



The Case Against ENDA

By: Andrew Sullivan - November 3, 2013

The federal bill banning workplace discrimination against gays, lesbians and transgenders is up for a vote tomorrow. Gay dad Wally Olson makes the case against it – and perhaps his strongest point is on whether it will ever be used:

Statistics from the many states and municipalities that have passed similar bills (“mini-ENDAs”) indicate that they do not serve in practice as a basis for litigation as often as one might expect. This may arise from the simple circumstance that most employees with other options prefer to move on rather than sue when an employment relationship turns unsatisfactory, all the more so if suing might require rehashing details of their personal life in a grueling, protracted, and public process.

To take a similar point on the federal hate crimes law, since it was passed in 2009, there have been *two* successful prosecutions under the act for anti-gay bias, so far as I can find. One was in March, 2012, in Kentucky, and the second was in Georgia last June. It may well be that neither would have been pursued without the federal law, but still. If I’ve missed any, please let me know. But two successful prosecutions in four years does not suggest a problem so vast that the federal government must be involved. If you care at all about economic liberty, it seems to me you have to weigh the costs as well as the benefits.

At the same time, the private sector has forged ahead of government, acting rationally to get the best set of employees possible. The Human Rights Campaign annual report (pdf) on voluntary corporate anti-discrimination policies gives us the latest: *88 percent* of Fortune 500 companies have non-discrimination policies with respect to homosexuality, and 57 percent also include gender identity in their policies. The progress in the private sector over the last ten years has been remarkable, and HRC can rightly feel proud of their work engaging corporations. But that, of course, suggests that government itself may not be the best way to protect gay employees.

I used to be opposed *tout court* to such laws on libertarian grounds (and not just for gays but for everyone apart from those subjected to the unique historical burden of slavery and segregation). *Virtually Normal* also makes the case that the government has no right to compel private citizens not to discriminate against gays when it discriminated so perniciously against gays in civil marriage and military service. But two things have changed my mind over the years.

The first, quite simply, is that the libertarian position on such crimes is largely moot – for good and ill. The sheer weight of anti-discrimination law is so heavy and so entrenched in our legal culture and practice, no conservative would seek to abolish it. It won't happen. And if such laws exist, and are integral to our legal understanding of minority rights, then to deny protection to one specific minority (which is very often the target of discrimination) while including so many others, becomes bizarre at best, and bigoted at worst. Leaving gays out sends a message, given the full legal context, that they don't qualify for discrimination protection, while African-Americans and Jews and Catholics and Latinos and almost everyone else is covered by such protections. It's foolish to stick to a principle, however sincere, in the face of this reality.

Secondly, the federal government has ceased its own discrimination policies in marriage and military service and therefore now has some small sliver of moral standing to lecture private individuals across all states. My objections twenty years ago are now moot.

Put those two developments together and I would not vote against ENDA if I, God help us, were a Senator. But I would vote for it with my eyes open. I don't think it will make much difference in reality just as I don't believe hate crime laws make much difference in reality. Of course that's an empirical question and I promise readers horrified by my luke-warm support of this that I will gladly recant such skepticism if ENDA truly does lead to a flurry of successful suits across the country against anti-gay bias.

But to me, this feels a lot like a) an easy concession to Gay Inc. which has devoted almost its entire existence to this bill, b) an easy vote for a Republican trying to hold onto a marginal seat, c) an even easier way for Democrats to grandstand on the issue, even though it stands a snowball's chance in Hell of getting through the current House. So I hope it passes. But forgive me for not cheering it on.