

Rawls on the the “Hard Question” in *Fulton v. City of Philadelphia*

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In his dissent in *Obergefell v. Hodges*, Chief Justice John Roberts warned of a “hard question” concerning the tension between LGBTQ equality and religious liberty. In 2018, *Fulton v. City of Philadelphia* posed this question: Are religious exemptions just? I apply John Rawls’ theory of justice to determine if exemptions are just in a constitutional democracy when applied to LGBTQ people. First, I argue exemptions create an inequality for LGBTQ people based on Rawls’ first principle of justice, which asserts equal entitlement to basic liberties. Second, I analyze if this inequality can be justified under the second principle, which considers equal opportunity and the impact on society’s worst-off. I conclude exemptions fail to meet Rawls’ criteria and are unjust.

Introduction – The “Hard Question” in *Fulton v. City of Philadelphia*

LGBTQ rights have experienced significant progress in the 50 years since the first brick was thrown at the Stonewall Inn riots in 1969. On June 26, 2015, the U.S. Supreme Court legalized same-sex marriage in all states in the landmark case *Obergefell v. Hodges*, 576 U.S. 28 (2015). Despite this rapid progress, the LGBTQ community faces a new battle after the legalization of same-sex relations and marriage. This new challenge comprises an assault against LGBTQ nondiscrimination protections. Most recently on June 15, 2020, the U.S. Supreme Court held that sex-based employment discrimination extends to those who identify as LGBTQ under Title VII of the Civil Rights Act of 1964. However, religious liberty claims frequently counter nondiscrimination protections. Whether refusing to bake a wedding cake for a same-sex couple or firing an LGBTQ teacher at a faith-based workplace, homophobia manifests as claims to religious freedoms. Put simply, religious exemptions allow homophobia to seek legal exclusions from toleration. However, this discrimination is a perversion of religious liberty, as defined by the First Amendment.

Chief Justice John Roberts recognized this inevitable challenge in his dissent in *Obergefell v. Hodges*, 576 U.S. 28 (2015). Chief Justice Roberts writes:

Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples.

Three years later, Roberts’ prediction arose in the U.S. Third Circuit Court of Appeals in Philadelphia, Pennsylvania. In March 2018, the *Philadelphia Inquirer* informed the City of Philadelphia that two of the contracted foster care service agencies in the public child welfare system declined to license same-sex couples to be foster parents based on the agencies’ religious beliefs. Upon receiving this notice, the City informed both agencies they were each in violation of their contracts and stopped referring children to them. One of the agencies agreed to comply while the other, Catholic Social Services (CSS), sued the City, claiming a constitutional right to discriminate against prospective foster families headed by same-sex couples (1). CSS claims that the First Amendment right to free exercise of religion entitles CSS to a taxpayer-funded contract to perform a public service albeit its intentional incomppliance with the City’s requirement that agencies accept all qualified families under the Fair Practices Ordinance. The American Civil Liberties Union (ACLU) and the ACLU of Pennsylvania (ACLU-PA), representing the Support Center for Child Advocates and Philadelphia Family Pride, intervened in the lawsuit brought by CSS. The ACLU is supporting the City’s right to require all of its contracted foster care agencies to accept all qualified families.

On February 24, 2020, the U.S. Supreme Court granted review of the U.S. Third Circuit Court of Appeals’ decision that sided with the City and maintained that agencies performing taxpayer-funded, public, foster care services lack a constitutional right to discriminate (1). The case calls into question the tension between LGBTQ equality and religious liberty. The case of *Fulton v. City of Philadelphia* draws into question my primary research interest: Are religious exemptions just? To address this question, I analyze the case primarily through John Rawls’ theoretical framework in *A Theory of Justice*, as

well as his related works and essays.

Why Rawls?

As the 21st century's preeminent political philosopher, John Rawls' conception of justice largely influences debates surrounding liberty and equality. Rawls' seminal work *A Theory of Justice* deals explicitly with the tension between equality and liberty. Moreover, Rawls is very much concerned with what is fundamentally fair. In his other groundbreaking work, *Political Liberalism*, Rawls continues to grapple with the tension between liberty and equality in a complex pluralistic society. For my own arguments, I largely draw upon these two works as well as Rawls' tangential essays related to the central questions posed in *A Theory of Justice* to address the central questions in *Fulton v. City of Philadelphia*.

The City of Philadelphia as a Social Institution

As the central municipal government, the City of Philadelphia largely comprises and controls the basic structure of Philadelphia's society. Or, as Rawls puts it, the City influences "the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages of social cooperation" (2). As a key player in the basic structure, the City also qualifies as a major institution itself as part of the "principal economic and social arrangements" of Philadelphia (2). Regarding the role of the City as Philadelphia's central institution, the City greatly "define[s] men's rights and duties and influence[s] their life-prospects, what they can expect to be and how well they can hope to do" (2). From stimulating economic growth, bolstering public safety, and providing social services, the City is an integral element and underpinning of the basic structure of Philadelphia society. As a local government within the United States' federalist system, the City maintains limited autonomy within a single governmental system. Yet, the City is still bound to the U.S. Constitution that binds the American liberal democratic system. The City accordingly has an interest in constitutional compliance and the fair administration of justice.

For Rawls, the basic structure is the "primary subject of justice because its effects are so profound and present from the start" (2). As a key component of the basic structure, the City plays a vital role in upholding and enforcing justice as fairness as defined by the two principles. The City carries out this function through its managerial, policymaking, legal, and policing departments under the Mayor's Office. These departmental entities contribute to the City's overall

execution of its duty to uphold the principles of justice as fairness. The justice of Philadelphia's social scheme essentially depends on how the City, as a whole, assigns and manages economic and social conditions (2). As Rawls warns that inequalities are bound to arise in the basic structure, the City and its partners must navigate these complexities concerning questions of justice (2).

While the City itself qualifies as a social institution, the City is responsible for the administration and organization of subsidiary institutions including its own departments as well as its contracted partners. These partners entail private entities as well as nonprofit organizations, like CSS, that assist the City with a variety of projects. I suggest that these partner organizations take on a more important role in the basic structure than other non-partnered organizations by contracting with the City. While a nonprofit or private entity may take it upon themselves to promote justice, entities directly partnered with the City align themselves with the central institution in Philadelphia's social organization. Hence, their role and relationship to the principles will deepen and evolve, especially in matters relating to beliefs and interests.

Within the bounds of Philadelphia, the municipal City government is the most accountable social institution to the two principles since lesser institutions rely on the City for satisfying the two principles. Hence, the City has a key interest in ensuring that its partners uphold justice as fairness.

Social Groups

In this section, I define what I mean by "social group" in a Rawlsian context. First, I explain the concepts and terms Rawls uses to study social groups within a pluralistic liberal democracy. For this first portion, I transition slightly away from *A Theory of Justice* and mostly draw upon *Political Liberalism* instead. In the second portion, I explain how the Catholic Church and the LGBTQ community qualify as social groups. Lastly in the third portion, I consider how we should treat these groups in the basic structure within a Rawlsian framework.

My goal for this section is to clearly define my units of analysis for CSS and LGBTQ Philadelphians. By articulating each of these groups in Rawlsian terms, my analysis in the following sections flows accordingly. Moreover, we can begin to see how the basic structure and its social institutions should treat these social groups in a pluralistic society beholden to the two principles of justice as fairness.

By "social group," I mean a collection of individuals who each express and share a property trait in common that is central to their expressed identity. Echoing Fiss'

1976 work, I more precisely define “social group:”

1.) It is an entity (though not one that has a physical body). This means that the group has a distinct existence apart from its members, and also that it has an identity. It makes sense to talk about the group (at various points of time) and know that you are talking about the same group. You can talk about the group without reference to the particular individuals who happen to be its members at any one moment.

2.) There is also a condition of interdependence. The identity and well-being of the members of the group and the identity and well-being of the group are linked. Members of the group identify themselves and explain who they are by reference to their membership in the group; and their well-being or status is in part determined by the well-being or status of the group. Similarly, the well-being and status of the group are determined by reference to the well-being and status of members of the group (3).

These social groups comprise the pluralistic, democratic society with which Rawls grapples in *A Theory of Justice* and *Political Liberalism*. In Rawlsian terms, these social groups can be individuated by their comprehensive doctrines. In *Political Liberalism*, Rawls defines and characterizes comprehensive doctrines based on these four features:

1.) Reasonable, that is rational, citizens only endorse reasonable doctrines (4).

2.) Reasonable comprehensive doctrines are an exercise of theoretical reason. The doctrine encompasses the “major religious, philosophical, and moral aspects of human life in a more or less consistent and cohesive manner.” That is, the doctrines review and organize values as to form a consistent worldview compatible with its basic tenets (4).

3.) In addition to its theoretical component, reasonable doctrines exercise practical reason by identifying which values are significant and what to do when values conflict. Hence, theoretical and practical reason are used to produce reasonable comprehensive doctrines (4).

4.) While a reasonable doctrine may change or evolve, they are largely attached and derive from a “tradition of thought and doctrine.” Reform usually occurs in punctuated moments gradually over long periods of time (4).

Rawls considers a comprehensive doctrine to be a citizen’s conception “of what is of value in human life, and ideals of personal character, as well as ideas of friendship and of familial and associational relationships, and much else that is to inform our conduct, and in the limit to our life as a whole” (4). Moreover, comprehensive doctrines can be religious, philosophical, and moral, and can form the basis

of certain social groups, e.g. Marxists, Jews, moral relativists, etc. While comprehensive doctrine helps to individuate social groups, Fiss’ useful definition of social groups does not require a comprehensive doctrine. For example, we consider racial and gender groups as entities as well as recognize their interdependence in society among members; however, these groups neither carry a unified religious, philosophical, or moral doctrine, nor do they require such to qualify as a social group.

These social groups and their respective comprehensive doctrines present a complex challenge for modern constitutional democracies: how do these individuals and their groups peacefully coexist and form a government in light of their competing interests and potentially clashing doctrines? To begin resolving this critical issue, Rawls outlines a political conception for the basic structure that grapples with comprehensive doctrines and explains how its social institutions deal with its interests and needs. Crucially, the political conception of justice as fairness legitimizes the rule of law as a manifestation of society’s political culture.

Rawls’ political conception possesses the following three features. First, concerning its subject, the political conception is also a moral conception crafted to meet the specific subject for a system of political, social, and economic institutions, i.e. the basic structure (4). Second, concerning its mode of presentation, the political conception is presented as an agnostic doctrine. That is, it is important to present the political conception as an entirely separate view distinct from any comprehensive doctrine. As Rawls puts it, “the political conception is a module, an essential constituent part, that fits into and can be supported” by society’s variety of comprehensive doctrines (4). In contrast to a comprehensive doctrine, the conception solely concerns the basic structure un beholden to another view. Third concerning its contents, the political conception is “expressed in terms of certain fundamental ideas seen as implicit in the public political culture of a democratic society” (4). These fundamental ideas include the public norms and traditions of political institutions in a constitutional democracy. In the basic structure, social institutions drive and animate these fundamental ideas.

Once conceived, a liberal political conception of justice will attribute basic rights and liberties, uphold these rights and liberties as its chief priority, and enact a system in which citizens can freely and equally practice these rights and liberties. To do so, the political conception realizes these aims through the legitimate use of the social institutions within the basic structure. From this democratic thought and political tradition, justice as fairness arises and “takes as its fundamental idea that of society as a fair system of cooperation over time, from one generation to the

next” (4). By establishing such a political conception, Rawls legitimizes the basic structure and its authority. However, he still must account for how and why social groups with different comprehensive beliefs consent to this conception since a “constitutional regime does not require an agreement on a comprehensive doctrine: the basis of its social unity lies elsewhere” (4). To identify the basis of its social unity, Rawls outlines how a constitutional regime and its pluralistic society achieve social stability via an overlapping consensus.

Through an overlapping consensus, citizens agree upon a political conception for different reasons according to their own comprehensive doctrine. As Rawls explains, the political conception must be able to be “supported by various reasonable comprehensive doctrines” to allow for “reasonable pluralism” (4). Simply put, the political conception must be formed in a way to convince citizens to endorse its legitimacy, albeit their varying justifications. The chief aim of the overlapping consensus is to avoid a *modus vivendi*; that is, an agreement among groups to a conception based on personal gain that any group would readily violate for its own interest (4). Rather, Rawls’ conception aims for a social unity that persists even if certain group’s relative strength weakens or increases. Hence, the liberal political conception differs from a *modus vivendi* in that groups wish to remain in consensus regardless of power distribution.

For our purposes for *Fulton v. City of Philadelphia*, my main objective is to define LGBTQ people and CSS (as a subsidiary of the Catholic Church) as social groups according to the above analysis and definitions. By framing the involved parties as such, we can track how the City as an institution and as a part of the basic structure should interact and support each social group to reach an overlapping consensus to uphold a political conception.

CSS as a Social Group

I treat CSS as a representative subsidiary of the larger community of the Catholic Church. As a religious group, CSS meets the first part of Fiss’ 1976 definition of a social group as an entity with “a distinct existence apart from its members, and also that it has an identity” (3). Hence, the Catholic Church exists without reference to any particular member and possesses a unique identity. For Catholics, this unique identity comprises their comprehensive doctrine as outlined by the Catholic Catechism. So, in the case of CSS, we can individuate it as a social group largely identified by its comprehensive doctrine.

As a representative subsidiary, CSS also meets the second portion of Fiss’ definition, i.e. the condition

of interdependence. As a religious group and global institution, the Catholic Church is made up of millions of members who identify as Catholics. Hence, the members rely on the status and wellbeing of the institution just as the institution requires the wellbeing of its members to persist. Regarding the Archdiocese of Philadelphia and its chapter of CSS specifically, the Catholic organization relies on the wellbeing of its members to support its functions, and vice versa. Foster parents who use CSS’s services face a risk if CSS loses its contract with City of Philadelphia, i.e. it hinders their wellbeing. Hence, the Church and its members are interdependent on one another for their mutual wellbeing.

LGBTQ Community as a Social Group

The lesbian, gay, bisexual, transgender, and queer (LGBTQ) community meets Fiss’ definition of a social group. Regarding the first portion, the LGBTQ community can be considered an entity. We can refer to the LGBTQ community as a whole without specific reference to any individual in particular. Further, we can discuss the LGBTQ community as an entity with a unique history in the United States, and in Philadelphia in particular. Regarding the Philadelphia LGBTQ community, networks of organizations, partnerships, and subgroups comprise this larger community and underscore its existence apart from its members. Regarding identity, the LGBTQ community and its members can be identified based on their queer self-expression that varies from cisgender heterosexuality. However, the LGBTQ community cannot be individuated by any particular comprehensive doctrines. While the LGBTQ community faces many stereotypes, both positive and negative, there is no official doctrine that encompasses being queer; a gay Republican atheist is just as queer as a transgender Democratic Catholic.

Regarding Fiss’ condition of interdependence, the LGBTQ community as an entity is largely interdependent on the wellbeing of its individual members, and vice versa. The wellbeing of the LGBTQ community entails its human security; its social, political, moral, and economic status; and its recognition as a group deserving equal treatment. In Philadelphia, the wellbeing of the LGBTQ community concerns its status and security among the citizens and the City of Philadelphia, as well as the guarantee of certain civil rights and liberties under the U.S. Constitution. The wellbeing of the larger LGBTQ community greatly impacts the wellbeing of individual LGBTQ people. In places where certain protections lack for the LGBTQ community, queer individuals are directly and negatively affected. Conversely, where LGBTQ individuals experience social, economic, and political gains, the larger community benefits as its

members benefit. From the Stonewall Inn in 1969 until *Obergefell v. Hodges* in 2015, individual and group gains have furthered the wellbeing of the LGBTQ identity. However, recent battles like *Fulton v. City of Philadelphia* challenge the wellbeing of the queer identity, both at the group and individual levels.

When Groups Collide

In *Fulton v. City of Philadelphia*, there exists a tension between religious liberty and LGBTQ equality. Moreover, there is a tension between two social groups whose contention threatens the stability of the overlapping consensus and a democratic political conception. Hence, it is in the common interest to strike a balance between liberty and equality, and it is in the common interest to arrive at what is just, i.e. fundamentally fair. Here, Rawls' theory of justice crucially assists this effort. By assessing the City's relationship with each social group and the City's role in the basic structure, I present an argument in favor of LGBTQ foster parents and against religious exemptions. I accomplish this by employing a Rawlsian framework via his principles of justice as fairness.

First, I explain how the City as a social institution must stay accountable to the principles of justice and how the City would violate the principles if it acted otherwise. In this section, I also reflect on the City's responsibility to the social institution of the family in the basic structure. Second, I resolve foreseeable objections to my argument that may arise from communitarians on behalf of supposed religious freedoms. Lastly, I conclude with a view to reform - for both Rawls and the U.S. Constitution. To craft my recommendations, I draw upon the work of Iris Young on social groups and how this rethinking should inform our understanding of the 14th Amendment and the Equal Protection Clause.

Are Religious Exemptions Just?

Social Groups in the Original Position

In Rawls' original position, rational representatives of social groups gather to act on behalf of their respective populations. These representative parties act behind a veil of ignorance to nullify any bias in the decision-making process of the principles. Via the veil, fairness becomes the primary focus of the original position as representatives unbiasedly work toward an agreement that would fairly serve everyone in society. Behind the veil of ignorance, Rawls writes that "parties do not know certain kinds of particular facts" (2). More specifically, parties do not know their place in society, their class or social status, their conception of the good

and rational plan of life, the particulars of their own society, or to which generation they belong (2). Rawls extends these unknown particulars to include individual characteristics, such as intelligence, unique talents, physical capability, race/ethnicity, and sex. Hence, parties' social and economic standings, comprehensive doctrines, and prejudices remain outside of the original position. Parties are only aware of general facts.

Rawls' intent for the veil of ignorance possesses two key features for my purposes. First, the veil removes any knowledge of one party's conception of the good. While those in the original position are aware that members of their society possess conceptions of the good, they do not know "the content of these conceptions" or the "particular final ends and aims these persons pursue; nor the objects of their attachments and loyalties" (4). These parties are unaware of their own conceptions yet aware that they possess a conception. Thus, they have no predisposition or allegiance to the contents of their own conceptions.

The second point is related to the first. Since the representatives know that those for whom they define the principles of justice have a conception of the good, they do not identify with any particular conception or know their affections after the veil is lifted. As a result of their ignorance, representative parties avoid selecting principles that would benefit certain social groups over another. That is, they do not choose certain principles that further their own interests and their own pursuit of their conception of the good. Rawls explains that the veil of ignorance "removes differences in bargaining advantages, so that in this and other respects the parties are symmetrically situated" (5). These circumstances situate representatives of social groups in the original position to authentically derive the principles of justice as fairness without bias.

For my purposes, I will consider how representatives from the Catholic Church and the LGBTQ community would fair in the original position. While Rawls never explicitly mentions the LGBTQ community as a group, we can assume such a group would have a representative in the original position just like members of other social minorities. As a religious group, the Catholic Church would definitely have a representative in the original position. However, neither party would know their current status or background in society via the veil of ignorance. Next, I provide a more comprehensive account of each group in the original position by analyzing how each group's representatives would behave and what they would pursue behind the veil.

Catholics in the Original Position

As I have stated, we can confidently assume that

Catholics, including CSS, would have a representative in the original position. Catholics do count as equal citizens; they possess a conception of the good and maintain the capacities for a sense of justice and social cooperation. Hence, the Catholic Church as a social group would have a rational representative party active in the original position. In the original position, the Catholic party would subscribe to the same rules and circumstances as the other rational parties.

Since the parties are only aware of general facts behind the veil of ignorance, the Catholic party would be unaware and uninfluenced by the Catholic creed. First, the representative party would have no understanding of Catholic dogma, the Catechism, etc. In short, they would have no understanding of the Catholic conception of the good. Second, the party would be unaware of the status and influence of the Catholic Church. They would be ignorant of the Church's rich and ancient history, the evolution of its size and practices, its controversies and scandals, or its role in today's society. I seek to clarify if and how the Catholic conception of the good and its comprehensive doctrine impact the pursuit of justice as fairness.

LGBTQ People in the Original Position

While we can assume Catholics are represented in the original position, Rawls never explicitly mentions any group based on sexual orientation and/or gender identity in the original position. However, we can assume Rawls would include such a group as the LGBTQ community for a few reasons. First, LGBTQ people count as equal citizens since they also possess the minimum requirements: the capacities for a sense of justice, a conception of the good, and the ability to be cooperative members of society (6). Second, the LGBTQ community is a distinct social group defined by queer characteristics that shape its place in society. Just like any religious or ethnic identity, the queer identity amounts to encompass a social group and to deserve a representative party in the original position.

Regarding the role of the LGBTQ representative, they would function just like any other party in the original position behind the veil of ignorance. The representative neither knows anything about queer history, the LGBTQ rights movement, or queer culture, nor would they be aware if their society has historically been anti-LGBTQ (6). However, the LGBTQ party would be aware of homophobia and transphobia, just as they would know the existence of other bigotries like racism, xenophobia, and sexism.

Similar to individual characteristics like race, class, age, and sex, the representative party would be unaware of their queer identity. While Rawls does

not explicate this point outright, a party's awareness of their queer identity would compromise the original position's effectiveness. Ignorance of one's sexual and gender identity allows the representative party to truly consider and define the fair terms of social cooperation within the state among social groups and institutions (6). Like all other parties in the original position, we should want to avoid any LGBTQ representative shaping the content of the principles in favor of their own group over the interests of others. To fail to do so would lead to the formation of political and economic institutions that fail to serve the interest of justice. By avoiding bias, even if well intentioned, Rawls contends we can move towards a conception of what is truly just.

The veil of ignorance also plays a key part in making room for the LGBTQ party in the original position. As I have already mentioned, representative parties in the original positions have knowledge of general facts. Within their available knowledge, they have an understanding of basic human psychology, as well as how it pertains to social relationships. Hence, as Gray adeptly articulates:

While the person in the original position does possess general psychological knowledge of human beings, including the kinds of goals that persons tend to seek, those goals include a wide range of possibilities. Most people seek out romantic partners, sometimes for short-term relationships and sometimes for relationships that last a lifetime. Most people choose to make the relationship with that lifetime partner public by getting married, yet some do not. Many people desire to have children and raise a family, while some do not. And within all of these relationships are variations in the kind of partner that is sought, including same-sex partners, opposite-sex partners, multiple partners, and sometimes no partner at all. All of these possibilities are options for the person behind the veil of ignorance (6).

This analysis of psychology is crucial when considering family relationships in the original position: there is no clearly defined definitions of what makes good parenting, marriages, and families. Behind the veil, the parties are aware of the variety of such relationships but unaware of their own preferences and endorsements. I heavily rely on this point for my analysis of religious exemptions under Rawls' second principle of justice as fairness.

Consent to the Principles

With both social groups represented in the original position, we can assume that they both would consent to the two principles of justice as fairness. As each rational

party enters into the original position behind the veil of ignorance, each party would also move through the four-stage sequence of defining the principles and formulating a society and its institutions from these codes. Per Rawls' argument, these parties would rationally arrive at the liberal constitutional democratic system he lays out mainly in *A Theory of Justice*.

In the original position, the question surrounding religious exemptions would likely arise as it impacts the formation of a political consensus and informs the behavior of social institutions in the basic structure. Hence, we can use the case of *Fulton v. City of Philadelphia* to present the tension between religious liberty and LGBTQ equality. Secondly, we can draw upon the principles of justice, to which both social groups would consent, to determine the justice of such religious exemptions.

On the First Principle

To investigate how religious exemptions fair in the original position and in the basic structure of society, I will apply Rawls' principles of justice as fairness to CSS's desired religious exemption from working with same-sex couples. I will begin my analysis with the first principle of equality:

1. First Principle: "Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others" (2).

To give equal consideration to both sides, I will examine the effects on equality in both scenarios: the first being as if we grant the exemption, the second being if we deny the exemption to CSS. In both scenarios, I will weigh the impact on same-sex couples and on CSS.

Scenario 1: Religious Exemption Granted

If the U.S. Supreme Court grants that CSS is entitled to a religious exemption from working with same-sex foster parents, the social group most directly impacted would be the LGBTQ community. In other words, CSS is asking for its religious liberty to supersede the liberty of same-sex parents to foster children through CSS's services. Regardless if this is justified or not, we can neutrally agree that same-sex parents and the greater Philadelphia LGBTQ community as a whole would lose out in this scenario.

1. Impact on LGBTQ Social Group

When considering the impact on the LGBTQ community, the effects surround the capabilities for fostering children as well as the status of the LGBTQ identity. Obviously, if CSS chooses not to work with

or license same-sex couples, LGBTQ parents are more limited in their options to foster children. However, I do not think this a strong argument against exemptions: LGBTQ people likely neither seek out nor desire the services of an organization that disapproves of same-sex relationships. Additionally, same-sex foster parents have never actually worked with CSS given that the Archdiocese of Philadelphia does not condone same-sex relationships.

Despite this unrealized hypothetical, there is a real impact on the status of LGBTQ people in society. A ruling in favor of CSS by the U.S. Supreme Court would set precedent that religious exemptions are a legal and a valid means to deny equal treatment. Hence, this type of ruling would inherently create an inequality between opposite-sex and same-sex couples. However, as Rawls points out, some inequalities can be justified for their greater social benefits. I take up this question of justification when analyzing the second principle.

1. Impact on Catholic Social Group

In this first scenario, CSS (as a representative of the Catholic social group) fairs well. A decision allowing a religious exemption would grant CSS's pleas concerning religious liberty and the status of religion in the basic structure. Concerning the first of CSS's benefits, CSS's claim to religious liberty stands. In short, a favorable ruling for CSS would declare that forcing CSS to work with same-sex couples violates their right to equal liberty. By exempting CSS from the City of Philadelphia's Fair Practices Ordinance, CSS advocates that the agency can carry out its function in the basic structure while also expressing its comprehensive doctrine via its liberty. Further, as the parent body of CSS, the Catholic social group also is entitled to utilize its religious liberty in such a way.

Since CSS represents the larger body of Catholic citizens, the Catholic social group also seeks to gain from Scenario 1. If Scenario 1 plays out, then the Catholic social group will indeed experience a social validation of sorts as the U.S. Supreme Court underscores their religious liberty. Some members of the Catholic group may reject arguments acknowledging the inequality for LGBTQ people, regardless if it is justified. For example, some may argue that there is no inequality of liberty; same-sex parents still have the equal liberty to be foster parents just as long as they do not infringe on the religious liberty of CSS and its respective social group.

Scenario 2: Religious Exemption Denied

If the U.S. Supreme Court denies CSS's request for

a religious exemption, it is less clear which social group benefits or suffers in the immediate problem at hand. Concerning equality, there may, in fact, be a net impact for both CSS and same-sex parents. However, concerning precedent, there may very well be an extensive impact on the livelihood of citizens, both LGBTQ and Catholic.

2. Impact on LGBTQ Social Group

As I have already mentioned, CSS reports that no same-sex couples had previously sought out their services prior to the lawsuit. So, practically speaking, one can argue that there is not a gain or loss for both social groups: same-sex foster parents will continue to avoid CSS's services even if CSS cannot turn them legally away. However, the U.S. Supreme Court's rejection of CSS's claim to a religious exemption establishes precedential benefits for the LGBTQ social group, even beyond the realm of foster care services.

Since *Fulton v. City of Philadelphia* can have a precedential impact, the case can potentially benefit the LGBTQ community at large by providing a basis for nullifying the grounds for any religious exemption related to issues of sexual orientation and/or gender identity. If Scenario 2 plays out, the LGBTQ community as a social group stands to gain substantial legal protections. In short, Scenario 2 furthers the efforts for securing LGBTQ equality.

2. Impact on Catholic Social Group

In juxtaposition to the outcome in Scenario 1, the Catholic social group risks the loss of a certain amount of liberty in Scenario 2. If the U.S. Supreme Court denies CSS its requested exemption, then the Court expands the capabilities of LGBTQ advocates to implement similar impact litigation against religious exemptions in other services and sectors, e.g. employment, dining services, education, etc. While this direction favors LGBTQ equality, the Catholic social group's religious liberty wains.

Scenario 2 can potentially impact the standing of Catholics in society as well. Such a decision from the nation's highest court and its majority opinion may turn the public tide against exemptions. In cases involving LGBTQ people and religious exemptions, the public may perceive claims to religious liberty as covert claims of bigotry. Thus, Scenario 2 presents a sticky question: when are religious claims authentic and when are they steeped in prejudice?

Imprecise Results: How do we identify inequality?

From both scenarios, I have identified potential

'winners' and 'losers' of sorts. That said, there is no clear answer as to which scenario is fairer. There is no precise way of weighing the costs and benefits to identify which scenario damages the first principles' guarantee of equal basic liberties among all citizens. To do so, we must establish a coding system to calculate the impact on equality and evaluate the scenarios through a more systematic approach.

Identity as a Measurement

A potential way of evaluating the impact of religious exemptions is to review the role of identity. The two identities involved are the LGBTQ identity and the Catholic identity. However, I will refer to the Catholic identity as a religious identity since the question of religious exemptions in the original position would cover all categories of religious creeds. By evaluating exemptions this way, we narrow our scope of analysis to how exemptions may impact the equality of identities. Additionally, this evaluation then informs if exemptions comply with the first principle of justice as fairness.

Certainly, many religious believers espouse that their religious identity is central to their own identity. An ardent believer may even say that their religious creed is essential to how they define themselves and view their place in the world. I do not doubt the authenticity of such statements and fully support the freedom to such strong convictions. In fact, such religious convictions emphasize the importance of fairly establishing the place of religion in public reason and political institutions. However, identity as a measurement cannot adequately generate an equality index.

I reject the notion that identity is a helpful way of evaluating equality given the variability of identity. While religious identities appear essential to believers, religious identity varies from other forms of identity. Primarily, religious identity is a choice, and I take up this point later on. Secondly, it is impossible to fairly and objectively adjudicate clashes between identities and their claims of discrimination. This issue mainly arises out of differences in kind. For example, some identities are assumed or a product of circumstances: religion, education, class, etc. Others are inherent: race, ethnicity, gender, sexual orientation, ability, etc. Since identities vary, the way in which we treat identities also varies. Here, we see one key distinction between kinds of identities to offer a way out of this complexity. In other words, perhaps we should be warier of inequalities affecting inherent identities more so than those affecting identities that are chosen. Yet, this distinction still may be too easily drawn.

While identity seems to comprise two distinct

types, Robert Plant admonishes that the ideas of Simone de Beauvoir disagree with this seemingly intuitive notion. Plant argues, “Even if one took one’s identity to be a kind of given, whether by biology or inherited culture, it is always possible for an individual to take up his or her own attitude towards what this essential nature is supposed to be” (7). According to Plant, our inborn identity does not require us to fulfill the lifestyle attributed to that identity. If humans had to fulfill their identity, Plant explains that this enforcement would “extinguish the radical freedom which human beings have—even if it is freedom limited to taking up an inner mental attitude towards one’s identity as might be the case, for example, of someone with a severe physical handicap” (7). Rather, our identity is unfixed, fluid, and adaptive to our own dispositions. In the case of *Fulton v. City of Philadelphia*, this muddies the line between LGBTQ and religious identities. While being LGBTQ is not a choice, there still exists a choice to embrace and act upon one’s identity. This may not be the way many LGBTQ people and advocates view the queer identity. Nonetheless, I still seek a more objective, less debatable methodology to review the question of equal basic liberties in consideration. Hence, identity is not the best tool to use to adjudicate tensions in the present issue.

The Harm Principle

While identity does not serve our purposes for evaluating religious exemptions under the first principle, Plant offers another methodology that does: the harm principle. Rawls holds that equal citizens are rational agents who possess a conception of the good and maintain the capacities for a sense of justice and social cooperation. As members of a liberal democratic society, citizens are entitled to be treated with concern and as equals. If we accept this view as Rawls does, Plant advises that “there should be prohibitions of activities that cause harm to others, coupled with the idea that one such form of harm would be an action that undermines the civil status of particular individuals as free and equal citizens” (7). In short, the harm principle holds that matters of disagreement and inequality should be analyzed by considering the harm of certain policies and actions. Particular concern and protections should arise whenever damage is done to the civic equality and the status of certain groups or individuals.

Plant’s idea resembles Rawls’ first principle in that both are concerned with equal basic liberties and ensuring fairness; the first principle and the harm principle are less concerned with identity. Unlike the principle of identity as a measurement, the harm principle accounts for all the particularities and variability of situations that accompany issues surrounding identity. Further,

the harm principle evaluates any disruptions to the first principle’s guarantee of equal basic liberties. Thus, the harm principle best evaluates the justice of religious exemptions under the first principle. Given its utility, we can evaluate the potential harm of exemptions.

Civic Harm

In the case of a Catholic foster care agency like CSS, the agency may ask for an exemption from servicing same-sex foster parents since such an endorsement violates their comprehensive doctrine, conception of the good, and religious identity. As Plant predicts, CSS argues that the U.S. Supreme Court should accept the right of Catholic adoption agencies to legally discriminate against same-sex couples as long as CSS informs the couples of other local Philadelphia foster care agencies to service them. While this proposed solution seems to respect difference while still allowing same-sex couples to foster children, Plant notes a key problem inherent in this solution. If we commit ourselves to full adherence to the principles as Rawls claims any rational agent would do, the proposed solution enacts civic harm. Plant elucidates this point: “[T]here could be no case for such exemptions from general laws on such conscientious grounds because they would permit harm to be done to the civic status of particular individuals and that harm would violate a fundamental principle” (7). Hence, Scenario 1 would enact undue harm against the LGBTQ social group while giving religion a special place in the basic structure – a place it does not hold in Rawls’ theory of justice as a fairness.

In the case of an exemption, the LGBTQ social group bears the civic harm of the policy since the policy limits their liberty to enjoy a public service, to become licensed foster parents, and to build a family. Moreover, such a policy establishes a separate-but-equal formula; a same-sex couple can become foster parents, but not through all the same foster agencies as opposite-sex couples. To underscore this harm, we can reiterate this harm on equality in Rawlsian terms.

CSS’s desire for religious exemption threatens the status of the LGBTQ social group in the basic structure, and thus the equality of its members. The first principle emphasizes the political notion that all members of the society are free and equal citizens. Citizens’ freedom encompasses their liberty to have a certain conception of the good. Rawls emphasizes the importance of such liberties in his *Justice as Fairness*: “[They] provide the political and social conditions essential for the adequate development and full exercise of the two moral powers of free and equal persons” (5). As equal citizens, LGBTQ citizens and those in same-sex couples enjoy the equal basic liberty to form their

own conception of the good and pursue it. For LGBTQ people, this conception of the good may very well entail the desire to “find a partner, get married, and create a family,” or even become foster parents (6).

While citizens have the liberty to conceive a conception of the good, Rawls enunciates that citizens may not actually have a right to that realized good. He lays out two reasons to “reject a conception of the good that is not in line with the political conception of justice as fairness and the overlapping consensus, although he says there may be more” (5). Rawls writes:

[T]hose doctrines and their associated ways of life [that] may be in direct conflict with the principles of justice; or else they may be admissible but fail to gain adherents under the political and social conditions of a just constitutional regime. The first case is illustrated by a conception of the good requiring the repression or degradation of certain persons on, say, racial, or ethnic, or perfectionist grounds, for example, slavery in ancient Athens or in the antebellum South. Examples of the second case may be certain forms of religion (5).

With these guidelines in mind, the LGBTQ community’s conception of the good to foster children does not appear to violate either of the two rules Rawls lays out. Rather, a same-sex couple’s conception of the good involving a family or fostering children is simply a particular notion of family as a social institution within the basic structure. In fact, CSS appears to be the one in violation of the second rule as its certain conception of the good harms the status of LGBTQ equality in a just constitutional regime. CSS desires the state to prefer its conception of the good to allow for an exemption albeit the impact it has on the basic liberties of LGBTQ people and same-sex couples. However, I do not address yet whether this inequality is justified, especially since I concede that the denial of such exemptions poses certain inequalities for CSS. While the harm principle demonstrates an inequality, the harm principle cannot resolve whether it should be allowed or not. To resolve the issue of whether this inequality against LGBTQ people is just, we must turn to Rawls’ second principle of justice.

On the Second Principle

In the previous section, I have laid out that CSS’s religious exemption violates the first principle of justice as fairness by harming the LGBTQ community’s guarantee to equal basic liberties. However, my analysis of the second principle of justice seeks to review if this inequality should stand.

2. Second Principle: “Social and economic

inequalities are to be arranged so that they are both...

- a. Reasonably expected to be to everyone’s advantage, and
- b. Attached to positions and offices open to all” (2).

I argue that this inequality fails to meet the second principle’s criteria as it denies same-sex couples fair and equal opportunity, and worsens the conditions of the most vulnerable—foster children in this case.

Fair and Equal Opportunity to Family

The primary reason exemptions are unjust surrounds their violation of the second principle’s fair and equal opportunity requirement. The second portion of Rawls’ second principle of justice stipulates positions of authority and responsibility must be open to all (2). As Reed points out, Rawls “distinguishes this type of equal opportunity from what he calls formal equality of opportunity in that it addresses the unequal chances that some would face under a formal scheme” (8). The guarantee of fair and equal opportunity to pursue official roles are of the utmost importance:

[I]f some places were not on a fair basis to all, those kept out would be right in feeling unjustly treated... They would be justified in their complaint not only because they were excluded from certain external rewards of office but because they were debarred from experiencing the realization of self which comes from a skillful and devoted exercise of human duties. They would be deprived of one of the main forms of human good (2).

In this case, we can apply this important demand of the second principle. If an exemption is granted to CSS, CSS and the City would limit the ability of the LGBTQ social group to become foster parents and to exercise their conception of the good, which may involve forming a family. However, since Rawls’ stipulation for fair and equal opportunity only concerns positions of authority and responsibility in the social basic structure, I must first investigate whether foster parenting and leading a family meets these requirements to apply the second principle.

Parenthood as a Role of Authority and Responsibility

The role of parents in the moral development of children establishes parenthood as a role of authority and responsibility in the basic structure. Parents oversee the initial stages of moral development by instilling within their children the civic virtues that largely

direct the outcomes for their children in society. Indeed, parents are tasked with raising the future citizens of a liberal democracy. This alone underscores the important responsibility and authority of parenthood in the basic structure in producing future generations of citizens.

Parenting is also a social good that Rawls defines as “rights, liberties, and opportunities, and income and wealth” (2). Further, these social goods comprising liberty and opportunity are managed and defined by major social institutions in the basic structure. One may pursue the liberty and the opportunity to become a parent, or even a foster parent, as part of their rational plan of life. Hence, those with this desire rely on the institution of the family to make this dream possible. While we may consider the family as just a grouping of people in a relationship either by blood or marriage, we can think of the family as a social institution that makes up a part of the social basic structure. By analyzing how the institution of the family impacts the fair and equal opportunity of parents, I can more clearly evaluate if an exemption’s harm against LGBTQ equality is justified. As Reed notes, CSS’s desired result of “depriving people of equal consideration comprises a violation of equal opportunity” to become foster parents (8). Given the stakes of the exemption, we must evaluate whether the social institution of the family deals fairly with same-sex foster parents.

The Family as an Institution in the Basic Structure

Early on in *A Theory of Justice*, Rawls includes the family as one of the major institutions comprising the basic structure of a liberal constitutional democracy. As a major social institution, the “monogamous family” is a reflection of social justice (2). The family helps to establish the designation of fundamental rights and liberties, citizens’ basic duties, and the division of social advantages (9). In his *Political Liberalism*, Rawls also lists “the nature of the family” as one of the fundamental social institutions that comprise the basic structure (4). Across both of Rawls’ works, no prescribed definition and formulation of the family appears, thus no structure of the family should be assumed. Rather, the family and its role as a social institution become apparent and specified through the four-stage sequence in the original position.

During the later stages of the sequence, the parties in the original positions formulate the necessary social institutions for realizing the first principle, i.e. an equal guarantee to basic political liberties. At this stage, we may focus mostly on the role of government and economic institutions to meet the demands of fair value. However, we must also recognize here the incredible role of the family as an institution. The family as a

social institution plays a key part in establishing and implementing the first principle of justice as fairness. Primarily, the family creates an environment in which children and individuals develop a comprehensive doctrine, i.e. their capacity to be partial (10). Within the family setting, we first encounter ideological beliefs surrounding religion, morality, and the conception of the good. The family catalyzes the growth, expansion, and reformulation of beliefs and ideas as we grow. Our ideas and beliefs may very well change and shift as we age, yet we can trace our *first steps* of critical evaluation and speculation to the family. Hence, the family is a crucial space for one to exercise our capacity to be partial. Indeed, our capacity to be partial is a primary good; it is an expression of our basic liberty as the “freedom of thought.”

The Inequality of the Family

Regarding the second principle of justice as fairness, the family as a social institution becomes complex and problematic. Rawls even admits, “the principle of fair opportunity can be only imperfectly carried out, at least as long as the institution of the family exists” (2). Despite fostering the capacity to be partial as a primary good, the family creates a problem of inequality. Even if a society meets the two principles of justice, the family may act as a barrier to equal opportunity among individuals. I should note here that I am not questioning justice within the family, but rather the justice of the family itself. I argue that the family is indeed just and is crucial for guaranteeing the second principle of justice. To argue my point, I will review the role of the family in moral development and consider alternatives to the family to underscore it as our preferred option.

Taken as a fundamental aspect of society, the family produces unjust effects regarding opportunity due to wealth, class, race, etc. However, I echo Rawls in that the institution of the family is justified for its vital role in the moral development of democratic citizens. He develops this point through his three psychological laws (2). Rawls cites the origin of moral development within the family:

First Law: given that family institutions are just, and that the parents love the child and manifestly express their love by caring for [the child’s] good, then the child, recognizing their evident love of [the child], comes to love them (2).

The proceeding two moral-psychological laws draw on this initial familial relationship. From the first law, a person develops their capacity for “fellow feeling,” friendship, and trust as they recognize that

they and those for whom they care benefit from just social arrangements. As a result, the person comes to support these just social arrangements and performs their obligations and duties to uphold them. According to Rawlsian psychology, the just citizen ascends from the following psychological principle: “the child comes to love the parents only if they first manifestly love [the child]” (2).

Through the family institution, the child solidifies the basis for just citizenship and the morality of association (2). The child possesses the ability to love, but primarily comes to exercise this upon recognition of the parents’ love for the child. The child, as a rational self-interested being, comes to recognize the benefits of the parents’ love expressed through their actions. This parental love triggers the child to reciprocate this love as a self-benefitting action. Eventually, this reciprocation may become supererogatory as the child develops. Regardless, this early relationship establishes the desire for upholding a just system of social arrangement and cooperation, thereby reflecting the justice of the family.

By seeking a religious exemption, CSS tacitly asks the City to adopt a preferred methodology of childrearing that accords with Catholic doctrine. Hence, CSS asks the City to give special privileges to an agency that finds homosexuality and same-sex relationships inappropriate for raising children. In doing so, CSS seeks to rank the familial structures and childrearing environments within the public realm of government. I find this problematic based on the following two accounts: 1.) the restriction of the family and 2.) the limitation of the second principle.

First, I argue that CSS’s lawsuit seeks to narrow the definition of a proper family, thereby restricting the family as a social institution. According to Catholic doctrine, homosexuality and same-sex relationships are “innately disordered” and require abstinence to maintain a moral state of grace. Hence, same-sex or LGBTQ foster parents fail to meet CSS’s considerations of a safe and qualified household for foster children. By petitioning the City for a religious exemption, CSS asks the City to grant the agency a special privilege that indirectly asks the City to favor a certain definition of the family over Rawls’ broader notion. Contrary to CSS, Rawls loosely defines the family, which allows for familial environments that include same-sex couples and LGBTQ parents. Thus, CSS asks the City to favor its comprehensive doctrine and partly allow for the institution of the family to adopt its comprehensive doctrine – thereby restricting the family.

This is not to say that the traditional Catholic notion of a heteronormative, cisgender family is bad. Rather, what is “bad” is diminishing any nontraditional family unit. Regardless if the family unit is led by an individual

or a couple, or a heterosexual union or a homosexual one, Rawls rightly allows for an unspecific model of the just family unit. Put simply, as long as the family unit provides moral and psychological development for the rearing of just and good citizens, we should be satisfied with *that* family unit based on the principles of justice.

Foster Children and the Difference Principle

The restriction of the family leads me into my second objection. By narrowing the definition of the family, CSS complicates the City’s role as a social institution to uphold and exercise the principles of justice. By denying same-sex couples and LGBTQ foster parents, CSS fails the least advantaged, i.e. foster children, by narrowing the foster care network. In short, they reduce the second principle’s fair equality of opportunity. Further, this inequality is not justified since it does not benefit the least advantaged of society – a group the City has a vested interest in protecting as the main governmental institution.

In *A Theory of Justice*, Rawls defines what he calls the difference principle:

Then the difference principle is a strongly egalitarian conception in the sense that unless there is a distribution that makes both persons better off (limiting ourselves to the two-person case for simplicity), an equal distribution is to be preferred (2).

Through this principle, I can evaluate if an inequality is to the advantage of everyone by investigating the impact it has on the least advantaged in society. In the case of religious exemptions, CSS is more concerned with a violation of religious liberty than the care of the child. If the exemption were to stand, a legal door would be opened for other foster care agencies to turn away same-sex couples. The risk of such an outcome would directly threaten the wellbeing foster children, who are extremely vulnerable and dependent upon social institutions.

Secondly, an exemption would threaten the social values of the LGBTQ social group to the advantage of the Catholic social group. Rawls writes, “All social values – liberty and opportunity, income and wealth, and the bases of self-respect – are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone’s advantage” (2). If the exemption holds, the LGBTQ community faces an inequality of basic liberties and opportunity in violation of the first principle as well as in violation of the second since it is not to everyone’s advantage.

If we reduce the opportunity of the LGBTQ community to foster children, then we worsen the

conditions for foster children who are the most disadvantaged in the foster care system. With less opportunity for same-sex parenting, there is also less opportunity for foster children to find placement in a loving and supportive home. To echo Rawls, “Injustice, then, is simply inequalities that are not to the benefit of all” (2). Since exemptions fail both stipulations of the second principle, religious exemptions fail both the first and second principles of justice.

The City, the Family, and CSS

Based on my analysis of the family institution, we clearly see how the family is indeed a part of the basic structure and that the second principle’s fair and equal opportunity clause rightly applies to it. I also assert that the government, or in this case the City of Philadelphia, has a major stake in overseeing the formation of the family in accordance with the principles of justice. As the foremost political institution in Philadelphia, the City has a vested interest in the family, as I have said before. Rawls provides guidance for the government to do so here:

[T]he government would appear to have no interest in the particular form of family life ... except insofar as that form ... in some way affect[s] the orderly reproduction of society over time. Thus, appeals ... against same-sex marriages, as within the government’s legitimate interest in the family, would reflect religious or comprehensive moral doctrines. Accordingly, that interest would appear improperly specified. Of course, there may be other political values in the light of which such a specification would pass muster: for example, if ... same-sex marriages [were] destructive of the raising and education of children (11).

Given that same-sex relationships have been productive in raising children, I contend Rawls would disagree with CSS and reject any justification for the harm of religious exemptions. Since the City must adhere to the two principles of justice as fairness, the City must make an informed decision to best handle the tension between religious liberty and LGBTQ equality. Rawls holds that only traits pertinent to raising children should matter to how the City regulates the institution of the family to ensure proper moral development of citizens. For this reason, CSS makes the case that same-sex relationships are not conducive to moral development since their comprehensive doctrine holds that sexual orientation is a pertinent trait for parenting. Due to their beliefs, CSS asks the City to make an

exemption not to violate their identity as defined by their doctrine, conception of the good, and rational plan of life. I have argued here that the City must maintain the neutrality of the family institution to allow for fair and equal opportunity to foster children. While we do not want to violate CSS’s religious liberty, the City and the U.S. Supreme Court must look at this case through the second principle to truly see if a violation occurs. In the next section, I lay out why a violation of religious liberty does not occur to extend my argument as to why religious exemptions against same-sex couples are unjust.

So, is it just?

In the previous section, I have applied Rawls’ principles of justice to religious exemptions and have shown that they fail on both accounts. However, I can expand my argument by providing a more robust Rawlsian analysis of religious exemptions. To assert the injustice of exemptions, I explain the role of CSS’s choice and how the separation of church and state further establish the injustice of exemptions. I also reply to some potential objections that I may face in favor of religious exemptions.

The Role of Choice

I have used Rawls’ theory of justice to navigate the tension between religious liberty and equality. However, I have yet to emphasize the role of choice that looms in the background of this debate. CSS claims the City violates its religious liberty and freedom of expression by forcing CSS to comply with the Fair Practices Ordinance by serving same-sex couples. Yet, CSS knowingly and voluntarily entered into a taxpayer-funded, public contract with the City of Philadelphia Department of Human Services. This reality largely shifts the dynamic and the relationship between the City as an institution and the two involved social groups.

Establishment and Separation: The Role of Religion

Although *Fulton v. City of Philadelphia* deals with LGBTQ equality and the justice of religious exemptions, the implications of the case also influence the role of religion in society. In this section, I will summarize some major points in favor of exemptions that derive from a pro-religion view – not an anti-LGBTQ standpoint. Here, I draw on arguments from Sandel’s “encumbered self.”

Encumbered Selves and the Special Case for Religion

I do not deny that religious persons, like the Catholic social group and CSS, ardently believe that their comprehensive doctrines lie at the center of their identity. Nor do I deny that religious persons feel compelled to action as a requirement of their faith. As Sandel would say, the faithful have “encumbered selves” (12). In other words, Sandel explains that their religious beliefs fundamentally define who they are, provide meaning to their lives, and shape their identities. The encumbered self is essential to the individual; it pervades through their life and informs their goals, ends, and obligations to oneself and others. In criticism of Rawls, some claim a rational approach to justice such as the principles of justice fail to account for the encumbered self. That is, my Rawlsian analysis of *Fulton v. City of Philadelphia* inherently fails.

Given the dominance of the encumbered self, the role of religion takes on a more involved place in the public sphere. Plant explains that “[t]hese beliefs, they might think, have to be manifested in public in a whole variety of ways and that manifestation is intrinsic to and is mandated by their beliefs” (7). Moreover, when compelled, the state cannot ask a religious person to leave their faith at home. To do so would be to violate their identity. This also raises the question of governmental powers. Such an action would greatly augment the power of public authority into the sacred realm of personally held beliefs (7). If the City took such action against CSS by denying an exemption, critics claim we risk diminishing religious protections blindly for the sake of unnecessary government powers.

Government Neutrality

I begin my response to the above objections by first reiterating the danger of evaluating justice based solely on identity. First, I reject the notion as I have already shown how the harm principle provides a better frame of analysis for claims of injustice and inequality. Second, I again emphasize CSS’s voluntary choice to work with the City. While CSS may claim the City prevents them from their desired ministry, I remind CSS and my critics that CSS can still carry out its functions. CSS makes its own choice and acts accordingly without the City by rejecting its nondiscrimination policies.

To expand my argument, I rely on the essential function of the U.S. Constitution’s Establishment Clause that guarantees the separation of church and state. In *Political Liberalism*, Rawls does allow for the state to endorse and promote certain virtues and values; however, these values are only political values. Cross helps us define these political values: “As with the concept of a political value, the best way of understanding this concept is that a virtue is political

if and only if it is reasonably shareable” (13). Given this definition, the state and accordingly the City can neither promote nor endorse any comprehensive doctrines “since the burdens of judgement entail that they are the subject of reasonable disagreement” (13). Thus, the City cannot allow CSS to shape the institution of the family with its own comprehensive doctrine at the expense of LGBTQ equality and the wellbeing of foster children.

The City also signals a message to the public and other social groups if it permits CSS to enjoy a religious exemption. Indeed, the City risks alarming other religious groups, like Muslims and Jews, that the City aligns itself with the belief system of the Catholic social group. This act threatens the political community and the formation of a political consensus. Hence, the City violates its required neutrality under the U.S. Constitution. Laborde warns that:

If a state attaches itself too closely to the symbols of one or more religion(s), this is equivalent (in the eyes of dissidents) to the state ‘endorsing’ religion in ways that deny civic recognition to non-adherents to the faith. It would ‘send a message to non-adherents that they are outsiders, nor full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community’ (14).

In this way, the City’s actions indirectly, or rather symbolically, endorse CSS’s comprehensive doctrine, thereby privileging the Catholic social group over others and diminishing the self-respect the LGBTQ community and other groups derive from the City as a social institution.

The Power Gap in Rawls

Advocates for an exemption crucially fail to recognize the power dynamics at play among social groups. This is critically in the background of *Fulton v. City of Philadelphia*. The LGBTQ community has faced generations of state-sponsored discrimination and even criminalization. From sodomy laws to “Don’t ask, Don’t tell” policies, the LGBTQ community undeniably possesses a history of discrimination on the basis of an immutable trait. On the other hand, the Catholic Church, including CSS, is an international organization with a history of political, social, and economic influence spanning over a thousand years. Catholics have indeed faced discrimination, but modern public reason does not challenge the status of the Catholic social group as its members have risen to political and socioeconomic success in America.

To arbitrate a clash between LGBTQ and Catholic

social groups in Philadelphia without contextualizing the power dynamics at play is to ignorantly abdicate the role of the City as a defender of justice and equality. Young carefully makes this argument in her review of Fiss' 1976 work. She explains that policies like religious exemptions appear neutral; however, "The policy nevertheless oppresses and stigmatizes gay, lesbian and bisexual people, and is intended to do so. It reinforces a generalized status inequality of same sex-oriented people, as less than full citizens worthy" of parenting foster children (15). In short, these policies fail to account for the power dynamics and history of social groups.

For this reason, I suggest that proponents of the exemptions fail to understand how an exemption reinforces an already-established, powerful organization funded by the City against a social minority with a history of bigotry for an innate trait. Despite having used Rawls' work to analyze *Fulton v. City of Philadelphia*, I find an issue with Rawls that Young elucidates. Rawls attempts to leave out bias and anything beyond general facts in the original position. This move generates critiques like Sandel's encumbered self. However, I suggest the Rawlsian theory must expand its theory to include an analysis of power dynamics when forming social institutions and legislating their management of social groups when carrying out the principles of justice. I admit I do not have the solution and the guidelines as to how Rawls could exactly account for differing, systemic, and inequitable power dynamics. Nonetheless, I will offer some thoughts for how we may reconceive a limited ignorance behind Rawls' veil of ignorance in the original position.

The Injustice of Exemptions

In sum, I have produced a Rawlsian analysis of religious exemptions, in both *Fulton v. City of Philadelphia* and in general. After situating the LGBTQ community and Catholic Church as social groups in the original position, I first proved that exemptions create an inequality for the LGBTQ community based on the harm principle. I then proved that exemptions violate the second principle of justice for denying same-sex couples the fair and equal opportunity of fostering children via the social institution of the family. Here, I also showed that CSS would corrupt the neutrality of the family by having the City endorse its comprehensive doctrine, as well as reduce the City's capacity to care for foster children, i.e. the least advantaged. Thus, religious exemptions are unjust according to Rawls' theory of justice as fairness. My goal has never been to attack religious liberty, but rather to preserve it. Indeed, discrimination in the guise of religious freedom is a

perversion of faith and liberty.

Rawls, Fulton, and the U.S. Constitution: Defining Justice

As the U.S. Supreme Court prepares to hear oral arguments for *Fulton v. City of Philadelphia* in October 2020, I feel the need to explicitly reiterate that Rawls' version of justice does not align perfectly with justice according to the U.S. Constitution. Rawlsian justice is not congruent with constitutional justice. In fact, Young's analysis of Fiss' 1976 work lays this difference out very clearly. She elucidates that Fiss challenges the Equal Protection Clause "partly because that interpretation seems to render invalid those legal actions whose purpose is to equalize the status of a hitherto subordinated group" (15). In the case of exemptions, we can apply this inversely. If we allow exemptions, CSS attempts to equalize the status of its liberty. Yet, it neglects its privilege of social power over the LGBTQ community. Young further explains, "If we understand the purpose of equal protection as guaranteeing equal status for all groups, then laws that single out groups for special attention in order to equalize their status are not only permissible but may be required" (15).

In this case, nondiscrimination protections are required to support equality efforts for the LGBTQ community to account for social power dynamics that have continued to oppress them. Justice requires enactive and proactive action, yet the sluggish and arduous process of shaping and molding jurisprudence and precedent creates challenges and questions for this task. Precedent may very well protect fundamental rights while enshrining injustice via stare decisis reasoning. Regarding the 14th Amendment, this tension appears and presents a crossroad for the next generation of jurisprudence. The U.S. Supreme Court has not always interpreted the Equal Protection Clause in the way favorable to the LGBTQ community, but I urge the Court to heed Rawls and heed Young – LGBTQ equality depends on it.

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