

Freedom to Exclude Versus Enforced “Tolerance”

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The state of civil society in America is conflicted. On the one hand, we have a plethora of affinity groups to suit anyone’s fancy. Your social choices are no longer limited to the men’s club or bowling league, and digital-media tools can make anyone a YouTube or Twitter all-star. On the other hand, pressures to conform to ever-shifting political correctness can threaten the educational and employment prospects—and, increasingly, physical safety—of those who hold minority views.

Religious liberty, as exercised through free association beyond the bare freedom to worship, is under threat from government mandates, weaponized antidiscrimination laws, and other illiberalisms of the New Left. For example, US college campuses have become a hotbed of anti-Semitism even as such incidents decline worldwide (presumably because Jews are disfavored in the latest intersectional hierarchy of privilege).

The Supreme Court, for its part, has taken a middle stance, making the government relent in cases like *Burwell v. Hobby Lobby* (2014) and *Zubik v. Burwell* (2016) but not allowing student groups to restrict membership to actual believers in *Christian Legal Society v. Martinez* (2011). This fall, the Court will hear *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, one of the public-accommodations cases that ask whether businesses can be punished for declining to service same-sex weddings.

So what about those state laws? Here we see infringements of individual freedom in the spillover from the gay-marriage debates, with people being fined for not working same-sex weddings: the Washington florist, the Oregon baker, the New Mexico photographer, and many others, all of whom serve gay clients in non-marital circumstances. Most recently, a Michigan farmer was banned from the East Lansing farmer’s market for posting on Facebook that he would decline to host gay weddings on his outside-city-limits farm.

To me, there’s a clear difference between arguing that the government must treat everyone equally—the legal dispute regarding state issuers of marriage licenses—and forcing private individuals and businesses to endorse practices and participate in ceremonies with which they disagree.

Notwithstanding New Mexico’s state Religious Freedom Restoration Act, Elane Photography lost its case. Despite gay-rights activists’ comparing their struggle to the Civil Rights movement, New Mexico isn’t the Jim Crow South, where state-enforced segregation left black travelers nowhere to eat or stay. A YellowPages.com search yields more than 100 photographers in the Albuquerque area, most of whom would surely be happy to take anyone’s money.

That’s why it’s heartening that a Kentucky appeals court ruled in favor of local print shop Hands On Designs, which had declined to print t-shirts promoting the Lexington Pride Festival because its owners disapproved of the shirts’ message. That ruling was narrow, however, holding that the

public-accommodations ordinance didn't protect political views. (Many do hold ideology to be a protected class, as in Seattle and the District of Columbia.) The court missed the opportunity to make clear—as *Cato* urged in our amicus brief—that laws violate the First Amendment when they force people to publish words with which they disagree.

Indeed, many of these cases implicate freedom of speech even before associational considerations. Take, for instance, a freelance writer who refuses to write a press release for a religious or political group with which he disagrees. Under several state courts' theories, such a refusal would be illegal. Yet a writer must have the First Amendment right to choose which speech he creates, notwithstanding state law to the contrary. Likewise, with photographers and florists who create visual rather than verbal expression. The Court has said repeatedly that the First Amendment protects an "individual freedom of mind," which the government violates whenever it tells a person that she must or must not speak.

Upholding individual freedom and choice here would inflict little harm on those who feel offended and hurt. A photographer who views same-sex weddings as immoral would be of little use to the people getting married; there's too much risk that the photographs will, even inadvertently, reflect that disapproval. Those engaging in such a ceremony—or, say, entering an interfaith marriage, or remarrying after a divorce—would actually benefit from knowing that a prospective vendor looks down on their union, so they could hire someone more enthusiastic.

Many of our culture wars are a direct result of government's forcing one-size-fits-all policy solutions on a diverse citizenry. All these issues will continue to arise if those in power demand that people adopt certain beliefs or cease to engage in the public sphere.

The outcry over cases involving the freedom of speech and association shows a more insidious process whereby the government foments social conflict as it expands its control into areas of life that we used to consider public yet not governmental. Indeed, it is government's relationship to public life that's changing—in places that are beyond the intimacies of the home but still far removed from the state, such as churches, charities, social clubs, small businesses, and even "public" corporations that are nevertheless part of the private sector. Through an ever-growing list of mandates, rules, and "rights," the government is regulating away our Tocquevillian "little platoons." That civil society, so important to America's character, is being smothered by an ever-growing state that, in the name of equality, tries to standardize life from cradle to grave.

The most basic principle of a free society is that government cannot force people to do things that violate their consciences. Some may argue that in public-accommodations cases, there is a conflict between the "freedom to discriminate" and basic civic equality, so the government has to step in as referee. But that's a false choice, as President Obama liked to say. Without putting wedding vendors out of business, gay couples are still free to get married and to choose among many vendors when they do.

The problem that these clashes expose isn't that the rights of privileged businesses trump those of marginalized customers. It's that all too often governments don't recognize everyone's right to live his life as he wishes.

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