

## I Just Did Say That!

by Peter J. Lynch

### You Can't Say That! The Growing Threat to Civil Liberties From Antidiscrimination Laws

by David E. Bernstein

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A Miller Brewing Company executive is fired for retelling a racy segment of a *Seinfeld* episode at the watercooler. An unwed teacher successfully sues the parochial school that fired her for becoming pregnant out of wedlock, despite being contractually obligated to serve as a Christian role model for her students. Nominally Catholic Georgetown University is coerced by the threat of costly lawsuits into funding homosexual student groups. These are just a few of the examples of civil-liberties violations provided by David Bernstein in *You Can't Say That!*, an important study of the infringements on First Amendment freedoms by antidiscrimination laws.

Bernstein, an associate professor of law at George Mason University, traces the origins of these laws to the civil-rights movement, and the landmark 1964 Civil Rights Act in particular. Through this act, and later legislation such as the Fair Housing Act, legislators unwittingly pre-

sented judges with a means to undermine the First Amendment; with the passage of time, other minority groups clamored for the protection of these laws. As the American elite became increasingly preoccupied with the notion that no member of any minority group should be discriminated against or allowed to suffer even the merest slight, legislatures began to create—and judges, to interpret—laws to prevent discrimination against all kinds of groups, including the overweight, the pierced, and unmarried cohabitants. As a result, in some jurisdictions, a gym may not use advertisements mocking heavy people to make its pitch; an employer cannot refuse to hire people that have various metal objects affixed to their faces; and a landlord is unable to reject tenants on the grounds that their living situation is morally repugnant.

All of this illustrates the inescapable fact that antidiscrimination laws often conflict directly with the First Amendment. The right not to be offended or discriminated against can only come at the expense of others' rights to free speech and association. In their zeal to realize the promise of equality, the majority of those responsible for antidiscrimination laws have not foreseen the myriad ways in which those laws would be misapplied. In the case of other proponents of such measures, suppression of free speech is intentional. Bernstein briefly introduces his readers to a cabal of radical feminists, "critical race theorists," and other hard-core leftist academics who are openly hostile to the First Amendment, which for them represents "a barrier to the government's ability to pursue sexual and racial equality." For these scholars (among them such notables as Catharine MacKinnon and Stanley Fish), "equality" is an imperative justifying any means used to achieve it, including overriding the Bill of Rights. In the hands of liberal elites, antidiscrimination law becomes an effective tool, wielded not just to thwart individuals with heterodox opinions but to achieve a broader goal: the reengineering of society to conform to their utopian vision. The November 2003 ruling of the Massachusetts State Supreme Court on "same-sex marriage" is a prime example of this.

Bernstein, while pointing out well-documented and oft-decried instances of political correctness run amok (e.g., the notorious campus speech codes that prohibit "hate speech"), also shines the spotlight on some lesser-known cases,

such as the abuse of the Fair Housing Act (a 1968 addendum to the original Civil Rights Act) by the U.S. Department of Housing and Urban Development. “[D]uring the Clinton administration,” he claims, “HUD was the federal agency that most consistently violated civil liberties on behalf of an antidiscrimination agenda.” Bernstein cites several cases in which HUD, under the auspices of the Fair Housing Act and working in conjunction with the Department of Justice, attempted to suppress neighborhood associations that had peacefully organized and protested the government’s plans. HUD’s response was to try to force recalcitrant individuals and organizations to express views that met with HUD approval by offering a “conciliation agreement” that would allow the offending party to escape litigation. These agreements included provisions that compelled the public expression of views diametrically opposed to those they had expressed before the government crackdown.

We might expect that, in the struggle to preserve constitutional freedoms from self-righteous bureaucrats, the American Civil Liberties Union would declare itself unequivocally on the side of civil liberties. This is not always the case: Bernstein points to a number of occasions when the ACLU has either been indifferent to, or even actively worked to subvert, the defense of civil liberties. *Boy Scouts of America v. Dale* is just one example of the ACLU’s failure to live up to its name. The ACLU took up the cause of James Dale, the New Jersey assistant scoutmaster expelled in 1990 for his open homosexuality. Dale sued the Boy Scouts for violating his civil rights; under Title II of the 1964 Civil Rights Act, discrimination by private entities is prohibited if they are found to provide “public accommodations.” The Boy Scouts refuted the claim that they provide public accommodations and argued that, as a private organization, they have a constitutionally protected right to establish their own membership criteria. Fortunately, the Supreme Court decided on the side of freedom of association. Yet the ACLU, despite its failure in *Dale*, continues to agitate against allowing the Boy Scouts to use publicly funded facilities.

In the 20th century, the United States experienced an almost unremitting increase in the power and scope of government at all levels. In this, the federal government led the way, assuming broad powers—often in times of national

crisis—that could not be justified by any honest interpretation of the Constitution; state and local governments followed suit and encroached further upon the lives of the citizenry. Antidiscrimination laws are just one example of the public sphere enveloping the ever-shrinking private one. Bernstein never clearly and forcefully condemns the proliferation of government regulations that, in themselves, lead inevitably to excessive litigiousness and curtailment of freedom. Nevertheless, he demonstrates full understanding of the libertarian dilemma: In the pursuit of liberty for all, the profane must receive the same treatment from the law as the sacred. Bernstein acknowledges that “asking Americans to display a measure of fortitude in the face of offense and discrimination is asking for a lot. But in the end, it is a small price to pay for preserving civil liberties.”

True enough; for, if the seemingly innocuous Fair Housing Act can be used to trample rights protected by the First Amendment, what effect may the PATRIOT Act be expected to have?

*Peter J. Lynch writes from Alexandria, Virginia.*