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Discrimination Can Be Good or Bad, but Is It the State's Business?

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In the wake of the *303 Creative v. Elenis* ruling, leftists are very upset. "The Supreme Court is giving people the right to discriminate!" they howl. "What's happening to this country!"

What's happening is called freedom, actually. In fact, far from establishing a precedent, the court is simply preventing governments from doing the unprecedented: forcing Americans to express ideas they find morally objectionable.

Andrew Koppelman, John Paul Stevens Professor of Law at Northwestern University, explains the *303 Creative v. Elenis's* particulars, writing that the case

> concerned Lorie Smith, who owns a graphic design firm. She wants to expand her business to include custom-designed wedding websites, but she opposes same-sex marriage on religious grounds. So she won't design sites for same-sex weddings and wants to say that on her own promotional website.
>
> But the Colorado Anti-Discrimination Act (CADA) bans businesses that are open to the public from discriminating against gay people or announcing their intent to do so. She sued the state, seeking a preemptive ruling that this law couldn't be applied against her.

Smith won her case, of course — and the mainstream media have been apoplectic, claiming that the resurrection of George Wallace-like segregation may be nigh. But this is misrepresentation. The *Washington Examiner* explains well why, writing:

> *303 Creative* does not give any business the right to turn away gay people. It explicitly states otherwise. Instead, it gives businesses the right to refuse offering specific services that run afoul of their deeply held convictions. The liberal media wants its audience to believe that the decision was somehow a reversal of Title II of the Civil Rights Act, which restricts businesses from denying service to particular groups, such as when Woolworth's lunch counter denied service to four black college students in 1960. But *303 Creative* only protects businesses from being forced to make expressions that they disagree with.

The *Examiner* then points out that mainstream media can easily help their audiences grasp the decision's implications with a simple reverse scenario.

"Imagine that a web-design business were run by a trans or nonbinary individual who strongly disagrees with the traditional notion that gender is binary and inextricably related to one's biology, and

that it is even harmful," the site continues. "Now, let's imagine that a young, married Christian couple were to approach this business and request a website for a 'gender reveal' party with the following text on the banner: 'Boy or girl? It can only be one! Come celebrate the news of our daughter or son!'"

"According to *303 Creative*, the web designer in this case would have the right to deny performing this service without the threat of legal action, the *Examiner* explains. "This is not only constitutional but utterly rational. Of course, the trans or nonbinary web designer shouldn't be forced to make an utterance at odds with their conscience. Who wants to live in a country that forces people to say things they don't believe?"

Put differently, forced speech is not free speech. Yet there's a good reason leftists are wholly unconcerned about a scenario such as the one the *Examiner* presents:

They have absolutely *no intention of trying to prevent such politically correct discrimination*.

Their anti-discrimination laws are for use against their ideological opponents.

Just juxtapose, for example, the reactions to the *Creative* opinion and to the other recent one on affirmative action. Leftists are disgusted that some baker earning $50k a year in the boonies, whose endeavors won't make or break careers, is "allowed to discriminate," but equally disgusted that Harvard, which boasts a $53 billion endowment and the ability to open doors to the establishment, will *not* be allowed to discriminate.

This hypocrisy manifests itself in anti-discrimination law itself, in that it only bars discrimination against "protected classes." So if you're in an unprotected class, such as Trump supporters or conservatives (or liberals), you're out of luck. So much for equality and a classless society.

Yet the anti-discrimination-law discriminators are undaunted. The aforementioned Koppelman, for example, complains about the *Creative* opinion, misrepresents it, and then, quoting Justice Sonia Sotomayor's dissent, cites alleged implications of the ruling.

"A website designer could equally refuse to create a wedding website for an interracial couple," he relates. "A stationer could refuse to sell a birth announcement for a disabled couple because she opposes their having a child."

Koppelman then asserts that determining who can be discriminated against will depend "on how expressive they are. How can courts decide that? Where is the line?" Yet there's a simple answer:

Courts don't have to decide that — if we just get them out of the discrimination-arbiter business.

Koppelman mentions a "new, mysterious constitutional right to discriminate," but he should take issue with the made-up, mysterious constitutional power granted to the feds to prohibit discrimination. For neither that right nor that power exists.

In other words, if we accept that the government has the right to trample freedom of association, then we must agonize and theorize, spend time cogitating and litigating, as we squander billions suing each other into oblivion all so pseudo-elites can decide who may discriminate against whom and how. If we allow for freedom of association, these problems disappear. Unjust?

Well, consider: You have a right to include in or exclude from your home whomever you please, for any reason whatsoever. Why should you lose your freedom of association merely because you decide to expand your dining room, erect a few more tables, and begin serving meals for money? It's still your property, created by the sweat of your own brow.

Or, to echo the late Professor Walter E. Williams, who once cited an old Baltimore law prohibiting blacks and whites from playing tennis together on public courts, would it be any less offensive if the regulation had required blacks and whites *to* play tennis with each other?

Alright, now, is it different in other areas of life, such as commerce? As Williams put it, "Forced association is not freedom of association."

If the implications of this seem scary, please again note that anti-discrimination law, with its "protected classes," does *not* eliminate discrimination. Thus is the message clear: "We have no problem with discrimination," say the pseudo-elites — "as long as *we* get to decide who can be discriminated against."

Of course, Professor Koppelman and the legal profession in general no doubt relish the power and pocketbook anti-discrimination law brings. They get rich helping litigate our endless anti-discrimination lawsuits and then, like little gods, can discriminate among the discriminators.

The bottom line is, we should worry less about who is being served by a bakery in Lakewood and more about who is being served through the activist courts.