Testimony Before the U.S. Commission on Civil Rights, Briefing on Peaceful Coexistence: Reconciling Non-Discrimination Principles with Civil Liberties

Michael A Helfand, Pepperdine University
As expressed by the Commission, the focus of this briefing is to explore tensions between two competing values: non-discrimination and religious liberty. This discussion comes at a crucial time as we face a new set of debates over the role of religion in a liberal democracy. While many such debates have explored the extent to which government should grant religious exemptions from generally applicable laws, a new wave of debates have increasingly focused on the unique role played by religious institutions in our constitutional order. Indeed, at the center of many of these new debates stand competing views regarding the extent to which religious institutions and organizations should be afforded constitutional exemptions from statutes and public policies that protect individuals from various forms of discrimination. Such constitutional protections – often referred to collectively under the umbrella of the “church autonomy doctrine” – generally provide religious institutions with a right to direct their own internal affairs free from government interference. However, critics worry that granting religious institutions with unbridled discretion might lead to wide-ranging discrimination and misconduct.

Within the larger framework of this briefing, I would like to address the more narrow issue of church autonomy, outlining four points about how we might think about questions related to religious institutions going forward by considering (1) the constitutional value of religious institutions in a liberal democracy, (2) the appropriate limits on the constitutional protections afforded religious institutions, (3) the relationship between misconduct and religious discrimination, and (4) how we might leverage the value of religious institutions to address conflicts between law and religion.

1 Debates regarding exemptions for religious individuals continue to play an important role in the general discussion over the role of religion in the United States. See, e.g., Elane Photography, LLC v. Willock, No. 30,203 (N.M. Ct. App. May 31, 2012) (holding a photographer liable under New Mexico’s Human Rights Law for refusing to photograph a same-sex marriage).


3 See, e.g., Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 115 (1952); Watson v. Jones, 80 U.S. 679, 728-29 (1872).

In summary, I believe that as a liberal democracy we must provide religious institutions with the strongest of protections to decide matters of religious faith and doctrine. Religious institutions are afforded such protections by the First Amendment because they provide an infrastructure for individuals to pursue matters of faith in concert with others. And to the extent individuals join religious institutions in order to pursue matters of faith, such institutions should be afforded constitutional protection in order to make rules and develop doctrine geared to accomplish those goals.

(1) The Value of Religion and Religious Institutions in a Liberal Democracy

To address the scope and limits we place on religious freedom requires that we articulate the core value of religion and religious institutions in a liberal democracy. Stripped to its essentials, a liberal democracy must affirm the right of individuals to develop and revise their own vision of what it means to live, as the philosophers say, the good life. This right ensures that individuals can lead sincere and authentic lives, making their own decisions on matters of faith and identity free from government intrusion.

Of course, thinking through who we are and what we believe is not something typically done in isolation. We invariably work through these deeply personal questions of faith and identity while in conversation, often embracing values and ideals shared by others. More narrowly, many people conclude that they can only accomplish their religious goals by joining with others who share their core faith commitments. In fact, the Supreme Court has long recognized that the value of religious institutions is premised on their importance to the faith of individual citizens, focusing on how religious institutions provide the infrastructure that allows individuals to pursue their deeply held religious objectives.

This is precisely why the Supreme Court originally understood the value of religious institutions as based upon the “implied consent” of their membership. The argument was quite straightforward. Because individuals voluntarily join religious institutions to pursue religious objectives in concert with others, the institution is granted “implied consent” by the membership to make rules and develop doctrine that promotes those goals. In turn, individuals can utilize religious institutions as a resource to develop their own vision of what it means to live a good life.

---

5 Watson v. Jones, 80 U.S. 679, 728-29 (1872) (“The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned.”).


7 Watson v. Jones, 80 U.S. 679, 729 (1872) (“All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.”).
Of course, religious institutions can provide this infrastructure only so long as they can speak on matters of religious faith, doctrine and practice free from government intervention. The Supreme Court captured this core intuition in 1952, endorsing a “freedom for religious organizations, an independence from secular control or manipulation – in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” The Supreme Court returned to this core constitutional commitment in *Hosanna-Tabor v. EEOC*, where the Court emphasized that the First Amendment “gives special soliciusite to the rights of religious organizations.”

In sum, a liberal democracy protects religion so citizens can decide who they want to be and what they want to believe. And a liberal democracy values religious institutions because they provide the necessary infrastructure to enable individuals to achieve their religious goals. This is precisely why we protect religious institutions; individuals implicitly consent to empower religious institutions to make rules and develop doctrine that promote their shared religious objectives. Accordingly, both religious individuals and religious institutions must be protected from governmental attempts to hijack decisions over substantive religious matters such as faith and doctrine.

(2) **Providing Limits on the Rights of Religious Institutions**

It is one thing to say that government should not interfere with the right of religious institutions to develop their own religious faith and doctrine. It is quite another to say that all decisions made by religious institutions should be shielded from any form of government oversight. Indeed, if we protect religious institutions because they promote the religious objectives of their membership, then such protection should end where religious institutions engage in conduct that fails to promote such objectives.

This is precisely the limitation on religious institutional autonomy the Supreme Court advocated in the early half of the 20th century. In 1929, for example, the Supreme Court noted that it would not defer to the decisions of religious institutions where they evinced “fraud, collusion or arbitrariness.” Such a limitation made quite a lot of sense given the reasons why we value religious institutions. Individuals ask religious institutions to make rules and develop doctrine that helps their membership achieve lofty religious objectives like faith and salvation. But individuals do not ask religious institutions to make decisions premised on fraud or collusion. When religious institutions engage in such conduct they cease to have constitutional protection.

---

8 Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 115 (1952).
The Supreme Court, however, has expressed unwillingness to impose these side constraints on religious institutions. The worry here is that reviewing the decisions of religious institutions for fraud or collusion would require courts to investigate matters of internal religious doctrine and practice in violation of the Establishment Clause of the First Amendment. But it may be high time to revisit that conclusion, especially given the damaging impact of this judicial reluctance. For example, claims of discrimination leveled by employees against religious institutions often boil down to accusations of pretext; the religious institution claims to have terminated an employee on the basis of protected religious considerations, while the employee claims that the religious considerations are simply a pretextual ploy to disguise prohibited forms of discrimination. While courts typically refuse to address claims of pretext on the grounds that resolving them would lead to judicial entanglement in questions of religious doctrine, such refusals are based on an over-expansion of the Establishment Clause, which should only prevent judicial intervention where a religious institution makes decisions on the basis of religious doctrine and not where religious doctrine is simply a pretext for other forms of discrimination.

In sum, religious institutions should be afforded the strongest of protections when they make sincere and authentic decisions about religious matters, such as faith, doctrine and practice. Such substantive religious decisions must remain beyond the reach of government except under the most extreme and compelling of circumstances. However, if we value religious institutions because of how they promote religious objectives then we need a method for determining when they engage in conduct which undermines those very goals. And courts are far better suited to engage in that inquiry than we currently allow.

(3) Preventing the Slide Towards Religious Discrimination

There is a tendency, unfortunately, to contemplate issues of religious freedom by focusing exclusively on these instances of fraud or collusion. On one level, this is understandable as some institutions, under the cloak of religion, have engaged in conduct so reprehensible that it becomes difficult to look at the larger picture. But focusing exclusively on the bad is problematic not simply because it pushes policymakers to throw out the proverbial baby with the bathwater, but because it has also led to a resurgence in proposed policies that seem to be infected with a significant dose of anti-religious discrimination.

Here I have in mind, for example, recent attempts in San Francisco to ban circumcision. While the proposal itself provides little evidence of animus, the cartoon series “Foreskin Man” –

---

11 See Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); see also Church of Scientology Flag Serv. v. City of Clearwater, 2 F.3d 1514, 1541 (11th Cir. 1993) (noting that “[i]n Serbian Diocese . . . the Court cast doubt upon the continuing vitality of the Gonzalez dictum”).


published by one of the very organizations promoting the circumcision ban14– tells quite a different story. To quote from Los Angeles Times columnist Mitchell Landsberg, “The image of a bearded, black-hatted Jew with an evil grin and a bloody blade seems straight out of the annals of classic European anti-Semitism.”15 Reconsidered in this light, one cannot help but worry that initiatives to ban circumcision are simply well-disguised attempts to discriminate against religious practices.

In a similar vein, consider the recent wave of anti-Sharia legislation in the United States. While sometimes couched in neutral terms, the goal of such legislation has been to undermine the religious infrastructure of the American Muslim community by prohibiting courts to consider Islamic law. A recent Kansas court actually deployed the state’s newly enacted anti-Sharia law to void an Islamic prenuptial agreement because doing otherwise, claimed the court, would perpetuate Islamic law’s “basic denial of due process” that grants the husband unilateral power to effectuate a divorce. Of course, the court deftly avoided explaining how refusing to enforce an agreement that required the husband to pay a substantial sum to the wife further perpetuated an allegedly discriminatory system whereby the husband exercised too much authority.

Such logical gaps begin to make one worry that what motivates some legislative enactments and judicial opinions is not protecting the weak from discrimination, but targeting religion – especially minority religions – for prejudicial treatment on the basis of unfounded animus. Such proposals have gained traction precisely because advocates are able to focus popular attention on the very worst of religion. But while we must respond swiftly and unapologetically to all forms of religious misconduct, we cannot allow religious misconduct to drive the conversation. Doing so too easily arms those who would capitalize on instances of misconduct to fuel their discriminatory agenda.

(4) Applying Implied Consent

Notwithstanding these worries of growing religious discrimination, we must also avoid caricaturing all laws that restrict religious conduct as discriminatory. In many instances, laws that promote important public policies clash with the desire of individuals to act in accordance with their own religious conscience. Instances of true conflict between competing values are not a cause for embarrassment. Instead, they require that we mine the underlying logic of the constitutional protections afforded religious institutions so as to properly balance the competing values at stake.

14 Matthew Hess, Monster Mohel, FORESKIN MAN 1(2) (MGMbll 2010), http://www.foreskinman.com/no2panel02.htm
By way of example, consider the Department of Health and Human Services promulgation of the so-called “contraception mandate,”\textsuperscript{16} which laudably protects the reproductive rights of women by requiring covered employers to include contraception methods in employees’ insurance policies.\textsuperscript{17} However, in enacting this policy, the Department of Health and Human Services has provided limited exemptions to religious institutions and organizations who believe complying with the mandate will require them to violate the religious consciences.\textsuperscript{18} Accordingly, this debate pits two competing and important values against each other: enhancing reproductive rights and protecting religious conscience.

Evaluating the requests of religious employers for exemption from the contraception mandate requires that we extend the underlying logic behind the constitutionally protected autonomy granted religious institutions. Religious institutions provide the infrastructure to many religious individuals to pursue religious objectives in concert with others. To achieve these religious objectives, individuals join religious institutions and, via “implied consent,” grant those institutions authority to make rules and develop doctrine that promotes those shared religious goals.

Now the very idea that individuals implicitly grant authority to a religious institution to make decisions on religious matters is predicated on a basic assumption: the individuals must know the institution is religious and understand that the institution’s purpose is to achieve religious objectives. Applied in the context of the contraception mandate, determining which employers should receive exemptions as “religious employers” requires us to consider to what extent employees were cognizant of their employer’s religious objectives and therefore impliedly consented to the authority of their employer to make rules to achieve those objectives.

Adopting such an approach provides wider protection to companies, organizations and institutions that openly and obviously incorporate religion into their day-to-day operations. In

\textsuperscript{16} 42 U.S.C. § 300gg-13(a)(4) (Supp. 5 2011) (“A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for— . . . (4) with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.”).

\textsuperscript{17} See Health Resources and Services Administration, Women’s Preventive Services: Required Health Plan Coverage Guidelines, http://www.hrsa.gov/womensguidelines/ (Guidelines outlining the “contraception mandate”).

\textsuperscript{18} 45 C.F.R. § 147.130(a)(iv)(A) (2012) (“In developing the binding health plan coverage guidelines . . . the Health Resources and Services Administration . . . may establish exemptions from such guidelines with respect to group health plans established or maintained by religious employers and health insurance coverage provided in connection with group health plans established or maintained by religious employers with respect to any requirement to cover contraceptive services under such guidelines.”); see also 45 C.F.R. § 147.130(a)(iv)(B) (2012) (defining a “religious employer” for purposes of the regulation). The Department of Health and Human Services has subsequently proposed new rules for public comment that expand the scope of religious exemptions provided. See Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8,456, 8,458-9, 8,474 (Feb. 6, 2013) (to be codified at 45 C.F.R. § 147.131).
such instances, employees can be assumed to understand the primary goal of their employer – to achieve religious objectives such as faith in salvation in concert with others. And in such circumstances, joining the institution can constitute implied consent to the institution’s authority over matters touching upon religious faith and doctrine. By contrast, institutions that do not make their religious objectives clear to others cannot claim to have constitutionally protected autonomy predicated on the implied consent of their employees. Employees that do not know of their employers religious objectives cannot be presumed to have consented to the institution’s authority over such matters.

The key to an “implied consent” analysis is that it focuses on the factual context of each employer, asking whether religion is truly part and parcel of the institutional culture. What such an analysis eschews is the inflexible criteria adopted by the Department of Health and Human Services to determine what employers receive exemptions as religious employers.19 Most notably, an “implied consent” approach wholly rejects the categorical claim that for-profit organizations cannot be exempted from the contraception mandate on the assumption that such organizations do not “exercise religion.”20 Instead, using “implied consent” as our guide, we should inquire whether a particular employer – whether a non-profit or a for-profit – openly and obviously pursues religious objectives in a manner clear to its employees. Indeed, some small corporations and institutions – such as schools21 or companies22 – may pursue religious objectives such as faith and salvation as their primary goal. And, in so doing, they seek to incorporate religion into the day-to-day operations of their institution – a fact that should give us significant pause before we dismiss their claims of religious conscience and impose rules that require violating their core religious commitments.

To be sure, just because institutions “exercise religion” does not mean that such exercise of religion should always win the day. Indeed, some values are simply too important – and simply too compelling – to provide religious institutions exemptions. To determine what values qualify as compelling requires careful consideration and thoughtful balancing. But all such inquiries

---

19 45 C.F.R. § 147.130(a)(iv)(B). As noted above, the Department of Health and Human Services has subsequently proposed new rules for public comment that expand the scope of religious exemptions provided. See http://www.gpo.gov/fdsys/pkg/FR-2013-02-06/pdf/2013-02420.pdf.
20 This is the argument the government has made in some of its briefs in the course of litigating claims for preliminary injunctions against the contraception mandate. See, e.g., Defendants’ Memorandum in Opposition to Plaintiffs’ Motion for Preliminary Injunction at 2-3, Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278 (W.D. Okla. 2012) (No. CIV-12-1000-HE) (“Hobby Lobby is a for-profit, secular employer, and a secular entity by definition does not exercise religion.”); Defendants’ Opposition to Plaintiffs’ Motion for Preliminary Injunction at 2, Tyndale House Publishers, Inc. v. Sebelius, Civ.A. 12-1635 RBW, 2012 WL 5817323 (D.D.C. Nov. 16, 2012) (“Tyndale is a for-profit employer that cannot “exercise religion” under RFRA and the Free Exercise Clause.”).
demand that we adopt nuanced evaluation of the claims at stake to ensure that we arrive at the best judgment possible so as to maximize the rights of all individuals.

*****