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Liberty v. Equality; Equality v. Liberty

Marc D. Stern*

¶1 In other forums, I have taken the position that the state should recognize same-sex marriage even as it protects religious liberty.[1] I have also, by signing a letter drafted by Professors Robin Wilson, Thomas Berg, and others,[2] indicated my support for generous protection of the religious liberty of those who oppose same-sex marriage. In this letter, we proposed that recognition of religious liberty be a part of same-sex marriage legislation pending in several states. This was a joint proposal, and, as is the nature of such things, it was difficult to reach complete agreement on every detail. The point was to establish a broad draft statute addressing the conflict that has arisen between the right to same-sex marriage and the right to religious freedom, and to provide a template for legislation that can adequately deal with the issue. Our suggestion for a statute applying to all marriages, but in practical terms relevant only to same-sex marriages, ran:

> No individual, no religious or denominational organization, and no charitable or educational organization which is operated, supervised, or controlled by or connected with a religious organization, shall be liable, penalized, or denied benefits under the laws of this state or any subdivision of this state, including but not limited to laws regarding employment discrimination, housing, public accommodations, licensing, government contracts or grants, or tax-exempt status, for refusing to provide services, accommodations, advantages, facilities, goods, or privileges related to the solemnization of any marriage, for refusing to solemnize any marriage, or for refusing to treat as valid any marriage, if such providing, solemnizing, or treating as valid would cause such individuals or organizations to violate their sincerely held religious beliefs, *provided* that
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> (a) a refusal to provide services, accommodations, advantages, facilities, goods, or privileges related to the solemnization of any marriage shall not be protected under this section where (i) a party to the marriage is unable to obtain any similar services, accommodations, advantages, facilities, goods, or privileges elsewhere, and (ii) such inability to obtain similar

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[1] Marc D. Stern, Op-ed, *Will Gay Rights Trample Religious Freedom?*, L.A. TIMES, June 17, 2008, http://articles.latimes.com/2008/jun/17/opinion/oe-stern17; Letter from Thomas C. Berg, Professor of Law, University of St. Thomas School of Law, et al., to John Lynch, Governor, New Hampshire (May 1, 2009), *available at* http://www.mirror-of-justice.blogs.com/files/letter-to-gov.-lynch-re-h.b.-436-1.pdf.

[2] *See*, *e.g.*, Letter from Thomas C. Berg, Professor of Law, University of St. Thomas School of Law, et al., to John Baldacci, Governor, Maine (Oct. 5, 2009), *available at* http://mirrorofjustice.blogs.com/files/wilson-et-al-to-governor-maine-100509.pdf.

> services, accommodations, advantages, facilities, goods, or privileges elsewhere constitutes a substantial hardship; and
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> (b) no government employee may refuse to assist in the solemnization of any marriage under this section if another government employee is not available and willing to do so.

¶2 Some of the proposed statute's provisions are easily defended, such as exempting religious agencies from the requirement to recognize same-sex marriage. At the same time, the provision prohibiting the denial of government funding to institutions that do not recognize same-sex marriage can be questioned, or the provision allowing an exemption to corporations can be limited to apply only to small, closely held corporations without serious harm to religious liberty.

¶3 The proposal is ambiguous on some points. For instance, are individuals who do business in corporate form protected (and, if so, what size corporations would be protected)? Or, do only those acting in an individual capacity fall within the statute? While beyond the scope of this Article, this and other issues deserve to be discussed in detail and may plausibly and reasonably be debated.

¶4 In this Article, I will attempt to put the arguments in a larger framework. First I will introduce the topic by providing the background of the debate, including the basis for religious liberty protection and the practical importance of enshrining such protection in any same-sex marriage legislation. Then, I will demonstrate that the ability to claim religious protection depends largely upon whether the issue of same-sex marriage is framed as one of equality or personal liberty. Next, I will explore the argument proposed by some for the privatization of religion—that religion has no place in the public sphere. Finally, I will briefly discuss the argument for moral autonomy.

I. INTRODUCTION

¶5 While the details of any such statute invite debate, the general principle of the proposed statute above—that religious accommodation is necessary—should not be debatable. Recognition of same-sex marriage, whatever technical form legal arguments made on its behalf take, exemplifies a "live and let live" policy. That same policy should apply equally to religious believers who oppose same-sex marriage—they should not be required to act directly in opposition to their religious beliefs, that is, in ways that appear to confer their personal blessing on such marriages. While such exemptions are necessary, there are probably far fewer people around who would invoke such exemptions than is generally thought. And, given the poll data,[3] there will be even fewer as older people move off the commercial scene.

¶6 That recognizing same-sex marriage will, for the while, put many people with "traditional" religious beliefs[4] in a vise between their religious commitments and the law

[3] *See, e.g.*, Press Release, Quinnipiac University, Same Sex Marriage Loses Support in New Jersey, Quinnipiac University Poll Finds (Nov. 25, 2009), http://www.quinnipiac.edu/x1299.xml?ReleaseID=1400; Support for Same-Sex Marriage By Age & State, http://contexts.org/socimages/2009/11/05/support-for-same-sex-marriage-by-age-and-state (Nov. 5, 2009, 10:01 PST).

[4] I use the term "traditional beliefs" to refer to those whose religion requires the belief that marriage should only be between a man and a woman.

is really not open to serious question. Just as traditional believers too often slight the harm done to gays when they are denied access to marriage and its benefits, so too do advocates of same-sex marriage slight the interference with religious practice that the recognition of same-sex marriage will inevitably bring about.

¶7 Proponents of same-sex marriage deny that recognizing same-sex marriage will impose any costs on religious liberty because religious leaders and institutions would not be required to perform or host same-sex marriage ceremonies,[5] a proposition echoed by both the California and Iowa decisions recognizing same-sex marriage. Some even deny that a conflict exists between religious liberty and recognition of same-sex marriage. This denial is particularly irritating given the increasing number of cases arising from the clash between same-sex marriage (or civil unions) and traditional religious practices here and abroad.[6]

¶8 The issue of whether or not there is a conflict between religion and same-sex marriages was debated in Maine, where a referendum held last fall invalidated legislation recognizing same-sex marriage.[7] Opponents of same-sex marriage argued, *inter alia*, that the legislation should be overturned because of its impact on religious liberty.[8] That argument would have been denied them had the original legislation provided meaningful religious liberty protection. The issue of religious liberty clashes with same-sex marriage also helped fuel the passage of Proposition 8 in California.[9]

¶9 In many states where same-sex marriage is on the legislative table, proponents of same-sex marriage have vigorously opposed any religious exemption beyond the religious institution ceremony provision.[10] In New Hampshire, for example, the governor

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[5] *See, e.g.*, Dan Gilgoff, *Conservative Activists Argue Gay Marriage Threatens Religious Liberty*, U.S. NEWS & WORLD REP., Feb. 2, 2010, http://politics.usnews.com/news/religion/articles/2009/05/19/conservative-activists-argue-gay-marriage-threatens-religious-liberty.html; Maine Same Sex Marriage People's Veto, Question 1 (2009), http://ballotpedia.org/wiki/index.php/Maine_Same-Sex_Marriage_People%27s_Veto,_Question_1_%282009%29 (last visited July 1, 2010).

The tenor of the debate can be gathered from Professor Geoffrey Stone's argument that California's Proposition 8 is an establishment of religion because people with traditional religious beliefs were essential to its passage, and his labeling of the opposition as "self-righteous" and "prejudiced." Geoffrey R. Stone, *Democracy, Religion & Proposition* 8, HUFFINGTON POST, Nov. 15, 2008, http//:www.huffingtonpost.com/geofrey_r_stone/democracy_religion_and_ pr_b_144103.

[6] Various articles compile these cases. *See, e.g.*, Marc D. Stern, *Same-Sex Marriage and the Churches, in* SAME SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 1 (Douglas Laycock, et al., eds., 2008); Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J.L. & SOC. POL'Y 274 (2010); ANDREW KOPPELMAN & GEORGE W. DENT, JR., MUST GAY RIGHTS CONFLICT WITH RELIGIOUS LIBERTY? (forthcoming 2010).

[7] *Maine Rejects Same-Sex Marriage Law,* CNN.com, Nov. 4, 2009, http://www.cnn.com/2009/POLITICS/11/04/maine.same.sex/index.html.

[8] Robin F. Wilson, Op-ed, *Same Sex Marriage Law Lacks Religious Protection*, BANGOR DAILY NEWS, Oct. 17, 2009, http://www.bangordailynews.com/detail/125681.html (the "blogged" comments which follow).

[9] Proposition 8 is now codified at CAL. CONST. art I, § 7.5. I am not suggesting that religious liberty was *the* primary concern motivating supporters of Proposition 8, just that it was *a* concern.

[10] Greg Kesich, *Religious Institutions Don't Need Protection from Same-Sex Marriage*, PORTLAND PRESS HERALD, May 27, 2009, at A6; Chistian Ehret, *New Hampshire House Rejects Amended Same-Sex Marriage Bill*, JURIST, May 21, 2009, http://jurist.law.pitt.edu/paperchase/2009/05/new-hampshire-house-rejects-amended.php; Posting of Thomas Berg to Mirror of Justice Blog, http://mirrorofjustice.blogs.com/mirrorofjustice/2009/10/page/13/ (Oct. 5, 2009, 12:48 EST); Posting of Emma Ruby-Sachs to 365Gay Agenda Blog, http://www.365gay.com/blog/ruby-sachs-new-hampshire-governor-worried-about-religious-freedom/ (May 15, 2009, 10:38 EST) (noting that exemption sought by

had insisted on broad religious liberty protection as a condition for signing same-sex marriage legislation.[11] The legislature originally complied, including protection that roughly followed what the proposed statute above urges. But, under intense pressure from proponents of same-sex marriage, the legislature retreated to a far narrower and mostly meaningless protection for religious institutions.[12] The governor did not insist on the original version, and now the New Hampshire statute legalizes same-sex marriage at the expense of religious liberty.[13]

¶10 Given the number of real, litigated conflicts, the claim that there are no such conflicts is factually untenable. I suspect that the refusal to consider religious liberty claims is in part fueled by anger at some of the more outrageous statements about gays made by religious leaders over the years. Or, perhaps, the denial of the existence of a problem is intended only to shift the focus of the debate to where proponents of same-sex marriage prefer to have it focused, because their policy arguments are stronger than the arguments about religious exemptions.

II. LIBERTY V. EQUALITY

A. The Legal Arguments

¶11 As a matter of current First Amendment doctrine, there is much force to the claim that there is no legally important clash between religious liberty and equal recognition of same-sex marriage. The controlling case in this area is *Employment Division v. Smith*,[14] in which the Supreme Court held that facially neutral, generally applicable laws burdening religion need no special legislative justification and, therefore, would not be subject to compelling (or other heightened) interest analysis.[15] Laws that mandate the acceptance of the validity of same-sex marriage would be neutral laws of general applicability and, hence, would require no special justification to satisfy the federal constitutional guarantee of free exercise of religion. On the other hand, such indirect burdens on religious practices might violate state constitutional religious liberty guarantees in those states departing from the rule introduced in *Smith*.

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the governor would encourage homophobia, and that equality for gays has never interfered with religious liberty).

[11] John Lynch, Governor, New Hampshire, Statement on Same-Sex Marriage Bill (May 14, 2009), *available at* http://www.nhpr.org/ node/24894.

[12] *See* Wilson, *supra* note 8.

[13] The fight is not confined to the same-sex marriage context. Efforts to protect religious liberty generally in many legislative forums have been blocked unless they contain an exclusion for gay civil rights claims.

[14] Employment Div., Dept. of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990).

[15] For an example of application of the compelling interest test under state religious freedom acts, modeled on the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2006), see *State v. Hardesty*, 214 P.3d 1004 (Ariz. 2009) (involving religiously mandated use of controlled substances). For a federal case under the Religious Freedom Restoration Act, see *Gonzales v. Centro Espiritu Beneficente Unicio de Vegetal*, 546 U.S. 418 (2006) (involving religiously mandated use of controlled substances).

New York applies a modified *Smith* rule, but one of uncertain scope. *See* Catholic Charities of Diocese of Albany v. Serio, 859 N.E.2d 459 (N.Y. 2006). For cases rejecting *Smith*'s neutrality rule on state constitutional grounds, see *Attorney General v. Desilets*, 636 N.E. 233 (Mass. 1994) (retaining existing compelling interest standard); *Hill-Murray Fed'n of Teachers v. Hill-Murray High School*, 487 N.W.2d 857 (Minn. 1992) (same).

¶12 Federal statutes, like Title VII of the Civil Rights Act[16] or the Religious Freedom Restoration Act,[17] and state equivalents, require accommodation of religious practices in some contexts regardless of the facial neutrality of a law or policy.[18] Other constitutional provisions—namely the freedom of association as applied in *Boy Scouts of America v. Dale*,[19] and the freedom of speech as in the public school context[20]—support religious accommodation as well. These provisions cover some of the same ground that the Free Exercise Clause used to cover, although freedom of association claims will have little traction in the business context.

¶13 Despite this legal support for the position that there is compulsion to accommodate, I do not think opponents of a broad protection for religious liberty are at bottom making a legal claim; rather, they are making a policy argument. They are arguing that the equality interests behind same-sex marriage trump the liberty interests behind a religious exemption.

¶14 The argument that, as a matter of policy, there are no legitimate religious liberty claims to be made makes little or no sense if one conceives of the right to same-sex marriage as rooted in personal liberty. On the other hand, it makes substantial sense if the argument for same-sex marriage is rooted primarily in a claim about equality.

¶15 If the argument for same-sex marriage is rooted in personal liberty ("I can love whom I want without state interference," or "so long as no else is hurt, the state should not regulate my private actions"), one has to confront the fact that liberty to marry whom one chooses often will conflict with other personal liberties, notably religious freedom ("I can serve God as I please"), freedom of non-association ("I can serve whom I want"), and, in some cases, freedom of speech ("I can state my opinions on same-sex marriage without interference"). One would be hard-pressed to argue that the liberty right to same-sex marriage should unfailingly trump those other liberty rights. No principle of liberty that I can imagine would lead to a rigid preference for one liberty right over all others.

¶16 If, however, same-sex marriage rights are rooted not primarily in liberty, as early challenges to sodomy laws were,[21] but in the right to equal treatment, as most contemporary efforts to legalize same-sex marriage are,[22] then the claim that individual

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[16] 42 U.S.C. § 2000e (2006).

[17] *Id.* § 2000bb.

[18] *See* Buonanno v. AT&T Broadband, 313 F.Supp.2d 1069 (D. Colo. 2004). In *Buonanno*, an employer required all employees to sign a pledge to respect the sexual choices of their fellow employees. Plaintiff refused and was fired. He successfully sued under Title VII's religious accommodation provisions. The rule requiring the signing of the pledge was neutral and generally applicable, but it failed to meet even the low standard of justification excusing religious accommodation.

[19] 530 U.S. 640 (2000) (holding that the right to freedom of association allows Boy Scouts to discharge gay scoutmaster).

[20] *Compare* Harper v. Poway Unified School Dist., 445 F.3d 1166 (9th Cir. 2006), *vacated as moot*, 549 U.S. 1262 (2007) (holding that the school may ban anti-gay speech in interest of protecting gay students from insult), *with* Nuxoll v. Indian Prairie School Dist., 523 F.3d 668 (7th Cir. 2008) (holding that the state has no legitimate interest in protecting people from critical speech).

[21] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 579–85 (2006) (invalidating sodomy law on liberty grounds, though Justice O'Connor, concurring, would have rested on equal protection theories); Powell v. State, 510 S.E.2d 18 (Ga. 1998) (holding based on the right to privacy); Corn v. Wasson, 842 S.W.2d 487 (Ky. 1992) (same, but including equal protection); Post v. State, 715 P.2d 1105 (Okla. Crim. App. 1986) (holding based on the right to privacy).

[22] *See, e.g.*, *In Re* Marriage Cases, 183 P.3d 384 (Cal. 2008); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

liberty claims cannot trump an equality claim makes sense. Equal citizenship claims stand on a different plane than bare claims of religious liberty.

B. Liberty v. Equality in Practice

¶17 The right to equality has been defined as the most fundamental claim a citizen has against government: the right to be held in equal regard and to be treated equally by the government.[23] Rights are created by equal citizens, not privileged ones.

¶18 A statute authorizing private departures from the equal treatment mandated by foundational law could itself be seen as a departure from the guarantee of equal status before the government. *A fortiori*, allowing government officials to discriminate against citizens by refusing to solemnize their weddings would offend the duty of treating citizens equally and according them equal dignity. Even if equality claims ran only against the government, the government could be guilty of sanctioning inequality by virtue of statutes that authorize private discrimination based on religious objections to same-sex marriage.

¶19 In England, for example, where equality is of cardinal importance in current legal and political discourse, religious liberty claims to the right not to treat gays equally have uniformly faired poorly.[24] The Charities Commission, a not-for-profit watchdog group, has cast a highly jaundiced eye on sexual orientation discrimination by charities.[25] There is an effort underway to require parochial schools to teach that same-sex relationships are normal,[26] and a Catholic parochial school was not allowed to fire a headmaster (a principal for us colonials) who was in a same-sex relationship.[27] The Sexual Orientation Equality Act (passed in 2007) has a most limited exception for religious groups.[28] Efforts to broaden the exemption were successfully challenged, over Prime Minister Blair's objections, as an intolerable departure from the principle of equality,[29] and even that

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[23] *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971).

[24] The cases are collected in Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions*, 5 NW. J.L. & SOC. POL'Y 319, 324 nn.19–24.

[25] *See, e.g.*, In the Matter of Appeal to Charity Tribunal, Catholic Diocese of Leeds v. Charity Commission [2009] UKFTT 376, *available at* http://www.charity.tribunal.gov.uk/documents/decisions/CatholicCareDecision1609v2.pdf; Jessica Geen, *Catholic Adoption Charity to challenge gay ruling in High Court*, PINK NEWS, Oct. 14, 2009, http://www.pinknews.co.uk/2009/10/14/catholic-adoption-charity-to-challenge-gay-ruling-in-the-high-court/ (reporting on challenge to ruling that Catholic charity could not refuse same-sex adoption placement).

[26] *See* Tim Ross, *Ed Balls to Let Faith Schools Teach Homosexuality is Wrong*, LONDON EVENING STANDARD, Feb. 23, 2010, http://www.thisislondon.co.uk/standard/article-23808956-ed-balls-to-let-faith-schools-teach-homosexuality-is-wrong.do. Such schools are now permitted, somewhat vaguely, to address sexual issues from the point of view of faith.

[27] *See, e.g.*, Peter Smith, *Nothing We Can Do Says Liverpool Diocese about Openly Gay Headmaster*, LIFESITE NEWS, Aug. 13, 2007, http://www.lifesitenews.com/ldn/2007/aug/07081303.html.

[28] Equality Act (Sexual Orientation) Regulations, 2007, 2007 No. 1263 (U.K.). The relevant provisions are §§ 13, 14, and 15.

[29] Matthew Tempest, *No. 10 Mulls Catholic Opt-Out From Gay Rights Law,* THE GUARDIAN, Jan. 23, 2007, http://www.guardian.co.uk/politics/2007/jan/23/immigrationpolicy.religion; Rachel Sylvester, *Blair Moves to Head off Row Over Religion*, THE TELEGRAPH, June 26, 2000, http://www.telegraph.co.uk/news/uknews/1345007/Blair-moves-to-head-off-row-over-religion.html; Tony Blair's Embarrassing Gay Adoptions Climb Down After Cabinet Revolt, http://direland.typepad.com/direland/2007/01/tony_blairs_emb.html (Jan. 31, 2007).

limited exemption has been criticized by the European Union as too tolerant of discrimination.[30]

¶20 Of course, modern egalitarians do not limit the demands of equality to equal treatment by government. Modern civil rights statutes properly reach private employment,[31] housing,[32] access for the disabled,[33] and the like, typically applying the same standards to both government and private actors. No more rigorous standard is applied to Title VII cases brought against government entities than to all but the very smallest of employers.[34] This is a good thing. In a society in which the private sector controls substantial amounts of access to social goods, it would greatly disadvantage disfavored groups if, due to private discrimination, they had access only to the resources controlled by government.

¶21 More evidence of the triumph of equality over liberty comes from the public schools. School officials have allowed students to wear T-shirts expressing support for gay rights, while suppressing speech by opponents of those rights.[35] The justification for that censorship is rooted in equality: gay students would feel themselves denied an equal opportunity to take advantage of school when faced with such "attacks" on their identity.[36]

¶22 It is sometimes said that religious exemptions that burden others are akin to establishments of religion; that persons adversely affected by the behaviors exempted from otherwise applicable statutory prohibitions must bear the cost of someone else's religious observance. It would follow that any exemption burdening partners to same-sex marriage would thus be coerced compliance with religious norms. The cryptic opinion in *Estate of Thornton v. Caldor, Inc.*,[37] invalidating an inflexible mandate of religious accommodation in the employment context, lends some support to this claim. But, given *Corporation of the Presiding Bishop v. Amos*,[38] upholding a very broad religious institution exemption from the ban on religious discrimination in employment of Title VII, the broadest readings of *Thornton*—denying any religious accommodation—are implausible. The reality is that there is no clear legal rule distinguishing between permissible and impermissible accommodation.

¶23 Equality does not admit of halfway measures. One is either equal or unequal. Speaking on gay marriage (as opposed to civil unions), one advocate recently said

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[30] European Commission, Commission Takes Legal Action Against UK in Gender and Employment Equality (Nov. 20, 2009), http://ec.europa.eu/unitedkingdom/press/press_releases/2009/pr09146_en.htm (exemptions for religious employers to the principle of non-discrimination on the basis of sexual orientation are broader than permitted by the Union (directive 2000/78/EC)).

[31] *E.g.*, Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e (2010).

[32] *E.g.*, Fair Housing Act, Title VII of the 1968 Civil Rights Act, 42 U.S.C. § 3601 (2010).

[33] *E.g.*, Americans With Disabilities Act, 42 U.S.C. § 12101 (2010).

[34] Title VII applies to all employers with fifteen or more employees, and New York's ban on employment discrimination applies to employers of more than four people. N.Y. EXEC. LAW § 292(5) (2010).

[35] Harper v. Poway, 445 F.3d 1166 (2006).

[36] *See, e.g.*, Martha M. McCarthy, *Student Expression that Collides With The Rights of Others: Should the Second Prong of Tinker Stand Alone*?, 240 EDUC. L. REP. 1 (2009); Brian Bilford, *Harper's Bazaar: The Marketplace of Ideas and Hate Speech*, 4 STAN. J.L. CIV. RTS. & CIV. LIBERTIES 447, 472 (2008) ("Few would argue against the *Harper* court's lofty goal of protecting students from the pain caused by hate speech.").

[37] 472 U.S. 703 (1985).

[38] 483 U.S. 327 (1987) (employee fired because no longer in good standing with church operation of community center).

"[t]here is no such thing as a fraction of equality. We want equal protection under law."[39] Seen through the prism of individual liberty, it is hard to see why the states should systematically avoid burdening same-sex couples, no matter how lightly (recall that the proposed accommodation statute does not apply where gay couples cannot readily find alternative suppliers), at the expense of other liberties, including the ability of others to practice their faith. But if the right to same-sex marriage sounds in equality, not liberty, and the right to equality is given preferential status, then the arguments against an exemption become plain.

C. The Argument For Liberty

¶24 I believe that if same-sex marriage rights are bottomed in liberty, religious exemption claims cannot be ignored. One response to this suggestion is to deny that liberty includes the power to impose costs on others. That is, one's right to religious liberty does not include the power to impose personal religious beliefs on same-sex couples. "Your liberty ends where my nose begins," as the old adage has it. This, however, raises the question of where one's nose begins; that is, whose personal liberties are the starting points for the analysis? It is one thing to say that a religious Jew, Catholic, or Mormon has no right to prohibit me from marrying someone of the same sex. It is quite another to demand that person recognize my union in violation of his beliefs; to say that I can compel a caterer with traditional religious beliefs to cater my same-sex wedding ceremony.[40] If one starts with the caterer's rights, it is perfectly cogent to argue that the liberty interest in same-sex marriage does not extend to the power to compel others to participate.

¶25 Whose "nose" is impacted when the state, having recognized same-sex marriage, compels a small family-owned business to subsidize a same-sex spouse's health insurance to the same extent as it subsidizes that of a heterosexual spouse, or tells a wedding photographer that she must accept an assignment at a same-sex wedding ceremony? What is the "liberty" interest that the gay person has that may compel someone else to lend support to his or her decision to enter into a same-sex marriage? These examples demonstrate that, while equality may conclusively exclude claims for religious exemptions, liberty cannot.

III. RELIGION IN PUBLIC LIFE

¶26 Some same-sex marriage proponents' refusal to consider religious liberty claims stems from a perception that religion has no place in "public" life, that is, outside one's own home and place of worship.

¶27 At first glance, this is a claim more acceptable in France, with its policy of *lacite*, than the American settlement of official, but benevolent, neutrality towards religion in the public sphere. And, indeed, in most of Europe, equality claims generally trump religious

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[39] Apparently, the phrase was first used in a talk by Cleve Jones at the Commonwealth Club. *See* Nelson Hernandez & Yamiche Alcindor, *Making a Federal Case for Gay Rights*, WASH. POST, Oct. 12, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/10/11/AR2009101100161.html.

[40] It is, of course, impermissible for the state to disfavor certain religious claims specifically because they are "retrogressive" or because other religious leaders believe them to be a distortion of religious teachings. Yet people who claim to be advocates of religious liberty sometimes make just these claims.

liberty ones when the two clash.[41] Nevertheless, the claim that religion does not belong in the public sphere has been heard more frequently and in a variety of contexts in the United States in recent years,[42] so it merits discussion.

¶28 For example, in response to religious clashes between physicians and patients over abortion and end of life decisions, one encounters the argument that we live in a secular society, so medicine ought to be governed by secular rules only, and that religion has no place in the "public" practice of medicine. Thus, the argument would follow that, whatever one's religious objections to same-sex marriage, in a secular society these objections have no place in "public," and they must not be expressed in ways that impact others.

¶29 The popularity of this argument reflects, in part, the decreasing participation in religion in the country, particularly among the better-educated classes. No doubt, too, this claim is a backlash against the excesses, real and imagined, of the Bush Administration and the so-called Religious Right. However one defines the latter, it is true that some of its spokespersons have invited this backlash by the stridency of their discourse and political agenda.

¶30 In Europe, efforts to forcibly privatize religion have garnered considerable force and enjoy the general imprimatur of the European Court of Human Rights.[43] However, the put-religion-in-the-closet argument is difficult—no, largely impossible—to reconcile with the historic American understanding of religious liberty. Unlike the French and other European settlements, the American settlement does not regard religious challenges to prevailing social norms as inherently dangerous, to be kept from any public expression. For example, Muslim head scarves have been banned in France and Switzerland, yet are commonplace in the United States.

¶31 One explanation for this difference may be that we have not known, by and large, Europe's religious wars.[44] Europe has experienced numerous organized slaughters of religious dissenters, from the English civil wars and the suppression of the Huguenots, to the persecution of the Roma, and, of course, the Holocaust. Having witnessed first hand the devastation religious persecution can reap, Europe may be quick to silence religious claims of exemption from law and other societal norms. Another explanation is the fact that European religious practice has been on the decline, even as far back as World War II.[45] What's politically possible in an increasingly secular Europe is not possible in the (so far) vastly more religious United States.

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[41] Various decisions of the European Court of Human Rights have upheld restrictions on Muslim women's head coverings on the ground that the restrictions on liberty further the interest in gender equality. *See, e.g.*, Sahin v. Turkey, 41 Eur. H.R. Rep. 8 (2005).

[42] This claim is quite prominent in Internet discussion-boards, especially with respect to same-sex marriage. *See, e.g.*, Constitutional Democracy or Theocracy?—Same Sex Marriage: Separation of Church and State (Apr. 12, 2004), http://www.samesexmarriage.ca/equality/intrv120404.htm; Shannon L.C. Cate, Separation of Church and State=Same Sex Marriage (Oct. 29, 2008), http://www.babble.com/CS/blogs/strollerderby/archive/2008/10/29/separation-of-church-and-state-same-sex-marriage.aspx.

[43] *See* Partisi v. Turkey, 37 Eur. H.R. Rep. 1 (2003) (upholding ban on broadcasts of religious commercials).

[44] The Mormon Church might question this assertion, and so might Native Americans.

[45] See, albeit with a distinct point of view, Pope Benedict's reflections on this in JOSEPH RATZINGER (POPE BENEDICT XVI) & MARCELLO PERA, WITHOUT ROOTS (2005). *See generally* Loek Halman & Veerle Draulans, *How Secular Is Europe*, 57 BRIT. J. SOC. 263 (2006); Liliane Voye, *Secularization in a Context of Advanced Modernity*, 60 SOC. RELIGION 275 (1999).

¶32 If the in-the-closet approach to religion is not formally compatible with American church-state doctrine, it is also apparently incompatible with American economic practices. The freedom to practice religious dissent in the United States is in good part a product of the fact that Americans have not allowed religion to intrude into commerce and public life, certainly not in modern times.

¶33 We have not known, for example, the Protestant/Catholic troubles of Northern Ireland, which caused a religious-divide in the housing and employment market.[46] By-and-large Americans have not carried doctrinal or theological disputes over to the marketplace or the workplace. One can say with near certainty that our laws and attitudes would be different if we had had an experience similar to Northern Ireland. Or maybe the fact is that the true American religion is the pursuit of profit, in which case few would choose to take advantage of any religious exemption included in same-sex marriage legislation if it interfered with the ability to make a profit.

¶34 It may also be that the GLBT community[47] and those who practice more liberal faiths object to protection for traditional religious beliefs in the hope that a same-sex marriage law would leave such views too expensive to implement. If this is the purpose of the opposition, legally mandated acceptance of same-sex marriages represents an unacceptable intrusion of government into an important intra-church dispute. The intra-church dispute over the acceptance of same-sex marriage is one that, at bottom, plumbs one's attitude toward the binding authority of religious texts, their interpretation, religious traditions, and the question of whether God imposes norms that impose heavy burdens on people. The government has no place deliberately intruding into this dispute beyond offering legal protection for the liberal view in its own spheres.

IV. RESPECT FOR MORAL CHOICES

¶35 There is one final argument sometimes heard regarding same-sex marriage. It is the argument that respect for other people's moral choices prohibits tolerance of the refusal to facilitate those choices. The argument has two parts: one supporting moral autonomy and the other making religious claims.

¶36 The moral autonomy claim is the belief that the moral choices of citizens may not be questioned by other citizens, at least not in ways that move beyond the theoretical. One may not confront an individual's moral choice directly, or impede him or her in acting on that moral choice. This, however, is to confuse immunity from legal impediments to carrying out one's moral choices, on the one hand, with a ban on criticism and the refusal to assist in the carrying out of other's moral choice on the other hand. The two are not the same. The former is often permissible in a liberal democracy; the latter is at odds with it. Yet contemporary political discourse often confuses the two. Respect for the moral autonomy of an individual demands that one not be forced to act in a way that goes against moral choices, such as the choice not to accept same-sex marriage.

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[46] That, at least, is the standard story. For partially dissenting views, see Vani K. Borooah, et al., *Catholic Protestant Income Differences*, 41 REV. INCOME & WEALTH 41 (1995); Christopher Hewitt, *Catholic Grievances, Catholic Nationalism and Violence in Northern Ireland During the Civil Rights Period: a Reconsideration*, 32 BRIT. J. SOC. 362 (1981).

[47] The "GLBT community" refers to Gay, Lesbian, Bisexual, and Transgender persons and those who support them.

¶37 The second part of the argument, the claim about religion, attempts to expound on the meaning of religion and the definition of sin. This argument states that it is no sin to help someone else carryout, under coercion of law, a legal and (arguably) moral act that one believes to be a sin. The basis of this argument, which can be traced back to John Locke's *Letter on Toleration*, is either that officially coerced activity is no more sinful than any coerced act which would not be a sin, or that moral responsibility lies solely with the person committing the primary evil. Therefore, the argument goes, the recognition of a same-sex marriage, which one finds sinful, would not itself be a sin. Many religions teach otherwise, so to assert this is to stand in the place of religious leaders and assert a religious proposition. Such blatant interference with religion should not be tolerated.

V. Conclusion

¶38 As demonstrated above, there is no legal justification for a religious exemption if the right to same-sex marriage is based in equality. At the same time, there are various and compelling non-legal arguments for the appreciation of religious liberty. In the end, we must decide whether equality must make room for liberty (and liberty for equality). The take-no-prisoners approach to politics that categorizes so much of the contemporary debate makes it unlikely that any middle ground will emerge—and, in fact, this is how the debate is proceeding. This is unfortunate, as I have demonstrated that a qualified religious exemption may preserve religious liberty without placing too large a burden on the equality of same-sex couples.

¶39 Beyond the same-sex marriage debate, some of the most common and divisive issues on the legislative agenda implicate the clash between equality (e.g., universal medical care, campaign finance limitations, etc.) and liberty (e.g., conscience clauses, objections to compulsory purchases of insurance, etc.). Neither proponents of equality nor of liberty seem prepared to acknowledge that, while these two values are sometimes in conflict, both are valuable and should be protected. Sometimes one or the other will need to yield, but often there is some way to maximize both. Too many people prefer the simplicity of a mono-polar tradition to a complex one. That is too bad.