

Rights in Conflict: the Limits of Religious Liberty

By Rob Boston



Mention disputes over the separation of church and state, and most people think of the classic issues: Prayer in public schools. Ten Commandments displays in courthouses; and the "faith-based" initiative.

These are important issues, and courts regularly hash them out. Underlying each is a shared question: Can the government compel you to act religiously? Can it impose prayer on children, employ religious language in your name or compel you to support financially a religious organization?

Vital questions all. But more and more Americans these days are grappling with a different question, one that has the potential to affect millions of people. It's this: When the government wants you to do something, under what circumstances can you be excused from doing that thing because of your religious beliefs?

Here's an example ripped from recent headlines: The government wants people to have access to the medication they need. Yet some pharmacists refuse to dispense birth control pills because of their religious beliefs. The government wants people to be free from discrimination. Yet some people who own businesses and stores don't want to serve lesbian, gay, bisexual and transgendered clients, and again they cite their religious beliefs.

The recent flap over the provision of contraceptives in the new health-care law shows how explosive this question can be. The Obama administration argues that access to birth control is an important medical goal for the country and an essential feature of women's rights. Religiously affiliated institutions assert that their rights are violated if they are compelled to contract with insurance firms that provide this service to employees who want it.

Who's right? Is compromise possible? The answers to these questions will do more than resolve a church-state dispute; they will determine what type of society we are or are striving to be.

Most of these disputes revolve around a handful of issues: health care, LGBT rights, family law, privacy and commerce. The key to resolution, I believe, rests in examining the types of entities that provide services to the public. Once we've recognized that these entities are not all the same and thus must abide by different sets of rules, a clearer picture emerges.

These entities can be categorized in one of three ways: government, private/religious and quasi-public/church affiliated. A deliberate attempt by some religious leaders to blur these categories – especially among the last two – has spawned confusion.

Government entities are perhaps the easiest to deal with and most susceptible to the application of bright-line rules. Put simply, the government's first duty is to treat all citizens equally; it must do so in a neutral manner that does not further religious interests.

In a state where same-sex marriage is legal, for example, the county clerk has no conscience right to refuse to issue a marriage license to any couple that legally meets the requirements for marriage. A clerk who refuses to do so can be terminated.

Likewise, an employee of a public hospital has no right to refuse to provide certain medications because they might offend her religious beliefs. In a government-run institution, personal theology must be kept out of all public policies. Government employees may have certain private religious rights – for example, the right to wear religious garb in certain cases or be accommodated for time off to meet religious needs – but this right has never been interpreted as allowing infringements on the rights of others.

Private/religious entities are also open to broad rules and less susceptible to nuance. In such entities (churches, mosques, synagogues, temples, etc.) it's to be expected that decisions and policy will be governed by theological beliefs. Such institutions have no legal right to serve the general public. Indeed, they can refuse services and admission to any person for virtually any reason.

A priest at a Catholic church is under no legal obligation to marry a non-Catholic couple. Even Catholic couples can be subjected to theological dictates. For example, a couple that has been cohabitating can be required to establish separate households before the ceremony can be performed. Rules like this protect church autonomy and ensure that the Religious Right's nightmare scenario of houses of worship being forced to perform same-sex marriages will never come to pass. The First Amendment's principle of religious freedom prevents that.

Quasi-Public/Church-Affiliated entities present the biggest challenge and will be discussed in more depth. These organizations include church-run colleges, hospitals and social-service agencies. They are sponsored by religious organizations but are often providing (directly or indirectly) a service on behalf of the government.

Generally speaking, these entities can be categorized by three features:

They receive large amounts of support from the taxpayer. Religiously affiliated hospitals receive federal and state support through Medicare, Medicaid and other taxpayer-funded programs. Students who attend colleges and universities run by religious groups are eligible for Pell Grants, low-interest student loans and other forms of financial aid. Sometimes, the institutions themselves receive direct government grants. Religious social-service agencies are often heavily dependent on taxpayer aid. Catholic Charities, for example, receives more than half of its budget from government sources.

They hire people outside their faith tradition. Most church-run hospitals and colleges hire the best person for the job, regardless of the individual's religious or philosophical beliefs. Many religiously affiliated social-services agencies do as well, although some impose a religious test in hiring. (This has been a bone of contention over the faith-based initiative for years.)

They serve the general public. You don't have to be Catholic to go to Georgetown University. In some cases, church-affiliated colleges will actively recruit outside the faith for students with special athletic or academic skills. Likewise, if you're having a medical emergency, a Baptist hospital will assist you even if you haven't been to church in years. In some cases, social-service agencies that accept tax funding are legally required to help everyone.

Certain religiously based accommodations have already been made for these entities, especially hospitals. Catholic institutions, for example, won't provide birth control or sterilization. These accommodations are controversial in their own right, and many Americans believe no more should be granted.

These three factors set quasi-public/church-affiliated groups apart and make the imposition of bright-line rules all the more challenging. Yet some regulation is inevitable to ensure that public funds are spent in a way that accords with the public interest. Claims by some religious leaders that attempts to regulate them after the receipt of public funds are a violation of religious freedom are unrealistic and, I would submit, arrogant.

Tax funding is the key in dealing with these entities. None of them are required to accept public support, yet most eagerly seek it. When applying for (or sometimes actively lobbying for) tax assistance, these groups tend to play up their secular sides. They seem to acknowledge the value of secularism when tapping the public purse.

But it's a different story when regulations start to come. At that point, many quasi-public/church-affiliated groups begin stressing their faith-based side. "You can't impose that rule on us!" their leaders cry. "We're a religious group."

Such statements overlook the fact that the provision of tax money changes things in a very fundamental way. Thousands of corporations every year receive millions in tax funds to provide services to the federal government. None of these contractors expects to be unregulated. Why do religious groups?

When public funds are involved, it is assumed that the entity in question is operating in the public interest. In these cases, the government has the right – some would say the duty – to impose regulations to ensure that the public interest is protected.

The recent flap over birth control provides a good example of this principle in action. Most Americans see the compromise that has been struck as reasonable: Houses of worship are exempt from the mandate that birth coverage be provided at no cost but religiously affiliated groups are not.

Why the difference? A lot of it has to do with public support. Unlike churches, religiously affiliated hospitals, colleges and social service agencies actively solicit and accept huge amounts of tax aid. They also hire outside the faith and serve the public. These factors open them up to reasonable forms of oversight to protect the public interest and individual rights. In an era where use of birth control has become nearly universal, it is simply unrealistic to allow repressive theological dictates – rules that are so strict that even the vast majority of Catholics ignore them – to govern public policy for all Americans.

Equal treatment of all citizens is another compelling government goal that should influence this debate. Consider the issue of adoption, which has been controversial in certain states. In some states, government agencies directly oversee or facilitate adoptions. But they may also contract with religious agencies to provide this service and even give them tax funding to 24 The Human Prospect Volume 2 Number 2

do it. In these cases, religious adoption agencies should be required to assess potential parents using neutral criteria. Denying adoption services to entire classes of people (gays, atheists, etc.) who fall short of a theological litmus test is rank discrimination. The government has the right – and again some would say the duty – to eradicate this type of discrimination.

The government also has the right to condition the receipt of tax aid on other relevant factors – for example, is the religious group seeking a government contract willing and able to do the job? A recent flap over aid to victims of human trafficking provides a useful example. In this case, an agency run by the Catholic Church lost a federal contract because it had told its sub-contractors that they could not provide birth control to victims of trafficking. The Obama administration believed that victims of trafficking – many of whom have been sexually assaulted or forced into prostitution – needed this service and awarded the contract to a group willing to provide contraceptives. Church officials claimed this was discrimination. Most people would view it as simple common sense that the state has the right to give tax-funded contracts only to groups willing to provide the full range of services that the government deems desirable.

Private businesses also fall under bright-line rules. Most stores and businesses are considered public accommodations under the Civil Rights Act of 1964 and may not discriminate on the basis of race, gender, religion or national origin. Sexual orientation is not yet protected by federal law but is in some states and localities. As laws extending civil rights protections to the members of the LGBT community grow, there will be conflicts when certain business owners cite their religious beliefs and refuse to provide services to gays.

Some cases like this have already occurred. Several concern people working in the wedding industry (caterers, photographers, bakers, etc.) who refuse to serve same-sex couples. Although fundamentalists may not like it, cultural trends are clearly breaking in favor of the expansion of gay rights, providing more opportunities for conflict.

A legal answer may come from the courts, but the key to resolving these conflicts may rest with the culture. As tolerance of LGBT Americans expands, the country will eventually reach the point where open bigotry against gays is no longer socially acceptable, just as anti-Semitism and racial prejudice are today. (Of course both still occur, but the law and the culture give them no harbor.)

In summary, religious liberty (a principle which includes the right to reject religion entirely) is a treasured right of the American people. But it has never been interpreted as the right to impose your faith on others. A pharmacist may sincerely believe that birth control is a sin. However, although strongly held, that belief gives him no right to impose this view onto a woman seeking the medication her doctor has prescribed for her. Nor does it give a church the right to collect millions in tax dollars while acting as an agent for the state yet ignore the regulations that accompany that funding.

All religious groups have the right to spread their views and try to persuade people to adopt them.
All religious people have the right to meet for worship in fellowship with like-minded believers.
All Americans have the right to support the religious groups of their choosing or support none.

But no religious group has the right to use the government as the engine to propel its theology. The recent effort by some religious groups to define the concept of religious freedom to include a so-called "right" to rake in every dime of public funding available while remaining unaccountable to the taxpayers who provide that aid makes a mockery of that noble principle.

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