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How Can Gay Rights And Religious Liberty Coexist? With Free Association

By Ramona Tausz

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The deplorable state of religious freedom in America is due to a fundamental shift in how our country views First Amendment freedoms, speakers at the Cato Institute's "Protecting Religious Freedom" conference declared yesterday.

Moreover, they argued, today's increasing numbers of private businesses prosecuted for failing to service same-sex weddings or provide contraception drugs cannot be remedied through public accommodations and exceptions, such as Religious Freedom Restoration Acts, but only by returning to a lost understanding of liberty and First Amendment rights.

"We at Cato have long supported both religious liberty and gay rights, insofar as the agenda of each is consistent with the liberty of unlimited constitutional government," Roger Pilon, founding director of the Cato Center for Constitutional Studies, said. "But we draw the line when same-sex couples turn around and use government to force venues against their religious beliefs to participate in same-sex ceremonies, as happens too often today."

Dialogue at the conference between Pilon and Louise Melling of the American Civil Liberties Union confirmed that the issue at stake is whether the harm of violating First Amendment rights is greater than the harm to a person's dignity when he is refused service due to sexual orientation or lifestyle choices.

Libertarians: Religious Liberty 'Exemptions' Sideline Freedom of Association

Pilon cited many cases of private businesses and individual vendors prosecuted for refusing to service a same-sex wedding or provide contraceptive drugs, claiming the dramatic increase in such cases is due to a fundamental change in how our country views the freedom of association. This First Amendment right, he said, used to mean individuals had the right to associate or to not associate—that is, discriminate—in private and religious affairs, an understanding that has now been replaced in our society with forced association.

“Modern forced association arose with Progressive and New Deal employment and labor laws, but especially with the 1960s civil rights movement,” Pilon said. This change constitutes a shift in presumptions: a switch from assuming that individuals have a right to associate or not associate to assuming that everyone must associate, with the burden on individuals to defend their reason for opting out.

“In the Civil Rights Act we decided to prohibit private discrimination,” he said. “I think in that context it was absolutely necessary—how long it’s going to be necessary is another question.”

The 1993 Religious Freedom Restoration Act, and subsequent state RFRAs that support religious freedom merely by way of “exemptions,” he argued, ground their understanding of religious freedom on this shift in American understanding of freedom.

“Notice the word ‘restoration’—what have we come to when we have to ‘restore’ religious liberty, our first freedom?” Pilon asked. “As RFRA’s very title implies, religious freedom is treated as an exception.”

Liberals: A Right to Dignity Trumps Religious Liberty

Melling, on the opposite side of the spectrum, declared government regulation of public accommodations essential in order to avoid harming others and infringing on people’s right to feel dignified. For Melling, “Religious liberty, like other rights, has a limit, and that limit comes when you’re going to hurt others, including by discrimination.”

“If we don’t have the government act, that is an action,” she said. “There is indeed a dignity harm, whether you agree on how it gets addressed. And that harm is not a First Amendment harm that is solely neglected.”

Melling disagreed with suggestions that a same-sex couple discriminated against by a business go to a competitor instead of suing to force private individuals to do what they want.

“It doesn’t matter if someone discriminated against can go somewhere else,” she said. “The harm of being turned away, no matter what you think, is real.”

Like Pilon, Melling cited the context of the civil rights movement as a reference point.

“People of faith were on both sides” of the civil rights movement, she said. “Bob Jones University in the ’80s, resisting admitting students who believed in interracial dating, argued religious liberty in the face of losing its tax-exempt status. The court said no—compelling state interest.”

According to Melling, there were plenty of other schools to go to, but Bob Jones still needed to end its discrimination policy because of a compelling state interest in ending discrimination. The same situation, she said, applies today.

Do We Have a Right to Force Others to Make Us Feel Good?

Pilon noted that dignitary harm is "as vague a term as you could possibly come up with," opening up a fruitless war over whose feelings are hurt more. Melling didn't explicitly define what constitutes a dignitary harm, though she did note that desires to feel dignified should also be the focus when considering the claims of the other side—the cake baker and florist who are prosecuted for failing to provide a service.

"We do need to hear about the owners of the business and what it means to stop providing cakes," she said. "We do need to hear about what that means for a person of faith and to understand what the consequences are in that context as well."

Pilon suggested the dignitary harm of the prosecuted religious cake baker might actually be greater than that of the same-sex couple, but that the real issue at stake isn't "Who feels more embarrassed and hurt" but "Whose First Amendment freedoms are being violated?"

Pilon called it "ridiculous" to say we should have an action of law for feeling offended, or that "rejection when you go into the baker and ask for a custom-made cake" is "harmful." While Melling's argument suggested laws should be based on subjective feelings of hurt and offense, her libertarian opponents continually appealed to objective constitutional rights as overriding subjective feelings.

Mark Rienzi, from the Catholic University of America and Becket Fund for Religious Liberty, agreed with Melling about the importance of dignitary harm, but sided with Pilon in holding that First Amendment freedoms trump such harms.

"It is surely painful to have someone tell you that your sexual identity or your religious identity is wrong or immoral," he said. "But as a First Amendment matter we've got really clear doctrine saying that that kind of hurt cannot override people's First Amendment freedoms. We have a long tradition of saying, even when the speech is hurtful and hateful, that we need to protect it precisely because we don't want the government to be picking the winners and losers."

For Pilon and Rienzi, the very terms of the debate — the question of dignitary rights vs. First Amendment rights — suggest current conflict is the result of a shift in how Americans view the right to private discrimination. Moreover, that means that even RFRA exemptions fail to deal with the real issue at the heart of violations of religious liberty in America today.

As Pilon concluded, "We need more than a Religious Freedom Restoration Act—we need a Freedom Restoration Act, which was of course what the Constitution was meant to be."