Gay rights and religious liberty: Can Americans have both?

by Warren Richey

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(*The Christian Science Monitor*) The recent backlash against "religious accommodation" laws in Indiana and Arkansas is evidence of an increasingly bitter confrontation that is dividing the country and threatens to diminish the scope of religious liberty in America.

That is the conclusion of a number of scholars and experts who are urging the United States Supreme Court to consider this confrontation when it hears oral argument on April 28 in a potential landmark case involving same-sex marriage.

On one side are gay couples who are seeking the full benefits of equal treatment and dignity in a society that has long forced them into second-class status, or substantially worse.

On the other side are religious conservatives, who say they are being coerced to support or participate in activities that offend their religious beliefs.

Gay rights activists, sensing an approaching victory at the Supreme Court, are growing more aggressive in challenging the conservatives. Many argue that any accommodation of religious beliefs in the context of gay rights would amount to a "license to discriminate."

Conservatives counter that the issue is freedom of conscience. Religious accommodations traditionally have been provided to avoid the prospect of coercion against one's faith, they say.

Indiana and Arkansas were just the latest flashpoints in what could become a major turning point. For the first time in U.S. history, a sizeable social and political force seems intent on sharply restraining or eliminating religious accommodations, according to scholars who study religious freedom.

Now with the Supreme Court poised to take up same-sex marriage, some advocates are hoping the high court will offer much-needed guidance to a nation torn between conflicting values.

Some states, like Indiana, have tried to address the religious accommodation side of the equation, while others, like Utah, have taken a more comprehensive approach—addressing religion accommodations and antidiscrimination laws together.

The stakes involve more than just whether same-sex couples will be able to obtain a cake, or photographs, or flowers for their wedding. Ultimately at stake is a quintessential requirement of life in America: tolerance—on each side for the other.

A middle-ground position for Supreme Court?

Douglas Laycock, a professor at the University of Virginia School of Law and leading scholar of religious liberty, has staked out a middle ground position in the looming confrontation between gay rights and religious rights. He calls his approach “liberty and justice for all.”

“Same-sex civil marriage is a great advance for human liberty,” Laycock wrote in a friend-of-the-court brief. “But failure to attend to the religious-liberty implications will create a whole new set of problems for the liberties of those religious organizations and believers who cannot conscientiously recognize or facilitate such marriages.”

He is urging the high court to recognize a constitutional right to same-sex marriage. And he believes states should pass laws barring discrimination based on sexual orientation.

But he also favors robust religious freedom restoration laws at the state level, and he is urging the justices to make clear in their opinion that religious conservatives retain broad freedom to live their lives in accord with their highest sense of morality and faith.

“The gain for human liberty will be greatly undermined if same-sex couples now force religious dissenters to violate conscience in the same way that those dissenters, when they had the power to do so, forced same-sex couples to hide in the closet,” Laycock said.

“That is what will happen, unless this Court clearly directs the lower courts to protect religious liberty as well as same-sex civil marriage,” he told the justices.

In a speech last fall, Sen. Orrin Hatch (R., Utah), warned that religious liberty was under attack—and losing ground.

“What was once a broad consensus here in the United States that religious freedom deserves special protection has recently crumbled,” he said.

The senator said that gay rights organizations and other advocacy groups were increasingly opposed to religious exemptions that a few years ago would have passed without dissent.

“From my perspective, it appears that now these groups believe they are ‘winning’ the argument and therefore have no need for religious accommodations,” he said. “Whereas in the past they were willing to respect religious freedom, now that they believe they have the upper hand they are ready to disregard religious liberty altogether.”

Last June, the Supreme Court pushed back against this trend in a five-to-four decision upholding a religious accommodation for the owners of Hobby Lobby.

Within weeks of that ruling, 56 senators voted to overturn the decision and eliminate the accommodation. The tally, only four votes short of the 60 needed to advance the bill, included every Senate Democrat and three Republicans.

Backlash in Indiana and beyond

The uproar sparked by Indiana’s passage of its own Religious Freedom Restoration Act in late March illustrates the potential high stakes for religious conservatives.

Indiana lawmakers and Republican Gov. Mike Pence encountered a swift and unrelenting backlash by a well-organized gay rights campaign supported by major business leaders, Democratic governors, and others threatening to unleash an economic boycott against an entire state.

Those threats prompted Republican leaders in Indiana and Arkansas to quickly retreat and water down their religious freedom laws.

It also directed a national spotlight on the intersection of gay rights and religious rights.

It did so in part by focusing on an eight-table pizza shop in Walkerton, Indiana.

Memories Pizza owner Kevin O'Connor and his daughter, Crystal, said they would serve any gay or lesbian customers in the shop. But they added that they would refuse to cater a same-sex wedding because such a ceremony would offend their religious beliefs about marriage.

The store closed for eight days after receiving threats and hate mail. At the same time, supporters on a fundraising website contributed more than $840,000 to the shop.

The action against Memories Pizza erupted not from an actual request for service from a gay couple. It resulted from a hypothetical question from a local television news reporter.

Other well-known cases involve a Colorado bakery's refusal to bake a wedding cake for a same-sex marriage ceremony, a New Mexico photographer's refusal to photograph a same-sex commitment ceremony, and a Washington florist's decision not to design floral arrangements for a same-sex wedding.

In each case, the Christian business owner said the refusal was based on a sincerely-held religious belief about the sanctity of marriage. And in each case, the courts ruled that the Christian owners violated laws prohibiting discrimination based on sexual orientation.

"In the last year or so, with the rise of the push for gay rights, it is beyond wanting there to be an appreciation and respect for gay rights. Now a segment of our population is seeking to have that right trump religious freedom," said Jeffrey Mateer, a lawyer with Liberty Institute in Plano, Texas.

"We are seeing people of faith being attacked, discriminated against, and losing their jobs because they are speaking out on the marriage issue," Mateer said.

Among other cases cited by conservatives:

- A private evangelical college in Massachusetts may lose its accreditation over the school's code of conduct that prohibits students, faculty, and staff from engaging in "sexual relations outside of

marriage and homosexual practice."

- The Atlanta fire chief was terminated in January after officials discovered that the chief, an evangelical Christian, had written a self-published religious book in which he expressed a personal view that "homosexuality" was a "sexual perversion" morally equivalent to "pederasty" and "bestiality."
- The California Supreme Court recently enacted a rule barring all state judges from serving in any role with the Boy Scouts. The court took the action because the Boy Scouts prohibit gay men and lesbians from serving as adult leaders.

A 'highly dynamic' area of law

It isn't just a matter of filing lawsuits or challenging the award of government benefits to certain businesses. The broader campaign often portrays religious conservatives as bigots. The strategy appears aimed at discrediting any claim to the American tradition of solicitude to religious adherents involving sincere matters of faith.

"That's one way of looking at it," said Yale Law School professor William Eskridge, a leading scholar of gay rights. "Here's another way. What counts as a religious reason is highly dynamic."

In the 1960s, opponents of the Civil Rights Act used the Bible to try to justify continued discrimination against African-Americans, Eskridge noted. It didn't work. The tactic was swept aside as the tide of public opinion embraced the principle of equality for African Americans.

Eskridge suggests it is only a matter of time before gay rights become normalized across the country, and religious and moral arguments are swept aside and discarded.

"One of the lessons of history unfortunately is that very often the line between bigotry and religious doctrine or religious faith is not a clear-cut line, particularly when public opinion is swiftly changing," Eskridge said.

The professor predicted that as the nation's rapid embrace of gay rights continues, public norms and the law will also change. So will religious practice and belief, he said.

"We've already seen it, and we are going to continue to see it," he said. "Some religions are literally changing their doctrine."

Utah's seeds of a solution

So where does that leave the state of interplay between gay rights activists and religious conservatives?

The legal landscape is a patchwork. Even if the U.S. Supreme Court rules in late June that all 50 states must issue marriage licenses to same-sex couples, only 22 states currently have laws prohibiting discrimination based on sexual orientation.

That means that gay men and lesbians are vulnerable to discrimination in 28 states.

Among those 28 states: Indiana and Arkansas.

Some observers view the recent ugly flare-up in the culture war in both states as a missed opportunity.

Had officials in Indiana and Arkansas sought to pass their new religious freedom restoration laws in concert with new legal protections for the lesbian, gay, bisexual, and transgender community, the energy invested in threatened boycotts and waging heated protests would have been expended instead on celebrations of leadership and progress, these analysts say.

Robin Fretwell Wilson knows how to get this done. She was an adviser to the effort do it in one of the most conservative states in America.

“At a time of great change, people have to know what the rules are,” said Fretwell, a professor at the University of Illinois College of Law. The idea is to get the relevant parties around a table and negotiate a set of rules acceptable to all.

It employs a common sense approach: If you are sensitive to our concerns, we’ll be sensitive to yours.

The result was the Utah Compromise. It passed the Republican-controlled state legislature and was signed into law last month with the blessing of the Church of Jesus Christ of Latter-day Saints.

When it takes effect on May 11, it will mark the first time in state history that gay men, lesbians, bisexuals, and transgender people have specific legal protections prohibiting discrimination in housing and employment because of sexual orientation or gender identity.

“Utah gets it right on every single score,” Wilson said. “They did something good and decent for the LGBT community, but they did not make it come at the expense of religious believers. I think that’s huge.”

The workplace protections apply to all businesses with 15 or more workers, including state agencies, local governments, and school districts. It does not apply to religious organizations, religious schools, and wholly-owned subsidiaries of religious organizations. It also exempts the Boy Scouts.

The compromise has its critics. Some say it does not go far enough.

For example, the Utah Compromise does not address the thorny issue of public accommodations—whether a small business such as a bakery, wedding planner, or florist must participate in same-sex wedding ceremonies if they have religious objections.

But within the compromise are the seeds of a solution to that problem, as well, Wilson said.

The agreement establishes a right for any qualified person in Utah to get married at a county clerk’s office. But under the agreement, no official in any clerk’s office can be fired or otherwise forced to officiate a same-sex wedding if they have a religious objection.

Instead, every clerk’s office in Utah—including in rural counties—must have a process that provides a willing celebrant to any same-sex couple seeking to marry at the clerk’s office.

There is a term for this kind of approach. It is called religious accommodation.

Wilson said she is developing a similar model that may offer a compromise for religious business owners who are worried about getting sued over their religious objections to participating in a same-sex wedding.

In the medical field, there are recognized abortion conscience clauses that exempt certain medical professionals from involvement in that procedure because of their religious beliefs. In effect, someone else takes their place through a prearranged process.

“When that happens, no one says you are being mean to the lady who wants an abortion,” Wilson said. “We don’t even think about it that way.”

The same prearranged process could be set up at a Christian-owned bakery or flower shop. In essence, those parts of the business serving same-sex marriages would be handled by workers (in-house or by contract) who do not have a religious objection to such ceremonies.

“The idea that you show up in the moment and get refused by a religious person is really, really hard to choke down. I don’t think the gay rights people are going to be able to bargain to that,” Wilson said. “And the idea that you suddenly let gay rights run roughshod over every religious person in the community is also hard to choke down.”

She adds: “So if we can find a model where everybody gets served and religious people don’t have to leave those jobs, I think we’d do a really good thing.”

Wilson’s approach holds great promise, particularly in conservative red states looking for solutions or to avoid economic boycotts. But not everyone is ready and willing to negotiate a cease-fire in the culture war.

That’s where the concept of a RFRA may become essential as an increasing number of cases move into the courts.

Confusion over what an RFRA actually does

Much of the controversy last month in Indiana and Arkansas was premised on misinformation and misconceptions on both sides of the debate, according to legal experts.

Some conservatives were under the false impression that a RFRA would offer guaranteed protection against lawsuits by same-sex couples. And some gay rights activists argued, incorrectly, that the Indiana RFRA would be a “license to discriminate.”

Uncritical press reports parroted this line, over and over.

The debate kicked up gobs of dust and fury, but shed almost no light on the real purpose of passing a state RFRA, analysts say.

“I don’t think it is right to view RFRAs in light of gay rights specifically, because RFRA has always protected religious minority groups,” said Eric Rassbach, a lawyer at the Becket Fund for Religious Liberty in Washington.

He said RFRAs have helped protect a Santería priest seeking an exemption from a local ordinance outlawing goat sacrifices; it is being invoked to help native Americans who need an exemption from federal law to possess eagle feathers. The law has been used to uphold the right of a Sikh accountant to pass through security at a federal building in possession of her religious kirpan, a small dull dagger that is symbolic to Sikhs.

In January, the U.S. Supreme Court applied a RFRA-like statute and ruled that the Arkansas prison system must allow a Muslim inmate to grow a short beard in compliance with his religious faith. That ruling was nine to zero.

“If people want to go around stopping RFRAs or neutering RFRAs, the people who are going to be hurt will be the religious minorities—the Sikhs, the native Americans, the Muslims, the Orthodox Jews,” Rassbach said. “I think that is a real problem for our society because we are not getting less religiously diverse, we are becoming more heterogeneous.”

The purpose of passing a religious freedom restoration law is not to grant a right to engage in anti-gay discrimination, Rassbach and other analysts say. The law isn’t designed to work that way, and it hasn’t worked that way in practice.

No religious exemption sought under RFRA has ever been granted in any case involving alleged sexual orientation discrimination.

That doesn’t mean there won’t be an accommodation granted in the future. But these results suggest RFRA is no “license to discriminate.”

The real license to discriminate in Indiana was the state’s lack of a statute prohibiting discrimination because of sexual orientation. That is a license to discriminate, legal experts say.

In contrast, the purpose of a RFRA is different. The law is designed to allow a neutral judge to weigh the competing interests when a law that is applied broadly imposes a significant burden on sincerely-held religious beliefs.

When that happens, there must be proof that the provision advances a compelling government interest and that it is tailored to do that in a way least restrictive of religious faith.

How courts have viewed the issue

This approach was not dreamed up in some backroom legislative chamber in Indiana. It is a legal standard that was recognized as a constitutional guarantee for the entire country and was enforced by the U.S. Supreme Court from 1963 to 1990.

In 1963 the Supreme Court granted a religious exemption to a Seventh-day Adventist who was denied unemployment benefits after she was fired for refusing to work on her sabbath. In 1972, the high court reaffirmed this pro-religion accommodation standard when it granted a religious exemption to Amish families who objected to a Wisconsin law that required all children under 17 to attend public school. The state law clashed with Amish traditions, including home-schooling older children. In 1981, the Supreme Court granted a religious exemption to a Jehovah's Witness who was denied unemployment compensation benefits after he lost his job for refusing to work in a department that produced war materials.

Despite this broad, constitutional protection of religious conscience, religious adherents didn't always prevail. In 1983, Bob Jones University argued for a religious exemption from a federal regulation prohibiting tax-exempt organizations from discriminating on the basis of race. The university had a rule barring interracial dating.

The high court held that the government had a fundamental—and overriding—interest in ending any vestige of racial discrimination in education.

Though the decision did not diminish the importance of religious accommodations in general, it put religious adherents on notice: fighting discrimination is a compelling government interest that can outweigh a claim for religious accommodation.

Then, in 1990, the high court abruptly changed course. The justices were presented with a case involving two drug counselors who were fired for their sacramental use of peyote as members of the Native American Church. They were also denied unemployment benefits. The two sued the state of Oregon, seeking a religious accommodation that would allow them to collect the benefits.

A divided Supreme Court ruled that the free exercise clause of the Constitution did not authorize a religious exemption from laws of general applicability.

This was a major constitutional shift that made it more difficult for religious adherents—particularly those in minority religions—to seek accommodations from general laws that imposed significant burdens on their faith.

Congress responded in 1993 by passing the Religious Freedom Restoration Act. (It passed the House by voice vote, and the Senate 97 to 3.) The statute reestablished the same national legal standard of religious accommodation that had been enforced by the high court from 1963 to 1990.

Then in 1997, the Supreme Court ruled that the federal RFRA only applied to federal law, not at the state or local level.

In response to that decision, states began enacting their own religious freedom restoration acts. Currently, 22 states—including Indiana and Arkansas—have enacted RFRAs.

In addition, 11 other states have interpreted their state constitutions as providing guarantees of religious liberty consistent with the standard enforced by the U.S. Supreme Court from 1963 to 1990.

Thus, 33 of the 50 states have in some fashion embraced the broad concept of offering religious accommodations.

Where we go from here

How the approaching legal battles will play out is uncertain.

Some cases will be preempted by automatic exemptions from discrimination laws that have long been granted to religious organizations and affiliated groups.

But the stage is now set for litigation over public accommodations related to same-sex marriages. Ironically, most of those cases will be litigated not in conservative “red” states, but in liberal “blue” states that have already accepted gay marriage. That’s because there are no anti-discrimination statutes in most red states that would allow a same-sex couple to file a lawsuit.

“It is that middle area of the small business, individual proprietorship, the mom and pop enterprise; that’s the area where this is going to bite,” Eskridge said. “That is in play and it is highly dynamic.”

The professor sees the legal landscape shifting against accommodation claims.

“Accommodations that would have been given in courts ten years ago are not going to be given in courts ten years from now, or even today in some cases,” he said.

In courts across the country the critical question is going to be whether it is possible to strike a balance between discrimination and religious accommodation.

What is at stake is more fundamental than cakes, photographs, and flowers. It is whether at some point politicians and judges begin to look for ways to defuse disputes so that both sides can start moving forward together toward tolerance and acceptance.

The alternative is more Indiana-style protests and boycotts.

“What was so devastating for the religious community was to be seen as saying we have to have our religious freedom so that we can knock down your gay rights. When they say stuff like that—which is just ugly—they lose,” Wilson said. “But on the other side, if the gay rights guys say I have to run you out of business in order for me to win, that is just as ugly, and they will lose.”