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Religious Liberty and LGBTQ Equality: Civic Pluralism Points to a Path Through the Ongoing Conflict

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Civic pluralism, as [introduced](#) in this series, does not call on us to celebrate religious and moral diversity for its own sake. Rather, it comprises “the proper, obligatory, governmental acknowledgement of and response to the deep divisions of conviction that empirically exist in societies.” This article focuses on how the law does and should deal with pluralism in the area of human sexuality. The deep divisions in our society in this area are as pronounced as ever, and they manifest themselves in individuals and institutions. Some express conservative views on human sexuality and marriage, while others affirm lesbian, gay, bisexual, transgender, and queer (LGBTQ) expressions and ways of life. People of faith are found across this spectrum and beyond. It is within this social diversity that civic pluralism can serve as a guide for Christians who believe that government law and policy *cannot* be a space devoid of religious and moral commitments. At the same time, it *should not* be a space in which various religious and moral commitments constantly compete for supremacy in winner-take-all battles. Allowing broad space for religious and moral diversity flows not from the false idea that truth is ultimately relative or divided. Rather, it comes from recognizing government’s proper domain and competence within God’s created order and the limits of the unity it should seek to achieve while we await the fullness of God’s Kingdom.

The perceived friction between religious freedom and LGBTQ equality is not just about persons, but also institutions. Certain ways of resolving this friction can undermine the diversity of organizations in our society. Diverse organizations reflect the diverse populations they seek to serve. Their freedom to exist and operate authentically enables the freedom for diverse patients, customers, clients, applicants, students, residents, etc. to be served in ways that correspond with their own respective convictions. Upholding the freedom of diverse organizations, then, is a means of respecting and even enhancing individual freedom.

In addition to this “equity among diverse institutions” framework, this article will also explore two other key threads relevant to these issues. First, the introduction of LGBTQ equality measures into law puts distinct demands on a political community that liberty protections generally do not. If not carefully crafted and limited, the [sheer moral force of equality](#) measures, which have undoubtedly done much good, can also do great harm. Second, the multi-dimensional nature of sexual orientation and gender identity, which parallels religious identity in this respect, complicates the demands of LGBTQ equality, particularly as enacted in nondiscrimination laws. Each of these threads offers critical insights for dealing with the contrasting understandings and expressions of human sexuality in our society. Civic pluralism supplies a framework for ordering and applying these insights in the political and legal domains.

This article will not deal directly with the current political and legal questions surrounding gender identity. While many of these questions parallel those raised by sexual orientation, the differences are substantial enough that gender identity merits its own treatment (for further reading on gender identity from a Christian perspective, [here](#) is a *Christianity Today* article from 2015; [here](#), [here](#), and [here](#) are some books that may also be of interest.)

Remembering religious freedom’s broad scope

As Chelsea Langston Bombino noted in a December 2017 [article](#), “With Americans only hearing about religious freedom in the narrow context of ‘birth control, baking, and bathrooms,’ they miss the broader picture of religious freedom...” While important, these cases are a small fraction of the religious freedom issues that legislatures and courts in this country have grappled with since America’s founding. *From a [law](#) exempting credible religious objectors from participation in war (enacted near the beginning of World War II) to a [prisoner](#) seeking to fulfill a religious obligation to maintain a beard otherwise prohibited for his fellow inmates, the American tradition of religious freedom is profoundly varied. It is vital that we remain mindful of the scope of this tradition and its centrality to our nation’s history and self-understanding.*

Defining key terms

The concept of “religion” is notoriously difficult to precisely define. Yet Timothy Shah offers us tremendous help in a 2012 [article](#) in which he defines religion as:

[T]he effort of individuals and communities to understand, to express, and to seek harmony with a transcendent reality of such importance that they feel compelled to organize their lives around their understanding of it, to be guided by it in their moral conduct, and to communicate their devotion to others, both in public and in private.

At its most basic level, religion is an orientation to transcendent reality, and it implicates a person’s beliefs, behavior, and identity.

There is a similar complexity to defining LGBTQ identities. According to a leading LGBTQ advocacy organization, Human Rights Campaign, [sexual orientation](#) refers to an “inherent or immutable enduring emotional, romantic or sexual attraction to other people.” The American Psychological Association (APA) [adds](#) that sexual orientation also “refers to a person’s sense of identity based on

those attractions, related behaviors and membership in a community of others who share those attractions.” The elements of beliefs, behavior, and identity are important here, too.

Differences among protected classes

Civil rights law protects against a number of forms of discrimination, not just those animated by racism. It protects across various domains of life. The [1964 Civil Rights Act](#), for example, prohibits discrimination based on race, color, religion, and national origin in public accommodations with a connection to interstate commerce (Title II). It also prohibits discrimination in federally funded programs or activities based on race, color, and national origin (Title VI). It then adds a prohibition on sex discrimination for employers with 15 or more employees (Title VII). Though sexual orientation (and gender identity) is not a protected class in federal law, [20 states and the District of Columbia](#) have nondiscrimination laws that forbid discrimination on these bases in employment and housing. Many states also have these protections regarding access to public accommodations and credit services.

Notably, civil rights laws do not treat these protected classes identically. Differential treatment based on race is almost never permitted, but in some circumstances the law protects treating men and women differently. Religious discrimination is generally illegal, but religious organizations may hire based on religious considerations. These differences are due, in significant part, to the nature of the protected characteristic. People do not adopt their race, color, national origin, or sex; these traits are immutable, unlike the manner in which people might adopt their religious or LGBTQ identities. This is not to say that religious and LGBTQ identities are matters of mere choice. Religious and LGBTQ persons often understand themselves to be responding to something true about themselves and reality in embracing one of those identities. However, this act of “embracing” is inapt for the other protected classes.

Recent court cases

The Supreme Court’s opinion in [Masterpiece Bakeshop v. Colorado Civil Rights Commission](#) helps outline how religious liberty and LGBTQ equality are similar and different. In the case, Masterpiece owner Jack Phillips served gay people. He had previously served the same gay couple, David Mullins and Charlie Craig, who later filed a civil rights complaint against him when he refused to bake a custom cake for their commitment ceremony. Colorado law prohibits discrimination based on sexual orientation. Should it be considered forbidden discrimination if a religious wedding services vendor declines to provide a custom product for a particular ceremony but otherwise serves all customers? If so, what has happened to the constitutional or statutory liberty interests of those who may not want to support or affirm the behaviors or expressions symbolized in certain ceremonies? While the High Court did not address these issues directly (instead deciding to rule in favor of Phillips because the Colorado Civil Rights Commission “showed elements of a clear and impermissible hostility toward [his] sincere religious beliefs”), eventually they will need to be resolved. The key issue here is that Jack Phillips served gay people, a point undisputed in the record. His refusal to serve this gay couple in this particular circumstance was based on his religiously-rooted understanding of marriage and human sexuality – not their enduring pattern of same-sex attraction, i.e., their sexual orientation.

[Adoption and foster care cases](#) during the last several years have implicated similar questions. Consider the recent decision of the City of Philadelphia to discontinue its foster care contract with

Catholic Social Services (CSS) and Bethany Christian Services due to their refusal to place foster children with same-sex couples. Bethany has since [modified its practices](#), but CSS has not and will continue to litigate its case in federal court. According to the [Becket Fund](#), the firm handling the case for CSS, “The City’s policy prohibits Catholic Social Services from placing at-risk children in available homes solely because the City disagrees with the foster agency’s religious beliefs about marriage.” The City of Philadelphia, by contrast, has characterized CSS’s policy as a violation of the City’s ordinance. And yet the City has not claimed that CSS’s placements of children are substandard. How should this conflict be interpreted? Is the City unfairly cutting CSS out of foster care because of CSS’s fidelity to Catholic views on marriage and the best interests of children? If CSS is plainly violating an ordinance against sexual orientation discrimination that is binding on all City contractors, should that ordinance have some kind of exemption? Should it include some kind of mechanism so that there will be diverse agencies to serve diverse families? This is another example of how sexual orientation introduces complexities into the application of nondiscrimination law that classes like race and national origin do not.

Distinguishing the demands of liberty and equality

Professors Douglas Laycock and Thomas Berg, both constitutional law scholars who are leading voices in the area of religious freedom, have long argued that religious individuals and institutions and LGBTQ people often make parallel claims. In a December 2017 [article](#) in *Vox* they wrote:

Same-sex couples and religious dissenters make parallel claims to liberty. They each argue that a core aspect of their identity is so fundamental that it should be left to each individual, free of all nonessential regulation. Their conduct cannot be separated from their sexual orientation or their religious beliefs. Believers can no more fail to act on their understanding of God’s will than all gays and lesbians can remain celibate.

Laycock and Berg are raising an important point here, but they do not appear to fully account for a key structural difference between liberty and equality claims. Individuals and institutions making religious liberty claims are attempting to secure the freedom to internally order their lives and practices in accord with their religious commitments. LGBTQ equality claims are attempting to alter the practices of other individuals or institutions, such as the CSS agency in Philadelphia. Of course, no form of liberty, even that which is enshrined in the Constitution, is absolute. Moreover, sometimes equality should supersede liberty when they are in conflict. It is vital, nevertheless, that we not overlook the significant ways in which these two preeminent public norms manifest themselves differently in our political community.

Consider again the two cases I reviewed earlier. The *Masterpiece* case involved both religious liberty and LGBTQ equality claims. Recall that Jack Phillips served gay customers and only objected to making a custom cake to commemorate a gay wedding (as he also refuses, as documented in the [opinion](#), “to bake cakes containing alcohol, cakes with racist or homophobic messages, cakes criticizing God, and cakes celebrating Halloween”). With sexual orientation as a protected class in Colorado, it is difficult to imagine how a religiously-based objection to serving gay customers could be justified. But the situation in this case was different: here Mullins and Craig sought a custom cake to celebrate their romantic and sexual relationship. In such circumstances the religious freedom claim should generally prevail. Jack Phillips was seeking the freedom to order his own business affairs in a manner consistent with his religious commitments about marriage and human sexuality. Mullins’ and

Craig's sexual orientation were not at issue, as Phillips clearly demonstrated in his prior service to them and other gay customers.

Notice the different consequences for the two different parties depending on whether the liberty or the equality interest prevails. If there is no religious freedom protection, then the religious person or organization has two choices: violate one's religious beliefs or pay a legal penalty. When the equality side fails, the result can be what Stanley Carlson-Thies describes in his introductory article as the "harm of being turned away." The couple is disappointed and may consider themselves dishonored and violated. Such dignitary harm is serious and should not be discounted, but it does not amount to material harm or a compelled violation of conscience. The individual or couple who was denied typically has the ability to go to another establishment to seek that which was denied to them by the religious objector.

As to the Philadelphia foster care case, the choices before CSS became clear: violate Catholic teachings on marriage and the best interests of children or lose its foster care contract with the City of Philadelphia. The burdens here are quite disparate between CSS and any potential same-sex couple who may come through its doors. CSS seeks to order its own affairs consistent with its Catholic identity. The couple can turn to many other agencies. The City is seeking to compel CSS to either forfeit its ability to care for foster children or forfeit its fidelity to Catholic teachings. These are heavy burdens. This case brings to a fine point the differences between CSS's liberty claims and the City's equality claims.

Conclusion

Advancing LGBTQ equality in law is a very different enterprise than protecting religious liberty. Civic pluralism demands that we maintain vast social space for religious freedom. This is based on what the Kuyperian tradition refers to as confessional pluralism and what Carlson-Thies in his introductory article describes as "a rule and pattern...for how [government] should respond to the deep divisions of conviction...among [its] citizens." Being free according to the law to create and operate a distinctive organization is one matter. It is another to have the government assist you in demanding that this or that private organization abandon its values that diverge from yours.

Therefore, before we ask how particular forms of discrimination should be addressed in law, we must ask the prior question of discrimination by whom. It is always necessary for government to ensure equal treatment of all persons before the law. However, we should also acknowledge that government has a different interest in ensuring that organizations outside of government treat everyone equally. Furthermore, establishing laws to address these matters must be crafted and qualified accordingly. While liberty and equality are both essential public norms for our political community, efforts to advance equality in law, particularly via nondiscrimination laws, have the potential to undermine civic pluralism. This is because extending government's reach into organizations can illegitimately infringe upon their internal commitments and practices. In the context of the LGBTQ community, we need to be able to look for ways to achieve the basic civil rights goals that historic legislation like the 1964 Civil Rights Act was intended to realize. However, we need not necessarily employ all of the same means. Eradicating systemic racism, as this Act was intended to do, was and is an unparalleled moral objective, especially given our country's history. The political and legal means, therefore, to address racial discrimination do not translate directly to other areas of social concern. The multi-

dimensional nature of sexual orientation only adds to the ways in which the racial discrimination analogy is largely unhelpful in this area.

This conclusion returns us to the “equity among diverse institutions” perspective mentioned earlier. We should promote a diverse civil society not only for the sake of the institutions that inhabit it, but also for the sake of a diverse population that may want to be served in certain ways for which not every institution is equally equipped. Nondiscrimination law may sometimes be necessary, but we should not ignore the reality that its application is likely to limit the array of institutions available to potential patients, customers, clients, applicants, students, residents, and others. Civic pluralism favors laws and policies that protect LGBTQ persons and pro-LGBTQ organizations to live out their convictions and understandings, and it favors similar protections for religiously and morally conservative individuals and institutions. Civic pluralism demands equal treatment of all persons before the law. It opens the way for nondiscrimination measures intended to remedy material harms exacted against certain, definable populations within society. Absent these criteria, the law should allow diverse individuals and institutions that represent the “deep divisions of conviction” in American society to interact, competitively and collaboratively, with one another without government interference.

In sum, civic pluralism seeks to establish a public-legal framework that allows all persons in society the freedom to establish, and engage with, institutions that align with their core convictions (and those that do not). Civic pluralism does not, however, call for a society in which all persons must feel at home in every institution. Nor does it give the one being served the right to dictate the terms of that service in every, or even most, respects.

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