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SSM at the Supreme Court: Part II

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Distinctly Catholic

Yesterday, I issued the plea that both sides in the debate about same sex marriage be respectful of the good intentions of each other, and resist the urge to hurl the epithets like ?bigot? or ?civilizational threat.? Of course, the discussion in front of the Supreme Court today will not be a political discussion but a legal one. So, let us look at the role of the law in adjudicating this issue.

The two cases before the court are quite different. Today, the justices will examine a lower court ruling that invalidated California?s Prop 8, a referendum by which the voters of that state barred same sex marriage. Tomorrow, the court will hear arguments regarding the Defense of Marriage Act (DOMA) which bars the federal government from recognizing same sex marriages solemnized in states that have adopted the practice.

The first case involves balancing the liberty interests of the plaintiffs against the constitutional authority of the people of California. It is nettlesome, as always, but the decision could have significance only in California. The Supreme Court goes not need to declare a national legal regime either for or against same sex marriage in that case.

The second case involves states? rights, which is what makes it so interesting to see how the more conservative jurists will come down. We all know that marriage is traditionally a matter of state law, but there are hundreds of federal statutes that provide for different ways of treating the married and the unmarried. If the court decides to invalidate DOMA because it unnecessarily interferes with state jurisdiction, they run into a 14th Amendment issue because gay people will be treated differently in different states. (Here, too, we see the limits of law: No matter what the court decides, gay people in the rural south will be treated differently than gay people in lower Manhattan.) And, if they invalidate DOMA

on broader grounds, they will essentially be creating a national right to same sex marriage.

It has been interesting to see which prior cases the opposing counsel use to make their case to the public. Some who are opposed to same sex marriage say the court should stay out of the issue, resolve the cases before them on the narrowest grounds possible, and let the issue continue to percolate through the various state legislatures. They note that Roe v. Wade sought to resolve the abortion issue but, by short-circuiting a political discussion, and casting it in absolutist terms, only guaranteed that the issue would continue to fester, as indeed it has. The consequences of Roe are actually worse: It prevented the will of the majority from reaching the kind of ambivalent legislative result most people want, a legal regime in which some, but not all abortions, are permitted. I am deeply sympathetic to the view that it would be better if the Supreme Court found a way to let the legislative process continue so that twenty years from now, whatever conclusions are reached are accepted as definitive in a way that Roe never has been.

Proponents of same sex marriage point to another case, one that would seem to be more on point, Loving v. Virginia. Apart from being the most happily named Supreme Court case ever, Loving v. Virginia overturned state statutes barring interracial marriage. As I noted yesterday, one of the things that has changed in the culture?s understanding of homosexuality in recent decades is that most people understand sexual orientation is a given, not a choice, and just so, it would seem to be a personal attribute akin to race, which is also a given. Perhaps, in terms of the law, the analogy holds. But, I would suggest that homosexuality is not like race, and the analogy overlooks things it is important to keep in mind, for both sides. A white couple living in the suburbs of Washington may not know whether their daughter will come home from her first year at college and announce she is a lesbian, but they know she will not come home and announce she is black. On the one hand, many people, including most recently Sen. Portman of Ohio, have switched their position on same sex marriage in part because of the discovery that one of their children is gay. Or they know someone at work or a neighbor whose child is gay. This experience has created a ground swell of sympathy that has largely accounted for the changing attitudes towards same sex marriage. On the other hand, many parents, even many liberal parents, want for their children the happiness that they have found in their lives, and fear the prospect that their child may be gay. They may fear the discrimination that child would face. They may fear for their gay child?s soul if they believe God?s law forbids homosexuality. So, homosexuality may be a given the way race is a given, but it occasion opportunity for sympathy and for fear that race does not. It functions differently in the psyche and therefore functions differently in the political life of the nation.

There are deeper issues here than which prior Supreme Court ruling is more on point. During his speeches at the Bundestag and Westminster Hall, and in his public discussion with Habermas in 2004, Pope Benedict XVI focused on the ethical foundation of law and posed deep and troubling questions for Western democracies, questions we prefer not to ask or answer because they are difficult but nonetheless affect how we view particular issues like same sex marriage. In the famous ?mystery passage? of the Court?s decision in Casey v. Planned Parenthood, the Court stated: ?At the heart of liberty is the right to define one?s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the state.? Of course, you can spot the difficulty here at first glance. The state, in the form of a court opinion, in indeed compelling a certain understanding of these matters by insisting that they are the fruit of individual searchings, and that they may not be judged against any exterior standard of truth. But, if the standards of truth are whatever a majority says those standards are, how firm a foundation do we have for our laws?

I have called attention frequently to Brad Gregory?s book ?The Unintended Reformation: How a Religious Revolution Secularized Society.? There he traces the transition ?from medieval Christianity?s ethics of the good to modern liberalism?s formal ethics of rights via the disagreements and disruptions

about the Christian good during the Reformation era.? Gregory also provides a fine recapitulation, and an important critique, of the work of Alasdair MacIntyre, writing, ?Despite his proper insistence on the relationship of moral philosophy to social relationships and politics, MacIntyre ignores almost entirely the concrete disruptions of the Reformation era. Aristotelian virtue ethics was not rejected in the first instance or primarily because of a direct assault by Enlightenment thinkers, as a corollary of post-Aristotelian natural philosophy, because of the increasingly specialized character of academic inquiry in late medieval universities, or even through its repudiation by early modern Lutherans, Reformed Protestants, and/or Jansenists ? even though all of these played a role. Rather, its repudiation stemmed more fundamentally from its continuing association with Roman Catholicism in an era of deadlocked doctrinal controversy and religio-political violence.? The philosophic analysis of MacIntyre here finds a more thorough-going historical explication of the circumstances by which competing philosophic approaches were adopted and discarded. These issues, in short, have been around for a long time.

So, what to expect? Who knows. But, I hope the court finds a way to craft a narrow, not an expansive, ruling. The movement for same sex marriage, and gay rights more generally, has had one of the fastest gestations of any socio-political movement in American history. We can all read the polls and detect the trajectory. Rather than complicating that trajectory by short-circuiting it with a sweeping affirmation of a constitutional right to same sex marriage, and inviting those who might be or become sympathetic to recoil in the face of what they perceive as judicial overreach, I think the issue is best left to the states. DOMA should be overturned and the federal government should recognize whatever married couples a given state government recognizes. On the California case, I am torn, but would incline to finding a way for the Supreme Court to punt. But, whatever the courts decide, it will behoove legal scholars to ask the deeper questions Benedict XVI and Professor Gregory have raised. If our formal ethics of rights is to be the only norm, the on-going hyper-individualization of our society will continue apace, and that frightens me at a time when other issues, such as the environment, will require a body politic capable of articulating a common good.
