

NATIONAL REVIEW

‘Gay Rights Are Under Siege in This Country’?!?

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Wow. How stupid, or ideology-blinded, does Jeffrey Toobin take his *New Yorker* readers to be?

In a piece titled “The Right Wing’s War on the L.G.B.T.Q. Community,” Toobin asserts in his opening sentence: “An Arizona Supreme Court ruling on Monday provided further evidence that gay rights are under siege in this country.” Toobin objects specifically to that court’s ruling that the two owners of Brush & Nib Studio, an online art business (run, for what it’s worth, out of the home of one of the owners), have free-speech and free-exercise rights under the Arizona constitution that entitle them to decline “to create custom wedding invitations celebrating same-sex wedding ceremonies in violation of their sincerely held religious beliefs.”

Amazingly, Toobin dismisses as “to put it charitably, ... nonsense” the majority’s declaration that “the guarantees of free speech and freedom of religion are not only for those who are deemed sufficiently enlightened, advanced, or progressive” but instead “are for everyone.” According to Toobin, the owners of Brush & Nib Studio “are free to believe anything they want,” but “[w]hat they should not be allowed to do is to use those beliefs to run a business that is open to the general public but closed to gay people.”

Toobin’s claim is confused. For starters, as the majority opinion makes clear, the owners of Brush & Nib Studio haven’t “closed” their business “to gay people.” They “will create custom artwork for, and sell pre-made artwork to, any customers, regardless of their sexual orientation.” What they won’t do, pursuant to the operating agreement that governs their business, is create “custom artwork that communicates ideas or messages ... that contradict biblical truth, demean others, endorse racism, incite violence, or promote any marriage besides marriage between one man and one woman, such as same-sex marriage.”

It’s not clear whether Toobin’s statement of what the studio owners “should not be allowed to do” is his own judgment of what the law *should* be or his assertion of what the law *is*. Insofar as it’s the former, does Toobin really believe, say, that a free-lance writer shouldn’t, based on his ideological or religious beliefs, be able to turn down some requests for his work? Or that the existence of a public-accommodations law should somehow necessarily trump freedom of speech and religion? Insofar as Toobin purports to be stating what the law is, his brief analysis is (to borrow his own words) “to put it charitably, ... nonsense.” The federal constitutional issues are much weightier than his cursory discussion would indicate (see, for example, the amicus brief that the Cato Institute, Dale Carpenter, and Eugene Volokh submitted in support of Brush & Nib Studio), and he doesn’t even acknowledge, much less grapple with, the fact that the Arizona ruling rests on state constitutional grounds.

As for Toobin's broader characterizations: The gay-rights movement won massive (and, in my judgment, undeserved) victories when the Supreme Court invalidated the federal Defense of Marriage Act and imposed a federal constitutional right to same-sex marriage. The idea that those who resist being conscripted to celebrate same-sex marriage are the aggressors in a "war on the L.G.B.T.Q. community" is quite extraordinary. Anyone who wants to purchase customized invitations for a same-sex wedding has a zillion options to choose from. That's some "siege."