

## “RELIGIOUS LIBERTY AND GAY RIGHTS: CAN NEITHER LIVE WHILE THE OTHER SURVIVES?”

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Many issues of religious liberty are at a good place today, including:

- Equal participation by religious adherents in programs that are equally available to religious and non-religious participants, including:
  - *Widmar v. Vincent*, 454 U.S. 263 (1981) — Public university that has created a public forum by recognizing non-curricular student groups may not deny recognition because of a group’s religious purpose.
  - *Rosenberger v. Rector*, 515 US 819 (1995) — Public university that has created a public forum by paying printing costs for student-written publications may not deny funding because of a newspaper’s religious viewpoint.
  - *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) — a state school voucher program in which parents chose which school their children will attend, with voucher money following the kids, does not violate the Establishment Clause even where state money ends up going to religious schools.
  - *Espinoza v. Montana Dept. of Revenue*, 591 U.S. \_\_\_ (2020) — the Montana Constitution’s Blaine Amendment — as applied to a state program providing tuition assistance for parents who send their children to private schools — violated the Free Exercise Clause by discriminating against religious schools and families.
  - *Carson v. Makin*, 596 U.S. \_\_\_ (2022) — Maine’s “nonsectarian” requirement for otherwise generally-available tuition assistance payments (for parents who live in school districts that do not operate a secondary school of their own) violates the Free Exercise Clause.
  - *Fulton v. Philadelphia*, 593 U.S. \_\_\_ (2021) — the refusal of Philadelphia to contract with Catholic Social Services for the provision of foster care services unless CSS agrees to certify same-sex couples as foster parents violates the Free Exercise Clause.
  - *But cf. CLS v. Martinez*, 561 U.S. 661 (2010) — a public university may force a private, religious student group to admit non-believers into group leadership positions if the university applies an “all-comers” policy to all groups.
- Public displays and expressions suggesting the existence of God, including:
  - *American Legion v. American Humanist Assoc.*, 588 U.S. \_\_\_ (2019) — a cross-shaped memorial to honor World War I dead does not violate the Establishment Clause, because the cross communicates a mixture of religious (Christian) and broader (respect for the dead) meanings.

- *Greece v. Galloway*, 572 U.S. 565 (2014) — the Establishment Clause was never meant to prohibit legislative prayer, especially where the legislative body has worked to be inclusive in its selection of prayer-deliverers. The content of this prayer does not need to be non-sectarian, because such a requirement would place the courts in the role of arbiters of religious speech, thereby involving the government in religion to an extent that is impermissible under the Establishment Clause.
- *Kennedy v. Bremerton School District*, 597 U.S. \_\_\_ (2022) — In forbidding Coach Kennedy’s individual, post-game, on-field prayers, the District sought to restrict his actions because of their religious character, thereby burdening his right to Free Exercise. The *Lemon* and endorsement tests for the Establishment Clause no longer exist.
- Employment protections through:
  - the Title VII exemption — *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987) — Section 702 of the Civil Rights Act of 1964, exempting religious organizations from the Act’s ban in Section 703 on religious discrimination, does not violate the Establishment Clause.
  - the constitutional “ministerial exemption” — *Hosanna-Tabor v. EEOC*, 565 U.S. 171 (2012), and *Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. \_\_\_ (2020) — employment decisions of religious entities with respect to ministerial and teaching positions are not subject to review under civil rights and employment discrimination laws.

The big exception is found at the intersection of religious freedom and LGBT rights.

Historic treatment of sexual minorities in America — horrific. This may not have been specially a Christian phenomenon, but some Christians took part — and Christians generally didn’t intervene to protect the persecuted. We may disagree with gay people on issues of sexual morality, but all human beings bear the image of God and deserve to be treated with respect and honor.

**Genesis 1:26-27** — <sup>26</sup> Then God said, “Let Us make man in Our image, according to Our likeness. They will rule the fish of the sea, the birds of the sky, the livestock, all the earth, and the creatures that crawl on the earth.” <sup>27</sup> So God created man in His own image; He created him in the image of God; He created them male and female.

**Matthew 22:35-40** — <sup>35</sup> One of them, an expert in the law, asked a question to test Him: <sup>36</sup> “Teacher, which command in the law is the greatest?” <sup>37</sup> He said to him, “Love the Lord your God with all your heart, with all your soul, and with all your mind. <sup>38</sup> This is the greatest and most important command. <sup>39</sup> The second is like it: Love your neighbor as yourself. <sup>40</sup> All the Law and the Prophets depend on these two commands.”

But in recent years . . .

- *Lawrence v. Texas*, 539 U.S. 558 (2003) — a stupid law criminalizing private, consensual homosexual conduct between competent adults violates a fanciful understanding of substantive Due Process. Fine result; terrible constitutional law.
- *Obergefell v. Hodges*, 576 U.S. 644 (2015) — finding that the Due Process Clause requires states to redefine marriage, removing the universal historical husband/wife dynamic. This is as indefensible constitutionally as *Roe v. Wade* and *Lawrence*, but it is much less likely to be overruled than *Roe*.

Now the shoe is on the other foot. Due perhaps in large part to portrayals in movies, TV, and popular culture, the LGBT community has enormous power and influence. Today the question is: are people allowed to disagree?

Millions of Americans still believe (in accordance with all major world religions and a huge consensus of humanity across history) that sex is only morally good within a marriage of one man to one woman.

However, today, different millions of Americans believe that sexual conduct is morally righteous is a much wider set of contexts — or, in the most extreme views, that it is simply a recreational activity without a moral component.

Can both groups co-exist in the American republic? Or, like Harry and Voldemort, must one destroy the other in order to survive? *Obergefell* majority:

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. 576 U.S. at 679-680.

Is this working? No. More and more states and cities (perhaps the nation someday) include “sexual orientation” and “gender identity” in statutes that prohibit discrimination in “places of public accommodation.” These are being used not just to allow LGBT people to live their lives in peace, but to extinguish the opposing worldview.

Case in point? Jack Phillips of Masterpiece Cakeshop. Two things have always been true in these cases:

1. The vendor is happy to serve gay people (just not participate in the ceremony).
2. Lots of other bakers, etc., are available.

These cases do not involve hatred against gays.

They involve private businesspeople not wanting to take part in a ceremony or event that violates their moral convictions. Analogies?

- Klan rally
- Neo-Nazi Hitler’s birthday party

Where do these laws come from? “Place of public accommodation” was a pretty narrow concept under the common law — it applied to inns that were given a governmental monopoly. See Alfred Alvins, *What is a Place of “Public” Accommodation?* 52 MARQUETTE LAW REVIEW 1, 4-6 (1968).

Expansion in modern times — first to motels and restaurants, but now to all kinds of private businesses, the Jaycees, the Boy Scouts, the Boston St. Patrick’s Day parade, etc. Maybe soon churches?

And, as noted before, “discrimination” in state law often misses the difference between treating people badly and not wanting to participate in an offensive event. (Or “loving the sinner but hating the sin”?)

How to we protect Christians who hold traditionalist sexual beliefs?

- The non-discrimination laws could be drawn more narrowly, but that seems unlikely.
- *303 Creative v. Elenis* — free speech for artistic expression, but the line is murky. Is baking a cake more like creating a website or cooking barbeque?

The problem is free exercise:

*Employment Division v. Smith*, 494 U.S. 872 (1990) removed “strict scrutiny” from free exercise cases and replaced it with a “neutral law of general applicability” test that permits states to try to stamp out controversial (i.e., traditional) religious views.

The small minority of professionals with religious/moral objections should not be forced to participate in business activities that they find morally offensive. Religious exemptions should make this easy, but for *Smith*. *Fulton* helps. “Less restrictive means” would allow religious exemptions, unless they really harm the gay people.

*Fulton v. Philadelphia*, 593 U.S. \_ (2021) may help by making it easier to show that the government’s rule was not “generally applicable”; this triggers strict scrutiny.

Fundamentally, however, this is a worldview problem; the ongoing “culture wars.” But:

- Christians/Muslims/Jews/traditionalists are not going to convince all Americans that sex belongs only in committed man/woman marriage; and
- the LGBT community is not going to convince all Americans that it doesn’t.

The only solution is to apply the Golden Rule: treat others as we want to be treated.

**Matthew 7:12** — So in everything, do to others what you would have them do to you, for this sums up the Law and the Prophets.

. Live and let live — find ways for both sides to live in accordance with their convictions.

At present, traditionalists' ability to follow their convictions is in danger; that of the LGBT community is not. Religious freedom can solve. But we must pursue that freedom without degrading the humanity of those who disagree.

Can it work? Yes — the 2015 "Utah compromise," enacted with support of the Mormon church and the LGBT community. Legal protection for gay people but with religious liberty protection as well.

The bill can be viewed at <https://le.utah.gov/~2015/bills/static/sb0296.html>.