

Discrimination to Protect Liberty

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Discrimination to Protect Liberty

General Idea. “Discrimination to protect liberty” is the notion that exceptions to general anti-discrimination laws or norms are justified when enforcement of full equality would unduly infringe upon some people’s liberties (freedoms). For example, administrators and judges have generally interpreted federal and state anti-discrimination laws to allow religions to “discriminate” in their choice of ministers/priests/rabbis on the basis of religion, sex, sexuality, race. The “discrimination” is allowed in order to give space to religious liberty.

Discrimination Against Gays to Protect Liberty for Parents

California Proposition 8 (2008). Mainstay of anti-gay initiatives (1977-2008) has been the argument that equal treatment of “homosexuals” means that parents and religious persons will lose liberties. Anita Bryant (1977): Save Our Children. Colorado Amendment 2 (1992, *Romer v. Evans*): parents, landlords, churches will lose liberties when gays are assured equal treatment. Prop 8 (2008): if “homosexual marriage” were not overturned, schools will be required to teach children there is no difference between gay marriage and traditional (real) marriage.

Discrimination Against Gays to Protect Liberty of Association

Boy Scouts v. Dale (2000). Freedom of association cases were SCOTUS's response to southern efforts to harass civil rights groups. Traditionalists unsuccessful in invoking freedom of association to exclude women from social clubs (*Roberts*, 1984) but successful in Boy Scouts Case. BSA tells youth to be "morally straight," a normative mission which BSA/SCOTUS interpret as inconsistent with tolerating openly gay assistant scoutmasters. N.B. SCOTUS did not follow *Dale* to require Hastings College of Law to subsidize the Christian Legal Society, which discriminates against "unrepentant homosexuals."

Discrimination Against Women to Protect Women's Own Liberty

Gonzales v. Carhart (2007). Most successful strategy for chipping away at *Roe* = libertarian strategies focused on women's abortion decisionmaking. States are allowed to protect parental rights when minors want abortions; to impose informed consent (now including sonogram viewing) requirements on women considering abortions; and to require reasonable waiting periods. *Carhart* is important b/c SCOTUS relied on abortion "regret" to uphold a substantive limit on abortions (no "partial birth" abortions).
Operation Outcry.

Social Movements and Liberty

Experience of people of color, women, and gays has been similar:

Malignant Variation. Society viewed any racial/gender/sexual variation as malignant and each social group as inferior. Hence: pervasive discriminations, including slavery and then apartheid (blacks), coverture (married women) and job exclusions (all women), and outlaw status (“homosexuals”). Subordinated groups sought liberty protections: criminal procedure (blacks, gays), right to own property (women, blacks), privacy (women, gays).

Social Movements and Liberty

Tolerable Variation. Groups resisted pervasive discrimination by demonstrating that variation is tolerable. Anti-discrimination laws = important battleground. *Modernization of Justification* for discriminating against minorities: supplement direct denigrations (these people are inferior) with arguments that equality would sacrifice liberties. Civil Rights Act would invade white people's "freedom of association"; Abortion Choice would sacrifice lives of fetuses and liberty of husbands and parents; Gays Rights would corrupt children and harm parental rights

Social Movements and Liberty

Tolerable Variation—Libertarian Tropes:

(1) **No Promo.** State should not be “promoting” racial mixing (*Loving*), abortion (Funding Cases) or homosexuality (Prop 8; Boy Scouts).

(2) **Crossing the Rubicon.** Social collapse/massive losses of liberty inevitable once integration occurs (Southern States’ arguments in *Brown*), “feminist” women gain complete control over childbearing (anti-*Roe*), and “gay marriage” is allowed (Prop 8).

(3) **Decisionmaking Regret (new).** Women “regret” abortion (Informed Consent Laws; Partial Birth Case). Many gays regret “choosing” homosexuality (Prop 8).

Social Movements and Liberty

Benign Variation. If the minority group persuades the polity that its variation is benign, then the anti-discrimination norm sweeps. (Marriage equality is often the last frontier.) Outliers will be allowed to discriminate so long as the discrimination is *contained*: the discrimination is important to a traditionalist identity, the discrimination does not undermine the minority group's core liberties, and the state is not asked to subsidize the discrimination. Burning a cross on your own lawn is apparently protected by the First Amendment, for example. Contrast the Bob Jones Case: no tax subsidy to a religious school that discriminates because of race.

Normative: Key Questions

“Liberty” normally entails the right to exclude. The right to property allows a person to keep people of color off of his land; freedom to marry allows a woman to exclude women or unattractive people from her choice pool; freedom of association allows a parade to exclude openly gay marchers. Anti-discrimination laws **always** restrict liberties: the discriminating person is no longer “free” to exclude or isolate himself from others because of the protected trait (race, sex, etc.). So how ought we arbitrate the mobile line between protected “liberty” and illegal “discrimination”?

Key Questions

How “private” (confined) or “public” (obvious spillover effects) is the “liberty” being asserted?

Citizen A owns a building. If the building is his domicile, A can lawfully discriminate on the basis of race, sex, sexual orientation when he decides whom to invite/allow into his home, and there might be constitutional problems if the state tried to regulate. If A rents units in his building or runs a business out of it, anti-discrimination law might apply (though usually not if there are few units or few employees). If A turns his building into a hospital, he cannot discriminate on the basis of race, sex, religion; in many states, he cannot exclude gay people either. But A may refuse to perform abortions at the hospital.

Key Questions

How pushy does the state want to be in enforcing paternalist policies? What should state policy be, considering efficiency, fairness, and social friction? Consensus that race discrimination is unfair, inefficient, and causes friction. Educative role of state. If Citizen B owns a business, state teaches him that his racist premises are unfair, idiotic decisionmaking, and cause social friction. Does the same analysis apply if B is a woman considering abortion, because some women regret that choice? There is strong evidence that the choice process for abortion is one where women make serious decisions w/o state meddling.

Key Questions

Does protection of liberty enhance the functioning of our pluralist democracy?

Democracy-enhancing liberties: freedom to dissent from social orthodoxy; freedom of press; and freedom of association (BSA, CLS). But also consider anti-discrimination as a democracy-enhancing liberty: minorities who live in fear of discrimination will be politically immobilized. Distinguish the Boy Scouts Case (private membership rules) from the Hastings Case (public school does not have to subsidize discrimination against “unrepentant homosexuals”).



The END

QUESTIONS?