The Establishment and Free Exercise Clauses in Social Services

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COMM 320-50 – Individual rights and public discourse

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June 18th, 2021

Introduction

On September 30th, 2018, there were an estimated 437,293 children in the foster care system, of whom 46% were not located in relative family homes. (Child Welfare Information Gateway, n.d.) Foster care is just one of the public services that faith agencies provide services for using taxpayer funds. It also is the basis for *Fulton v. the city of Philadelphia* where a faith agency receiving public funds has and wants to continue to deny foster placement with qualified LGBTQ+ families who or fail to hold the same religious beliefs. The foster system is already overtaxed. The ones being most affected are the kids, by no fault of their own.

In this essay, I will propose that new federal legislation be created to regulate the use of private faith organizations that provide social services such as foster care, food banks, homeless shelters, etc. to the general public. These faith agencies must agree to disregard their protection under the Establishment Clause when providing those services to all individuals without discrimination in exchange for taxpayer funding.

To find the reasoning for this policy, I will examine the rights of all parties and how to address those rights most broadly with federal legislation. We have religious freedom and the right to exercise it here in the United States, but how does the practice of it and recognizing opposing views exist together to work in the best public interest?

The varied guarantees of religious freedom and civil rights

We have grown up hearing about the separation of Church and State, but that is an overly broad statement today. Our Constitutional Framers wanted people to be free to practice their religion without interference. They also wanted to have a system that did not favor one religion

over another. These two concepts are better known as the “Free Exercise Clause” and the “Establishment Clause.”

First, looking at the Establishment Clause we have an expectation of neutrality from governmental intrusion. We can see an example of this in the case of *Bowen v. Kendrick* (n.d.) where the application of the Establishment Clause was used in a ruling of “federal funding for organizational services and research in the area of premarital teenage sexuality.” The case examines whether the Adolescent Family Life Act (AFLA) violated the Establishment Clause in determining beneficiaries without declaring funds could not be used on religious grounds. The court decision found that as AFLA “required potential recipients to reveal what services they intended to provide and how they would provide them. Thus, the government could protect against the misuse of its funds. At the same time, however, such oversight did not create an "excessive entanglement" between church and state because AFLA merely authorized funding of religiously affiliated.” (Bowen v. Kendrick, n.d.)

Supposed direct protection for people’s right to practice their religion falls under the Free Exercise Clause. A well-known Free Exercise case is *Employment Division v. Smith*. (1990) Here we have the Court’s opinion that while a person can have their own religious beliefs, Free Exercise does not provide an exemption from laws that a state can regulate. On the contrary, in the case of *Church of Lukumi Babalu Aye, Inc v. City of Hialeah (1993)* Free Exercise of the church was unduly burdened for legal faith behavior, in this case, it was over the sacrifice of animals in Santeria ceremonies. Congress has tried to correct for a wider view of faith beliefs through various legislation such as the American Indian Religious Freedom Act of 1978 (AIRFA) and other amendments since. While some legislation has afforded rights previously

withheld, Ie: the legalization of peyote for use in the American Indian Church; other provisions have been ruled as U.S. Congressional overreach and unconstitutional.

These “Clauses” do have their own working spaces. However, they can “play in the joints” as defined in *Davey v. Locke* (Hawley, 2017) by the Court. This overlapping area creates a place where following the Establishment Clause does not impinge on the Free Exercise Clause. Yet, if we look at Jacobson's opinion in her *Fundamental Funds* (2021), she writes that “there is a fundamental right to be free from unequal treatment due to religious status.” Or, we cannot have discrimination based on an individual’s belief system.

To this point, public policy must encompass the viewpoints of everyone. Accessibility to all faiths or even the lack thereof needs to be addressed in policymaking. Here in the United States, dominant religions are considered to be the “norm” and minority religions are left out, making for non-inclusive policies based on those morals. But as the United States continues in its ever-expanding melting pot trajectory, more cultures are added with their own values and morals. Idleman (1993) argues that removing religious values from the system does us a disservice. We need to incorporate a faith system that includes the perspectives of historical accounts and other beliefs in a context that considers everyone’s rights.

At the base of my essay, are the rights of individuals. We all have civil rights afforded to us for practicing our own faith beliefs and gender identification, among others. Capp (2021) discusses that “incidental burdens” on Free Exercise should trigger an “intermediate scrutiny...when it violate[s] religious conscience.” So, here is where we must look at what is more important: the civil rights of the individual or a faith agency knowing taking taxpayer funds and yet denying contractual services to individuals when it goes against their faith tenets? We see in *Espinoza v. Montana* (2020) that the Court found Free Exercise “protects religious

observers against unequal treatment" when the state placed an undue burden on parents trying to receive tuition assistance to send their children to private religious schools. Here the tenet of "scrutiny" was applied to this case and the state of Montana created an overly narrow interpretation of a separation of church and state required at either state or federal levels.

Now, that the backgrounder of the issues and caselaw are covered, we come back to the focus on social services and the rights of people. Currently, the U.S. Supreme Court is considering *Fulton v. the City of Philadelphia* where Catholic Social Services is asking for the ability to discriminate against those who do not meet their religious test. This is not acceptable. The State of Pennsylvania's Department of Human Services' website lists three basic requirements for foster care applicants.

- Be at least 21 years of age.
- Pass a medical examination that states the individual is physically able to care for children and is free from communicable disease.
- Pass screening requirements related to child abuse and criminal history clearances.

This is considerably basic. Foster care is open to everyone, regardless of gender or religion.

The need is to provide the most equitable service for everyone. Slowly, over the years we have watched the budgets of government-run social services shrink and with it the overhead to manage these programs. Some charitable organizations were already working in this space and expanded to meet the needs for services. The organizations ranged between sectarian and secular organizations. Some regions can be underserved where faith organizations are the only providers available. We have two choices to balance service: requiring that all service providers be secular

and have plans to expand into underserved areas, or work with faith organizations that is committed to accepting everyone that is seeking aid.

What happens if a change is not made?

The case of *Fulton v. the City of Philadelphia* could be the nationwide window of religious extremism tied to what we are seeing in politics. Discrimination could be exhibited unchecked in a host of critical social services that people depend on. The ACLU reported in a press release that 46 “friend of the court” briefs were filed on behalf of 100 members of Congress from both the House and the Senate, Anti-Defamation League, Sikh Coalition, faith organizations, national and local child welfare organizations, and others. This case has a great implication for many.

Many services will be affected. Lack of foster parents mean that foster youth will be relegated to group homes until they age out, leaving many new adults without resources or skills to move on into adulthood. Families could go hungry if their access to food shelves are blocked due to following the wrong religion. Homeless shelters based around strict faith agencies can make their own rules around religious requirements to be able to shelter there and receive care.

This potential reduction of critical services could drive people into the streets. During COVID-19 we have seen how critical services have been overwhelmed by people in need seeking aid. If people loss access to services, tension is created in the community and becomes a powder keg for the slightest flare up. We saw early in the Black Lives Matter (BLM) protests for George Floyd how quickly things could get out of hand.

Putting systematic racism aside for the moment, people who have access to resources are less likely to create trouble. Data shows that Minneapolis crime rose in 2021 over the same period in 2020 according to a Theo Keith article. (2021) "The city has seen a 222 percent increase in carjackings this year compared with this point in 2020, averaging 1.27 incidents per day, according to police data. Homicides are up 108 percent from a year earlier, while shootings have risen 153 percent," according to Keith's reporting. A reduction in the Minneapolis Police by more than 200 officers is a contributing factor to these numbers. The intersectionality of these conditions is broader than the scope of this essay, but it is meant to point out that even a minor change in services can have a major impact in society.

Caselaw has grown to muddy the waters of the separation of church and state. The Grossman (2017) *Slate* article, "Goodbye, Establishment Clause" points this out in the first paragraph as "the court's 7–2 ruling in *Trinity Lutheran v. Comer*, when a state makes a funding program available to the public, it cannot deny funds to a church because of its status as a religious organization. This sets a dangerous precedent, one that betrays the court's historical commitment to true religious freedom and threatens to obliterate the divide between church and state." The basis of the complaint was that *Trinity Lutheran's* application did not qualify under a Missouri grant program to receive funding for the resurfacing of their Learning Center's playground for Establishment Clause reasons. *Trinity* sued instead under Free Exercise rights. Grossman (2017) summaries Justices Neil Gorsuch and Clarence Thomas' accent opinions of the *Trinity Lutheran* case "as an opportunity to expand the place of religion in public life by creating a one-way ratchet that allows churches ever-increasing access to public funds while giving religious exercise primacy over laws of general applicability."

Meanwhile, in decent, Justice Sonia Sotomayer "explained, Missouri must decline to fund these improvements under the Establishment Clause of the First Amendment, which forbids states from using public funds to underwrite religious exercise." She also looks to the church's own description of the Learning Center facilities as an outreach for their faith to be spread in the community. Her view is that "the Church's playground surface—like a Sunday School room's walls or the sanctuary's pews—are integrated with and integral to its religious mission." Sotomayor referred to the decision in *School District of Abington Township, Pennsylvania v. Schempp* (1963) as an Establishment Clause upholding. She quoted from that decision, "While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the state to practice its beliefs."

The *Trinity Lutheran* case marks the slippery slope of faith agencies that argue for considerations under both Clauses. The lines between them will blur over time. As this happens, we will lose the Principle of Consistency referred to by Capp (2021). This is applied specifically to First Amendment protections on speech and religious exercise and the incidental burdens on them. This is a generally accepted principle and brings us back to the concept mentioned earlier of triggering an "intermediate scrutiny" when Free Exercise matters come up in court. If faith organizations use Free Exercise as an end around to access taxpayer funding, then they should lose the ability to "play in the joints" and the right to use the Establishment Clause.

This continued blurring of the lines by the co-mingling of government and religion shows up most in education. Every child has the right to an education and funding for education brings in the taxpayer. We see that in *Espinoza v. Montana Department of Revenue* (2020) and commented on by Jacobson (2021) that the two "Clauses" run into each other. Montana's

Constitution, Article X, section 6 “firmly prohibits aid to sectarian schools” (Jacobson, p 86) and is known as the “No-Aid Clause.” But the U.S. Supreme Court walked back their precedent from *Trinity Lutheran* to what is now an “infringement of the Free Exercise Clause to offer any public benefit with religious use limitations.” (Jacobson, p 88)

Who is responsible for ensuring that social services are provided

The blurring lines between the “Clauses” and the separation of church and state have left people stuck in the middle. Most visible are the children in foster care. We have seen in *Espinoza v. Montana* (2020) religious use limitations can be an infringement. However, we have two parties who have a case of infringement, and we are left to decision whose rights are more important. The government agencies lacking funding to staff full departments of workers allowed for help by various agencies, both secular and sectarian, to fill the gaps. Regulation and enforcement of services were either overlooked or relaxed to “charitable choices” from congressional provisions (O’Neill, n.d.) over the years. Now, we have agencies such as Catholic Social Services (CSS) filling a gap, but on their terms and possibly as the only provider in some regions. Congress is the body responsible for creating federal legislation to regulate the use of funding and services.

The faith agencies involved in providing social services vary widely. CSS exists on one end of the spectrum while going towards the other end we have faith organizations with the mission to do “good works.” The government and faith organizations have worked together since colonial times. (O’Neill, n.d.) President George W. Bush took it a step further and created several executive orders that required “equal treatment for religious organizations seeking federal funds, permitting them to use religious beliefs in selecting employees and methods but not in choosing

clients, and barring religious worship in subsidized social programs." (O'Neill, n.d.) Here still, we have an expectation that faith organizations cannot discriminate against some clients when operating under federal funding at any level.

Looking to the courts, we have a body that determines the constitutionality of legislation and the protection of rights. They are the interpreters of our laws, and they are not responsible for policies. They are required to make fair and unbiased decisions based on the 1997 modified Lemon Test.

> "By combining the last two elements, the Court now used only the "purpose" prong and a modified version of the "effects" prong. The Court in *Agostini* [*v. Felton*] identified three primary criteria for determining whether a government action has a primary effect of advancing religion: 1) government indoctrination, 2) defining the recipients of government benefits based on religion, and 3) excessive entanglement between government and religion." (Freedom Forum Institute, 2011)

The Court created the test and demanded to have regulations to stop public funds being syphoned into religious uses. Yet, they assumed that everyone would play by the rules and do not make the same demands for oversight. (O'Neill, n.d.)

Lastly, we look to the service seeker for a demand for equal services. That can be an onerous task for an individual, but have the case, *Fulton v. Philadelphia* to prove that an individual can hold organizations and institutions accountable. Here, qualified same-sex couples were rejected for foster family placement. Families complained to the city, who then ended the CSS contract and barred them from participating in city programs which required non-discriminatory practices. The voices of citizens can be heard. Even through the government machine.

Fulton v. Philadelphia was argued on November 4th, 2020, and we are waiting for the Court's decision as of this essay. Meanwhile we can look to see if one of the parties change their position. The city is stuck between the "Clauses" and their non-discrimination policy. They have an upper hand as they are trying to protect all the rights of Philadelphia citizens through the contracts they enter into. CSS has its own upper hand of having its protection under the Establishment Clause. However, as argued earlier, they should not be able to claim protection under both of the "Clauses."

The likelihood that change can occur between the city and CSS does not track well. McGrath (2020) in his comparison between the situation in *Fulton* and his state of Arkansas points to the hostility between the parties of the *Fulton* case. Words are being flung about like a good old mud-slinging fight. The situation in Philadelphia is now entrenched and it comes down to the Court's decision. No matter what there will be change.

Not all organizations have to operate with taxpayer dollars and could function without it. A program in Arkansas is the proof. There, a faith-based group, The Call, has recruited and created a network supported by donations and makes up half of Arkansas' foster homes as written by Benjamin Hardy. (2017)

What can be done to alleviate conflicts like *Fulton v. Philadelphia*

In the end, the law and government protect the constitutional rights of the citizens. Based on the examples provided, the Free Exercise Clause for an individual as a broader application over either of the "Clauses" of a faith organization. The reasoning for this is that less people's religious freedoms are impinged upon. This essay has examined caselaw and policies created by various bodies to create a reasoning for new proposed Federal Law legislation.

A codification of newly defined rights and non-discriminatory policies needs to be legislated at a federal level to protect individual rights in this day and age. I recommend a policy with the following language.

To better provide service to our citizens through Social Services, we must protect their constitutional rights and dignity by enforcing non-discriminatory practices within the government and any contractor to any governmental agency. Such services would include but not be exclusive to:

- Foster Care
- Adoptions
- Food Banks
- Homeless Shelters
- Job Training

Any agency or organization which intends to apply for a contract and receive taxpayer funding MUST adhere to a non-discriminatory mandate and agree to the terms and regulations set forth herein.

- A background check of the agency will be conducted looking at their past actions, decisions, and practices.
- The agency must disclose its governing ethics and mission/creed.
- The agency will make a contractual agreement to provide services to all seekers without discrimination against the protected classes of “age, race, sex, sexual

orientation, religion, national origin, pregnancy, familial status disability, veteran status, and/or genetic information." (Protected groups, 2021)

- Complaints
    - An investigation will be conducted to review complaints that could be considered a breach of contract.
    - If after an investigation has been conducted and violations of the contract are found to be true penalties will be assessed against the agency. These could be in the form of fines or suspensions and lead up to and including termination of the contract.
    - The severity of the violation can also result in jail terms, and/or permanent banning of the agency.
    - The agency will have 30 days to refute any findings found in the investigation in a federal court.

These rights must be protected at the federal level as they are constitutionally guaranteed. AIRFA was mentioned earlier to have amendments and in 1993 Congress passed the Religious Freedom Restoration Act (RFRA) as one of those. The plan was "if a government action substantially burdens a person's exercise of religion, the government must demonstrate that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." (Rosenberg, 2021) However, the Court found that RFRA was unconstitutional for state governance. Having a form of the policy above will help individual maintain a quality of life. The policy will also set expectations for agencies to work within and set a standard for how to maneuver through the Establishment and Free Exercise Clauses that affect them directly.

If we do not see a policy like the one listed above, other solutions could be less attractive. The most drastic solution would be barring any faith organization from participating in social services. This would eliminate any question of whether a faith organization is using discriminatory practices in the name of government. Or faith agencies could have a reduced role in social services that would not promote discriminatory practices.

The costs with and without a new policy

Not having a policy in place for social services could cost everyone as they get swept up in the quagmire that the "Clauses" are now found in with recent, inconsistent rulings from the Supreme Court. (Lemieux, 2020) Creating legislation now will reduce costs in an ever-widening circle with benefits we have yet to see. This is important to realize that we save now and will pay off in dividends later.

By creating a new policy, we are creating new definitions. Legally, it is a hope to reduce overall litigation. We will always have some outliers that will want to test the waters. The codification of rights and policies should set boundaries of where the law ends and reduce ambiguities.

Reducing the ways people can be discriminated against adds value to a new policy in a few ways. Again, we could have an eventual reduction of litigation as everyone adjusts to non-discriminatory acts. Mental well-being would be improved for everyone. As in the foster system, more children could be placed and turn out more productive and adaptable children from the system. This was recognized by the United States Congress on the Joint Economics Committee webpage (2020) which states "A stable and healthy family life is crucial to healthy child development and is associated with a variety of positive outcomes."

Standardizing the system for providers enables them to use their resources more efficiently. Time is not wasted when expectations are set which makes for lower labor costs. Agencies can focus on their missions and spend less on advice, legal or otherwise.

A version of this policy will cost us all in the form of administrative oversight. While the U.S. Supreme Court feels that oversight is unnecessary, it is naïve to think that agencies will try to find workarounds, or just need help in trying to work through a new system. An administrative system is needed for people to file complaints with as well.

Indirectly, a cost of a different kind may come forward. Those agencies that do not wish to participate in the new policy may leave a hole in the social service net in some regions. If they are the only provider and close, it will force people to travel long distances or even forgo services. Foster children may have to leave their home counties to find a placement. (Hardy, 2017) And, if agencies do close, we will have unemployed workers who will need to relocate for work, depressing regions further.

In conclusion

With this essay, I have provided a policy proposal for new federal legislation to codify the regulations and rules around using faith agencies to provide public services using taxpayer dollars. Everyone has the right to practice their religious beliefs but losing access to services paid for by the public should not be blocked by the Establishment Clause. Agencies should not have priority over individuals when it comes to the rights afforded by the Free Exercise Clause.

I proposed that new federal legislation should be created to regulate the use of faith organizations that provide social services such as foster care, food banks, homeless shelters, etc.

to the general public. These faith agencies must agree to disregard their protection under the Establishment Clause when providing those services to all individuals without discrimination in exchange for taxpayer funding.

Religion and the U.S. Government were meant to be separated by the Framers of the Constitution. However, without more taxpayer funding to support governmental staffing of public services, we will continue to be dependent on a hybrid of governmental and faith agencies. Having a clear-cut procedure of how to move forward for those in need of help should be the ultimate goal that everyone wants.

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