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Why Utah's Mormon/LGBT Compromise Is Just Awful

How a landmark deal that would supposedly protect the rights of both LGBT people and religious conservatives erodes freedom for everyone.

By Walter Olson

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Governor Gary Herbert has signed a new law that extends Utah's anti-discrimination laws to gays, but with broader religious conscience carve-outs than is usual with such laws. And this is troubling for reasons that have gotten almost no attention so far in the press.

The law resulted from an unprecedented compromise between leaders of the Church of Jesus Christ of Latter-day Saints, who have historically stood against extending anti-discrimination laws to gays, and LGBT advocates including the statewide Equality Utah and national Human Rights Campaign. The law applies only to employment and housing settings; atypically, Utah law does not ban discrimination in so-called public accommodations, which took off the table the big and contentious set of "bake my cake" controversies involving florists and other wedding providers.

Some centrist commentators, notably Jonathan Rauch and Bill Galston of the Brookings Institution, have hailed the accord as lighting a way off the culture war battlefield; unsurprisingly, many strong advocates on both the LGBT/anti-discrimination-law and religious-conservative sides are having none of it, and are likely to oppose such compromises elsewhere.

As for me, I approach this dispute as an outsider. I think most Americans have better things to do than wage culture war on each other, and I've written with some sympathy about religious-conscience objectors. At the same time, as a libertarian—and apparently unlike both sides in the negotiations—I don't support the idea behind this bill in the first place. As I noted at the Cato Institute's website a while back, these laws "sacrifice the freedom of private actors—as libertarians recognize, every expansion of laws against private discrimination shrinks the freedom of association of the governed."

And unless we decide where to stop adding more groups and categories, we will inevitably "see freedom of association turn into a presumption of something else":

> At what point do we say no to future demands that protected-group status be accorded to employees based on political and controversial systems of belief [among many other presently unprotected categories]? If we say yes to all, we introduce a new presumption—familiar from the prevailing labor law in parts of Europe—that no employer should be free to terminate or take other "adverse action" against an employee without being prepared to show good cause to a judge.

Not to say I was prescient in leading off my list of up-and-coming protected categories with "systems of belief," but—OK, I'll go ahead and say I was prescient. Because the most distinctive feature of the Utah Compromise is that, in the words of The New York Times, it "also would protect employees from being fired for talking about religious or moral beliefs, as long as the speech was reasonable and not harassing or disruptive." Here's the specific language on that from the bill:

> An employee may express the employee's religious or moral beliefs and commitments in the workplace in a reasonable, non-disruptive, and non-harassing way on equal terms with similar types of expression of beliefs or commitments allowed by the employer in the workplace, unless the expression is in direct conflict with the essential business-related interests of the employer.

That counts as something novel in American law, and it has the potential to pose quite a serious incursion on employers' current liberty to manage their workplaces to keep the focus on work rather than sectarianism or debate.

It's true that some states have previously sought to prohibit employers from firing or disciplining employees over off-the-job politicking or controversial beliefs. It's a far more intrusive step, though, to second-guess their discretion to set rules for employee conversations about morality in the workplace. Although the provision quoted above is vague, some will interpret it to mean that if fervent discussion is allowed on any moral topic ("Another mass murder—how can such evil exist in the world?") it must therefore be allowed on equal terms to any arguably "similar" moral topic.

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When an employee then begins treating customers or co-workers to unasked-for disquisitions about religious or moral matters, it will apparently be the state of Utah — rather than, as now, the folks in human resources—who will have the final say as to whether the topic is "similar" to others on which discussion had previously been allowed, and whether the proselytizing or

reproachful comments taken as a whole were "reasonable" or by contrast "harassing or disruptive."

If an employer's HR department guesses wrong as to how the state will answer those questions, the legal and financial consequences are likely to prove quite painful.

Somehow I think most employers would rather retain for themselves the leeway to decide whether to ask employees to spare workplace colleagues a running, contentious discussion of the relative intellectual and spiritual merits of Richard Dawkins and Franklin Graham, Islam and Episcopalianism, Nietzsche and Mary Baker Eddy. (Or, alternatively, impose a "never discuss morality ever" rule, which would lead to its own absurdities.)

Unfortunately, it's not clear whether anyone was at the table speaking up for employers' rights and interests during the Utah negotiations. It's a lot easier to reach what's hailed as a historic compromise if you can do so at the expense of absent third parties, isn't it?

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