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The debate over single-sex marriage

By Ronald Goldfarb - 05/19/11 12:38 PM ET

Most people have fixed positions on the merits of single-sex marriage. Fixed, if not contentious. For those who do not, or do but have an open mind, the discussion yesterday at the Cato Institute in Washington was enlightening.

A double odd couple of speakers discussed the recent Perry trial in California dealing with Prop 8 (and the federal DOMA), state and federal laws limiting the legality of single-sex marriage. Odd because the organizational sponsors were Cato's Bob Levy and Center for American Progress CEO John Podesta; and the lead speakers were the two lawyers who argued the Perry case — conservative advocate Ted Olson and liberal lawyer David Boies (who opposed each other in the 2000 election case). All their commentaries were informative and persuasive.

The key to the trial court's 134-page opinion in Perry (now on appeal) is that marriage is a fundamental right that harms no one if it is exercised by people of the same sex. However, people are hurt by the denial of marriage status — their children, for example. Single-sex marriage is legal in five states, permitted as civil unions in several others, and approved by a small majority of the general public (53 percent) according to recent polls. Under federal law, 1,138 statutes relate to people who are married, so the status "married" is consequential to significant and growing numbers of people.

Marriage is a private contract, historically, and if states are to be involved, as they are, they cannot discriminate. To do so would be to deny gay people equal protection and due process under state laws. Their liberty, right of association and privacy would be fundamentally affected, the lawyers argued.

The issue is a cultural one and the case could be made that states, as social laboratories in the federal system, should be allowed to explore varied approaches to evolving ideas. The cultures of Idaho and New Jersey are quite different on social issues, and arguably different states should be permitted to follow different policies. However, the panelist pointed out, the cultural norm nationally regarding single-sex marriage is changing rapidly, in favor of the practice. Sixty percent of private companies now extend rights to gay couples, for example.

A side issue arose after the court's decision (it was a non-jury trial) when it was noted that the trial judge is gay, and thus arguably was prejudiced. But as lawyer Olson pointed out, a heterosexual judge could also be deemed to have a personal interest in the case if the sexual predilection of judges should be considered the basis for a challenge. Black judges are not disqualified from civil rights cases.

Both lawyers made an additional point worth noting. They asked the court that the trial be broadcast so a wide public could hear for itself the witnesses and experts, and see the evidence — so important is public understanding of the issue. It was not. The general public thus missed the presentations Cato attendees heard, to our distinct edification. This point proves again that televised trials can be an important educational medium. The lawyers underscored the importance of winning the case not only in the California courts, but in

the court of public opinion.

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