-will, then it follows that when debates over public issues occur, a potentially effective form of rhetoric will be to argue that your opponents are acting from . . . hatred or ill-will."

The problem with this approach, Smith contends, is that, "paradoxically, [it] is at the same time morally elevating and yet conducive to an ugly and destructive moral discourse." On the one hand, it appeals to a widely shared value, and does not depend on other premises that may be morally contestable among the (imagined) public audience for the Court's opinions. On the other hand, the actual application of that ostensibly shared value involves accusing millions of Americans of acting for *no* reason other than "'animus,' ill-will, bigotry, or a 'bare desire to harm.'" As Smith writes: "It is hard to imagine a jurisprudence better calculated to undermine inclusiveness, destroy mutual respect, and promote cultural division."

I find much about Smith's analysis of the "discourse of denigration" perceptive and important, notwithstanding my views on the underlying issue. Doubtless those who oppose *Windsor* or same-sex marriage will now be applauding it. But they should perhaps hold their applause and dig deeper. Smith's paper, it seems to me, raises questions of its own.

For one thing, he might consider that much legislation in the midst of a culture war, whether motivated by bare animus or not, is also not really motivated by *any* meaningful public policy interest. My own state of Alabama, which desperately requires serious policy reform on a variety of bread-and-butter issues, has spent much of the last couple of months passing essentially meaningless laws aimed at "protecting" Christianity, for instance—not because Christianity is under threat in this state, but because election primaries are coming up and its representatives want to shore up their credentials with voters by attacking a mostly imaginary adversary. That does not mean such laws are necessarily unconstitutional. (Although most of them unquestionably are.) But he might consider that in between laws designed to harm others and those designed to help or protect lies a distressingly common third category: laws designed to *do* little at all, except to stake out a symbolic and often hostile position in the culture wars. Perhaps the discourse of denigration is on the rise because essentially denigrating symbolic legislation is on the rise.

Another question that troubled me deeply at first is whether the paper does not engage in some denigrating discourse of its own. Ultimately, I think it does not, or not in the way that he is discussing. But there is little doubt that Smith's language—for example, calling the *Windsor* passage "extraordinary in its offensiveness, its presumption, and its lack of evidentiary support," and adding for good measure that it seems like "the sort of thing normally associated with irresponsible and scurrilous pseudonymous comments on marginal political blogs"—is unlikely to draw in those who most need to read the paper.

Those readers might be more prepared to read and ponder it if they put to one side what I see as occasional strong expressions of emotion by Smith, and think of the article more as an exploration of the problems with "public reason" approaches to constitutional jurisprudence, particularly when combined with "expressive" theories of constitutional law. They might ask what kinds of rhetorical strategies tend to follow from these approaches. To ask those questions hardly requires changing one's mind about same-sex marriage or LGBT rights in general. But it does, perhaps, suggest that it would be

better to reach those results through a direct debate over fundamental premises than by attempting to preemptively clear the ground of argument over those premises by rejecting their opponents as simply malevolent.

On the other hand, opponents of gay rights might ask (as we all should) whether any of their own rhetorical strategies rely on similarly denigrating rhetoric. ("War on Christians," anyone?) And Smith himself, who I do not lump in with that group, might want to explore a broader question that is only hinted at here. He describes denigration as a "discursive *pattern*," and says "*Windsor* was merely one manifestation of a serious deficiency in a larger judicial strategy." But that strategy, at least in his telling, appears to be linked only to one kind of topic: "areas of profound and divisive controversy," such as abortion and gay rights. As a nation, however, we may agree profoundly on many cultural issues that do not end up in court. Conversely, there are other divisive issues that *do* end up in court but whose resolution rarely depends on the discourse of denigration.

What, then, accounts for the important but limited terrain of the discourse of denigration? Is it possible that the discourse of denigration, even if it is wrong, is not fatal to our legal or political culture because it is likely to be time-limited? After all, as Smith notes, we use similar language in some of our race-oriented constitutional discourse, and it has arguably not achieved the same degrading or divisive effects—or at least, not once a vast majority of Americans came to believe that racial discrimination is unjustified and the remaining pockets of dissidents became ever more firmly identified as bigots. Once that happened, the divisive force of most constitutional discourse around race faded and much of the law in that area became ordinary doctrinal work. There are still exceptions on some issues. But no one today, as far as I know, considers *Gomillion v. Lightfoot* to be "offensive" or "presumptuous."

Perhaps, then, the "discourse of denigration" that Smith worries about is likely to flower only in times of transition, as our national consensus on values first reaches a boiling point and then is more or less resolved. Perhaps he can rest easy knowing that once a national consensus on the fundamental rightness of same-sex marriage and gay rights has been reached, the doctrine itself will grow more forthright, less focused on the views of its increasingly marginal opponents, and altogether less controversial.

Somehow I do not think this will satisfy him; I'm not sure it should. In the meantime, we *are* in a period of hot contestation on some issues. It may be, as Smith says, that the discourse of denigration is the easiest or even the only rhetorical strategy available during such periods, and that no rehabilitation of constitutional law and theory could change that. But we can and should still be interested in the phenomenon itself, its causes and consequences. Smith's paper provides an excellent and thought-provoking introduction to that subject.

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