

The Collision Between Religion and Civil Rights?

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Religious beliefs and LGBT rights seem to be in constant tension. Recently, the nation has been focused on religious opposition to LGBT rights in the context of the battle over same-sex marriage. We have all read stories about the Mormon Church's integral involvement in the campaign to pass Proposition 8 in California. And, more recently, we all witnessed the tug of war between New Hampshire's legislature and its governor over the extent of the religious exemptions that would be included in a bill extending the right to marry to same-sex couples. Yet, religious opposition to LGBT rights is by no means confined to the issue of same-sex marriage; it also figures prominently in debates over including "sexual orientation" and "gender identity" among the list of protected characteristics in laws prohibiting discrimination in employment, housing, and public accommodation as well as in laws enhancing the punishment for bias crimes.

In some respects, this tension is quite real and requires a choice to be made regarding whose rights will take precedence over the other's. For example, in states such as Massachusetts and Connecticut where same-sex couples may marry, there is a tension between these couples' right to marry and religious organizations' right to the free exercise of their religion, which may not recognize such marriages. In resolving this tension, the right of religious organizations to decide which marriages they will—or will not—solemnize should clearly take precedence over the ability of same-sex couples to exercise their right to marry.

In many other respects, however, this tension between religion and LGBT rights is more rhetorical than it is real. For the next few minutes, I would like to explain this assertion and to leave you with some questions to ponder. The vehicle that I will use to explain my assertion that the tension between religion and LGBT rights is, in many cases, more rhetorical than real is the recent decision of the Iowa Supreme Court that extended the right to marry to same-sex couples.

The Supreme Court of Iowa issued its decision in the case of *Varnum v. Brien*¹ in early April. This opinion was remarkable in several respects. It was remarkable because it was issued by a court in Iowa—bringing marriage equality away from the coasts and into the heartland—and because that Iowa court was unanimous in the decision that it reached. This opinion was also remarkable for another, less noticed reason. In its opinion, the Iowa Supreme Court—more forthrightly than most others weighing in on this issue—discussed religious opposition to same-sex marriage and the role that it should play in legal cases involving lesbians and gay men.

The court noted that, “[w]hile unexpressed, religious sentiment most likely motivates many, if not most, opponents of same-sex civil marriage and perhaps even shapes the views of those people who may accept gay and lesbian unions but find the notion of same-sex marriage unsettling.” The court then went out of its way to address precisely why the religious beliefs that are at the heart of much opposition to same-sex marriage should play absolutely no part in its decision.

The court first noted that religious objections to same-sex marriage are often based on arguments of tradition and biblical interpretation. Yet, the court stated, “[t]he

¹ http://www.judicial.state.ia.us/Supreme_Court/Recent_Opinions/20090403/07-1499.pdf.

belief that the ‘sanctity of marriage’ would be undermined by the inclusion of gay and lesbian couples bears a striking conceptual resemblance to the expressed secular rationale for maintaining the tradition of marriage as a union between dual-gender couples, but better identifies the source of the opposition.” In effect, the court unmasked the oft-articulated secular argument that it is imperative for courts to refrain from “activism” and to retain the “traditional” definition of marriage as no more than a disguised religious argument. Indeed, the court observed that, “whether expressly or impliedly, much of society rejects same-sex marriage due to sincere, deeply ingrained—even fundamental—religious belief.”

After acknowledging this religious opposition to same-sex marriage and its role in the debates over same-sex marriage, the court complicated the picture by acknowledging that other groups “have strong religious views that yield the opposite conclusion.” These groups *do* recognize same-sex marriage. Depicting this as a religious difference of opinion, the court made it clear that its role is actually to ensure that the government stays out of such religious disputes. Citing the Establishment Clause of the Iowa Constitution, which provides that “[t]he [Iowa] general assembly shall make no law respecting an establishment of religion,” the Court stated that “[o]ur constitution does not permit any branch of government to resolve these types of religious debates and entrusts to courts the task of ensuring government avoids them.” In other words, in a pluralistic society such as the United States, the law requires that we honor all individual religious beliefs by refusing to codify any of them in law.

To pacify those who might be upset at the court’s refusal to enshrine certain (i.e., their) religious groups’ views of marriage in the law, the court then drew a sharp

distinction between civil and religious marriage. The court underscored that its decision related only to civil marriage and did not affect religious definitions of marriage, leaving it to each religion to decide which marriages it will solemnize. The court's task, it said, was simply to apply the constitutional guarantee of equal protection of the law to the exclusion of same-sex couples from civil marriage. The court then emphasized at the end of this passage of its opinion that:

Religious doctrine and views contrary to this principle of law are unaffected, and people can continue to associate with the religion that best reflects their views. A religious denomination can still define marriage as a union between a man and a woman, and a marriage ceremony performed by a minister, priest, rabbi, or other person ordained or designated as a leader of the person's religious faith does not lose its meaning as a sacrament or other religious institution. The sanctity of all religious marriages celebrated in the future will have the same meaning as those celebrated in the past. The only difference is civil marriage will now take on a new meaning that reflects a more complete understanding of equal protection of the law. This result is what our constitution requires.

This passage in the court's opinion draws our attention, however obliquely, to the importance of rhetoric in battles over LGBT rights. Those opposed to lesbian and gay rights have framed the issue of legally recognizing same-sex relationships in terms of the need to "protect" or "defend" so-called traditional marriage. This framing is epitomized by the labels applied to legislation and constitutional amendments designed to exclude same-sex couples from marriage; these measures are routinely called "defense of

marriage” acts and “marriage protection” amendments, by their proponents—and, quite unfortunately, opponents of these measures have acquiesced in the use of these labels. This rhetoric—by speaking of “defending” and “protecting” marriage—turns the rhetorical tables by painting lesbians and gay men as aggressors and heterosexuals as victims.

And this framing of the debate does not simply stand alone; rather it taps into deeply felt emotions attached to a storied institution with a long history. In summarizing its own thoughts on the institution of marriage (in the late 1970s), the U.S. Supreme Court succinctly sketched the background against which this rhetorical move is made and nicely illustrates the importance to many of defending so-called traditional marriage against attack:

[D]ecisions of this Court confirm that the right to marry is of fundamental importance for all individuals. Long ago, in *Maynard v. Hill*, the Court characterized marriage as “the most important relation in life” and as “the foundation of the family and of society, without which there would be neither civilization nor progress.” In *Meyer v. Nebraska*, the Court recognized that the right “to marry, establish a home and bring up children” is a central part of the liberty protected by the Due Process Clause, and in *Skinner v. Oklahoma ex rel. Williamson*, . . . marriage was described as “fundamental to the very existence and survival of the race.”²

Framing the question in this way and against this background conjures an image of marriage as an ancient citadel that is under attack by (implicitly, foreign) invaders. This

² *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

rhetorical move has been successful because it has put LGBT rights advocates in the difficult position of having to convince judges, legislators, and the electorate why they should open the gates of the citadel wide to allow in these (foreign) invaders who are bent on plundering and destroying their way of life.

But, when it spoke in terms of prohibitions against the establishment of religion, the Iowa Supreme Court made a rather important rhetorical move in a different direction. The court shifted the discussion away from this usual framing of the arguments about same-sex marriage, which tend to focus not on the real discrimination suffered by lesbians and gay men but on what same-sex marriage means for heterosexuals. In rejecting the notion that extending the right to marry to same-sex couples would harm those whose religious beliefs are to the contrary, the court lucidly explained just how little religious beliefs (as well as secular beliefs grounded in religion) have to do with the question of whether the right to marry should be extended to same-sex couples in order to fulfill the constitutional guarantee of the equal protection of the law to *all* citizens.

Aside from steering clear of dictating which marriages a religious organization must solemnize, the court found that religion had no role to play in its analysis of how the Iowa Constitution should apply to the claims of discrimination by same-sex couples who had been refused marriage licenses by the state. The court made it clear that just as the government must respect the religious beliefs of those who oppose same-sex marriage, so must the government respect the right of those who do not subscribe to those beliefs to be free of them. In other words, one person's religious beliefs—no matter how sincere or strongly held—should play no role in determining another's constitutional rights.

At least implicitly, the court was saying that this case—and the whole debate over same-sex marriage and lesbian and gay rights—is about the real, tangible effects of discrimination on sexual minorities, and not about the effect of eradicating discrimination on the heterosexual majority. The court acknowledged that there was some tension between religion and LGBT rights in the case before it, but was able to resolve that tension quite easily by drawing a sharp distinction between civil and religious marriage. Any remaining tension was not between religion and LGBT rights but between the differing interpretations of different religious groups concerning the merits of arguments about LGBT rights. This “religious undercurrent” in the debate over same-sex marriage, as the court called it, should not be allowed to influence the direction of the legal debate over the constitutional necessity of extending the right to marry to same-sex couples. As the court concluded:

[C]ivil marriage must be judged under our constitutional standards of equal protection and not under religious doctrines or the religious views of individuals. This approach does not disrespect or denigrate the religious views of many Iowans who may strongly believe in marriage as a dual-gender union, but considers, as we must, only the constitutional rights of all people, as expressed by the promise of equal protection for all. We are not permitted to do less and would damage our constitution immeasurably by trying to do more.

This same dynamic is at play in arguments over the tension between religion and the addition of “sexual orientation” and “gender identity” to the list of protected characteristics in bias crimes laws. It is often argued that, were “sexual orientation” to be

added to the list of protected characteristics, clergy would be criminally punished for having committed a “hate” crime when they delivered an antigay sermon. However, this argument—like the religious opposition to same-sex marriage—creates an illusory tension between religion and LGBT rights. It completely ignores the fact that bias crimes laws are generally written as penalty enhancements for some underlying crime (e.g., murder, arson, assault, or battery), where the victim of that underlying crime was selected because of a protected characteristic (e.g., because of his or her sexual orientation). It will be the rare clergy member who commits a crime in connection with the delivery of an antigay sermon.

In addition to highlighting how the tension between religion and LGBT rights is in many respects more rhetorical than real, the Iowa Supreme Court also made a very important point when it noted the mutability of religious views. Courts that render decisions extending the right to marry to same-sex couples are often called “activist,” a label that is clearly intended to paint them as twisting the interpretation of legal texts to exalt their own views of an issue above those of others. But by drawing attention to the existence of a difference of opinion among religious groups on the question of same-sex marriage, the Iowa Supreme Court also underscored the mutability of religious texts. In other words, the court drew attention to the fact that, just as laws are open to interpretation, so are religious texts. Some interpret these texts in a way that can accommodate same-sex marriage, while others take a reactionary position that does not permit such an interpretation of the same texts.

This recalls a debate from not so long ago—that is, the debate over interracial marriage. The U.S. Supreme Court struck down the last bans on interracial marriage more

than forty years ago when it decided the case of *Loving v. Virginia*. Many conveniently forget that, prior to that time, court decisions often cited religious views in upholding state bans on interracial marriage. For example, in the trial court's decision in the *Loving* case itself, the judge, who suspended the Lovings' one-year jail term on the condition that they leave the state of Virginia and not return together for twenty-five years, stated in his opinion that:

“Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.”³

And this statement was by no means unique or aberrant in such cases. Nearly a century earlier, another Virginia judge defended the state's antimiscegenation statute in a similar fashion:

The purity of public morals, the moral and physical development of both races, and the highest advancement of our cherished southern civilization, under which two distinct races are to work out and accomplish the destiny to which the Almighty has assigned them on this continent—all require that they should be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion.⁴

³ *Loving v. Virginia*, 388 U.S. 1, 3 (1967).

⁴ *Kinney v. Commonwealth*, 71 Va. 858, 1878 WL 5945, at *7 (Va. 1878).

And demonstrating that such views were not confined to the South, an Indiana court defended that state's antimiscegenation statute by quoting at length from a Pennsylvania Supreme Court opinion concerning the legality of segregated rail cars:

“The right to separate being clear in proper cases, and it being the subject of sound regulation, the question remaining to be considered is, whether there is such a difference between the white and black races within this state [i.e., Pennsylvania], resulting from nature, law and custom, as makes it a reasonable ground of separation. The question is one of difference, not of superiority or inferiority. Why the Creator made one black and the other white, we know not; but the fact is apparent, and the races distinct, each producing its own kind, and following the peculiar law of its constitution. Conceding equality, with natures as perfect and rights as sacred, yet God has made them dissimilar, with those natural instincts and feelings which He always imparts to His creatures when He intends that they shall not overstep the natural boundaries He has assigned to them. The natural law which forbids their intermarriage and that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures. The tendency of intimate social intermixture is to amalgamation, contrary to the law of races. The separation of the white and black races upon the surface of the globe is a fact equally apparent. Why this is so it is not necessary to speculate; but the fact of a distribution of men by race and color is as visible in the providential arrangement of the earth as that of heat and cold. The natural separation of the races is

therefore an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature. From social amalgamation it is but a step to illicit intercourse, and but another to intermarriage. But to assert separateness is not to declare inferiority in either; it is not to declare one a slave and the other a freeman—that would be to draw the illogical sequence of inferiority from difference only. It is simply to say that following the order of Divine Providence, human authority ought not to compel these widely separated races to intermix. The right of such to be free from social contact is as clear as to be free from intermarriage.”⁵

To the twenty-first century ear, these passages—all of which were written by judges, and not by pastors, reverends, or rabbis—are likely shocking and abhorrent. Yet, they underscore the extent to which religion can be used not only as a rhetorical sword, but also as a rhetorical shield to defend ingrained prejudices from the encroachment of the law and the disapproval of society, with what later come to be seen as strained interpretations of religious texts. Indeed, in the context of a recent case concerning whether a marriage license could be issued to a postoperative transsexual man and a woman, one Ohio judge remarked, after noting the long history of gender discrimination, slavery, and antimiscegenation laws in the United States, that:

The establishment of our current civil rights legislation required that we rethink the long established history and origins of our prejudices. Without exception, the continuation of those prejudices was defended in the name

⁵ *State v. Gibson*, 36 Ind. 389, 1871 WL 5021, at * 10 (Ind. 1871) (quoting *Westchester & Phila. R.R. Co. v. Miles*, 55 Pa. 209, 213–14 (Pa. 1867)).

of natural law, the God-given order of things, and because it had always been that way. Then, as today, the defenders of the status quo always seemed to have God's lips to their ears.⁶

This naturally raises further questions about the true extent of the collision between religion and LGBT rights and how we resolve any perceived conflicts. In particular, it raises a question about how best to reconcile individual religious beliefs with state laws that prohibit discrimination on the basis of sexual orientation and gender identity in employment, housing, and public accommodations. With regard to the application of the federal constitution to such state laws, the U.S. Supreme Court has held that an individual is not excused by the Free Exercise Clause of the First Amendment from complying with a valid and neutral law of general applicability. At the state level, however, the decisions on this type of question (particularly as it relates to the ability of landlords to refuse to rent to unmarried different-sex couples) have been mixed.

Recently, and closer to home, I understand that opponents of Pennsylvania House Bill 300, which would add “sexual orientation” and “gender identity” to the Pennsylvania Human Relations Act, wish to amend the bill to include an exception for those with contrary religious beliefs. Given the long history of religious texts being interpreted in ways that clothe entrenched bigotry in religious garb and for those interpretations to later be abandoned, I would ask whether it is appropriate to provide such an exception for individual beliefs when the individual has chosen to enter the public marketplace by holding himself or herself out as an employer, a landlord, or the operator of a business establishment that is open to public patronage. Or is this just another way of using

⁶ *In re Marriage License for Nash*, Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095, ¶ 61 (Ohio Ct. App., Dec. 31, 2003).

rhetoric to shift the LGBT rights debate away from focusing on discrimination against lesbians, gay men, bisexuals, and transgender individuals and of placing the focus on the effect of nondiscrimination measures on the heterosexual majority? Or is this simply a clever move to gut antidiscrimination legislation and leave it on the books, but with little (if any) practical force and effect? Or is it due to some combination of these motivations?

In closing, I hope to have gotten you thinking more about the extent to which religion and LGBT rights actually are in tension. In any pluralistic society, there is bound to be some conflict between the rights of groups that hold different beliefs. The question that we need to really think hard about is whether the conflict between certain religious beliefs and LGBT rights is really as great as it is sometimes portrayed to be, or whether that conflict is being overstated in an effort to stymie LGBT civil rights gains and to obtain legal sanction and a government imprimatur for the views of highly vocal reactionaries.