

# LECTURE

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## Religious Liberty vs. Identity Politics: An Overview

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### Abstract

*It is too strong to say that those promoting the Lesbian, Gay, Bisexual, Transgender, Queer agenda are just kicking in a rotten door when they prevail over persons like Jack Phillips and chaste innkeepers and modest students. It is about right, however, to say the “door” is rotted and hanging off its hinges. Indeed, only after the public realm was secularized and religion thus privatized and in the private sphere treated as just one of many possible sources of personal “identity” could American religious liberty be so threatened by the rival claims—in fact, demands—of others to define themselves sexually, and to do so without having to endure moral criticism by others.*

Religious liberty was planted in America by Protestants working on distinctively Protestant soil. Their handiwork was nonetheless supple enough to absorb the shock of Roman Catholicism during the 19th century and to survive the death of the “implicit” Protestant establishment at the turn of the 20th. By the end of World War II American religious liberty incorporated Judaism into the new “tri-faith” America; then, the term “Judeo-Christian tradition” was introduced into our national vocabulary to indicate this successful merger, or melding, of biblical religions.

By that time, too, American religion had balkanized into some 250 sects, according to one Supreme Court Justice’s estimate; another Justice (Robert Jackson) quaintly observed in 1944 that “[s]cores of sects flourish in this country by teaching what to me are queer notions.” These odd groups included Jehovah’s Witnesses, who characteristically believed in no human government. God’s sovereignty, they believed, over the universe was undivided. They refused to salute

### KEY POINTS

- In past debates about the precise scope of religious liberty, though, no one publicly questioned the great and general value of religious liberty itself.
- The sexual revolution may be a necessary part of the gale-force headwind buffeting religious liberty. But sexual freedom itself is not nearly sufficient to threaten it: Only identity politics could do that.
- Identity politics, which suffuses so many of today’s challenges to religious liberty in America, poses a very grave threat to religious liberty.
- Before sexual identity could emerge as the colossus it is, religion had to be reduced to nothing more than one’s singular expression of ineffable spiritual experiences and/or of the collective identity of one’s religious tribe.
- The appeals of aggrieved sexual minorities are, to be sure, very powerful these days. But even they could not threaten religious liberty if identity politics had not already infiltrated, and hollowed out, religious liberty itself.

This paper, in its entirety, can be found at <http://report.heritage.org/hl1304>

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the flag, and they bitterly denounced Catholics. Yet these Witnesses won signal religious liberty victories in cases where they did *these things!*

In the 1960s, American religious liberty confronted, and renewed itself by digesting, rugged religious individualism. Existentialists who doubted God, and other loners who professed no creed and belonged to no sect, won Supreme Court victories for religious liberty. (I am talking here particularly about the Supreme Court cases of *United States v. Seeger*<sup>1</sup> and *Illinois v. Frazee*.<sup>2</sup>)

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### **Religious Liberty**

Each of these encounters left its mark: Religious liberty changed and grew stronger and more inclusive, even as America experienced, in addition to all the challenges just described, profound secularization through the whole 20th century. Religious liberty weathered that challenge, too, proving itself a most resilient “first freedom.”

But *identity politics*, which suffuses so many of today’s challenges to religious liberty in America, poses a very grave threat to religious liberty. The same-sex wedding vendor cases, most prominently including the continuing saga of *Masterpiece Cakeshop*,<sup>3</sup> constitute the aggressive front of this threat.

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For the first time in American history, it recently became respectable to publicly oppose religious liberty and its supreme value in our polity. This

unprecedented turn is ominous. It will not only diminish our constitutional law. It will remap our common life, for religious liberty has always been a strategic linchpin of our political culture.

Americans in the past often opposed particular claims of religious liberty—by Latter-Day Saints concerning polygamy or by Catholics who resisted Protestant observances in public school rooms, or of Native American parents claiming their rightful authority to direct the religious upbringing of their children. In past debates about the precise scope of religious liberty, though, no one publicly questioned the great and general value of religious liberty itself.

What’s happening now is different. Opposition back then was to a specific activity of a particular religious group, say, to Mormons’ plural marriages. What’s happening now is happening to religion across a broader front of issues, while the percentages of Americans who belong to some sort of religious body—or even who say that they believe in God—are at all-time lows.

The brunt of the new hostility to religious liberty is not being born by religious minorities, either. Christians who adhere to what was, until recently, America’s common morality are instead its chief victims. Besides, when Mormons and Catholics and Native Americans found themselves on the losing side, no one associated religious liberty itself with of unjust discrimination, or with “demeaning” anyone’s “dignity,” much less with hatred and bigotry.

Now many do.

### **The Sexual Revolution**

Some might be thinking that this means that the sexual revolution is threatening religious liberty. What’s new about that? Well, think again: The Religious Freedom Restoration Act passed unanimously in the House, with just three dissenting votes in the Senate—in 1993! (Then-Representative Chuck Schumer [D-NY] introduced it in the House; liberal lion Ted Kennedy [D-MA] introduced it in the Senate.) I noticed the rebellion against sexual morality while I was in high school; how could any teenage boy not notice the cleavage and innuendo even in prime-time television? And I discovered that college life was in full debauch when I enrolled at Cornell in 1972.

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1. *United States v. Seeger*, U.S. 163 (1965).

2. *Illinois v. Frazee*, 489 U.S. 829 (1989).

No, the sexual revolution may be a necessary part of the gale-force headwind buffeting religious liberty. But sexual freedom itself is not nearly sufficient to threaten it. Only *identity politics* could do that.

### Identity Politics v. Religious Liberty

Here are only three of many possible illustrations of what I mean when I say that *identity politics* poses an especially great threat to religious liberty.

**Self-Understanding.** One is that what believers invariably understand themselves to be doing—steering clear of immoral involvement in the bad conduct of another person—is by force of reconceptualization replaced with a substitute, namely the personal status or “identity” of some putative victim; that is, of a person self-identifying or presenting as a member of a supposedly vulnerable group.

Thus, Masterpiece Cakeshop’s refusal to supply *anyone*, straight or “gay,” with a cake for celebrating an ersatz marriage is reconceptualized as discrimination against “gay” customers. Bed-and-breakfast owners who refuse to rent to unmarried couples are charged with discriminating on grounds of marital status. Employers who cannot conscientiously distribute contraceptives are told they discriminate against women. Teenagers who refuse to disrobe in the presence of a member of the opposite sex (albeit one assertedly suffering from gender dysphoria) are accused of demeaning that person’s self-understanding.

You get the idea.

This override of the believer’s self-understanding amounts to the sort of religious stereotyping which, I used to think, was well behind us. And the gross mistakes in this way of thinking about Jack Phillips (the proprietor of Masterpiece Cakeshop), for example, was cogently laid out by Professor Steven Smith, in an open letter to Justice Ginsburg, published on October 30 in *Public Discourse*.<sup>4</sup>

**“Imprimatur.”** Compounding this first error is the prevalent notion that where public authority recognizes the religious liberty of, say, Jack Phillips, the state puts its own “imprimatur” on Phillips’ unjust discrimination, and even on his normative premise that marriage between two men or two women is morally impossible.

Not so, as Professor Smith ably showed and as I just suggested. Besides, no one ever suggested that, when the Jehovah’s Witnesses won the right not to salute the flag, the Court was endorsing their denial of United States sovereignty in favor of God’s undivided sovereignty. Lawmakers who recognize Amish claims about limited schooling do not thereby ratify Old Order Anabaptist beliefs. You do not profess, endorse, ratify or show the slightest sympathy with Native American beliefs by supporting their right of access to peyote-infused rituals. And so on.

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**“Dignitary Harm.”** A third error builds upon the first two. Often styled as “dignitary harm,” the idea seems to be that when one is refused a service due to the provider’s moral qualms about activities of yours that you are inviting him to participate in or assist, one’s person or identity is “demeaned,” and one’s “dignity” is attacked. There are many mistakes in this line of thought. One mistake is about dignity itself, which has to do with the inherent qualities of persons that make them rights-bearers and worthy of respect. “Dignity” thus properly understood is not prone to be compromised by others’ bad behavior.

Let’s set that mistake aside. It is ever more apparent that, in this context, we are really talking about *perceived* insult, about a same-sex couple’s *feeling* that they have been humiliated or demeaned, even though no word has been spoken, no gesture made, that means anything more than, “It is against my conscience to participate.” Then again, we are securely in the realm of identity politics, where self-esteem—at least for those who happen to be in favor—rules the day.

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3. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. \_\_\_ (2018).

4. Steven Smith, “Disagreement, Discrimination, and Polarization: An Open Letter to Justice Ruth Bader Ginsburg,” *Public Discourse*, October 30, 2018, <https://www.thepublicdiscourse.com/2018/10/43954/> (accessed January 15, 2018).

The Supreme Court’s same-sex “marriage” decision, *Obergefell v. Hodges*,<sup>5</sup> traffics in this same identity politics. The opening sentence of that case introduces liberty which “includes...[the] right[] of persons within a lawful realm to define and express their identity.” The center of gravity in *Obergefell* is communal affirmation of each person’s intimate, and self-defining, choice of a companion to ward off “the universal fear that a lonely person call out only to find no one there.” Indeed, if you deleted from the majority opinion in that case the complex of thoughts about “identity” (which could be well summarized thus: ‘the purpose of marriage law is to communicate the whole community’s affirmation of the same-sex couple’s self-defining choice to marry and thereby to avoid “demeaning” or “humiliating” them), there would not be a syllable of justification left in it.

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The appeals of aggrieved sexual minorities are, to be sure, very powerful these days. But even they could not threaten religious liberty if identity

politics had not already infiltrated, and hollowed out, religious liberty itself. Before sexual identity could emerge as the colossus it is, religion had to be reduced from a set of beliefs and truth-claims about the way the cosmos really is, to nothing more than one’s singular expression of ineffable spiritual experiences and/or of the collective identity of one’s religious tribe. Religion had to first be authoritatively re-described, in other words, over against the self-understanding of many believers, as raw subjectivity, as the realm of “faith” conceived *itself* as feeling and emotion, of some inner domain outside the dominion of rationality.

It is too strong to say that those promoting the Lesbian, Gay, Bisexual, Transgender, Queer agenda are just kicking in a rotten door when they prevail over persons like Jack Phillips and chaste innkeepers and modest students. It is about right, however, to say the “door” is rotted and hanging off its hinges.

Indeed, only *after* the public realm was secularized and religion thus privatized and in the private sphere treated as just one of many possible sources of personal “identity” could American religious liberty be so threatened by the rival claims—in fact, *demands*—of others to define themselves sexually, and to do so without having to endure moral criticism by others.

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5. *Obergefell v. Hodges*, 576 U.S. \_\_ (2015).