March 7

Same-Sex Marriage and the Twilight of Religious Freedom

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Seven years ago I wrote an article titled *Civil Rights for Whom?: Gay Rights Versus Religious Freedom.* To some it seemed alarmist, but since then the gay movement’s assault on religious freedom has moved far faster than anyone expected. Although gay marriage is recognized, and discrimination based on homosexuality is illegal, in only a minority of states, the gay movement has won many battles and anticipates total victory over religious resisters quite soon.

The liveliest issue now is whether a small space of freedom can be preserved for conscience exemptions for people of faith from performing acts that they feel condone or promote homosexuality. The political left’s response to pleas for such an exemption is exemplified by an editorial in last week’s NY Times titled *A License to Discriminate.* That attitude prevailed when the governor of Arizona vetoed a proposed conscience protection law.

But what does it mean to discriminate? It means simply to choose. Broad liberty to choose how to live our lives is the very hallmark of a free society, unlike repressive states where people have very little freedom to choose—that is, to discriminate—and must do what the government orders.

Broad liberty was once axiomatic in America, but in the 1960s freedom ran into the problem of entrenched racial segregation. To bar government discrimination but permit private discrimination, it was feared, would perpetuate segregation indefinitely. That fear may have been wrong, and antidiscrimination laws may not be much needed now, but racial discrimination is so repugnant now that to allow it is unthinkable.

Of course, we do allow most discrimination which, again, means free choice. It’s perfectly legal to discriminate against people who own guns, vote Republican, or root for the wrong baseball team. Lawyers may reject clients they don’t like. The gay movement itself discriminates when, for example, it promotes a boycott of Chik-Fil-A.

And most conduct is thought of in terms of what we do rather than what we don’t do, so we don’t even think of inaction as discrimination. So we don’t say that a vegetarian restaurant discriminates against carnivores, even though it does so just as much as an inn that accepts only opposite sex couples discriminates against homosexuals. Nonetheless, the gay movement has succeeded in equating disapproval of homosexual conduct with the Ku Klux Klan.

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1 95 Kentucky L.J. 553 (2007).
So how do we decide what choices (i.e., discrimination) are permitted and which are not? This question raises fundamental issues of the meaning of freedom, of human nature and well-being, and of the relationship between government and the individual. No society can allow unrestricted choice, such as freedom to kill.

What of religious freedom? Free exercise of religion is enshrined in the first clause of the Bill of Rights, and by any reasonable construction of that clause faith-based refusals to condone homosexuality would be protected. But in an opinion by, ironically, Justice Scalia in Employment Division v. Smith, the Supreme Court held that the Free Exercise clause covers almost nothing that’s not already handled by the Free Speech and Equal Protection clauses.

People of faith can seek statutory protection from legislatures. However, liberals see no value in religion, so they tolerate religious freedom only to the extent that it makes no secular difference. And they do not value marriage and the natural family, so they easily accept the comparison of traditional sexual morality to racism and reject any so-called “license to discriminate.” Even when statutory protections are adopted they may be challenged as unconstitutional preferences, or state protections may be overridden by federal law, as with the proposed federal Employment Non-Discrimination Act.

People of faith can translate their pleas to terms of secular values that liberals respect, say as claims for free speech or equal protection. However, many religious people find it difficult to perform that translation. They speak the language of faith, not the language of secular liberalism. And even if they can translate effectively, they may hesitate to do so because it seems dishonest to disguise a religious claim in secular clothes.

And the effort may not work. Eg, the Elanes, Christian photographers in New Mexico, claimed that photography is expressive activity and that requiring them to shoot a same-sex ceremony would unconstitutionally compel them to speak against their faith. This seems to me incontrovertible. A marriage or commitment ceremony is as expressive an act as a religious ceremony, and I hope we wouldn't require people to assist at a service of a religion they did not profess. But the New Mexico court said the photographer’s function is technical, not expressive, and rejected their claims.

People like the Elanes could comply with the law but exercise their free speech in some other way. They could do the shoot but in various ways show that they consider the ceremony sinful. And the Elanes, like the florist in Washington and the baker in Oregon, were victims of sting operations. Their callers had no intention to hire them; they just wanted to find anyone who would decline their request so that they could prosecute and make an example of them. The Elanes could have said "Sure, we'll do it," and they would never have heard from the callers again. But that would have been dishonest to their faith.

Right Or Exemption?

Professor Wardle has perpectively noted that freedom of speech is characterized
as a right, but its First Amendment companion, freedom of religion, is characterized not as a right but as possibly justifying an exemption, as if free speech were something valued by everyone while religious freedom is valued only by oddballs.

But until recently religious exemptions were quite rare in American law. Why is that so? The Founders, after all, were emphatic about the importance of freedom of conscience. But religious exemptions were rare primarily because the law rarely imposed duties or prohibitions that clashed with mainstream religious beliefs.

That was true both because our lawmakers used to respect religion and because the reach of the law and of the state was much smaller then. Eg, the law did not mandate employer-provided health insurance, so there could be no clash with employers’ faith. Now, there is. Respect for religious freedom has declined, but so has respect for freedom in general, not in favor of equality in general, which has no objective definition, but in favor of a highly selective and partisan concept of equality that is the secular liberal fashion du jour.

Definitions of freedom and equality rest on underlying concepts of human well-being. Secular liberals respect freedom in matters they value, like artistic expression, vegetarianism, racial identity for minorities (but not for whites), and environmentalism. At some point the long-standing liberal disapproval of homosexuality began to change. There was nothing scientific about this. It was just part of a general trend toward sexual laissez-faire. Now it is a sacred liberal tenet that homosexuality is a core element of the homosexual's personality and must be not merely tolerated but grandly celebrated by state and society. This leads to the phrase "marriage equality," which is nonsense for at least three reasons.

First, suppose that someone moves to the U.S. after living her whole life in England, Japan, or Ireland. She is told that she has a right to equal protection of the law, and she notes that people who want to drive on the right side of the road are allowed to do so. She then invokes equal protection and announces that she wants to drive on the left side of the road and has a constitutional right to do so.

True? No. Equal protection doesn’t mean everyone gets to make their own rules; it means that everyone is governed by the same rules, so long as those rules have a rational basis. That’s true for traditional marriage laws as it is for driving on the right side of the road, even though there are people who don’t like both those rules.

Second, however, equal protection allows people to be treated differently if there is a rational basis for doing so. No one thinks Bill Gates and a homeless man should pay the same taxes. Equality means likes should be treated alike. With respect to marriage law we don’t know what likes are until we explain its purpose. As indicated by the quote from James Q. Wilson that I read, its purpose is to keep children together with their biological parents. Given that reason, it’s obvious that, with respect to marriage, intrinsically sterile couples are not like male and female couples.3

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3 It is also highly doubtful that same-sex “marriages” would be as durable as normal marriages, if only
Third, if you reject the purpose of marriage law I just stated and insist that we must be allowed to legally marry whomever we love, what is the legal meaning of marriage? If two women can marry, why can’t three women marry? Bisexuals are part of the “LGBT” coalition and it takes at least four people to have a fully bisexual marriage. If two unrelated men can marry, why can’t two brothers marry? And why should a person be limited to one marriage. Why, if we so choose, can’t we be parties to several different marriages, just as we can be shareholders of several companies? And more fundamentally, why should government favor marriage at all? What business is it of the government to say that it’s inferior to live alone?

Although secular liberals prize sexual laissez-faire, religion is considered false, and often pernicious, so religious freedom is treated as a foible and tolerated only when it does not intrude on something liberals value.

Note the huge change in anti-discrimination law here. Despite gays’ constant references to sexual orientation, no one I know of wants to discriminate on that basis, which may be, like race, a matter of status. But the Abrahamic faiths--Christianity, Judaism, and Islam--generally do not discriminate on the basis of status, except for limiting the priesthood by gender. We all have some orientation or natural inclination to misbehave in certain ways, say to steal, but we object only to those who actually engage in stealing. Most Americans of faith believe that we are all sinners and should do business with sinners, but we should not facilitate their sins.

So the Elanes were happy to take passport photos for homosexuals because that does not abet a sin, but helping to celebrate a same-sex marriage would be very different. However, gay activists insisted that the Elanes must do so to affirm their behavior, and the courts agreed.

Recently in Illinois religious groups argued that, if a law to recognize gay marriage were passed, it should have a clause allowing all private organizations and individuals a religious refusal to recognize any marriage. Their opponents said that clause wasn’t needed because there had been no clashes with religion in states that recognized gay marriage, but they also argued that the clause would have horrible consequences because it would lead to widespread and destructive discrimination against married gay couples. In other words, they argued that the proposed exemption would have both no impact and a terrible impact.

So, you ask, que pasa? The answer is this: In practical terms the exemption is trivial for gays. Few large companies or non-religious non-profit organizations are going to discriminate, and for small businesses like the Elanes gays can easily go elsewhere. However, in symbolic terms the exemption is immensely important because it grants legitimacy to the belief that marriage must be between a man and a woman, as all societies believed since time immemorial. So for the gay movement, it is crucial that the state send an official message that this belief is intolerable.

Likewise, public schools must not be allowed to stay neutral between the two sides in because the bearing of children creates a glue for normal marriages that same-sex “marriages” cannot have.
this contest, but must treat it as a struggle between good (the gay movement) and evil (mainstream religion).

No Compromise

However, the gay movement is pragmatic and, unlike the dolts in the Tea Party, advances one step at a time when it has to. Take the statutory exemptions for religious organizations in states that recognize gay marriage. Even that freedom will be whittled away as quickly as the gay movement can do it.

First, as we already see with the contraceptive coverage mandate in the Affordable Health Care Act, the term "religious organization" will be defined narrowly to exclude religious hospitals and schools. Then, state funds that are otherwise available will be withheld from religiously affiliated organizations that refuse to bow to the gay movement. For example, Catholic Charities in Massachusetts lost state money and had to close its outstanding adoption placement work because it would not serve gay couples. Other public benefits will be denied, as where church-sponsored Boy Scout troops are denied access to public parks. State vouchers and charter school status will be denied to religious schools that teach traditional family values.

Finally, tax exemptions will be removed from churches that do not celebrate gay marriage or hire gay clergy. There is precedent for this in Bob Jones University, the revocation of whose tax exemption was upheld by the Supreme Court because it did not allow interracial dating.

Pressure will also be placed on individuals. Suppose you work in a government office and you have to hire someone for a job that includes some contact with the public. You see a resume that looks perfect until you notice that the applicant is a member of the Ku Klux Klan. What would you do? I suspect that many people would reject that person right then. Now imagine that the applicant is a Catholic—or a Mormon. Will there be a presumption that she has unacceptable views about homosexuality, just as the Klansman has unacceptable views on race?

Is There a Future for True Marriage?

So far it sounds like I'm resigned to a total defeat of religious freedom. Certainly the gay movement promotes that thinking by urging people to be on the right side of history. But even a slight knowledge of history teaches the hazards of predicting the future. Repeatedly, causes that seemed hopeless have rallied and triumphed. So far, forces for religious freedom have not even gathered together, much less formulated a long-term strategy, because until the recent Supreme Court decisions it seemed that such action was unnecessary. We're like America after Pearl Harbor. Now we know what we're facing and can start to plan our response.

We have three factors going for us. First, our public relations effort can improve. Indeed, it can't get any worse. Second, people of faith are starting to realize that we must cooperate. If we do not risk hanging together, we will surely hang separately.
Third, and more important, no public relations effort by the gay movement can change the underlying truths of marriage and the family, which can be separated from issues like employment discrimination. Although the customs of marriage have varied from time to time and from place to place, three features are constant in every known society. First, marriage is never just a private matter; it is always a public event. Second, whatever else it is about, it is always centrally concerned with the conception, bearing, and raising of children. And the third, which is just a corollary of the second, is that it is always exclusively between male and female.

Two explanations are offered for this constant pattern. The first is that the natural or biological family is the best for raising children, and marriage is society's way of promoting the natural family. Even if we correct for income, children raised by their married biological parents fare much better in all respects than other children. And, of course, marriage tends to result in higher income, which is an additional benefit for children. As James Q. Wilson said: "Marriage is a socially arranged solution for the problem of getting people to stay together and care for children, which the mere desire for children, and the sex that makes children possible, does not solve."4

The alternative explanation is that marriage, as celebrated in every society since the beginnings of civilization, has existed for one reason and one reason only—to stigmatize homosexuals. I can't imagine that anyone would take that explanation seriously, yet it was accepted by a majority of the Supreme Court in Windsor.

Again, que pasa? As Charles Murray and others have pointed out, the college-educated get the importance of marriage on their own, without a government message. For them, illegitimacy rates remain very low, and their divorce rates are below average and dropping. So government support for the natural family is like mandatory school attendance laws—unnecessary for the elite, but important to the less educated.

But, we are told, the natural family isn't so great; children raised by gay couples do just as well. However, as Professor Wardle and a very few others pointed out several years ago, all the studies claiming to prove the success of gay parenting have major flaws, including small, self-selected samples, and none made comparisons to the gold standard—children raised by their married, biological parents. More recently, the largest study to date showed what an informed person would expect—that children raised by same-sex couples possibly do as well as children raised by single parents or other broken families, but not nearly as well as children raised by their married, biological parents.

But so what? How does recognizing gay marriage harm normal marriages? Society has supported the natural family mainly through the expressive function of law—i.e., the role of law "in expressing social values and in encouraging social norms to move in particular directions."5 Both sides recognize the importance of this

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function. California’s Prop. 8 was held unconstitutional even though it gave gay couples all the benefits of marriage except the name, because the very word “marriage” was held to have such tremendous symbolic value.

The traditional message was that the natural family is best, especially for children. Recognizing gay marriage sends a new message—that the natural family is no better than any other; that the capacity of a woman and a man to create human life is no value, it is no better than an intrinsically sterile relationship; and that marriage is not about children but for the gratification of adults.

But if the function of marriage is no longer to support the natural family, why should society support marriage at all? Apart from concern for children, why should government care about private adult relationships? What we will have is what I call meaningless marriage. So why shouldn't government just get out of the marriage business, as many libertarians already propose?

Again, the law's support for marriage is not important for the elite, which get it on their own, but for the rest of society, where marriage has been falling apart, with great damage to children. But the political elite, including some Supreme Court justices, know little about the rest of society and don't think about the impact of redefining marriage on non-elite children. The position of liberals is that, in the name of gay equality and feminism, they'll smash the natural family, but then make up for it by taxing the well-off to fund compensatory programs for broken families. However, with the entitlements we have already growing beyond our means, we won't and maybe can't pay for such programs. After all, can any amount of money compensate for the lack of good parents? I doubt it.

We must face the reality that the federal government and a growing number of states have—for the first time in American history—declared core beliefs of mainstream Christianity, Judaism and Islam about marriage and the family to be irrational bigotry and have made action based on these beliefs illegal. This cannot help but alienate us from what is supposed to be government of the people, by the people and for the people. We should help those who need help, including children suffering in broken families, but perhaps we should direct our efforts through private, pro-family channels, and not through our anti-family government, while acknowledging that no effort by outsiders can compensate for the lack of good parents.

One corollary of all this—a silver lining, perhaps—is, I predict, a golden age for Latter Day Saints. As the family deteriorates elsewhere in society and more children fall behind in school and in the job market, groups that maintain strong families and a commitment to work and education will flourish. So we can be very happy about the rise of same-sex marriage and demise of the natural family if we just join the Supreme Court majority and the liberal secular elite in thinking only about ourselves and ignoring the growing number of American children who are falling behind because of their broken families. However, for myself, I am not able to do that.