Reconciling Equal Protection and Religious Liberty

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When the U.S. Congress passed the Religious Freedom Restoration Act (RFRA) in 1993—by a 97–3 vote in the Senate and by unanimous voice vote in the House, quickly followed by President William Clinton’s signing the bill into law—it seemed a rare moment (albeit, not as rare then as it would be today) of congressional consensus.

What was that consensus? Nothing less than a widespread belief shared by many on both the right and the left, as well as by a broad swath of the nation’s religious communities, that the U.S. Supreme Court had erred in its 1990 decision in Employment Division v. Smith, 494 U.S. 872, which set forth a narrow view of the protections accorded religious practice under the First Amendment’s prohibition on government abridgment of the free exercise of religion.

In RFRA, Congress enacted legislatively what had, until Smith, been understood by many to be the applicable constitutional standard, namely that a law could not be enforced so as to prohibit religious conduct unless justified by a compelling state interest that cannot be satisfied by more narrowly tailored means. In Smith, the Court rejected that understanding of the Free Exercise Clause, reading its earlier cases to mean that the compelling interest test applied only in a limited class of religious liberty cases, and saying that the government may constitutionally regulate religiously motivated conduct subject to the same reasonableness standard applied to regulation of other conduct—so long as it does so through “neutral law[s] of general applicability.”

The broad consensus leading to RFRA’s passage notwithstanding, the high court ruled in 1997 that in enacting that law Congress had exceeded its authority under section 5 of the Equal Protection
Clause, at least insofar as the law purported to impose the compelling interest test on action by the states, *City of Boerne v. Flores*, 521 U.S. 507 (1997) (RFRA continues to be applicable to the federal government, as an exercise of congressional plenary authority).

Almost immediately, many of the same groups that had come together to press for passage of RFRA began to urge that Congress pass a narrower bill—the Religious Liberty Protection Act (RLPA), introduced in 1998—that would rely on Congress's powers under the Commerce and Spending Clauses of the Constitution. While the bill was greeted early on with bipartisan support in both houses of Congress, with—it seemed at first—the same broad support among religious liberty advocates, storm clouds quickly began to form. By the end of 1999, having passed in the House on what was—unlike RFRA’s passage by acclaimation a scant few years earlier—almost a party-line vote (largely Republicans for, Democrats against), it became evident that this second effort to effectuate a general “compelling standard” test was not going to clear the Senate. Instead, RLPA was shelved, and Congress moved to a narrower bill, the Religious Land Use and Institutionalized Persons Act (RLUIPA), which provided enhanced religious liberty protections in two specific situations: the use of land for religious purposes and religious liberty claims by prisoners. This bill was passed handily by both houses of Congress and signed into law by President Clinton in 2000, and it remains in effect today.

The collapse of a consensus in support of a broad standard protecting religious free exercise between the pendency of RFRA and RLPA was the first sign of a paradigm shift, in some quarters at least—as an increasing number of civil rights groups began to articulate the view that so broad a standard, while intended to safeguard the core constitutional principle of religious liberty, could undermine another fundamental constitutional concern, that of ensuring equal protection under the law. This shift grew directly out of the fact that, even as RLPA was pending, lawsuits began to come to the fore involving landlords of small properties who, because of religious objections to renting apartments to unmarried couples, sought to be exempted from state and local laws prohibiting housing discrimination on the basis of marital status. See, e.g., *Thomas v. Anchorage Equal Rights Comm’n*, 165 F.3d 692 (9th Cir. 1999) (holding for the landlord), vacated on other grounds, 220 F.3d 1134 (9th Cir. 2000) (en banc); *Smith v. Fair Employment and Housing Comm’n*, 913 P.2d 909 (Cal. 1996) (holding for tenants).

It quickly became evident that these cases had implications for cases in which landlords might want to refuse to rent to same-sex couples, notwithstanding state or local laws prohibiting discrimination on the basis of sexual orientation. These local laws
represented a signal achievement of the civil rights community as, over the years—at federal, state, and local levels—an expanding class of populations that had historically been victimized and marginalized were afforded protection against discrimination in a variety of contexts (i.e., employment, public accommodation, education, housing).

The opposition to RLPA, at least if civil rights claims were not exempted from its scope, was by no means a uniform response to the potential conflict of interests. Not surprisingly, conservative supporters of RLPA—that, in any event, had policy, if anything, in opposition to laws prohibiting discrimination on the basis of sexual orientation—were opposed to carving out any such exception. But it was also the case that there were progressive groups, with long-standing policy in support of LGBT rights, that believed that such a global exception, even to protect civil rights, was not necessary and would have a detrimental impact on religious freedom.

In testimony before a Senate committee in 1999, Prof. Douglas Laycock (now at the University of Virginia) pointed out that there were “examples [of cases in which there should not be such an exception] that should have been uncontroversial—ordination rules, which sometimes involve sex discrimination; rules for membership in religious organizations, which generally involve religious discrimination; and laws in some states that prohibit employment discrimination on the basis of ‘any lawful off-the-job activity.’” Statement of Douglas Laycock, Religious Liberty, Hearing Before the Senate Committee on the Judiciary, 106th Cong. 99–101 (1999), as cited at Douglas Laycock, “Sex, Atheism and the Free Exercise of Religion,” 88 Univ. of Detroit Mercy L. Rev. 407 (2011).

It was also noted by advocates for RLPA that there were myriad other interests that might be singled out for special treatment; the only way to safeguard the principle of broad protection for the free exercise of religion from government incursion was to rely on the courts to apply the compelling interest balancing test. With respect to the assertion of RLPA as a defense to a civil rights claim, these advocates argued the courts were likely to find in most cases that the state’s interest in protecting individuals from invidious discrimination was, in fact, a compelling interest—and one that could not be satisfied by more narrowly tailored means than through its uniform application.

This dynamic—of opposition by parts of the civil rights community to religious liberty legislation so long as there is any prospect that a religious free exercise defense might be asserted in response to a civil rights claim—was, as has already been noted, successful with respect to RLPA and has continued to the present day. The Workplace Religious Freedom Act (WRFA)—legislation that would
enhance the ability of an employee to obtain from an employer a reasonable accommodation of his or her religious practice (Title VII of the Civil Rights Act of 1964 already obligates an employer to provide such an accommodation absent an “undue hardship,” but that obligation has been interpreted by the courts in a mostly very crabbed fashion)—has been introduced in various forms over the last two decades but has never become law.

Although, to be sure, WRFA has never been a bill much loved by business interests, one of the reasons for the lack of success in moving this legislation to passage has been the opposition of civil rights groups asserting the same types of concerns as were raised with respect to RLPA. These groups assert that, were WRFA to become law, some employees might claim the right to a religious accommodation that allows them to berate coworkers for being gay or Mormon or agnostic, even if that disrupts the workplace—or to be allowed to refuse to dispense contraceptives, even if that means that an employer’s clientele are denied goods that they are lawfully entitled to receive.

As with RLPA, supporters of WRFA include among their number progressives who are themselves very much committed to LGBT civil rights and reproductive rights—and who dispute this analysis. These defenders of WRFA assert that the creation of a hostile work environment for others, often amounting to a violation of long-standing prohibitions on harassment, would clearly impose a significant burden on the employer—and, with respect to the reproductive health scenario, they assert that such an accommodation could not, by any stretch, be required if it meant that the services in question were no longer available to the public—because to require such an accommodation would clearly impose an undue hardship on the employer. Whatever the merits of the contending arguments, the political reality is that WRFA, as was the case with RLPA, has not moved forward to passage. (To be fair—and in another parallel to RLPA, where opposing civil rights groups swung behind a narrower RLUIPA—many of those asserting civil rights concerns have supported a “targeted” version of the bill that would enhance protection for observance of religious time, and for religious observances involving grooming and dress requirements, while leaving in place the existing—lesser—level of protection for other forms of religious observance, including religious objections to job duties.)

In the years since Employment Division v. Smith and Boerne v. Flores, and the ensuing failure to pass RLPA, a number of states check have moved forward to enact their own versions of RFRA (often termed as “state RFRAs”), either as state legislation or as amendments to state constitutions—and, in a number of cases, state constitutional provisions have been interpreted by their respective courts as providing RFRA-level religious liberty
safeguards. Some of these state statutes have been enacted with specific coverage exclusions, mostly not addressed to civil rights claims. Texas’s RFRA, however, bars the use of that law as a defense to civil rights claims, except with respect to the performance of certain duties for a religious organization.

There are also many states that have their own laws requiring reasonable religious accommodation. A California religious accommodation law, enacted in September 2012, specifically provides that a religious “accommodation is not required under this subdivision if it would result in a violation of this part or any other law prohibiting discrimination or protecting civil rights.” In contrast, New York’s workplace religious accommodation law, expanded in 2003 from a long-standing law protecting Sabbath observance to more broadly protect religious observance, says nothing about how it intersects with civil rights claims, notwithstanding which there has been no epidemic of assertions by employees of a right to harass their colleagues.

The issue of accommodation of religious practice, and its intersection with equal protection concerns, received significant attention in 2012—indeed, became implicated in the presidential election—as a result of the Obama administration’s announcement early in 2012 that religiously affiliated organizations would be required, along with other employers, to pay for insurance plans that offer free birth control to their employees. Although churches themselves are exempt from the mandate, religiously affiliated institutions—such as hospitals, colleges, charities, and social service agencies—are by and large subject to the obligation to provide this type of coverage. Following strong criticism in some sectors that this policy was an assault on religious freedom—coming not only from the Roman Catholic bishops, from whom dissent would have been expected, but also from many Catholic Democrats as well as some progressive columnists and religious leaders—the administration put forth an alternative approach under which the cost of this coverage is to be shifted to health insurance companies.

This bought peace only from some quarters. Some critics pronounced themselves satisfied by the revised approach, or at least praised it as a good step forward while noting some practical questions about how it would work in practice (for instance, the administration’s amended approach provides no relief to self-insurers). For others, however, antipathy to the mandate continued unabated—thus, the U.S. Conference of Catholic Bishops maintained that Catholic agencies would still effectively be paying for the coverage, and would, in that and other ways, remain linked directly to conduct that they deem religiously objectionable. In November 2012, as it became evident that the election results had left the Health and Human Services (HHS) regulations a live issue,
Timothy Cardinal Dolan of New York, head of the Conference, asserted, as he had previously, that Catholic institutions would not comply with the mandate, leaving open the possibility that the Church might be prepared to pay high fines incurred by noncompliance, or even close its hospitals and other agencies. If this last possibility seems far-fetched, consider that Catholic agencies providing adoption services in Massachusetts closed their doors when the state compelled those agencies to place children with same-sex couples, notwithstanding that there were numerous other agencies in the Bay State ready, willing, and able to do so.

On the other side, there were those who not only supported the HHS mandate, but also questioned why churches were not also brought within its scope—arguing that the only conscience that matters ought to be the conscience of the woman in question, whose option to have affordable birth control should not be dictated by the religious beliefs of her employer. Thus, Cecile Richards, president of the Planned Parenthood Federation of America, said in February 2012, “Birth control is basic health care and women should have access to birth control, no matter where they work. The Obama administration’s birth control benefit . . . includes an expansive refusal exemption, allowing approximately 335,000 churches and houses of worship to refuse to provide birth control for their employees.” Commenting on this controversy, Prof. Jonathan Sarna of Brandeis University asserted that the notion that a religiously affiliated hospital should not have “to provide employees with an insurance policy that facilitates acts violating the organization’s religious tenets” fails to grapple with the fact that “from the perspective of those employees, the denial reeks of religious coercion.”

Prof. Sarna has a point, but the failure to understand the perspective of the other side is not limited to one side of the debate. Prof. Laycock has observed, “People on the pro-choice side want choice for abortion providers, but they do not want choice for medical providers [who have religious objections to providing abortions].” More broadly, he noted, the heat generated by issues having to do with reproductive rights and sexual orientation is unlike that associated with other religious conflicts. One reason for this is what Prof. Laycock calls the reciprocal nature of the conflict:

[E]ach side wants to regulate much that the other side considers private, personal, and essential to identity. The pro-life and traditional marriage side wants to eliminate abortions and restrict the personal lives of gays and lesbians. The pro-choice and gay rights groups want conservative believers not just to leave them alone, but to affirmatively assist with abortions and same-sex relationships—or else leave any occupation that might ever be relevant.
Laycock, Sex, Atheism, and the Free Exercise of Religion, id.

If the HHS mandate was 2012’s issue, we can expect—and the above quote points the way—that a paramount area in which this conflict will play out is that of marriage equality. The Supreme Court has granted certiorari in two cases that may well determine whether or not the federal government and the states are bound to extend the same treatment to same-sex marriage and different-sex marriage. Should the Court determine that to be the case, and in any event in states that have on their own extended marriage equality, the question will be whether, and to what extent, individuals and organizations with a contrary view will be protected in their ability to be “left alone.”

There is no serious expectation that we will see clergy forced to perform marriages that are contrary to their faith, but religious institutions will no doubt face the same conundrum vis-à-vis same-sex marriage as they have regarding the HHS mandate, that is, will they be compelled to treat same-sex couples as married even if this violates their beliefs? Might they even be at risk of losing their tax-exempt status, looking to the example of Bob Jones University v. United States, 461 U.S. 574 (1983)? Under the powerful paradigm of equal protection, the answer may well be “yes”; even for a religious institution, the failure to recognize a same-sex marriage could come to be seen not as a core constituent of that institution’s identity, to be tolerated even when one disagrees with the underlying belief system, but rather as an exemplar of invidious discrimination no less than would be a refusal to recognize interracial marriage.

Not all conflicts arising from the belief that equal protection principles need only rarely, if ever, be set aside to allow for religious exemption are so epochal . . . but the issue has manifested in a number of other ways, and will continue to do so.

Not too long ago, efforts were made to prohibit the practice of circumcision in San Francisco—ostensibly out of neutral concerns about protecting the bodily integrity of the child, a concept resonant with equal protection concerns. This initiative, which could have had the result of preventing Jews residing in that city from engaging in the ancient religious observance of brit milah, was turned back, at least for the time being, when a California court found it an inappropriate effort to regulate medical practice; the Jewish community may have seen this as an issue implicating fundamental concepts of religious liberty, but the shrunken scope of the Free Exercise Clause under Smith leaves in question whether a federal constitutional challenge alone would have been successful. And, several years ago, there was an effort to compel a Jewish health care provider in New York State to remain open on the Sabbath based on the claim that the failure to provide services
on Saturday was somehow an act of discrimination against community members who were not Jewish.

In sum, the challenge faced by society is how to reconcile its important interests—which manifestly include protecting individuals against invidious discrimination—with the fact that there are religious institutions and individuals who march to a different drummer. It is clearly the case that the states will often not be able to allow an exemption, even for religious reasons—and, in discussing various situations in which that exemption has been sought, I am not arguing that each is a case in which an exemption should be provided. It is the case, however, that our future as a tolerant, diverse society is dependent on recognizing that both sides in these conflicts bring to bear aspects of their identity that are “private, personal, and essential to identity.”

In considering how to resolve these conflicts, one rule need not apply to all. Thus, in the context of religious institutions, it may be that institutions whose primary task is religion teaching should receive a broader zone of exemption than institutions that are religiously affiliated but that mainly provide a secular service, with both of these types of institutions treated differently from organizations that place themselves in the stream of for-profit commerce. And it can make a difference whether government funding is implicated, as opposed to situations in which a religious organization is utilizing its own funds.

Whatever the result in specific cases, ongoing and debilitating conflict is more likely to be avoided if regulators and other interested parties bring to bear the same spirit of tolerance that they expect for themselves, and grant the legitimacy, if not the correctness, of religious conscience—and if we have in place constitutional and legislative standards that give due regard to religious practice and belief. Religious actors also have their responsibilities to bring an attitude of tolerance and thoughtfulness as to when what is at stake is about their own religious observance and avoid demands that smack of imposing their beliefs on others.

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