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SAME-SEX MARRIAGE IN THE HEARTLAND: THE CASE FOR LEGISLATIVE MINIMALISM IN CRAFTING RELIGIOUS EXEMPTIONS

*Ian C. Bartrum** †

In *Varnum v. Brien*, decided April 3rd of this year, the Iowa Supreme Court unanimously struck down the state's statutory ban on same-sex marriage. In a remarkably clear and thoughtful opinion, Justice Mark Cady explored in depth the immutability of sexual identity and the appropriate standard of judicial review for legislative classifications based on sexual orientation—adopting (for now) an intermediate level of scrutiny. The decision marked the first significant legal victory for same-sex marriage outside of New England (with the exception of a short-term success in Hawaii), and served notice that the gay rights movement—once thought compelling only among northeastern “liberal elites”—may be carving out a foothold in America's heartland. As events in Vermont and Connecticut have demonstrated, however, constructing the civil apparatus of same-sex marriage requires a deft legislative hand: there are, for example, complex intersections of state and federal law (tax, healthcare, etc.) to consider; and, perhaps more significantly, there are inevitable boundary disputes along the constitutional border between equal protection and religious liberty. Both of these states have restructured their tax code to account for same-sex couples without reference to federal law, and both have adopted statutory language that narrowly exempts religious groups from otherwise applicable requirements of anti-discrimination law. While Iowa can probably look to the northeast for help in resolving the former complications, recent polls indicate that Midwesterners tend to take their religion more seriously than do modern New Englanders, and so the state will likely have to cut its own trail through the thickets of religious freedom.

Indeed, the battles have already begun. At least two groups of academic signatories have sent letters to Iowa urging broad exemptions or “accommodations” for those whose religious convictions might prevent them from taking any part in same-sex marriage ceremonies. Carl Esbeck and others ask the state to exempt all religious denominations, organizations, and *individuals* from liability under state anti-discrimination laws “for refusing to provide services, accommodations, advantages, facilities, goods or privi-

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leges related to the solemnization of any marriage . . . [which violates] sincerely held religious beliefs.” What’s more, Esbeck suggests that such individuals and groups should remain free to deny the very validity of these marriages. Perhaps most troubling, Esbeck’s proposal would extend these same accommodations to *state and municipal employees* who might be asked to officiate at such ceremonies or otherwise treat these marriages as valid. The letter does suggest two exceptions—presumably in recognition of Iowa’s many small towns—which would remove the exemption in those cases where finding a suitable alternative service provider or government employee would impose a “substantial hardship” on same-sex couples.

Another group, fronted by Douglas Laycock, heartily endorsed Esbeck’s proposal as striking the right balance between potentially antagonistic interests: “It is obviously better for traditional religious believers; on a few moments reflection, it is also better for the same-sex couples. Because it is better for both sides, it is better for Iowa.” While Laycock acknowledges that Justice Cady’s opinion leaves religious organizations free to define marriage according to their own traditions, he worries that the Court has not adequately addressed all the potential conflicts that might arise. In particular, he laments that “the opinion had no occasion to consider the rights of religious individuals who facilitate weddings or provide services to help sustain marriages.” There remains, he suggests, a real danger that the state may “inflict serious harm” on such people by forcing them to work with, or for, same-sex couples. Further, Laycock argues that the proposed exemptions would protect individual religious liberty without intruding significantly on the right to same-sex marriage.

It is perhaps tempting to see these efforts as the desperate rearguard action of retreating “traditionalists,” but, in truth, not all those who advocate strong exemptions for religious dissent are ideologically opposed to same-sex marriage. Laycock insists that he and his signatories support same-sex marriage and regard *Varnum* as “a great advance for human liberty,” but nonetheless worry that the potential oppression of religious believers is no better than the oppression Iowa gays have recently overcome. To this end, he urges the state to avoid “careless or overly aggressive implementation” of gay marriage rights. And while I might characterize myself as on the other end of the spectrum—I am certainly no “traditionalist”—I, too, can appreciate the deep importance of the liberties specified in the First Amendment. They are indeed, as I have argued elsewhere, our first freedoms. I cannot help but wonder, however, whether it is actually Esbeck’s proposed exemptions that are careless and overly aggressive in this instance. Leaving aside the fact that his argument seems to open the theoretical door to discrimination more generally—after all, people might find serving gays qua gays just as objectionable as serving gays as married couples—Esbeck’s proposal exacerbates the constitutional problem by failing adequately to distinguish between *civil* and *religious* marriage. Moreover, his solution errs by sweeping both easy and hard cases into the same legislative loophole. I would urge a more modest and calculated approach.

First, there are the easy cases. It seems relatively clear that no religious institution should have to perform or recognize same-sex marriages. Marriage as sanctified by the Catholic Church (for example) is a *religious* institution, governed by religious principles. The state has no more business telling a church how to conduct this ritual than it does any other. The same rule should apply to religiously affiliated organizations generally (schools, charities, fraternal organizations, and so on): they may set whatever standards they see fit for their own institutions. On the other hand, it seems equally clear that state and municipal officials must perform and recognize same-sex marriages if they are to remain government employees. These marriages are *civil* institutions, governed by state law, and those civil actors who carry out the law must obey it themselves. Thus, no individual acting in his or her capacity as a state official can refuse to solemnize or otherwise recognize a civil marriage as the state defines that institution. This, of course, is the same principle that governs officials generally, notwithstanding potential religious objections to other enacted laws. Seems simple, right? In these cases, Vermont and Connecticut both seemed to think so: both states narrowly exempted clergy, religious organizations, and religiously affiliated fraternal benefits societies from at least some portions of their respective civil rights law; and neither state has taken the extraordinary step of exempting state or municipal actors. For the most part, these exemptions have defused much of the religious protest, and it is not clear that any of the further “implications” that Laycock worries about have yet materialized on the ground.

But Laycock rightly points out that there are potential hard cases out there. While individuals with deeply held convictions of faith are entitled to exercise their religion freely, this freedom does not usually insulate them from laws of general application. Anti-discrimination laws present a special challenge to the general rule, however, as religious practices often *require* active discrimination between, for example, insiders and outsiders; the sacred and the secular; or the righteous and the sinful. Does this mean we should permit racial discrimination based on religious conviction? Probably not; in *Bob Jones University v. United States*, the U.S. Supreme Court concluded that preventing such discrimination—at least in the educational context—is the kind of “overriding governmental interest” that justifies a burden on religious freedom. But homosexuality is a different matter, or at least it has been treated differently for a very long time. No one doubts that there are well-established religious traditions that view homosexual conduct as wrong, even if we might doubt the wisdom of such doctrine; and protecting gays is certainly not (yet) the “fundamental national public policy” that racial equality has become.

Indeed, in this sense—and this sense only—we might see the same-sex marriage issue as somewhat closer to the controversy over abortion, where we exempt service providers with religious objections from some requirements of the Civil Rights Act. While abortion and same-sex marriage clearly present different kinds of moral questions, both issues do generate well-recognized religious objections, and neither practice has yet settled into our

law beyond the reach of substantial controversy. If one is intellectually honest, establishing the theoretical limits of individual religious liberty in these contexts is quite difficult indeed. And the legislative task is all the more difficult because it is so hard to predict precisely what shape—if any—these theoretical problems may take in the real world.

Fortunately, we have a legal mechanism for such circumstances—the common law. Rather than try to settle the boundaries of religious freedom in a speculative, forward-looking statute, Iowa should allow its courts to develop the law on a case-by-case basis. Laycock suggests that such an approach only invites “expensive litigation”, but in truth it seems unlikely, as a practical matter, that the question of individual service providers will generate many actual cases or controversies: after all, who wants a disapproving chef to cater their happy day? Or, to put a legal point on the question, who is the likely plaintiff? It is difficult to imagine a same-sex couple going to court to force an individual to provide wedding services; particularly when such a suit might produce an unwelcome precedent. Moreover, the free market is generally fairly efficient at providing services to those that seek them. But in the event such disputes do arise, they are probably best settled by weighing the particular facts and policies at issue—the sincerity of the religious objection, the gravity of the hardships imposed, and so on. Courts are well-equipped to craft and evaluate these kinds of balancing tests governing constitutional rights, and thus the legislature should leave the question of private religious exemptions for later judicial interpretation. By reserving judgment on this thorny issue, the Iowa legislature can avoid creating a political firestorm—which same-sex marriage opponents would undoubtedly welcome—out of an issue that seems likely to have little real-world significance. This, I suggest, represents a more cautious and prudential approach to the hard cases that same-sex marriage presents, and it has the added benefit of utilizing the particular structural strengths our different legal institutions bring to bear. Just for kicks, we might even call such an approach “legislative minimalism.”