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## Markets, Religion, and the Limits of Privacy

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### Markets, Religion, and the Limits of Privacy

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In modern, Western societies religion is tied up with the idea of privacy. In the wake of the Wars of Religion, religious and political thinkers invented the idea of a private sphere in which one could practice one's religion separately from the public sphere of political action. The idea of privatizing religion has proven powerful and on the whole hugely beneficial. It allows for religious toleration and religious pluralism without suppressing religious belief and practice. Believers must simply keep their religion private, or perhaps more precisely we define as private the religious behavior that we are willing to tolerate.

The same seventeenth- and eighteenth-century world that used the idea of privacy to manage religion also employed the idea of private activity to make sense of the increasingly important role of markets in society. Aristotle thought of economic activity as part of the government of the household, which of course was seen as a private (and therefore not particularly important) realm as opposed to the public space of the agora, where the important aspects of life occurred.

By the time the Wars of Religion were winding down in the mid-seventeenth-century, however, commerce had become politically important. At the same time, the relocation of religion (and with it the ultimate questions of the good life) to the private sphere had rendered what went on there of far greater importance than it had been for Aristotle and his successors. By the eighteenth-century we had a whole new field – economics – that was focused on thinking about commercial life as a distinct sphere, and with the rise of nineteenth-century liberalism, this commercial activity – like religion – was conceptualized as a private matter, one where the collective decision-making of politics was to hold limited sway.

Many of the current skirmishes over law and religion are less about the relationship of God and Caesar than they are about the law regulating the relationship between God and Mammon. Cases like *Hobby Lobby* or the debates over anti-discrimination law and state RFRA statutes are about how the law ought structure the relationship between church and market. What these cases reveal is the extent to which the idea of privacy no longer makes very good sense of either religion or the market.

Virtually every religious tradition pre-dates the idea of religious privacy invented at the end of the seventeenth century. Because the idea of a religion as a private activity isn't native to these religious traditions, they can make demands on believers that extend beyond how ever it is that society happens to be defining private activity at the moment. Likewise, in a post-*Lochner* world, markets are no longer seen as entirely private matters. Rather, their regulation is a matter of intense public concern. Indeed, market regulation accounts for the vast bulk of the state's regulatory activity.

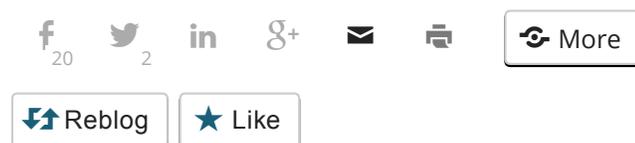
Anti-discrimination law, it seems to me illustrates how the ideas of privacy breaks down in defining religion and the market. The ubiquitous scare quotes that one see in public discussions of “religious liberty” suggests that for many folks there isn’t a “real” issue of religious practice implicated when conservative religious believers seek to avoid participating in same-sex weddings, for example. Implicit in the scare quotes, it seems to me, is the assumption that “real” religious activity must be private and once one becomes a wedding photographer or cake baker one’s activities are no-longer private and therefore not “really” religious or at least not religious in a way that is socially legitimate. The religious objectors counter by invoking the idea of the market as a private space, a space of private contracts, private agreements, and private decisions. The wedding photographer’s actions are legitimate precisely because they are private actions and therefore carried out within the legitimate sphere of religious activity.

Yet both sides in the kulturkampf employ the idea of privacy in strategic and inconsistent ways. For example, religious objectors can invoke laws against discrimination, and in the *Hobby Lobby* case Justice Alito justified the Court’s holding in part by invoking anti-discrimination norms, namely that religious firms could not be excluded from market participation because of their religious decisions. In this set of arguments, religion is private – and therefore cannot be regulated – but the market is a “public” space where norms of equality prohibit exclusion. Likewise, progressives tend to dismiss the idea of private activity as a naïve anachronism when privacy is invoked in the context of market transactions. Even very limited and apparently trivial commercial acts (getting another baker for one’s cake) are assumed to have far-reaching public consequences meriting aggressive regulation. Yet in cases like *Lawrence* the Court is applauded for striking down laws attacking homosexuality because sexual behavior is private, an activity without any consequences that might concern the community.

What this suggests to me is that despite its historical usefulness, the idea of privacy is doing relatively little work in these debates. Religion, markets, and sexuality can all be public or private depending on whether or not we want to regulate or control the activity in question. The idea of a private space is less an analytic tool telling us about the limits and reach of legitimate state power than a label we apply to our conclusions about those limits. In the context of debates over religion and the market this strikes me as particularly problematic because in current debates it seems to me that we are left with few conceptual resources other than the supposed line between private and non-private behavior for mediating those debates.

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