

Religious Freedom and the Nondiscrimination Norm

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Abstract:

"Discrimination," we believe, is wrong. And, because "discrimination" is wrong, we believe that governments like ours – secular, liberal, constitutional governments – may, and should, take regulatory and other steps to prevent, discourage, and denounce it. However, it is not true that "discrimination" is always or necessarily wrong. Nor is it the case that governments always or necessarily should or may regulate or discourage it even when it is. Some wrongs are beyond the authorized reach of government policy; some are too difficult or costly to identify, let alone regulate; others are none of the government's business.

When we say that "discrimination" is wrong, what we actually mean is that wrongful discrimination is wrong, and when we affirm that governments should oppose it we mean that governments should oppose it when it makes sense, all things considered, and when it is within their constitutionally and morally limited powers to do so. To label a decision or action "discrimination" is simply to note that one factor or another was or will be taken into account in the course of a decision; it is to invite, but not at all to answer, the questions whether that decision or action was or would be wrong, and whether the public authority may or should forbid or discourage it.

The important enterprise of respecting and protecting religious freedom in and through law is closely related, in several ways, to the also-important enterprise of deploying public power to identify, regulate, and discourage wrongful discrimination. It is suggested in this chapter the rhetorical, moral, and legal power of the antidiscrimination norm can sometimes distort or distract our thinking about how we do and should protect religious freedom through law. This is because the near-universal, if sometimes unreflective, conviction that "discrimination" is wrong means that assertions of religious freedom are sometimes heard as requests that the political authorities tolerate a wrong – i.e., "discrimination" – which they would otherwise prohibit, penalize, or discourage. Such requests then raise the question whether it is "worth it" for the authorities to do so – that is, whether doing so would complicate too much the government's own projects or conflict too glaringly with its values – and so, when they are granted, accommodations are regarded all around as concessions. Sometimes, to be sure, we do and probably should think about legal rights as protecting, or simply tolerating, a liberty to do even the wrong thing (so long as the wrong thing is not too wrong). We should not forget, though, that a dimension of the freedom of religion is, sometimes, precisely the freedom to "discriminate," and that this freedom should be protected not simply because such discrimination is an all-things-considered tolerable wrong – sometimes it is, sometimes it isn't – but because it is inextricably tied to a human right and is, sometimes, beyond political authorities' legitimate reach.