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Arizona's SB 1062

by Michael Sean Winters

Distinctly Catholic

Governor Jan Brewer of Arizona must decide this week whether or not to sign SB 1062, a law that would enact an expansive state-level version of the Religious Freedom Restoration Act (RFRA). Regrettably, the Arizona Catholic Conference has encouraged Gov. Brewer to sign the law.

RFRA was passed by overwhelming margins in both houses of Congress in 1993 – the vote in the House was unanimous and, in the Senate, only three senators voted against it – and signed into law by President Bill Clinton. The law was designed to overturn the U.S. Supreme Court's ruling in *Employment Division v. Smith*, handed down in 1990, and re-establish the *Sherbert* test in religious liberty cases. *Sherbert*, a 1963 Court decision, required strict scrutiny of religious liberty cases, that is, the government had to demonstrate a compelling government interest in order to restrict a person's religious liberty rights, and the means adopted by the government must be the least burdensome on those rights to achieve that compelling interest. In the subsequent 1997 case, *City of Boerne v. Flores*, the Court ruled that RFRA did not apply to the states. Ostensibly, the Arizona law seeks to enact a state version of the federal law.

As a liberal, my heart warms to the First Amendment. When I was studying the famous free press case, *Falwell v. Flynt*, I was writing a biography of Falwell, but as I researched the case, I was cheering for Flynt. Not because I was, or am, a fan of Mr. Flynt's particular brand of smut. I am not. But, to my mind, the First Amendment guarantees Mr. Flynt the right to publish his smut and to take a shot at public figures like Falwell. As a liberal, I like press shield laws, that keep a member of the press from having to testify in criminal proceedings if such testimony would require the reporter to reveal a source. (That said, I would make an exception for Glenn Greenwald, whose advocacy for Edward Snowden has put him beyond the role of journalist, and shield laws should protect journalists, not advocates. Besides, Greenwald is so obnoxious!)

Liberals are equally supportive of the right to free speech. I cannot think of anything more repulsive than the things that are said by the members of the Westboro Baptist Church, who congregate at other people's funerals to protest homosexuality. But, when the Court upheld their right to say offensive things, I applauded the decision. Why, then, do liberals get weak in the knees when the issue is the interpretation and application of the religion clauses of the First Amendment? The history of First Amendment jurisprudence in respect to the religion clauses is more complicated. No one has yet explained satisfactorily to me why a religious liberty claim must be yoked to another First Amendment claim to be vindicated, as the Court has held. Shouldn't we be in favor of an expansive reading of the religion clauses, not a restrictive one, if we are to be consistent in our liberalism?

A Catholic liberal, however, understands that rights are not absolute and that in our tradition, rights are balanced by responsibilities. Rights are not merely abstract propositions, but lived out in a community and a polity. They not only prohibit certain government actions, they instruct the community about the kind of polity that is understood as consistent with our democratic and constitutional norms. Although this more organic understanding of rights is anathema to some liberals, it is how rights play out as political, not merely legal, realities. When the courts decide that hateful speech like that coming from Pastor Phelps and his Westboro colleagues is constitutionally protected, they are not endorsing that hateful speech, nor hatefulness in general, but they are saying that in a free society, the cure for hatefulness cannot be government restriction of speech, that our liberty is protected by Westboro's idiocy being protected. I can live with that.

The Arizona case is not abstract either. If this were merely an abstract law, if it had been introduced in reaction to *Boerne v. Flores*, I would probably support it, although I would not support the part of this law that allows claims to be advanced under its wings even if the government is not a party to the litigation. This has a Wild West feel to it that should worry even those who are sympathetic to robust RFRA enforcement. But, I stray. This law has not been advanced at this moment to remedy a constitutional infirmity. It has been advanced by those who oppose gay marriage and wish to enshrine the right of a baker or a photographer to refuse service to a gay or lesbian couple that is getting married. The text of the law may not target gays. The political intent clearly does. And, that is why it was a mistake for the Arizona bishops to voice their support for it.

The question for the Arizona bishops is not simply if this is a good law or not. The question is: Should people be allowed to discriminate against gays? Why did the statement from the Arizona Catholic Conference not affirm that Church's clear opposition to any unjust discrimination against gay people? Again, one does not have to subscribe to *Hustler* magazine to be glad Larry Flynt triumphed in his free press case against Jerry Falwell. Do the Arizona bishops really think it is a good idea to encourage discrimination in the commercial world? Why should we think it is a good thing for a baker or a photographer or a hotelier to be able to refuse service to gay people?

It is a separate question why any gay couple would want a bigot photographing their wedding or baking their wedding cake. In this context, however, that is not even the right question. Gays want to be treated like everybody else. This is what the opponents of gay marriage never grasped and, just so, misplayed their hand. The Church should have combined its belief that society has a moral obligation to privilege traditional marriage with a strong affirmation of society's obligation to provide legal structures that protect gay and lesbian couples. The Church, however, tended to oppose civil unions and, in any event, that ship has sailed. Still, the point cannot be made often enough: The Church's opposition to gay marriage was weakened, not strengthened, by all the hyperbole about gay marriage being a civilizational threat, by the derogatory analogies employed to describe gay unions, and, most of all, and most distressingly, by the failure of the Church's leaders to acknowledge the good faith of gay couples who

simply want to be treated like everybody else. Demonizing one's opponent is unworthy of a Christian pastor.

A conservative friend asked me if I thought gay rights groups would be content with a "live and let live" approach to these issues. I do not know. Some would and some would not. But, if the Church aligns itself with the forces of anti-gay bigotry, I am quite sure gay rights groups will not be content with a "live and let live" approach and who can blame them?

Finally, those who support this Arizona law must be challenged to explain why the "Selma analogy" is not apt. I wrote about this last Friday when discussing R.R. Reno's essay in America magazine and need not recapitulate the argument here. But, many people in this vast country have sincerely held religious beliefs that are destructive of what I like to call the commonwealth of the nation, specifically the moral health of the nation. Bishops, of all people, should be aware of this. How much stronger the Arizona bishops statement would be if they had coupled their support for the law with a clear statement that no Catholic businessman or businesswoman should claim warrant in the Gospels or the teachings of the Church for discriminating against gays. Instead, once again, we have aligned our preaching of the Gospel with a political agenda that is championed by hateful bigots. And, then we wonder why young people want nothing to do with us? When bishops gather to bemoan the secularization of our society, they should start by looking in the mirror. If the face of Christianity is an angry hotelier who wants to place a "straights only" sign outside his inn, then we have no one but ourselves to blame for the decline of Christian faith.

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