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The (Hoped for) Shallowness of Progressive Skepticism Towards Religious Freedom

Nathan B. Oman

William & Mary Law School, nboman@wm.edu

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CENTER FOR LAW AND RELIGION FORUM

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The (Hoped for) Shallowness of Progressive Skepticism Towards Religious Freedom

Posted on [April 21, 2015](#) by [Nathan Oman](#) | [2 Comments](#)

In [his recent post](#), Mark writes:

Increasingly, secular liberals are losing patience with claims for religious liberty, particularly from traditionalists who dissent from progressive orthodoxy. Only fanatics could object to progressive goals like the Contraception Mandate and same-sex marriage, they believe, and it's wrong to accommodate such people. Accommodation encourages backward and malevolent attitudes that cause innocent people grave harm.

I wonder to what extent this is true. On one level, I think that Mark is clearly correct that secular liberals have increasingly decided that “religious liberty” is a code word for various regressive social positions and behave reflexively when it is invoked. On the other hand, I think that some religious conservatives have been rather too glib about labeling every social development to which they object as a threat to religious freedom. To be clear, I am not trying to adopt a pox-on-both-your-houses-above-the-fray stance here. I think that secular liberals have tended to overreact more than religious conservatives, and I think that religious conservatives are right to be wary of the enthusiasm with which progressives have used the power and authority of the state to stamp out perceived social evils. To be sure, conservatives have defended stuff like Blue laws or the Ten Commandments on the courthouse lawn, while progressives have done stuff like create the New Deal regulatory state. The progressive response strikes me as rather more legally ambitious.

That said, I also think that most people – left and right – are pretty shallow and reactive in how they make political arguments. Just 20 years ago, RFRA enjoyed overwhelming bipartisan support. Today it makes many liberals apoplectic. Perhaps this reflects a deep shift in attitudes towards religious freedom, as Mark suggests. Perhaps not. I wonder if at the end of the day, all of this is about two things and two things only. The first is gay marriage, and the second is antidiscrimination law. Right now, progressives worry that granting the legitimacy of any religious freedom claim will rip massive holes in antidiscrimination laws and might threaten the onward march of gay marriage.







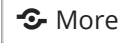
In actual fact, I think that religious freedom exemptions such as RFRA present basically zero threat to either movement. Given the shift in attitudes and demographics along with Anthony Kennedy's ambitions for immortality, gay marriage is already happening in the United States, and religious conservatives are not going to stop it. As for antidiscrimination laws, to my knowledge no court has ever found the application of the compelling state interest test to a law burdening religious exercise creates an exemption from the application of antidiscrimination laws outside of a church setting. Give that some version of this standard



has been applied off and on to religious freedom claims for half a century, if religious freedom was going to destroy antidiscrimination law, I think it already would have happened. Hence, if RFRA represents the maximal position on religious freedom in the current landscape, then the bottom line is that there really isn't any threat to antidiscrimination laws. To be clear, I think that antidiscrimination laws present genuine religious freedom problems, and I would prefer a regime in which there were religious exemptions in some cases from such laws. I just don't think that such a regime is at all likely, and I don't think that RFRA or the compelling state interest test is going to deliver it.

I think that over time, both the success of gay marriage despite religious opposition and the continuing vitality of antidiscrimination laws despite state or federal RFRA legislation will become glaringly obvious, even to the most fearful of progressives. Once this happens, I wonder if the newfound hostility to religious freedom will continue. It might. I think that a lot of what happens in politics – even the high politics of academic legal debate – is tribally driven. Secular progressives really dislike religious conservatives (and vice versa). I can imagine a world in which “religious freedom” becomes coded as “racist, homophobic religious hick” in the progressive mind, and their reactions get determined by the overwhelming need to insure that the other team doesn't win.

I think, however, it is also possible that once it becomes clear that priorities on gay marriage and antidiscrimination laws are not threatened that progressive hostility to religious freedom will wane. I don't know if this is the case, but it seems possible that really there is nothing deeper going on here than gay marriage and antidiscrimination laws.

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