

# NATIONAL AFFAIRS

## Nondiscrimination for All

Jonathan Rauch

July 1, 2017

In the months before the 2016 presidential election, many advocates of gay rights and many advocates of religious liberty were convinced that an undesirable election result could present an existential threat to their ways of life. And in the days following election night, many activists for gay rights feared that their victories of the last decade might be wiped away with a stroke of the presidential pen.

But the election of Donald Trump is very unlikely to result in a dramatic change in the status of gay Americans — or in a dramatic victory for the religious-liberty caucus, despite the outsized influence of the Supreme Court. The same would have been true if Hillary Clinton had won the presidency. The truth is that the argument over gay rights and religious liberty was never going to be settled in a single election. To see why, consider two bills that went before the last Congress.

The Equality Act would have granted LGBT Americans — whom I'll interchangeably shorthand as "gay," with no disrespect or exclusion implied or intended — protection from housing, employment, and public-accommodations discrimination under federal law, something they lack at present. It was championed by Democrats and liberals. The First Amendment Defense Act, supported by Republicans and conservatives, would have pre-emptively shielded those who object to or discriminate against same-sex marriages (whether on religious or moral grounds) from any federal sanction or disallowance of benefit.

The supporters of each bill came from opposite corners, but the two bills had something in common: Each tried to take all the marbles and leave the other side with nothing (or as little as possible). The Equality Act included a provision revoking any protection which religious objectors might enjoy under the Religious Freedom Restoration Act. The First Amendment Defense Act protected religious objectors from discrimination while leaving gay people wholly unprotected under federal law.

If these bills were opening positions in a negotiation, then what should ultimately happen is legislative bargaining leading to the obvious compromise — protections for gay people plus exemptions for religious objectors. Such a solution is possible, of course, but compromise is unlikely, in part because the bills also have something else in common: Both seem to be based on moral conviction, and not merely strategic positioning. In that respect, they are emblematic of an unfortunate development: A debate in which a few years ago there seemed to be fairly good prospects for reasonable accommodations has hardened into legal and political trench warfare.

That is not to say that a compromise based on reasonable accommodations is impossible. A widely noted 2015 deal in Utah demonstrated that conciliation is still politically possible and socially ennobling. The polarization and backlash and general nastiness following upon one-sided mini-RFRAs and bathroom bills in places like Indiana and North Carolina demonstrated that the absolutist path is politically costly and socially divisive.

To get past the nastiness to a reasonable compromise, we need to understand where we are, and to do that we need to talk about an elephant in the room. We need to talk about what's wrong with the way most Americans think about nondiscrimination.

Specifically, we'll have to move past the absolutist, myth-based model of nondiscrimination and toward a pluralist, reality-based understanding. But first we need to understand the current terms of the debate.

## **TO LIVE THEIR FAITH**

I should begin by saying that I start with a disposition that is protective of religious liberty — a disposition that is far from universal in the world of gay-rights advocacy. I am gay, and an atheist, and I disagree with most of what religious conservatives have had to say about gay equality and same-sex marriage. But my respect for the First Amendment's unique protectiveness of religion, and also for the unique social centrality and sensitivity of religion, strongly inclines me to find ways to allow religion to go on about its business whenever possible.

I also accept that human sexuality is part and parcel of the theologies of many religions (in a way that, say, race is not). And, to avoid subjecting religious individuals and faiths to public inquisitions, I believe we should generally treat religious objections as sincere and genuine, at least as far as law and public policy are concerned. Accepting these premises leads to the reasonable conclusion that religious people and institutions have a legitimate and well-founded claim to be cut some slack by law and society, even if they sometimes use that slack to behave in a way that strikes others (including me) as intolerant and hurtful.

Many gay people, however, don't share these assumptions. Instead, they look at religious objectors and see a desire to discriminate in the name of religion, and to leverage religion to obtain an explicit "license to discriminate." To many of my gay friends, this is not about "live and let live"; it is an aggressive effort to deny LGBT people the legal protections and social equality that religious people already enjoy and take for granted.

Unfortunately, over the past several years, the words and deeds of many on the religious-rights side have done nothing to allay such suspicions. To the contrary, some religious-liberty advocates have been quite explicit about their desire and intent to discriminate, at least against gay couples if not necessarily against gay individuals — and to do so even in commercial environments that advertise themselves as open to all comers and that seem, facially, remote from any kind of religious venue or activity.

The LGBT community thus looks with dismay and shock upon Mississippi's very broad religious-protection law, which gave religious people exemptions from anti-discrimination laws that did not in fact exist. (It was struck down by a federal district court.) There was a great deal

of that kind of "heads I win, tails you lose" legislating in the wake of the Supreme Court's gay-marriage decision in *Obergefell v. Hodges* in 2015.

In some cases, advocates of such measures made it explicit that their goal was not just to defend religion but to resist and ultimately revoke same-sex marriage, using salami-slicing tactics similar to those of the pro-life movement. They have been honest about this. Ryan Anderson of the Heritage Foundation put his cards on the table in a meeting at Brigham Young University: According to the *Deseret News*, Anderson explicitly recommended that traditional-marriage supporters borrow the strategies of the pro-life movement to make slow and steady progress against the *Obergefell* ruling.

Same-sex marriage has thus been the leading catalyst of conflict. Bakers, florists, and photographers have been sued and sanctioned for turning down same-sex wedding business. Mom-and-pop companies like Oregon's Sweet Cakes by Melissa and New Mexico's Elane Photography have become nationally famous, or infamous, for turning away gay couples.

It's important to remember, though, that same-sex marriage is only the most prominent aspect of a multifaceted conflict. Some cases involve homosexuality as such, not marriage per se. For example, ChristianMingle.com recently settled a lawsuit by agreeing to allow searches for same-sex matches. In Michigan, a pediatrician refused to treat a baby with two moms, telling the parents, "After much prayer...I felt that I would not be able to develop the personal patient-doctor relationship that I normally do with my patients."

Moreover, the claims of the religious nondiscrimination movement extend far beyond sexual orientation and gender identity. The Hobby Lobby and Little Sisters of the Poor cases involved contraception, for example. Albert Mohler, the intelligent and influential president of the Southern Baptist Theological Seminary, writing in July of 2016, sees the conflict as implicating the entire sexual revolution, not just the LGBT piece of it: "[T]he conflict of liberties means that the new moral regime, with the backing of the courts and the regulatory state, will prioritize erotic liberty over religious liberty."

Given the potentially far-reaching nature of this conflict, it would be encouraging if the modal religious leaders were trying to ratchet down the rhetoric and the stakes or were otherwise playing an emollient role. Unfortunately, that's not the case. Instead, we're often told we are on the brink of a war on religion, a vast apocalyptic battle. Mohler warns us that no person of faith, anywhere, is safe: "The religious liberty challenge we now face consigns *every* believer, *every* religious institution, and *every* congregation in the arena of conflict where erotic liberty and religious liberty now clash" (emphasis added).

Virginia state delegate C. Todd Gilbert inflated the stakes even further when he spoke in support of a state version of FADA: "The activists who pursue same-sex marriage...are not satisfied with equality and they will not be satisfied until people of faith are driven out of this discourse, are made to cower, are made to be in fear of speaking their minds, of living up to their deeply held religious beliefs. They want us driven out." One of my own Catholic acquaintances recently asked me, in agonized and angry tones, "How much longer am I going to be able to live in this

country before someone makes it impossible for me to raise my kids in my faith or go to the schools they go to?"

I don't doubt his sincerity. But "They want us driven out" is not only wildly inaccurate — it is the sort of hysterical talk one hears in broken and violent societies. Though those who invoke it may regard their posture as defensive, their hysteria reframes just about any imaginable compromise as an act of cultural suicide. This is, to put it mildly, very unhelpful.

Meanwhile, at both the state and federal levels, the religious-liberty movement has generally (though not universally) drawn hard lines against anti-discrimination protections for LGBT people. Such intransigence cannot be strategically wise. Inasmuch as any politically viable deal on nondiscrimination would need to benefit both sides, it would need to include anti-discrimination protections for gay people. Because the culture is growing more pro-gay and more anti-discrimination by the day, when religious activists and politicians rule out any such protections — and, in fact, revoke or pre-emptively block them — they effectively adopt the Palestinian bargaining strategy of holding out for a worse deal.

Many of the religious side's specific objections to anti-discrimination protections for LGBT people are tenuous, in my view. And yet, religious communities aren't irrational in their worry about a chain reaction that could result in their being cast out of polite society. They make a challenging argument, which goes like this: *Anti-discrimination laws establish sexual orientation as a protected category — like race. When such laws gain wide adoption and acceptance, those whose religious beliefs distinguish morally or theologically between homosexuality and heterosexuality could be treated in law, and also in society, as being like racists. Once that happens, religious teaching and observance will be relentlessly hounded from the public square.*

It is important to see that this argument is rooted in assumptions not about gay rights as such but about nondiscrimination. In effect, it says, "In today's America, nondiscrimination is not just a slippery slope but a slippery cliff, an all-or-nothing proposition. So we can't budge an inch toward protecting LGBT people from discrimination without losing everything — even if we wish we could." In other words, the claim is that, like it or not, nondiscrimination has become a social principle that militates against compromise.

## **TRUE TO THEMSELVES**

Unfortunately, on the gay-rights side of the debate, there has been something of a parallel evolution toward absolutism.

In 2010, in the prominent gay magazine *The Advocate*, I published an essay arguing for a conciliatory attitude toward religious-liberty claims. "[T]he smart approach," I said, "is to bend toward accommodation, not away from it, whenever we can live with the costs." One reason was legal: It's best not to be on the wrong side of the First Amendment and religious liberty. Another reason was political: Reasonable accommodations will speed public acceptance of LGBT equality at an acceptable and rapidly declining cost to gay people. The most important reason, though, was moral:

The real point of the gay rights movement is not just to secure equality for homosexuals; it is to maximize all Americans' freedom to be true to themselves — the freedom we were denied. The last thing a movement of former pariahs should seek is to inflict the same agony on someone else.

For those reasons, I said, reasonable religious accommodations are something gay people should embrace as a cause, not resent as a concession.

At the time, I got a hearing. But that door, never more than ajar, has closed. The strong consensus in the LGBT world today is that religious accommodations are a "license to discriminate" and are, by their very nature, a concession.

The game that gay-rights advocates are playing now is increasingly zero-sum. It has become quite hard — not by any means impossible, but quite hard — for leaders in the LGBT world to accept a compromise on religious accommodations, even if the compromise includes significant new protections. One reason is the tactical calculation that victory will eventually fall into the lap of the gay-rights side via the culture and the courts, so there is no urgency to negotiate. But negotiating will get LGBT Americans protected faster than waiting around will, and with broader social buy-in, which matters if the goal is to diminish discriminatory behaviors and attitudes.

Moreover, even if one views religious accommodations as concessions, they are affordable concessions. Outside of the religious institutions and organizations at the very core of the First Amendment, there just aren't many landlords and schools and places of business that want to discriminate, and the number is declining by the day.

Here, however, is the problem: Cost and benefit become irrelevant when an absolutist mentality sets in. We saw that mentality on display when equality-minded activists, many of them not gay themselves, demanded and got the firing of Mozilla's chief executive, Brendan Eich, on the grounds that, six years earlier, he had contributed \$1,000 to California's 2008 anti-gay-marriage initiative. Though the activists were entirely within their legal rights, I was among a contingent of gay-marriage supporters (gay and non-gay) who found the spirit of their campaign worryingly intolerant. Given their own historical role as victims of majoritarian repression — repression that was cultural as well as legal — LGBT people should be wary of joining or abetting campaigns to enforce moral conformity.

The presence of an absolutist strain in gay-rights activism isn't entirely a bad thing. Activists are in the business of being true believers, and morality is in the business of making universalist claims. Most gay (and gay-friendly) people believe that opposition to same-sex marriage or LGBT anti-discrimination protection is intellectually and morally indefensible. It follows, then, that gay-rights activism would reflect that view.

It is possible, however, to believe that one is morally in the right and still want to get along with one's neighbors and fellow citizens in a pluralistic society. The urge toward *moral* intolerance may be strong, but the urge toward *social* or *legal* intolerance does not necessarily follow.

And most gay people are not by inclination intolerant — including of religion. After all, many gay people are religious, most grew up in religious households, and all have religious friends and

loved ones. Like all Americans, they both desire and manage to get along with many people with whom they disagree, even on moral issues. So what's driving the hardening of attitudes in the LGBT world toward claims of religious liberty?

The hardball tactics of the religious-rights side have certainly played a role. As mentioned above, the people driving efforts like FADA and the legislative efforts in Indiana, North Carolina, and Mississippi could not have done a better job of seeming hostile and uncompromising. But the gay community's inflexibility is not just a reaction to the opposing side. Many LGBT people who are temperamentally inclined to conciliation have concluded that principles of nondiscrimination give them no room for flexibility — precisely the same conclusion many of their religious-rights counterparts have reached. The peculiar result is that many (though not all) gay-rights advocates and many (though not all) religious-rights activists, while disagreeing about everything else, share in the belief that, like it or not, the logic of nondiscrimination brooks no compromise, *even if compromise is desired*.

Why should this be so? The reason, or an important reason, is that both sides are applying — misapplying, I would argue — the lessons of the granddaddy of civil-rights struggles, that of African-Americans.

## **ZERO TOLERANCE**

*Discrimination* is a dirty word in America. And it should be.

No one should need to be reminded today how, even after slavery was abolished, legal and cultural discrimination oppressed, abused, and terrorized African-Americans. So pervasive and evil was the regime of racial discrimination that rooting it out required the legal and cultural equivalent of overwhelming force, putting the whole country through a necessary and just but traumatic upheaval the effects of which echo through our politics to this day.

Culturally, what the country learned from the civil-rights movement is that discrimination is everywhere and always wrong, and therefore must be everywhere and always illegal and unacceptable. In the racial paradigm, discrimination cannot just be minimized. It must be eradicated. *Every* diner, drinking fountain, and swimming pool open to the public must be open to blacks. In practice, after all, any lesser standard was exploited by racists as a tool of Jim Crow. In principle, the very existence of discrimination diminished African-American dignity. If any middle ground was possible in that struggle, whites' massive resistance blew it away.

The oppression of black Americans is historically and morally unique. Thank goodness, there is no other stain like it. That said, the persecution inflicted on gay Americans was very severe in its own way. Gay people were terrorized on the streets and in the schools, fired from their jobs, and banned from government employment and military service. Psychiatrists called them sick. Politicians called them subversive. Preachers called them a stench in God's nostrils. Their bars and churches were vandalized and burned; their children were taken away; and police, instead of protecting them, entrapped them for sport. As recently as 2003, in multiple states, they were deemed criminals.

Emotionally, gay people and equality-minded allies have reason to reach instinctively for the black civil-rights model. And that is what many of them have done. When I suggest religious accommodations, very often the reply I get from my LGBT and progressive friends is something like this: "We wouldn't give racists the right to kick black people out of their store." In the LGBT world, this comparison to racism is often perceived as a trump card, a conversation-ender. For many LGBT people, settling for "equality-minus" is, in and of itself, a form of discrimination. So the only religious accommodations they will even discuss are ones that apply in equal measure to race.

I have argued elsewhere that the black civil-rights model isn't a great fit for the LGBT issue, and that equating opposition to same-sex marriage with racism is especially problematic, though my arguments have mostly fallen on deaf ears. Maybe that is for the best; perhaps massively over-detering anything that looks remotely like discrimination is a price we pay for the magnitude of America's crimes against African-Americans, and maybe it's also a way we forestall other such crimes in the future. Even if this is true, it is also important to remember that over-deterrence, if that's what is happening, comes at the high social and political cost of marginalizing and delegitimizing compromise, exception, accommodation, and the normal variation in practices and preferences that inhere in a pluralistic society.

That is true not just where LGBT rights are at issue but wherever nondiscrimination law or public morality follows a context-blind, zero-tolerance approach. In particular, a zero-tolerance nondiscrimination model militates against the balancing of interests in the courts and in the legislative process, because allowing even a narrow "license to discriminate" is seen as vitiating the whole principle of nondiscrimination. Zero-tolerance is blind to diversity of community preferences and precludes geographic variation, so that Texas and Massachusetts must have the same rules, virtually guaranteeing a bad fit for one place or the other, or both.

Zero-tolerance also disallows comparing costs with benefits, weighing relative harms, and taking into account the particular structure of local markets. The effect of a Christian baker's refusal to cater a same-sex wedding is very different in a small rural community where there are no other bakeries than in a large city where bakeries are numerous. When regulating antitrust and price discrimination, we *always* look at marketplace context in deciding whether to allow a commercial practice, and we reason that diversity of practice and pricing is a *good* thing, so long as the customer has plenty of choices. Zero-tolerance, by contrast, militates against diversity: If one of hundreds of bakers understands his religious convictions as requiring discrimination, that is still one too many.

At some level, there is an abiding irony in gay-rights activists' arguing against diversity. But that is where the absolutist nondiscrimination model leads. Logically, albeit not necessarily politically, it points to the denial of government funds and student-loan dollars to religious universities that teach that homosexuality is wrong. California's legislature recently entertained (and fortunately dropped) a provision to do just that.

Asked in the *Obergefell* oral argument if a pro-gay-marriage decision might lead to the withdrawal of tax-exempt status from a school that opposed same-sex marriage, Donald Verrilli,

the U.S. solicitor general, famously replied, "[I]t's certainly going to be an issue. I don't deny that." He was talking, not about the ultimate political outcome, which depends on many factors and about which one can make no prediction, but about the logic of anti-discrimination as widely interpreted by progressives and conservatives alike. That absolutist logic, left to its own devices, pushes social conciliation out of reach.

## ACCOMMODATIONIST NONDISCRIMINATION

The problem is that the zero-tolerance interpretation is wrong. And it has always been wrong. As in *The Wizard of Oz*, the solution is right here, under our nose, and has been all the while.

The landmark civil-rights bills that broke the back of racial segregation in the 1960s were not absolutist. They provided exemptions for religious organizations. They exempted "Mrs. Murphy," the landlady renting a room in her own house. At the time, civil-rights advocates in Congress made the pragmatic argument that exemptions were needed to pass the bill, but they also made the politically principled argument that exceptions would increase social comfort with the legislation while still covering the vast majority of cases — a trade they deemed worth making. So not even in those dire days, a time of genuine social emergency, did we insist on a policy of zero-tolerance.

Since then, anti-discrimination law as enacted in countless jurisdictions and as interpreted by the courts is nothing close to being as absolute as today's activists and popular culture typically suppose. Employment-discrimination law offers exemptions for bona fide occupational qualifications, a conceptually elastic category that has proved, in practice, quite workable. State and federal nondiscrimination laws — as written, as judicially interpreted, and as further inflected by RFRA and its non-federal equivalents — are shot through with religious exemptions, most of which are so uncontroversial that only a few specialists even know they're there. Age-discrimination rules allow pension plans to treat old people differently than young people, and sex-discrimination rules allow single-sex elementary and secondary schools. Sexual-orientation anti-discrimination laws, where enacted legislatively, include religious carve-outs as a rule.

Then there is disability-discrimination law, which is one immense tangle of exceptions, because its "reasonable accommodation" standard is, by definition, *entirely* contextual. When the Americans with Disabilities Act passed in 1990, many thought it would be a bottomless pit of litigation and expense, but in practice it has proved to be surprisingly stable, affordable, and uncontroversial. In general, for every accommodation or exception that sparks a public argument (like the Hobby Lobby controversy), there are thousands that no one notices.

In fact, the pop-culture ideal of zero-tolerance nondiscrimination is possible only *because* of the underlying reality of ubiquitous accommodation. "The world would fall apart if you tried to pursue the logic of racial anti-discrimination into all these other areas," observes Walter Olson, a senior fellow at the Cato Institute. He is right: If Americans actually practiced nondiscrimination remotely as inflexibly as they preach it, the whole edifice would collapse.



Thus, in reality, zero-tolerance is not the rule at all. In practice, Americans have come to observe an informal spectrum of anti-discrimination models. Socially, if not always legally, race comes close to no-exceptions. The circumstances in which a court or the public will accept race as, say, a bona fide job qualification, or will accept race as grounds for a religious exemption, are vanishingly rare. Where the law does allow discrimination against African-Americans, few Americans will avail themselves of it. Mrs. Murphy still has the legal right to refuse her upstairs room to black renters, but nowadays she is probably a sociopath if she exercises it.

Where nondiscrimination is concerned, race is socially in a class by itself, but ethnicity also admits of relatively few contextual exceptions. Age and religion seem to be in a middle range, in which more exceptions are allowed. Sexual orientation and gender identity, although in flux, are likely somewhere in this middle range. Disability discrimination, as already noted, is contextual all the way through.

It's important to stress that this is a spectrum, not a hierarchy. It does not rank anti-discrimination rules from "better" or "stronger" at the race end to "worse" or "weaker" at the disability end. It also does not rank the social importance of various groups or the validity of their nondiscrimination claims. It is not a competition. Rather, the spectrum reflects the natural diversity of needs, situations, and histories of groups seeking protection and of the social contexts in which they are embedded.

All this is to suggest that, when religious conservatives and gay-friendly progressives say nondiscrimination principles force them to forswear social compromise, they occupy a prison of their own making. By embracing a mythical version of nondiscrimination, in which race is the master template and exceptions always weaken the underlying principle, they lock themselves and each other into unnecessary and escalating conflict, with the likely result that LGBT people miss opportunities to get anti-discrimination protections and religious people miss opportunities to get safe harbors.

The moment one drops the fallacious and counterproductive presumption that nondiscrimination inherently precludes compromise, all kinds of compromises become, at least in principle, reasonable and viable — even in the commercial sphere, currently the most controversial category. For instance, what might we do about a Christian-owned business that wants to refuse to serve same-sex weddings? There are lots of options. We could provide a mom-and-pop exception for businesses below a certain size. We could define and exempt a category of "religious-based enterprises." We could define and exempt a category of "expressive enterprises." We could allow accommodations if they are arranged so as to cause no serious inconvenience or dignitary shock to the customer. We could bar commercial discrimination while allowing businesses to express a *preference* not to serve same-sex weddings, as Northwestern University law professor Andrew Koppelman suggests.

Such options are not mutually exclusive. They could be mixed and matched. Nor is there any reason for every place to adopt the same approach. Within reason, accommodations and exemptions can and should look different in different places. If religious exceptions of whatever sort were coupled with the provision of new nondiscrimination coverage to LGBT people — the

obvious compromise, and the approach adopted in Utah — sexual minorities would be much better protected than under the status quo, which in most states offers them no protection.

The point is not that any particular accommodation or compromise is politically easy or philosophically perfect. The point is that there is plenty to talk about once we cast aside the zero-tolerance paradigm and acknowledge that context and flexibility occupy hallowed and honored places in anti-discrimination policy. We can get away from the slippery cliff, from all-or-nothing-ism, and from foreclosure of compromise. And we can start talking about win-win instead of win-lose or, in practice, lose-lose.

### **A FORK IN THE ROAD**

The question I am raising is not about gay rights, nor is it about religious liberty. It is about two interpretations of the modern Eleventh Commandment, "Thou shalt not discriminate." It frames a choice between an absolutist interpretation that is based on myth and impels us toward conflict, and a pluralist interpretation that is rooted in reality and invites us to compromise.

In the current moment, the conflict between gay rights and religious liberty is playing a role something like that of the proverbial canary in the coal mine. What we will find out over the course of the next few years, as the conflict plays out, is which interpretation of nondiscrimination our politics and culture are driving toward. In one future, the Equality Act and the First Amendment Defense Act — and their state and local equivalents — are opening bids in negotiations that ultimately produce compromises, enhancing both the fairness and the flexibility of nondiscrimination law. In another future, negotiations never start, or they fail for lack of support, and both sides dig in for an existential battle — not just between LGBT advocates and religious people but, far more disturbingly, between the moral principle of nondiscrimination and the social imperative of conciliation. This all-or-nothing conflict makes nondiscrimination seem inherently, not just incidentally, threatening to all manner of dissidents, not just religious ones, and so seems certain to ignite and inflame moral conflict down the road.

This is not a decision only about gay people or religious people. It's a decision about how much play we will allow in the democratic joints of our society, and whether we can live out America's core principles in ways that honor and celebrate America's characteristic pragmatism and diversity.