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The Empirical Irony of the Conflict Between Antidiscrimination and Religious Freedom

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I like markets. I think that on the whole commerce tends to make us better people, that trade is one of the best mechanisms of cooperation in a pluralistic society, and that participation in the market will generally increase our material well-being. Hence, insuring that everyone has the ability to participate in the market is important. Generally, the best way to insure such participation is to create institutions that keep markets competitive and remove barriers to entry. Contract and the search for new customers will do the rest.

I am not, however, a principled libertarian or anarcho-capitalist or the like. At times history, habits, and other institutions will result in a market from which some people are systematically excluded. I don't think that this is an inevitable result of markets, and I think that contract and competition do a better job of insuring access than most folks (perhaps especially law professors) recognize. Still, no human institution or set of practices is perfect, and this is definitely true of commerce. When such systematic exclusion occurs, I think that antidiscrimination laws are justified to insure access. In a pluralistic society, however, I don't think that the case for such laws is particularly strong if we justify them on grounds other than access. Living in a world in which others engage in acts that are an affront to one's dignity or manifest unsavory thoughts strikes me as part and parcel of the liberal ideal, and I don't think that such things should be made into legal wrongs, except in extreme cases like IIED torts.

Given my framework, I think that there is a deep irony in the current debates over religious exemptions and antidiscrimination laws covering homosexuality. First, I think that such antidiscrimination laws are justified where there are threats to the ability of gay citizens to participate fully and meaningfully in the market. The strength of that justification, however, is empirically contingent in my book. In places where there is widespread animosity towards homosexuality, the case for such laws is fairly strong. In places where animosity towards homosexuality is confined to a small subset of the population, the case for antidiscrimination laws is weaker.

I also think that antidiscrimination laws can burden religious exercise substantially. I actually don't think that the wedding cake baker or the wedding photography facts are particularly hard cases. There are lots of people who believe that the celebration of gay marriage is wrong, sinful, and blasphemous. It is pretty understandable that they would regard participating in such a wedding as sinful. One may disagree with their moral or theological position (I do), but I don't think that it is insincere, pretextual, or that the burden placed upon them is trivial. Hence, regardless of the doctrinal rout by which one gets there – RFRA, state constitutions, statutory carve outs, what have you – I think that exemptions in such cases make sense. Where granting such exemptions doesn't meaningfully threaten access to the market, fining the baker or the

photographer strikes me as needlessly punitive and vindictive.

However, I think that the case for religious exemptions from antidiscrimination laws is also empirically contingent. It is contingent in two ways. First, given the religious beliefs that command a following in society, are there a lot of belief systems that are going to label providing services to gay customers or employing gay workers as impermissibly sinful? Second, are there a lot of believers in these creeds? I think that there is a lot of mindless animosity towards homosexuality and some of that mindless animosity drives religious beliefs. There is less of this, however, than many secular liberals assume. I don't think, for example, that most conservative religious believers think that serving gay customers or having gay employees is sinful, even if they believe that homosexuality is sinful. Rather, I think that the desire for exemptions is largely about marriages, weddings, and perhaps family formation (IVF or adoption). And even there, I don't think that there are very many people – including conservative religious believers – that would actually use such exemptions.

I may be wrong about both of those conclusions, and in some places I am pretty confident that I am wrong. And this leads to the irony. In places where anti-discrimination laws are most justified we are the least likely to get them through the political process. Those are also the places where granting broad religious exemptions is most likely going to undermine antidiscrimination laws if they are enacted. On the other hand, those places where there is the strongest support for antidiscrimination laws are also the places where there is the least need for such laws and where the case against granting religious exemptions is the weakest. Yet these are also the places where we are least likely to see religious exemptions from those laws.

All of this makes me pretty depressed. The incentives, it seems to me, is for the politics to become the most toxic and destructive for both sides depending on the region. In crude terms, I think that in blue states conservative religious objectors will likely be dealt with harshly and punitively. In red states, I think that there is a real danger that in some places homosexuals will lack the ability to fully and meaningfully participate in the market.

There are, however, two things that give me hope. The first and greatest source of hope is commerce itself. I think that interactions and incentives in the market are likely to cool animosity and open opportunities. The fact that most people don't care a great deal about these debates and would rather get on with making a living is deeply heartening. The other source of optimism for me is Utah, where the state recently expanded antidiscrimination protection for LGBT folks, while carving out surprisingly narrow exemptions for religion. Utah is not as encouraging as the market itself, however, because the law punted on most of the hardest issues. Still it suggests that the rhetorical and legal tailspin that seems most likely to me in ideologically homogenous spaces isn't inevitable.

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