



# Protecting religious freedom isn't always easy or popular

By *Richard Esenberg*

In one of the most ringing passages in our constitutional jurisprudence, Justice Robert Jackson observed, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

Our founders embedded an important aspect of this liberty in the Bill of Rights by guaranteeing the free exercise of religion. Religious freedom was thought to deserve special protection because claims of faith and conscience were considered uniquely compelling. In his "Memorial and Remonstrance" to the Virginia General Assembly,

James Madison cited as a "fundamental and undeniable truth" that "religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." Freedom of religion was, both in theory and by its placement in the Bill of Rights, our "first freedom."

That was then. What about now? The recent debate over the interplay between claims of religious freedom and injunctions against discrimination (e.g., in the area of gay marriage) or the desire to regulate economic activity (e.g., the contraception mandate) suggests that not all of us are comfortable with this special protection for religious freedom.

The case of Kim Davis, a county clerk in Kentucky who did jail time over her refusal to issue marriage licenses

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to same-sex couples on religious grounds, has brought the debate front and center. That case, which involves an elected official whose actions may be necessary to enforce the law as interpreted by the U.S. Supreme Court, is a special and more complicated case.

But what about the religious liberty claims of private parties, i.e., the evangelical photographer who does not wish to lend her artistry to a gay wedding or the traditional Catholic pharmacist who objects to filling prescriptions for abortifacients? Can the law compel them to act against conscience?

**The attitude of many — particularly our cultural elites** — toward religion has changed. It is no longer thought to be a compelling matter of duty but a private practice to be undertaken — if at all — out of the public eye and without any discernible influence on an adherent’s public life.

Indeed, our cultural elites are far more likely to regard sexuality as imposing the type of demands that our ancestors ascribed to religious practice. One “chooses” to be Catholic and, because it is a choice, is entitled to less deference than other identities that are thought to be “immutable” or beyond individual control. Our founders, not all of whom were conventionally religious, would have disagreed.

They would have seen the demands of conscience as just as binding and constant as those of sexual desire. To paraphrase the words of a current television jingle, they would have understood that a devout Quaker, every bit as much as a gay man, “couldn’t change, even if he wanted to.”

Notwithstanding the fact that private sexual behavior can have enormous public costs (something that we tend not to acknowledge), most of us believe that the state ought not to regulate the great run of consensual sexual practices. This is a good development. Whether this consensus on tolerance should be extended to intolerance of private discrimination on the basis of private sexual behavior is another matter.

Doing so becomes particularly troubling if a legal prohibition against discrimination requires a religious objector — say, the photographer or pharmacist — to facilitate or participate in conduct that he or she regards as immoral. Is there ever room to allow religious objectors to avoid

legal requirements to do things that they find morally objectionable?

Answering this question requires us to recall Adlai Stevenson’s definition of a free society as a place where it is safe to be unpopular. No matter how sure we are that we know the truth, not everyone needs be compelled to come along.

Moreover, it is not helpful to limit religious freedom to matters of belief or worship. This is simply not the way that most religions operate. They demand not only assent to doctrines and participation in religious observances but living in a certain way.

And that will raise difficult questions. Religion is limited only by the human imagination and can be invoked to justify an unlimited array of practices. But even strong legal standards for the protection for religious freedom allow for state limitations on religious practice (as opposed to belief) that are necessary to achieve a compelling purpose. They provide a presumptive — but not absolute — freedom for the demands of conscience. They place a thumb on the scale, if you will, for religious freedom.

This has always been a heavy lift. Claims of religious liberty frustrate the designs of the majority. They are almost always asserted by unpopular persons who propose to do things that most of us disapprove of. People who adhere to mainstream religious views don’t really need constitutional protection. In a democracy, they are unlikely to face governmental oppression.

The extension of constitutional protection to something like religion or speech or the right to be secure in our homes reflects a judgment that there are certain parts of life that should not be readily subject to political control or that can be lived only at the sufferance of the majority.

Honoring those claims has always required us to be open to the liberty of people we don’t like. More than one commentator has noted that modern concepts of non-discrimination and solicitude for protected classes brook little dissent. To many, the idea that discrimination is wrong almost always trumps competing claims. Whether our “first freedom” can survive the current zeitgeist remains to be seen.

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*Richard Esenberg is president of the Wisconsin Institute for Law & Liberty. He blogs at [sharkandshepherd.blogspot.com](http://sharkandshepherd.blogspot.com).*