TENDENCIAS EN LAS POLÍTICAS DE EEUU PARA LOS PRÓXIMOS CUATRO AÑOS

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Liberalism, Morals, and the Supreme Law of the Land

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I. Introduction

In the United States, constitutional law serves as a critical battleground in the struggle over freedom's moral and political meaning. The Bush administration's conservative views on abortion, affirmative action, and same sex marriage can be better understood when the debate over them is placed in the context of American constitutional law. Today I want to provide some of that context. And bring some good news. Freedom is strong in America. Rights are protected. And a lively debate is taking place about freedom's material and moral preconditions.

By design, the American Constitution is the supreme law of the land. Because it is a *liberal* constitution, one whose first purpose is to protect individual freedom, the supreme law of the land avoids taking a stand on the supreme, or most fundamental issues. For example, the Constitution does not aim to instruct people on the proper catalogue of virtues, on the content of happiness, or on the path to salvation. That's not because the Constitution supposes that virtue is irrelevant, that happiness has no content, or that faith in salvation is a snare and a delusion. Rather, the Constitution establishes a framework within which each has the liberty to pursue virtue, happiness, and salvation consistent with a like liberty for others.

This constitutional framework consists of the enumeration of government powers and the elaboration of individual rights. It establishes minimum requirements and imposes outer boundaries on state action and personal conduct. In largely leaves substantive judgments about morals and policy to individuals and democratic politics.

Accordingly, to say of some law or action or institution that it is constitutional is not very high praise. For the Constitution permits much that is foolish, vulgar, or degrading. Yet the enshrinement in the supreme law of the land of the scope of individual freedom–minimum requirements and outer boundaries--has consequences. It colors and give direction to the moral life. Indeed, by proclaiming, backed by the coercive power of the state, what is forbidden, what is permitted, and what is required, the Constitution generates comprehensive background conditions for, and sets a tone that reverberates throughout, all spheres of life.

Most of the cases the Supreme Court hears are technical. Of those that, because of the morally and politically fraught issues at stake, do capture the public's attention, a majority arise under the 14th Amendment. And the most morally and politically fraught of these concern abortion, which involves a contest over the interpretation of the 14th Amendment's Due Process Clause, and affirmative action, which involves a contest over the interpretation of the 14th Amendment's Equal Protection Clause. In the not too distant future, same sex marriage may come before the Court; if it does, it is likely to involve a contest over the interpretation of both clauses.

The due process clause provides that no state "shall deprive any person of life, liberty, or property, without due process of law." The equal protection clause declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The original and overriding purpose of both was to make the federal government responsible for protecting the rights of blacks against infringement by state governments. But the 14th Amendment dealt with the challenge by reaffirming *universal* guarantees implicit in the original Constitution. And by making the federal government responsible for ensuring compliance by the states with those universal guarantees.

What precisely is the content of those guarantees? In deciding, Supreme Court justices have had no alternative but to fall back on their opinions, both considered and inarticulate, about the core meaning of freedom and equality. And thus, through its decisions, the Court has taken sides on, and enshrined in the supreme law of the land, answers, or at least sizeable fragments of answers, to some of the great moral questions of the day.

II. Abortion and the Due Process Clause

First abortion. Since the Supreme Court's landmark 1973 decision in *Roe v. Wade,* the public debate over abortion has been full of sound and fury. Movement leaders on both sides see their own positions as morally unassailably, and accuse the other side of terrible crimes. Yet the nation seems quietly to have reached a settlement. A solid consensus–in public opinion and embodied in the Court's key decisions–has emerged.
The consensus affirms that abortion is a complicated moral choice, involving two goods, the autonomy of the woman and the life of the fetus or unborn child. Early on in a pregnancy that choice is best left to the woman and those whom she loves and trusts and chooses to consult. As the pregnancy advances, the choice is increasingly subject to state regulation to protect the developing life of the fetus or unborn child.

The consensus reflects imperatives arising from our ideas about freedom. Both pro-choicers and pro-lifers are emphatically pro-personal freedom. Proponents of a woman's right to terminate her pregnancy defend the personal freedom of women, in the form of women's interest in maintaining control over their bodies and their lives. Woman can enjoy neither freedom to live their lives as they see fit nor equality in the marketplace and politics, pro-choicers argue, if they must bear the burden of an unwanted pregnancy.

But conservative opponents of abortion–and this is important!–also invoke personal freedom. They emphasize the rights of the unborn child who, they contend, is a person in the morally relevant sense, and whose right to life, they maintain, supersedes a mother's liberty interest in controlling her body and determining the shape of her future. Alternatively, conservatives invoke the freedom connected to self-government. Here they argue that Supreme Court, with no foundation–textual, structural, historical–in the Constitution, have fashioned abortion rights, thereby imperiously deciding a moral question that the Constitution leaves to the free choice of the people. Powerful conservative voices do oppose abortion on religious grounds, out of belief that the unborn child is an embodied soul, that is, the human embryo, even in its earliest stages of development, is already a unique human being. But when they become activists and participants in the public debate, the pronounced tendency of conservative opponents of abortion is to make their case in the language of freedom and not religion.

Moreover, both parties to the debate show that in practice–at least in other contexts–they do respect the other side's principle and embrace it as their own. For example, in their opposition to the death penalty, pro-choicers proclaim their respect for human life and their unwillingness to permit the state, even in response to monstrous crimes, to extinguish it. And pro-lifers demonstrate their respect for the principle of choice in their commitment to limited government, an essential purpose of which is to preserve for individuals the decisions about the matters that mean most to them.

Roe v. Wade captured something of the complexity of the *moral* challenge posed by abortion. The Court held that within limits the Constitution protects a woman's right to terminate her pregnancy. Though the *legal* reasoning in the case has been subject to severe criticism–even by law professors who support abortion rights–the underlying *moral* reasoning has carried the day. According to the Court, the claims of women's autonomy prevail during the first trimester, in which she may terminate her pregnancy at will. In the second trimester, the state's interest in the life of the developing fetus or unborn child is sufficient to justify reasonable restrictions. And in the third trimester, as the fetus or unborn child became viable outside the mother's womb, the state's interest in protecting its life can take clear precedence over the mother's wishes.

This reasoning suggests, first, that in a crucial respect the fetus or unborn child is a member of the human family and so endowed with rights. Second, that the fetus or unborn child is different in morally relevant ways so that early on its development the rights of the mother prevail over its. And, third, the further the fetus or unborn child develops, the more the morally relevant differences between it, or he or she, and a person fade.

What needs to be emphasized is this: Although it has been modified by subsequent decisions, the *Roe* framework, and the profound moral ambivalences to which it gives expression, still define the constitutional settlement. President Bush may have the opportunity to nominate as many as three justices to the Supreme Court this year. I doubt very much that his choices will result in the Court overturnng Roe. But keep in mind that if Roe is overturned, women are not thereby denied the right to get

abortions. The question would revert to the states. And my guess is that the vast majority of states will uphold that right.

III. Affirmative Action and the Equal Protection Clause

In June 2003, the Supreme Court struck down the University of Michigan's undergraduate affirmative action program in *Gratz v. Bollinger,* while upholding in *Grutter v. Bollinger* its law school's affirmative action program. Progressive proponents of affirmative action could be pleased: the Court held that the promotion of diversity was a goal of such overriding importance that it justified a university taking race into account, as one among a variety of other relevant considerations, in selecting students. Conservative opponents of affirmative action could take solace. The Court reaffirmed that quotas based on race were unconstitutional. Yet in striking a balance, the Court in fact tilted notably in favor of the progressive interpretation of liberalism.

Interestingly, the cases provoked little outrage. To be sure, taken together the cases amounted to a victory for proponents of affirmative action. As long as universities were prepared to invest the time and energy that more individualized review of applicants would require, few would be prevented by the Court's ruling from achieving the kind of diversity in admissions they sought. But what explains conservatives' moderation?

In part, it is because the public is closely divided on the question of affirmative action. But the particular character of the public divide is also important: the divide is not only *between* opponents and proponents of affirmative action but *within* opponents and proponents. Many conservative opponents of affirmative action accept that the massive injustices inflicted upon blacks by the American people–slavery, Jim Crow, private racial animus–create *some sort of* public obligation to remedy the effects of past and present discrimination. At the same time, many progressive proponents of affirmative action recognize the potential for race-based policies to polarize the public, perpetuate racial stereotypes, and sanction unequal treatment under the law.

As in the case of abortion, the key alternatives in the debate over affirmative action flow easily from liberalism's fundamental premise, equality in freedom. Which both sides share.

Typically, proponents of affirmative action argue that the state must take race into account in admissions in order to create a university community that reaps diversity's benefits. They draw upon a powerful moral conviction: equality in freedom is an achievement that in practice depends upon the state's lifting up those who have been trampled down by discriminatory state action, or who have fallen so far behind that they cannot catch up without benevolent government programs. Yet when critics argue that university admissions should be color blind, they too draw upon a powerful liberal conviction: that equality in freedom means that one should be judged as an individual and not as a member of a group defined by morally irrelevant features such as skin color.

The problem in *Grutter* is that while pretending to apply its precedents and principles faithfully, the Court deviated dramatically from them. To take one example, in establishing diversity as a compelling state interest, the Court utterly abandoned its concern that classifying individuals on the basis of race would reinforce pernicious stereotypes. Instead, the Court said it was proper, indeed served a compelling state interest, for universities to treat black skin as a proxy for a certain set of experiences and a distinctive set of opinions about the world.

Strained reasoning suggests the suppression of tensions. And the majority's *legal* reasoning in *Grutter* is embarrassingly strained. So why did it carry the day? One big factor is the powerful appeal across the political divide of the progressive interpretation of liberal principles, which calls for interpreting the equal protection of the laws as to require government to take steps to promote policies that create a more inclusive society. And there is no good reason to suppose that a majority will arise that will reverse this trend.

IV. Same Sex Marriage and the Ineluctable Logic of the 14th Amendment

The Supreme Court has not yet ruled on same sex marriage. No cases on the question have come before it, and none as yet are wending their way through the federal courts. If a challenge makes it through, the Court may well strike down the restriction of marriage to a man and a woman and do so for reasons similar to those given by the Massachusetts Supreme Court in November 2003, and those given in *Lawrence v. Texas*, in which the US Supreme Court struck down, on due process grounds, the state's law criminalizing homosexual sodomy. The problem is not that conservatives lack a respectable case against same sex marriage. They lack a respectable *constitutional* case.

The best conservative case against same sex marriage goes like this. Marriage has long been at risk and is the most vital institution in society for the formation of character in children, and the transmission of values to the next generation. By separating marriage from parenting, and by implicitly rejecting the idea of the natural complementarity of the sexes, same sex marriage will further undermine the institution of marriage.
Conservatives may well be right about the consequences of same sex marriage. And yet, as conservatives hardly need to be reminded, there are always countervailing considerations. One such consideration is the mistake of treating the Constitution, the supreme law of the land, as an instrument of social policy rather that the framework within which we debate social policy. Another is the natural momentum in America's diverse society of the arguments, rooted in the freedom to choose and equality before the law, for conferring upon all, including gays and lesbians,"the protections, benefits, and obligations of civil marriage." But there is another, closely related but less obvious consideration: the law generally does not prohibit practices on the grounds that they harm marriage, especially if the practice can be seen as enhancing equality in freedom.

Consider the variety of practices which, conservatives have persuasively argued, do put pressure on marriage, but which by and large conservatives properly do not seek

to prohibit. They include the birth control pill, premarital sex, no fault divorce, and the entry on an equal footing of women into the workplace. Now, suppose you are unwilling to support legislation to prohibit these practices because of the cost to individual freedom–an unwillingness many conservatives share. How in good faith can you single out same sex marriage for legal prohibition?

One answer is that in contrast to the aforementioned practices, same sex marriage does involve formal state approval, either symbolically or through the conferring of financial benefits. The others call only for the state to mind its own business.

In fact, in minding its own business in regard to all other aspects of intimate relations, the state makes a powerful statement of moral and political principle: the organization of intimate relations is a matter of personal choice. Now that bigotry against gays and lesbians is on the run, express legal liabilities have been lifted (with the notable exception of the military's don't ask, don't tell policy), popular culture has increasingly embraced homosexuals, and the question of same sex marriage has been brought out into the open and into focus by vigorous public debate, the admittedly speculative harms critics associate with same sex marriage will, in more and more people's minds, be outweighed by the rock solid principle of respect for individual choice. Particularly in matters relating to love and the family. Especially between consenting adults where physical harm is not an issue. While majorities in the United States may not yet be ready for same sex marriage, larger majorities will oppose legislation that smacks of anti-gay animus. I believe this describes the President's general orientation.

In short, because of the force of arguments about individual freedom and equality before the law in a free society, other state legislatures will likely sooner rather than later do on their own what the Massachusetts legislature is doing under the compulsion of its highest court. They will answer those policy questions in favor of granting gays the protections, benefits, and obligations of civil marriage. And the federal government lacks both the arguments and the will to resist.

V. Conclusion

In sum: The language of freedom remains the coin of the realm in American moral and political life. All of the great moral questions of the day eventually get translated into its terms. The Supreme Court's interpretation of the requirements of due process and of the equal protection of the laws in regard to abortion, affirmative action, and soon same sex marriage have a liberal warrant. They also provoke liberal anxieties.

Of course, to repeat what was observed at the outset, to say that a practice is constitutional is not the last word on the subject. It is part of the wisdom of the American Constitution to give us wide scope to examine the social costs of progress in freedom. The blessings of freedom cannot be conserved without attending to them.