

The Slants and the meaning of liberty (Guest - Oregonian, The: Web Edition Articles (Portland, OR) - July 7, 2017

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By Ofer Raban

Two years ago, a 5-4 majority of the U.S. Supreme Court declared that same-sex couples have a constitutional right to marry. That right arose, in part, from the due process clause's protection of "liberty." The decision was vehemently denounced by four dissenting justices, three of whom declared that the majority badly misunderstood the meaning of liberty under our federal constitution.

The petitioners, wrote Chief Justice John Roberts, demand that the government recognize the validity of their marriage. They seek "public recognition of their relationships, along with corresponding government benefits." But that was not a demand for liberty. Supreme Court precedents, Roberts wrote, "have consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State." Justice Clarence Thomas similarly explained that, in the American legal tradition, "liberty is only freedom from governmental action." Liberty is categorically not an entitlement to government recognition or services or benefits.

Important Supreme Court decisions have relied on the claim that the liberty protected by the U.S. Constitution is only so-called "negative liberty," i.e., freedom from government action, not an entitlement to any government services or benefits. In 1989, the Court held that the Constitution was not violated when the Department of Child Services of Winnebago County, Wisconsin, failed to protect a four-year-old child from his violently abusive father, even after receiving numerous reports about severe beatings. After more than two years of inaction, the boy was finally beaten so badly that he was left with a severe and permanent brain damage. A lawsuit was filed on behalf of the permanently disabled child, claiming that the government's egregious failure to act amounted to a deprivation of his constitutional right to liberty. But the Supreme Court dismissed the lawsuit: The purpose of the constitutional protection of liberty, said the opinion, "was to protect the people from the State, not to ensure that the State protected them from each other."

Last month, without providing any explanation for the apparent inconsistency, the Supreme Court again abandoned that principle in a case involving trademark protections.

The case was brought by an Asian-American rock band called "The Slants," which was denied trademark registration for its name. The U.S. Patent and Trademark Office refused to register the band's name after finding it racially offensive. The band could, of course, continue to use and market its name to its heart's content: its "negative freedom" remained totally unaffected. But it was denied trademark recognition, and the benefits associated with that recognition (principally, greater protections against others' appropriation of the name). The band sued, claiming a constitutional violation, and three weeks ago the Supreme Court agreed: the government's refusal

to recognize the band's name as a trademark was a violation of the freedom of speech. Finding the name offensive, said the Court (in a section joined by all the participating justices, including Chief Justice Roberts and Justice Thomas), was an insufficient reason to deny the band the recognition and benefits of its trademark registration. The government violated the constitutionally protected freedom of speech.

Writing in dissent in 1989, Justice Harry Blackmun berated the Court for refusing to hold that failing to protect a child could amount to a constitutional violation. The freedom protected by the U.S. Constitution, he wrote, could compel the government to provide certain benefits or services. He called the Court's opinion "a sad commentary upon...constitutional principles," and added: "The Court fails to recognize [a constitutional violation] because it attempts to draw a sharp and rigid line between action and inaction. But such formalistic reasoning has no place in the interpretation of the [U.S. Constitution]."

Last week's decision was yet another vindication of Blackmun's criticism. This decision, however, did not protect the physical safety of a helpless child; rather, it protected intellectual property.

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