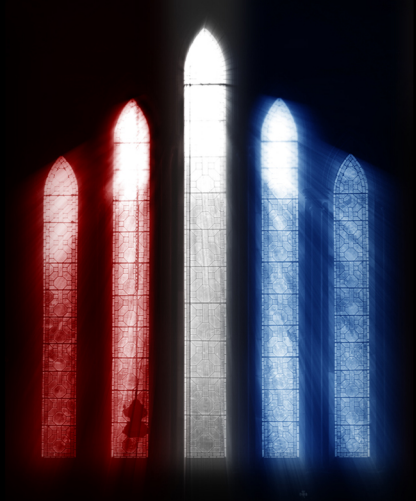
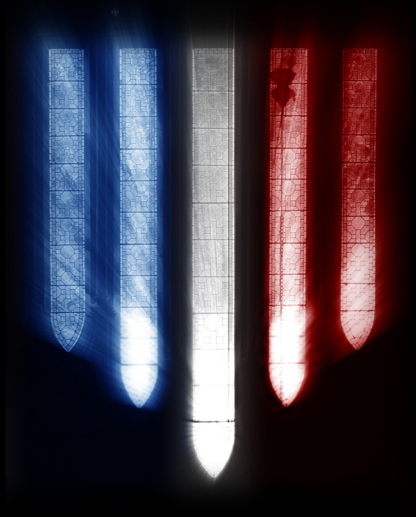


DEEP COMMITMENTS

THE PAST, PRESENT, AND FUTURE OF RELIGIOUS LIBERTY

EDITED BY TREVOR BURRUS AND DAVID MCDONALD



Contents

12. Can a Surfeit of Statutes "Accommodate" Religious Liberty?

Roger Pilon

America was founded in large part by people fleeing religious persecution,[1] yet today our own government restricts religious liberty in countless ways that a properly read Constitution forbids. We see that especially today in the area of "public accommodations." But that term is ambiguous. As most often used, it refers to businesses that serve the public. But it can also refer to the accommodations that public or governmental programs may or may not make for a variety of human rights and interests, including religious practices.

I'll focus mainly on the first sense, regarding vendors who have been prosecuted recently for declining, on religious grounds, to participate in same-sex marriage ceremonies. But at the end I'll touch on the second sense: first, regarding accommodations for religious organizations otherwise compelled to participate in Obamacare's contraceptive mandate; then, regarding the Obama administration's directive to schools to accommodate transgender students, which implicates the religious liberty and privacy rights of other students and their parents.

Just to be clear, we at Cato have long supported both religious liberty and lesbian, gay, bisexual, and transgender (LGBT) rights, at least insofar as the agendas of the respective parties are consistent with individual liberty under constitutionally limited government. Last year, for example, in *Obergefell v. Hodges*,

our amicus brief argued that if government provides benefits to opposite-sex couples, it must do so for same-sex couples as well.[2]

But we draw the line when same-sex couples turn around and demand that government force vendors, against their religious beliefs, to participate in same-sex marriage ceremonies, as happens all too often today. In 2015 in Oregon, for example, a Christian couple who owned a bakery were fined $135,000 and bankrupted after they declined to custom-design a wedding cake for a lesbian couple's wedding.[3]

In Washington State, the state's attorney general and the American Civil Liberties Union (ACLU) sued a florist who declined, on religious grounds, to design custom floral arrangements for a long-time customer's same-sex ceremony.[4] Across the country, in upstate New York, a Christian couple who own a small farm open to the public for seasonal activities were fined $13,000 by the New York State Division of Human Rights for declining to host a same-sex wedding. In addition, they were ordered to implement "antidiscrimination training and procedures" for their staff—reeducation, in effect.[5]

And in Phoenix, in an especially egregious case implicating speech rights and, potentially, religious liberty, two young female artists are suing to overturn a city ordinance that threatens fines of $2,500 and six months in jail for each day a business, including an artistic business, communicates any message publicly that would make someone feel "unwelcome" based on the person's sexual orientation, gender identity, or any one of a number of other characteristics.[6]

I could go on with many other examples, but the picture should be clear. These are small-business owners, vendors who are perfectly willing to serve all customers in their ordinary course of business—and they do. But whether they're bakers, florists, caterers, entertainers, whatever, they're asking simply not to be forced to affirmatively *participate* in an event that implicates their religious beliefs.

How did a country founded largely on religious liberty get to this point? Here's a very brief political and legal history.

Despite having fled religious persecution, we were often less than tolerant once we landed here.[7] But by the time we became independent and then reconstituted ourselves, we were fortunate to have had several religious denominations, no one of which dominated.[8] At the national level, even if not yet at the state level, that required us to separate religion and government.[9] We did that in the Bill of Rights, of course.[10] And over time we applied those rights against the states as well.[11]

But it wasn't simply for practical reasons that we separated church and state. From the outset, we were animated by individual liberty and by the natural rights the common law rested on.[12] Among other things, that law and those natural rights guaranteed freedom of association in our private affairs, including our religious affairs. And freedom of association included the right *not* to associate—in other words, to discriminate—for any reason, good or bad, or no reason at all.[13]

There were limited common-law exceptions, of course. Monopolies—especially arising from government grants—and common carriers had to serve all comers.[14] And if you represented your business as "open to the public," you might be held to that representation, especially if the public had few other options—although the law was uneven on that point. You did not have to serve unruly customers, however, and you could still negotiate over services.[15]

Modern forced association arose with Progressive and New Deal employment and labor laws.[16] But the form at issue in today's public accommodation cases flows mainly from the 1960s civil rights movement.[17] The long-overdue 1964 Civil Rights Act brought an end, finally, to the deplorable state-sanctioned *public* discrimination in the South: Jim Crow.[18] But the act also prohibited *private* discrimination in several domains and on several grounds, both of which have expanded over the years in both federal and

state law.[19] However inconsistent with the private right to freedom of association, that extension of anti-discrimination law to the private sector was probably necessary in the context—to break the back of institutionalized racism in the South. It's at the root of the issues before us here, however, because these private vendors, asking only to be let alone to practice their faith, are charged with discrimination.

To complete this brief background, however, I need to mention the Supreme Court's 1990 decision in *Employment Division v. Smith*, where the Court held that a person's religious beliefs do not excuse him from compliance with an otherwise valid law of general application—the Controlled Substances Act, in that case.[20] That led Congress to enact the 1993 Religious Freedom Restoration Act (RFRA), which has since been held to apply only against the federal government.[21] Nevertheless, 21 states have enacted their own RFRAs of various kinds.[22]

At the same time, in the opposite direction, other states have enacted anti-discrimination statutes covering various grounds, including sexual orientation.[23] And to this maze of often conflicting law, we should add that courts may and do invoke the imprecise common-law principles mentioned earlier to decide one way or the other in these public accommodations cases.

The upshot of all of this, as a practical matter, is that in deciding these cases, whether constitutionally, statutorily, or under common law, it is possible that judges will be able to discern and administer a distinction between legitimate discrimination, resting on religious objections to participating in offensive ceremonies, and illegitimate discrimination, resting on the refusal to serve customers in the ordinary courses of business. But that remains to be seen.

Stepping back, however, notice first that RFRA is an effort to restore a *constitutional* right *by statute*.[24] But more telling still, notice the word "restoration" in these RFRA statutes. What have we come to when we have to "restore" religious liberty—our first

freedom? Indeed, as RFRA's very title implies, religious liberty is treated today as an "exception," if and when it's granted, to the general power of government to rule.

Yet, if the basic principle in *Smith* is correct—that religious beliefs offer no exception to rules of general applicability (e.g., rules against murder, rape, and robbery)—it follows that the more our rules proliferate beyond what liberty strictly requires, the more our religious liberty will be restricted. Indeed, what better recent example of that than Obamacare? President Barack Obama's oft-repeated mantra, "We're all in this together," captures that connection perfectly.[25]

If we are indeed all in this together, then religious organizations will find themselves constantly importuning government to be "excused" from the offensive mandates government promulgates. They'll have to plead for "accommodations."[26]

Consider the Obama administration's recent transgender directive to schools. The connection between religion and sexual modesty is as old as the Garden of Eden.[27] And the issues are especially acute during adolescence. Yet, in the name of not discriminating against the tiny minority of students who "identify" with a gender different than their biological and genetic gender,[28] the administration has ordered transgender girls to shower with cisgender girls.[29] (For those unfamiliar with these terms, that means boys who identify as girls showering with girls.)

As justification for this arrangement, the ACLU issued a memo baldly asserting that this does not "undermine anyone's privacy" and, further (with original emphasis), that "no one has a legally cognizable privacy interest in NOT sharing space with another person of the same sex just because that other person is different from them in certain respects."[30] In that ungainly construction, "same sex" denotes the sex the person "identifies" as; "is different from" denotes genital and genetic differences. Such are the linguistic contortions one must indulge to try to squeeze this agenda under equal protection. In the end, however, it appears

that "we're all in this together" extends, literally, even to school locker rooms and showers.

The general point, however, should be clear. How could this state of affairs be otherwise when we've strayed so far in so many ways from principled constitutionalism? The sheer scope of government today at all levels ensures that conflicts over religious liberty will be ubiquitous. And so I conclude that even more than a religious freedom restoration act, we need a freedom restoration act, which of course is what the Constitution was meant to be.