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Challenging the Right,
Advancing Social Justice

WHEN EXEMPTION IS THE RULE

The Religious Freedom Strategy
of the Christian Right

by Frederick Clarkson



POLITICAL RESEARCH ASSOCIATES

Political Research Associates (PRA) is a progressive think tank devoted to supporting movements that are building a more just and inclusive democratic society. We expose movements, institutions, and ideologies that undermine human rights.

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Political Research Associates
1310 Broadway, Suite 201
Somerville, MA 02144-1837
www.politicalresearch.org*

Cover photo: Anti-choice activists supporting Hobby Lobby pray outside the Supreme Court, March 25, 2014 in Washington, DC. / Photo by BRENDAN SMIALOWSKI/AFP/Getty Images

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ACKNOWLEDGEMENTS

FEW WORKS OF ANY CONSEQUENCE or magnitude happen in isolation. All are built on the work of those who have come before, some known, most unknown. If I could, I would want them all to know I am humbled and honored to follow in their footsteps. Most publications are also collective enterprises and this is no exception. I want to thank the many people who made this report possible. I am honored to have had the assistance and wise counsel of my PRA colleagues—at various stages, Eric Ethington, Gabriel Joffe, Tarso Ramos, and report editor Abby Scher, who has patiently seen me through yet another remarkable editorial adventure. I am also grateful for the kind reading, constructive feedback, and encouragement from Rob Boston, Don Clark, Jay Michaelson, and Patti Miller. Special thanks to Jonathan Hutson for his expert research, editorial advice, and strategic media guidance. And finally, profound thanks to Tim Sweeney and the Pride Foundation for their generous support, without which this project might never have happened.

- Frederick Clarkson

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PREFACE

YOU MIGHT SAY RELIGIOUS LIBERTY is in my blood.

I'm a Mayflower descendant. My maternal grandmother was Delores Howland, some 16 or so generations removed from John Howland. His home still stands in Plymouth, and I have been there to sign the descendants' book.

As proud as I am of my Pilgrim Congregationalist history, I am also aware that within that history is the Puritan experience of the Salem witch trials and the treatment of indigenous peoples: reminders of how religion writ large as a culture's moral compass can bring out the worst in us. By the time our Constitution was written, both the desire to be free from religious tyranny found in the spirit of the Pilgrims—and the need to protect ourselves from religious zealots like the Puritans—would serve to inform its authors. They treated both as instructive, writing into the Bill of Rights language that would preserve our religious liberty and restrict the government's power to establish any religious point of view as normative.

The irony of the Religious Right fighting for a “freedom” that utilizes all three branches of government to enforce their narrow theology isn't lost on me. Anyone who doubts either the intent or the ability of the Religious Right to reshape the landscape of religious liberty in America isn't paying attention. And, to quote Arthur Miller's *Death of a Salesman*: “Attention must be paid.”

I believe in religious freedom, but not the kind that argues that government should grant me the right to refuse to serve or hire someone because they are homosexual. Removing someone's civil rights by empowering the government to protect and preserve my religious homophobia is not my idea of religious liberty.

I believe in religious freedom, but not the kind that argues that government should tolerate employers or medical care professionals who want to deprive women of their full range of health care options. Depriving women of choices that our courts deem legal and appropriate to preserve my religious misogyny is not my idea of religious liberty.

Religious expression in the United States is a beautiful mixture of the world's best thinking, the collective of which is hard to find anywhere else in the world. We were among the first people on the planet to live in a place where such expression could unfold free of tyranny; not restricted by the ability or willingness of the elected to understand or tolerate a particular religious expression; and within a bubble of protection that asked only that our free exercise neither depend on the establishment of the government for its validity nor violate any other laws or civil rights.

It is within such a context that the United Church of Christ, within which my faith is now lived, gave free expression to its beliefs and called for an end to slavery, an end to the disenfranchisement of women and people of color, an end to state-sanctioned homophobia, an end to the stranglehold that management held over working class peoples. Long before the laws would catch up to us, we ordained the first Black pastor in America, the first female pastor, the first gay pastor, the first lesbian pastor, and the first transgender pastor. We wrote liturgies that called for our clergy to perform same-gender-loving marriages.

When North Carolina rewrote their Constitution to not only deprive same-gender-loving couples of the full rights that our government provides to heterosexual couples when they marry, but also

criminalized the religious act of performing such marriages when allowed by other states, it was the United Church of Christ that brought a suit against the state. The federal Court ruled in our favor and called the amendment unconstitutional. It is one thing to ask the state to bend to your narrow religious beliefs. It is something else entirely to ask the state to imprison and fine the clergy of another religion; one that disagrees with you.

This is the religious liberty being propagated by the Religious Right. They argue that they have no religious freedom unless their restrictive moral code is written into the Constitution. They argue that they have no religious liberty unless those whose religious ceremonies violate the sanctity of their precious theology are thrown in jail. What they want to call religious freedom is in fact the kind of oppressive religious tyranny that my ancestors left their homeland to escape.

I believe in legislation that protects religious liberty. Good laws have been written to protect the free expression of my, and others', religion; and to limit the reach of government to establish anyone's religious beliefs as normative.

We can't allow the Religious Right to twist the meaning of religious liberty to the point that it becomes the means by which their theocratic vision is finally and fully realized. For decades now they have fought to erode or redefine the very freedoms the Constitution was written to protect. It would be unwise of us to either turn a blind eye to their machinations or to dismiss the ongoing effectiveness of their efforts.

Outcomes are hard to predict, but I think it is fair to say that the Religious Right is slowly but surely taking significant ground in the battle to turn America into a theocratic state, or a collection of theocratic mini-states, governed by the very narrowest of religious points of view. That they are doing it under the guise of protecting their religious liberty is the greatest of ironies. Their ambitions are to unseat the U.S. as the world's safest place to explore and express one's spiritual longings. If left unchecked by those of us who want to preserve an authentic rendering of religious freedom as envisioned by this country's founders, they will succeed.

Frederick Clarkson knows this. His ongoing and now longstanding commitment as an investigative journalist to bring out into the open the more covert operations of the theocratic Right makes him eminently qualified to write about this. He sounds an alarm bell that not enough of us are paying much attention to. He not only asks that we learn everything we can about what the Religious Right is up to, he realizes that, unless those of us who want to preserve our longstanding freedoms act with as much sophistication and savvy as they do, we will always lose ground to them. As the late Rev. Dr. Andrew Weaver used to say, "They are playing tackle football, and we are playing touch. We are going to lose this game every time."

I strongly urge you to not only read this remarkable report; I ask you to take seriously the actions Frederick Clarkson calls for within it. I intend to bring the United Church of Christ into this conversation. We have never been bystanders in the face of injustice when power colludes to deprive others of their liberty. We will not be in this time, either.

The Rev. John C. Dorhauer
General Minister and President
United Church of Christ

EXECUTIVE SUMMARY

THE EVANGELICAL PROTESTANT Christian Right and U.S. Roman Catholic bishops are intensifying their campaign to carve out arenas of public life where religious institutions, individuals, and even businesses may evade civil rights and labor laws in the name of religious liberty. By creating zones of legal exemption, the Christian Right seeks to shrink the public sphere and the arenas within which the government has legitimacy to defend people's rights, including reproductive, labor, and LGBTQ rights. In this, it is often aligned with the antigovernment strategy of free market libertarians and some business interests, who for a variety of reasons also seek to restrict arenas where government can legally act.

This conservative Christian alliance is challenging a century or more of social advances and many of the premises of the Enlightenment underlying the very definition of religious liberty in the United States. Its long-range goal is to impose a conservative Christian social order inspired by religious law, in part by eroding pillars of undergirding religious pluralism that are integral to our constitutional democracy.

Since Political Research Associates' March 2013 report, *Redefining Religious Liberty: The Covert Campaign Against Civil Rights*,^{*} a remarkable string of cultural, legislative, and legal victories by the LGBTQ community have further animated the Right's defensive strategy aimed at exempting conservative Christians from having to accept certain advances in human and civil rights. However, the Christian Right's religious freedom strategy is part of its long-game and is not merely an anti-LGBTQ tactic.

Among this report's findings:

- The network of Christian Right legal institutions advancing the redefinition of religious freedom is growing in its capacity to affect legal, political and cultural change.
 - › The Becket Fund, which has litigated landmark Supreme Court cases like *Hobby Lobby* and *Hosanna-Tabor*, grew 86 percent in just four years, from FY2009

to FY2012.

- › The national legal network Alliance Defending Freedom increased its annual revenues by \$5 million during the same period (a 21% increase) while also expanding its effort to seek influential legal precedents in international courts.
- › In an important mainstreaming move, the conservative John Templeton Foundation funneled \$1.6 million through the Becket Fund to establish a religious liberty clinic at Stanford University Law School. It opened in January 2013.
- The Christian Right's appropriation of religious freedom to justify discrimination is plainly visible in the U.S. Supreme Court's 2014 *Hobby Lobby* ruling, which for the first time recognized limited religious rights for closely held, private corporations to deny the Affordable Care Act's contraceptive mandate. This ruling has transformed not only federal jurisprudence, but the national conversation about the meaning and scope of religious freedom. One result was that the religious beliefs of the owners trumped the consciences and health interests of their employees.
- The Christian Right is seeking to undermine and evade civil rights law beyond the courts by "religifying" organizations. This means rewriting mission statements, contracts, and job descriptions to claim that the entire organization or jobs within it are essentially religious in nature and subject to the long-standing exemption of clergy from the Civil Rights Act. Under this logic, a religified business or nonprofit would have the right to discriminate against an LGBTQ client, or others with whom they may religiously disagree, by excluding people who do not conform to their doctrines. The groups promoting this tactic, such as Alliance Defending Freedom and Liberty Institute, have issued handbooks to help organizations protect against "dangerous antireligious attacks."
- Religification efforts are attempting to build on the 2012 U.S. Supreme Court ruling in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission* (EEOC) that the religious duties of a teacher fired in a discriminatory way insulated the mainline church school from antidiscrimination laws under the longstand-

^{*} Jay Michaelson, *Redefining Religious Liberty: The Covert Campaign Against Civil Rights* (Somerville, MA: Political Research Associates, March 2013). <http://www.politicalresearch.org/resources/reports/full-reports/redefining-religious-liberty/#sthash.VFqG8kCB.dpbs>.

ing clergy exemption. The ruling opened the door to expanding the definition of ministry, so that many more institutions—and their employees—can be exempted from the protections of the law.

- The Christian Right is seeking to pass state-level Religious Freedom Restoration Acts (RFRA) that would allow for-profit businesses to seek religious exemptions in the way the *Hobby Lobby* case made possible under the federal RFRA. The Right has succeeded in Mississippi, and, controversially, in Indiana, where the state RFRA was revised under pressure to make clear that it did not justify discrimination against LGBTQ people.
- Today's arguments echo those made by opponents of civil rights advances for African Americans in the 20th century—notably the fundamentalist Bob Jones University when it defended its policy against interracial dating because of its religious beliefs. In a major defeat for the nascent Christian Right, the U.S. Supreme Court ruled in 1983 that the Greenville, SC, college was not entitled to a federal tax exemption if it maintained this racist policy because the government's interest in eradicating racial discrimination in education trumped the school's claim to the First Amendment right to religious freedom.
- President Obama has failed to rescind a George W. Bush-era legal memo that allows federal contractors and grantees to discriminate in their hiring on religious freedom grounds.
- The Christian Right has carved out these victories following decades of building its political and institutional power. To avoid fighting within its frame and definition of religious liberty, progressives and their allies must build their own long game. One of the ways to do this is to avoid dualisms that distort the issue and play to the Christian Right framing, such as suggesting that LGBTQ civil rights (or reproductive rights) and religious freedom are somehow mutually exclusive.

While winning many victories, the Christian Right has lost some important battles in its campaign to redefine religious freedom. This is particularly so when other religious groups have taken the lead in opposing the Right. The United Church of Christ successfully sued to overturn a 2012 amendment to the North Carolina

state constitution asserting not only that same-sex marriages were invalid, but effectively criminalizing same-sex marriage ceremonies. Coalitions involving religious groups have also thwarted the passage of state RFRA that justify discrimination in Georgia and North Carolina. Elsewhere, workers and pension advocates took the lead. In December 2015, a federal appeals court ruled that the St. Peter's Catholic health system in New Jersey was not exempt on religious grounds from following federal law protecting pensioners and that it needed to fully fund its pension.

Contrary to the vision of much of the Christian Right, religious freedom is for everyone. We need fresh perspectives and coalitions to meet these challenges. Other sectors of society, from moderate Republicans to civil rights and labor activists, to religious and nonreligious organizations, need to discover how to do this, even though they may not be accustomed to working together. This will certainly mean envisioning and acting on short-term and long-term strategies, both inside and outside of the courts. We need 21st century coalitions and strategies to meet the challenges and opportunities of our time.

Among our other recommendations, we must,

- **Reclaim religious freedom as a fundamental democratic value.** This means embracing religious freedom as emphasizing the equality of all people, including everyone's right to believe and to practice faith (or not) as we will, and to change our minds—free from the undue influence of powerful religious institutions and government. The right to believe differently from the rich and the powerful is a prerequisite for free speech and a free press, the other two elements of the First Amendment of the U.S. Constitution.
- **Increase our capacity to respond to religious freedom-related issues.** This would include but not be limited to resourcing a network of researchers, writers, political thinkers, and scholars to develop and inform strategy with respect to religious liberty and civil rights.
- **Expand and refresh historic alliances that have extended civil and labor rights** in the 20th century more widely and deeply than at any other time in our history.
- **Expand celebrations of Religious Freedom Day on January 16th** and other events to of-

fer a clear, consistent, positive, and historically rooted alternative to the Christian Right's redefinition of religious liberty.

- **Counter misinformation.** Many conservative religious liberty claims rely on falsehoods, bogus history, and scare tactics. For example, clergy have never been forced under the law to perform any marriage of which they do not approve.
- **Urge candidates and elected officials to end legal justifications for all forms of discrimination** under the rubric of religious freedom. This includes demanding that President Obama end discrimination by faith-based contractors justified by the Bush-era legal memo.
- **Consider international human rights standards** regarding religious freedom and the rights of conscience. They are very strong and are consistent with a domestic agenda, and are part of the growing international dimension to this struggle.
- **Develop electoral answers** to the Right's long-term efforts to control various levels of government.

For a full list of recommendations, see page 27.



A statue of Thomas Jefferson, author of the Virginia Statute for Religious Freedom, in Colonial Williamsburg, VA.

religious beliefs of the owners trumped the beliefs and health interests of their employees.

This and other legislative and judicial wins discussed in this report have altered our public discussion and policy on a wide range of issues, from access to abortion, to health services for children of immigrants who are victims of sex abuse, to matters of LGBTQ discrimination, including access to government services for routine processing of marriage licenses for legal same-sex marriage.

The ripple effects of all this appear almost daily in the news as major politicians seek to prove their conservative Christian bona fides. “I believe that 2016 is going to be a religious-liberty election,” Senator Ted Cruz (R-TX) declared before a raucous crowd of some 7,000 Southern Baptists in October 2015. “As these threats grow darker and darker and darker, they are waking people up here in Texas and all across this country.”⁴ Religious liberty was the key theme of many Christian Right events in 2015, including the national Values Voter Summit in Washington, D.C., the World Congress of Families held in Salt Lake City, and campaign rallies of Sen. Ted Cruz. This is the new normal.

But most everyone to the left of the Religious Right is behind the curve in the face of these historic developments—from progressive issue organizations, the broad liberal/left, and the major political parties, including moderate Republicans. The social justice community broadly speaking is also impeded by the perennial problem of issue and

political silos (e.g. dividing reproductive justice v. LGBTQ rights vs. economic justice) even though it confronts a far more integrated program and strategy on the part of the Right.

This report will outline the history of that strategy and recent trends, particularly in the legal arena, detail the growth of key Christian Right organizations carrying out that strategy, highlight promising countertrends, and suggest some ways forward. As we will see, the Christian Right’s ability to move its agenda has greatly increased in recent years, thanks in large part to the construction of a vast organizational infrastructure of educational institutions, political and cultural organizations, and non-profit legal networks, as well as key alliances within the Republican Party and the wider conservative movement. We highlight the legal infrastructure because the opportunities created by recent U.S. Supreme Court decisions are among the main fruits of the Christian Right’s work of recent decades.

Let’s first state what religious freedom is so we can better understand how the Christian Right is appropriating it to advance their agenda. Religious freedom is the right of individual conscience; to believe as we will and to change our minds freely, without undue influence from government or from powerful religious institutions. It also means the right to practice our beliefs free from the same constraints. The right to believe differently from the rich and the powerful is a prerequisite for free speech and a free press, the other two elements of the First Amendment of the U.S. Constitution. That is one reason why religious freedom is often called the First Freedom. Religious freedom is integral to the idea of separation of church and state. Separation exists not to limit religious expression, but to safeguard against creeping religious supremacism and the theocratic temptations that have persisted throughout American history into the present.

This report is a call to people of goodwill to consider that as a society, we are on a slippery slope towards the kinds of factionalism that concerned the Framers of the Constitution. It is time for us to take a deep breath and consider the implications.

BUILDING INFRASTRUCTURE FOR THE LONG GAME

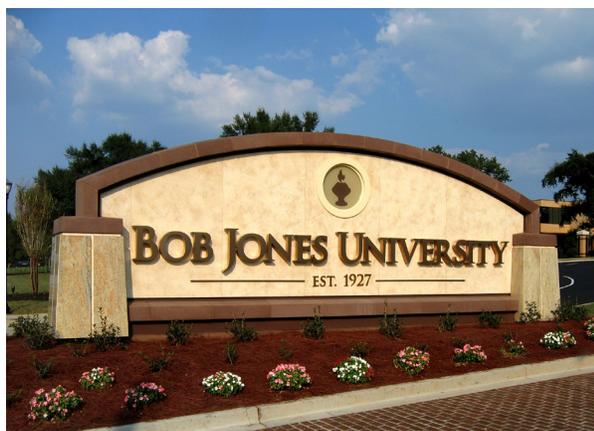
THE CHRISTIAN RIGHT'S POWER to reframe religious liberty as a justification of discrimination builds on decades of mobilization. It had to recover from its great defeat, the case of *Bob Jones University v. United States*.

MOBILIZING TO DISCRIMINATE IN *BOB JONES*

As recently as the 1980s, Christian Right activists defended racial segregation by claiming that restrictions on their ability to discriminate violated their First Amendment right to religious freedom. They lost in a landmark Supreme Court case in 1983, *Bob Jones University v. United States*, that has shaped politics every since. The U.S. Supreme Court ruled that the Greenville, SC-based, Christian fundamentalist school was not entitled to its federal tax exemption if it maintained its policy against interracial dating.

The case, which began during the Nixon administration, became a cause célèbre of the then-budding Christian Right as it advanced over the course of a decade. The late conservative strategist Paul Weyrich and historian Randall Balmer, among others, credited *Bob Jones* as the catalyst that politicized a wide range of conservative evangelicals. The “New Right” used *Bob Jones* as a political cudgel against Democratic President Jimmy Carter, turning many evangelicals against one of their own and contributing to the election of Ronald Reagan in 1980.⁵

Instead of African Americans being discrimi-



Bob Jones University entrance, Greenville, SC.

nated against by Bob Jones, the university argued it was the party being discriminated against in being prevented from executing its First Amendment rights. The Supreme Court disagreed, declaring, “Government has a fundamental, overriding interest in eradicating racial discrimination in education...[which] substantially outweighs whatever burden denial of tax benefits places on [the University’s] exercise of their religious beliefs.” The Court made clear, however, that its verdict dealt “only with religious schools—not with churches or other purely religious institutions.”⁶

As Balmer and others have shown, even before the issues of abortion and homosexuality became the policy priorities of a newly politicized Christian Right, its leaders fought the perceived threat of racial equality at conservative Christian academies by claiming their religious freedom to discriminate. This legacy should remind us that the Right’s religious liberty campaigns mobilize old arguments around new targets, and that their agenda extends beyond questions of contraception coverage, or marriage and nondiscrimination in the LGBTQ context.

BUILDING A POLITICAL INFRASTRUCTURE FOR A COUNTEROFFENSIVE

In the decades since *Bob Jones*, the Christian Right has catalyzed a conservative political realignment reflected in many ways in the composition of the U.S. Supreme Court. One might reasonably wonder whether there might have been a different ruling in *Bob Jones* had *Hobby Lobby* been decided first. However, it should also be noted that the court underscored that *Hobby Lobby* was not constructed to allow for religious justification for racial discrimination and their decision “provides no such shield.”⁷

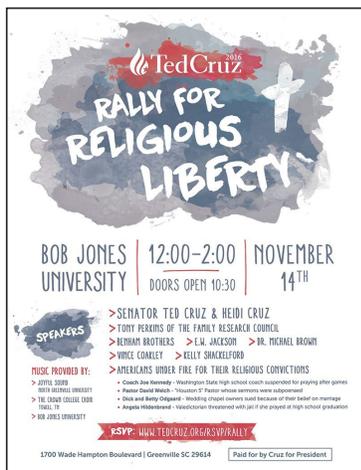
The mobilization around *Bob Jones* was part of the Christian Right’s long-term political development, when it pulled poorly mobilized evangelicals into civic engagement with visions of Godly governance. Jerry Falwell’s Moral Majority and its successors emphasized electoral development, making the Christian Right an integral part of the GOP. Beyond turning out current registered voters, they accomplished this by expanding the voter pool of conservative Christians and developing a class of people with the relevant skill sets and experience to contend for power, particularly in their drive to become the dominant faction in the Republican Party.⁸ The Christian Right’s hands on the levers of power in government, either directly or by proxy

through Republican alliances, made the job of civil rights and labor advocates that much harder.

Journalist Matthew Yglesias published an influential article in 2015 that paints a stark picture of how growing Republican control is creating opportunities for its Christian Right base. He observes that “70 percent of state legislatures, more than 60 percent of governors, 55 percent of attorneys general and secretaries of state...are in Republican hands. And, of course, Republicans control both chambers of Congress.”⁹

It is a trend that appears likely to increase. The Christian Right’s electoral plans for 2016 have long been in evidence. Here’s one brief example. David Lane of the American Renewal Project has been developing Christian Right organizing and electoral capacity within the Republican Party for many years. He is seeking to run 1,000 conservative Christian clergy for office at all levels in the next few years. He claims to have held training conferences for more than 2,000 clergy in 2015 in the hows and whys of mobilizing their congregations for electoral impact.¹⁰ Lane told *Reuters* in December 2015 that he was halfway to his goal of getting 1,000 pastors to run in down-ticket races.¹¹

Such campaigns seek not just to win elections, but to engage conservative Christians as a self-identified electoral force of lasting consequence.



Then and Now: Flyer for Rally for Religious Liberty at Bob Jones University, Nov. 2015.

operative, David Barton.¹³

In contrast, Yglesias warns, “Democrats have nothing at all in the works to redress their crippling weakness down the ballot.” The failure of everyone to the left of the Religious Right to

develop an effective electoral response to all this is especially remarkable because journalists and other political observers have seen the situation developing for years.¹⁴

MANHATTAN DECLARATION: A STRATEGIC TURNING POINT

A transformational moment in the contemporary Christian Right’s approach to religious freedom was the November 2009 publication of the *Manhattan Declaration: A Call to Christian Conscience*—a manifesto linking three interrelated themes of “freedom of religion,” “sanctity of life,” and “dignity of marriage.”¹⁵ The culmination of decades of theological and political development, conservative Roman Catholic and evangelical strategists (joined by junior partners in the Mormon Church and Orthodox Christianity) found sufficient common theological and political ground to wage not only the short term battles of the culture wars, but to envision a 21st century notion of Christian cultural conservatism—and a way to get there. These actors in various combinations, and sometimes in alliance with elements of Orthodox Judaism, have been tactical partners over time. This coalition was nonetheless a real achievement that crystallized a strategic direction deploying “religious freedom” to roll back advances in LGBTQ rights and reproductive justice.

Originally signed by 150 Christian Right leaders (followed by a half million others), it has broadened, deepened, and sustained the Roman Catholic/evangelical alliance that led the culture wars for more than a generation. Indicative of how far they had come in transcending centuries of distrust, 50 sitting bishops, archbishops, and cardinals—not merely a token prelate or two—joined top evangelical leaders in signing the *Declaration*.

The *Declaration* seeks to unify, rally, and mobilize the Christian Right:

We are Christians who have joined together across historic lines of ecclesial differences to affirm our right—and, more importantly, to embrace our obligation—to speak and act in defense of these truths. We pledge to each other, and to our fellow believers, that no power on earth, be it cultural or political, will intimidate us into silence or acquiescence. [Emphasis in the original.]

The document essentially defines religious freedom as being only for people who believe as

they do, and as under attack by those who believe differently. They declare,

Christians confess that God alone is Lord of the conscience. Immunity from religious coercion is the cornerstone of an unconstrained conscience. No one should be compelled to embrace any religion against his will, nor should persons of faith be forbidden to worship God according to the dictates of conscience or to express freely and publicly their deeply held religious convictions. What is true for individuals applies to religious communities as well.

This foundational idea expresses the rationale for religious exemptions from the law. Although published in 2009, the Declaration reasonably anticipated one day having to respect the equality of LGBTQ people in, among other things, marriage and employment, and the broad development of antidiscrimination laws generally.

The Declarationists also foresaw further wrangling over the question of complicity in abortion via efforts to

weaken or eliminate conscience clauses, and therefore to compel pro-life institutions (including religiously affiliated hospitals and clinics), and pro-life physicians, surgeons, nurses, and other health care professionals, to refer for abortions and, in certain cases, even to perform or participate in abortions. We see it in the use of antidiscrimination statutes to force religious institutions, businesses, and service providers...to comply with activities they judge to be deeply immoral or go out of business.¹⁶



Robert P. George is the primary author of the Manhattan Declaration.



The *Manhattan Declaration* essentially defines religious freedom as being only for people who believe as the authors do, and as under attack by those who believe differently.

Albert Mohler, President of Southern Baptist Seminary, explained that although he abhors Roman Catholic doctrine,

we are facing an inevitable and culture-determining decision on the three issues centrally identified in this statement. I also believe that we will experience a significant loss of Christian churches, denominations, and institutions in this process. There is every good reason to believe that the freedom to conduct Christian ministry according to Christian conviction is being subverted and denied before our eyes.¹⁷

One key message of the *Declaration* is that when conservative Christians are required to honor federal civil rights laws, profound opposition may be required. Invoking Martin Luther King Jr.'s "Letter from a Birmingham Jail," the Declarationists called for "resistance to the point of civil disobedience against any legislation that might implicate their churches or charities in abortion, embryo-destructive research or same-sex marriage."¹⁸ Their promise of resistance has since been reiterated many times by top Christian Right leaders, such as Rick Warren, Tony Perkins, and Robert P. George.¹⁹ Others have raised the possibility of violence.²⁰

George, a professor of jurisprudence at Princeton University and prominent Roman Catholic neoconservative, originated the *Declaration*. A key movement strategist, George is also the founder and guiding light of a number of related institutions that have adopted the Declaration's issue trinity, including the National Organization for Marriage, the Witherspoon Institute, the American Principles Project, and American Principles Action. Signers of

the *Declaration* include most of the leaders of the organizations mentioned in this report.

The three themes of the *Declaration* now frame the agendas of the major organizations of the Christian Right from the legal group Alliance Defending Freedom (ADF) and CitizenLink (the political arm of Focus on the Family) with its three dozen state affiliates,²¹ to the United States Conference of Catholic Bishops (USCCB). The formula promises to define their common platform for the foreseeable future.

On the eve of the 2015 *Obergefell v. Hodges* decision of the Supreme Court that legalized marriage equality, Mat Staver, founder and leader of another Christian Right legal agency, Liberty Counsel, noted that the *Declaration* “anticipated what lay ahead” and that now “the future is here, and we are facing a fundamental conflict between the laws of Caesar and the laws of God.”²²

LEGAL AND LEGISLATIVE PLAYERS AND TRENDS TODAY

PRA'S 2013 REPORT *Redefining Religious Liberty* exposed key organizations' message framing, capacities, and goals. Since then, two major Christian Right law firms featured in that report, the Becket Fund for Religious Liberty and ADF, have played historic roles in advancing their agenda in transformational decisions of the U.S. Supreme Court. The other major trend since 2013: These and other Christian Right groups promoting "religious freedom" have grown in revenues and influence on the national stage, adding millions to their annual budgets in two or three years (see boxes). For smaller outfits like the Becket Fund and Liberty Counsel, this infusion substantially expanded their reach.

It is worth considering in this context that over the past three decades, Christian Right-oriented law schools have arisen that developed much legal talent for the long haul. Pat Robertson founded Regent University School of Law in Virginia Beach (1986) and the late Jerry Falwell established a law school at his Liberty University in Lynchburg, VA (2004). In 1999, conservative Roman Catholic (and Domino's Pizza magnate) Thomas Monaghan founded Ave Maria School of Law in Naples, FL.

This growing Christian Right legal infrastructure was fully engaged in the following key legal developments since our 2013 report.

FEDERAL RELIGIOUS FREEDOM CASES

In the 2014 *Hobby Lobby* case opposing the Affordable Care Act's contraceptive mandate, the U.S. Supreme Court ruled for the first time that "closely held" for-profit companies with few shareholders have religious freedom—a right of the kind normally applied to individuals or religious organizations,²³ and that this right may be applied in matters related to certain regulations of the Affordable Care Act.²⁴ In so ruling, the Court gave some businesses the right to encroach on the religious liberty and workers' rights of its employees while declaring exemptions from the law for themselves.

While commonly referred to as *Hobby Lobby*, it was actually a consolidated case involving *Burwell v. Hobby Lobby Stores Inc.* and *Conestoga Wood Specialties Corp. v. Burwell*. ADF represented Conestoga Wood Specialties and the Becket Fund represented Hobby Lobby. Often overlooked is

that the Court also allowed the religious views of the owners of these companies to trump medical science in claiming that the four contraceptives at issue—two kinds of birth control pills and two kinds of intrauterine devices—were abortifacients.²⁵ An amicus brief submitted by medical associations, including the American College of Obstetricians and Gynecologists, stated that notwithstanding the personal views of the company owners regarding when life begins,

*The medical and scientific communities define pregnancy as beginning upon implantation. While personal beliefs may dictate individual choices and values, they cannot alter established scientific standards and terminology: abortion refers to the termination of a pregnancy. Thus, the term 'abortifacient' refers to—and should only be used in connection with—drugs or devices that end a pregnancy, not those that prevent it.*²⁶

The result is that *Hobby Lobby*, et al. redefines what pregnancy is, and therefore what abortion is. This may become a further issue with religious claims once again trumping the religious rights and health needs of women as further litigation tests the reach of *Hobby Lobby*. Feminist author Patricia Miller writes that although it was evangelicals who defeated the contraception mandate, they had a lot of Roman Catholic help. Indeed, the Catholic bishops had long "sought a broad-based conscience clause that would allow any employer or insurer to refuse to cover contraceptives for any religious or moral objection." They may now have one.²⁷



The Hobby Lobby chain of retail arts and crafts stores based in Oklahoma City, OK, won an important religious freedom case for the Christian Right.



Americans United for Separation of Church and State used the hashtag #FreedomFraud to comment on the *Hobby Lobby* case.

In its decision, the Court relied on the bipartisan 1993 federal Religious Freedom Restoration Act (RFRA), which was intended to protect individuals against government actions. RFRA set a high standard in which policymakers may not “substantially burden” a person’s exercise of religion unless they can show a “compelling governmental interest” and that the policy was the “least-restrictive means” of achieving it. *Hobby Lobby* reinterprets that standard to allow not just individuals but third parties such as businesses to make claims of religious exemption from various laws. As Professor Marci A. Hamilton of Yeshiva University’s Benjamin Cardozo School of Law noted, this interpretation of RFRA “dramatically increases the rights of religious believers against all laws as compared to the First Amendment.”²⁸

Hobby Lobby also relied upon a less well known law unanimously passed by Congress and signed by President Bill Clinton in 2000: the Religious Land Use and Institutionalized Persons Act (RLUIPA). The Court cited RLUIPA in the first paragraph of its *Hobby Lobby* decision.

A unanimous U.S. Supreme Court decision in 2015 that was widely deemed a reasonable accommodation of religion also relied on RLUIPA. *Holt v. Hobbs* (litigated by the Becket Fund, and argued by Professor Douglas Laycock of the University of Virginia Law School²⁹), allowed an Arkansas prison

inmate to grow a half-inch beard (even though beards were against prison regulations) because his Muslim faith required it. The ruling, which relied on RLUIPA, was widely deemed a reasonable and uncontroversial accommodation of prisoner Holt’s religion. It was, however, a significant judicial ratification of the language of RFRA and RLUIPA expanding the scope meant by the “exercise of religion.”³⁰

STATE-LEVEL RELIGIOUS FREEDOM RESTORATION ACTS

The original purpose of the federal RFRA was to restore individual religious liberty, seen to have been taken away in the 1990 Supreme Court case *Employment Division v. Smith*. This case involved Native Americans denied state unemployment benefits in Oregon because they had been fired as state drug counselors for using the illegal drug peyote in traditional religious ceremonies. The Court ruled that they had no legal recourse, so Congress in 1993 sought to narrowly set a standard essentially reversing the Smith decision via RFRA.

After the Supreme Court limited the scope of RFRA to the federal government (in the case of *City of Boerne v. Flores*),³¹ civil rights activists got versions of the legislation passed in 21 states. Most of these were identical or similar to the original federal RFRA, but in the wake of the *Hobby Lobby* decision, Christian Right groups sought to pass state-level RFRA’s that would allow third parties such as businesses to claim religious exemptions from laws. This was particularly aimed at businesses that did not want to participate in any way in same-sex marriage. In 2014, the legislation failed in several states, but passed in Mississippi, where it remains on the books. In 2015, state RFRA’s passed only in Indiana and Arkansas. Justice Ruth Bader Ginsburg, dissenting in *Hobby Lobby*, warned, “The court’s expansive notion of corporate personhood invites for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faiths.” Her concerns were realized in the efforts to insert *Hobby Lobby*-ized provisions into state RFRA’s.³²

A national controversy erupted in Indiana in March 2015 following the passage of a state RFRA which seemed to justify anti-marriage equality discrimination. (Nineteen original sponsors of RFRA were so outraged by this trend that they withdrew their support for the act.³³) The bill was modified in April to ensure that was not the case



Supreme Court of the United States ruled in favor of marriage equality in *Obergefell v. Hodges*, June 2015.



Supporters en route to the Marriage Equality Rally on day of *Obergefell v. Hodges* case oral hearings at the U.S. Supreme Court in Washington DC, April 28th 2015.

(see box).³⁴ A standard RFRA has so far failed to pass the legislature in Michigan. Instead, the state enacted legislation in June 2015 that allowed adoption agencies that contract with the state to decline service to prospective parents on religious grounds. The principal beneficiaries of the legislation were the evangelical Bethany Christian Services and the Michigan Catholic Conference, which together reportedly provide 25 to 30 percent of adoptions in the state.³⁵ Catholic agencies in several states, beginning in Massachusetts a decade ago, previously withdrew from providing state contracted adoption services rather than conform to state law upholding LGBTQ equality and recognizing same-sex marriages.³⁶ These are the kinds of exemption controversies we are likely to see for the foreseeable future, following from other such efforts to legalize LGBTQ discrimination without consequences for the discriminating party.³⁷

OBERGEFELL V. HODGES

The landmark decision of the U.S. Supreme Court that legalized same-sex marriage nationally in June

2015 was a major defeat for the Religious Right, but one for which they were prepared. As we will see, their political and legal contingency plans are now appearing all over the country, as activists invoke new forms of conscientious objection, and private spaces and places are being turned into legal bastions against the wider culture in which abortion and contraception are legal, and LGBTQ equality is mainstreamed. The Christian Right is now busy seeking to limit the implementation of the decision and to make it as unworkable as possible, in part by attempting to subject it to a death of a thousand exemptions.

FIGHTING FOR RELIGIOUS FREEDOM IN NORTH CAROLINA

A pivotal North Carolina court case from 2014, *General Synod of the United Church of Christ v. Reisinger*, demonstrates that the Christian Right does not get to define Christianity and that LGBTQ equality can, in fact, express the sacred.

At issue was a 2012 amendment to the North Carolina state constitution asserting that same-sex

ALLIANCE DEFENDING FREEDOM

Alliance Defending Freedom is a national legal network headquartered in Scottsdale, Arizona, led since its founding by Alan Sears. It has long had a close relationship with the conservative evangelical group Focus on the Family and its national political arm, CitizenLink, along with its three dozen state affiliates. As such it has been a vital hub in the development of legal and political talent.



ADF grew 21 percent from FY 2009 to FY 2012, increasing gross revenues from \$34.7 million to \$39.8 million. ADF litigated *Conestoga Wood Specialties v. Burwell*, which the Supreme Court later consolidated with what became the historic *Hobby Lobby* case.

ADF employs around 50 lawyers and has provided continuing legal education training to more than 1,800 attorneys. Since 2000, its Blackstone Legal Fellowships have trained more than 1,600 first-year law students from more than 225 law schools in 21 countries. These internships aim to inspire a “distinctly Christian worldview in every area of law, and particularly in the areas of public policy and religious liberty.”

Thus it is fair to ask: What is this distinct worldview? While the Blackstone program includes “natural law” as part of its legal and “worldview” curriculum, its recommended reading list features books by leading Christian Reconstructionist authors who advocate for transforming society according to “Biblical principles” in all areas of life, including politics and government.¹¹⁷ Numerous Blackstone alumni have risen to positions of influence in state and federal courts, the federal government, the United Nations, and international agencies.¹¹⁸

The ADF’s model Student Privacy Policy offers a highly individualized notion of religious exemption from civil rights laws, claiming, “Allowing students to use opposite-sex restrooms and locker rooms would seriously endanger students’ privacy and safety, undermine parental authority, violate religious students’ right of conscience, and severely impair an environment conducive to learning.” Its use of the term “opposite-sex” is clearly aimed at transgender students or in response to the introduction of trans-inclusive policies.¹¹⁹

Unsurprisingly, an international dimension to the struggle has emerged, with ADF launching a Global Initiative in 2010 to wage an “international fight for religious liberty for Christians and establishing a larger ADF footprint to accomplish this mission.” ADF says it funds “human rights legal work” in Europe, North America, and South Asia.¹²⁰ In so doing, it has worked in national and regional courts as well as the United Nations system. Since opening a regional office in Vienna, Austria, ADF has worked across Europe (and increasingly in Latin America) on issues of abortion, euthanasia, registration of churches, and homeschooling. In FY2012, ADF spent \$6 million to build alliances with religious and secular organizations that share its interests. ADF’s 2013 annual report states:

ADF works with our allies to develop effective approaches to legal cases that could result in important state, federal, and U.S. Supreme Court and foreign court precedents. Our most important example of this is found in court actions upholding voter initiatives affirming the traditional definition of marriage, by defending the rule of law in our courts and governmental bodies. ADF’s alliance has been on the leading edge of this effort.

As Gillian Kane reported in PRA’s quarterly, *The Public Eye*, this strategy of gaining precedents in international courts is working, with U.S. courts noting the cases in their decisions.¹²¹

PROFILE

THE BECKET FUND FOR RELIGIOUS LIBERTY

The Becket Fund for Religious Liberty, founded in 1994, grew 86 percent in just four years, with a gross revenue increase from \$2.7 million in FY2009 to \$4.75 million in FY2012. It litigated and won the landmark cases of *Hosanna-Tabor v. EEOC*, *Hobby Lobby Stores v. Burwell*, and *Holt v. Hobbs*. These cases are among the most important religious liberty cases in recent American history, and, as noted, challenge contemporary understandings of the First Amendment, with implications that are just beginning to be felt.



Its case docket includes seven that are follow-ups to the *Hobby Lobby* case, now consolidated into one that will reach the U.S. Supreme Court in 2016.¹²² The case, now named *Little Sisters of the Poor Home for the Aged v. Burwell*, challenges the procedure for seeking an exemption to the contraception mandate under the Affordable Care Act. The Little Sisters, a Roman Catholic order, does not want to be “complicit” in abortion and contraception by having to fill out the simple form requesting an exemption from the law on grounds that this would facilitate the very acts to which it objects. Becket’s cases will be presented by Paul Clement, Solicitor General during the administration of George W. Bush, who also argued the *Hobby Lobby* case.¹²³ ADF has litigated two of the seven cases.¹²⁴

In addition to its remarkable domestic record, the Becket Fund frequently litigates at the European Court of Human Rights (ECHR) in Strasbourg, France. The ECHR is the primary international court designed to enforce the European Convention on Human Rights.¹²⁵

PROFILE

LIBERTY COUNSEL

Liberty Counsel, founded in 1989 and headquartered in Orlando, Florida, is headed by Mat Staver, the (now former) longtime dean of the Liberty University School of Law. (Liberty University is a rightwing evangelical school founded by the late Jerry Falwell.) Liberty Counsel grew 17 percent in three years, with an increase in gross revenue from \$3.58 million in FY2010 to \$4.20 million in FY2013. Liberty Counsel has several related tax-exempt organizations, perhaps the most important of which is its political action arm, called Liberty Counsel Action (which is one of the organizational sponsors of the annual Values Voters Summit, the premier political conference of the Christian Right). It grew 39 percent in two years, with an increase in gross revenue from \$1.44 million in FY2011 to \$2 million in FY2013. Staver is perhaps best known for his legal defense of Kim Davis, the Kentucky county clerk who refused to issue same-sex marriage licenses in defiance of a federal court order. The Southern Poverty Law Center has designated Liberty Counsel as a hate group, describing it as “a legal organization advocating for anti-LGBT discrimination under the guise of religious liberty.”¹²⁶



PROFILE

**STANFORD UNIVERSITY LAW SCHOOL
RELIGIOUS LIBERTY CLINIC**

In an important mainstreaming move, the huge conservative philanthropy John Templeton Foundation funneled \$1.6 million through the Becket Fund to establish a religious liberty clinic at Stanford University Law School. It opened in January 2013. “In framing our docket, we decided we would represent the believers” rather than governments, the clinic’s founding director, James Sonne, told *The New York Times*: “Our job is religious liberty rather than freedom from religion.”¹²⁷

Douglas Laycock, a professor of law at the University of Virginia who keynoted the clinic’s opening, said it is not a religious liberty clinic in the full sense of the term. It is not litigating the separation of church and state, but instead focusing on the “free-exercise” of religion.¹²⁸ The clinic has filed 13 amicus briefs, including two on behalf of the Becket Fund; the clinic often files amicus briefs on cases in which the Becket Fund has also filed briefs.¹²⁹



PROFILE

THE FREEDOM OF CONSCIENCE DEFENSE FUND

The Freedom of Conscience Defense Fund in Rancho Santa Fe, California, was founded in 2012. By FY2013 it reported gross revenues of \$1.33 million. Charles Limandri, President and Chief Counsel, provides legal services at the trial level to protect religious liberty and free speech. The Roman Catholic-oriented organization often works with attorneys affiliated with Alliance for Defending Freedom. It is providing pro-bono representation for David Daleiden and the Center for Medical Progress, the producer of the infamous anti-Planned Parenthood videos released in 2015.¹³⁰



PROFILE

THE LIBERTY INSTITUTE

The Liberty Institute headquartered in Plano, Texas, was founded in 1972 as the Free Market Foundation. It has since transformed into a national religious liberty advocacy group, pro bono legal network, and funding agency. Headed by Kelly Shackelford, the Institute more than doubled its gross revenues in two years, from \$3.63 million in FY2011 to \$8.4 million in FY2013. It is currently best known for the publication of manuals for “religification” of churches and other institutions as a form of legal inoculation against civil rights lawsuits.



marriages were invalid. Together with the state's general statutes, this amendment effectively criminalized the performance of same-sex marriage ceremonies. The upshot of the subsequent legal fight was that the million-member United Church of Christ (UCC), a mainline Protestant denomination with more than 5,000 local churches, won a clear victory for both marriage equality and religious liberty. The UCC engaged the foundational values of religious equality and equal protection under the law that bind this diverse and often fractious nation. "By depriving the Plaintiffs of the freedom to perform religious marriage ceremonies or to marry," the UCC complaint read in part, "North Carolina stigmatizes Plaintiffs and their religious beliefs." The complainants also argued that the law relegated same-sex couples "to second-class status." Along with same-sex couples, plaintiffs also included the Alliance of Baptists, the Association of Welcoming and Affirming Baptists, and the Central Conference of American Rabbis, and clergy from several traditions, including Episcopal, Lutheran, and Unitarian Universalist. The complaint continued:

*The laws forbidding same-sex marriage tell Plaintiffs that their religious views are invalid and same-sex relationships are less worthy, thus humiliating each Plaintiff and denigrating the integrity and closeness of families and religious organizations, depriving Plaintiffs of the inclusive religious community of family units they wish to establish.*³⁸

Had the amendment stood, UCC clergy and others who routinely perform same-sex marriage ceremonies could have been subject to criminal prosecution. "We didn't bring this lawsuit to make others conform to our beliefs," UCC General Counsel Donald C. Clark, Jr. told *The New York Times*, "but to vindicate the right of all faiths to freely exercise their religious practices."³⁹

After a complicated legal trajectory, U.S. District Court Judge Max O. Cogburn Jr. issued a final decision after the U.S. Supreme Court declined to hear an appeal by the state in another case. He wrote, "It is clear [that these laws,] threatening to penalize those who would solemnize such marriages, are unconstitutional."

Cogburn's ruling underscores an idea that transcends the issues of the day: that religious liberty is only possible in the context of religious pluralism.

Since then, a fresh suit filed in 2015 challenges the constitutionality of a related North Carolina state law.⁴⁰ This law allows magistrates responsible for performing marriages to not only self-exempt themselves for religious reasons, but spend state funds in support of their choice. The state would spend money to bring in a willing magistrate to perform the wedding or if necessary, issue the license if every official in a given jurisdiction declines to perform a ceremony. The legislation also pays retirement benefits for the time out of office of those who resigned as a matter of conscientious objection but were later reappointed after the law took effect. Among the plaintiffs are a same-sex couple from the Reisinger case and an interracial couple barred from marrying in the era of miscegenation laws.

About 5 percent of North Carolina's roughly 670 magistrates had filed recusal paperwork as of September 2015.⁴¹ Utah is the only other state currently allowing religious-objection opt outs for court officials.

'RELIGIFICATION' AND ZONES OF EXEMPTION

IN THE EVER-SHIFTING TERRAIN of the so-called culture wars, the Christian Right is seeking to minimize its losses and consolidate its reserve strengths by seeking individual, institutional, and territorial exemptions from laws and regulations on religious grounds so they do not have to follow the same rules as the rest of society. These overlapping exemptions threaten to give rise to theocratic zones of control violating the religious liberty of those who find themselves under their sway. By opposing government sovereignty, the zones also would feed into the antigovernment efforts of free marketeers who oppose government regulation.

INDIVIDUAL EXEMPTIONS

In the United States, religious liberty historically has been considered first and foremost a right for individuals. Individuals are free to believe as they will, shielded from the undue influence of powerful religious institutions or the government. This was not intended as an exemption from the law. Everyone from Thomas Jefferson and James Madison to the U.S. Supreme Court has made clear that freedom of conscience is limited in some areas of conduct. But the religious and political Right are increasingly turning to civil libertarian ideas to seek exemption from the legal norms of society, even at the expense of the rights of others.

Supported by Christian Right institutions, individual pharmacists and health workers have sought exemptions to avoid being “complicit” in abortion and contraception. Similarly, government workers and elected officials have sought to gain exemption from executing same-sex marriages. Sometimes they make headlines. Kentucky County Clerk Kim Davis went to jail (briefly) rather than have her office issue same-sex marriage licenses. Some probate judges in Alabama invoked a segregation-era law to stop issuing all marriage licenses in their counties to avoid issuing same-sex marriage licenses: an all-White Alabama legislature passed the 1961 law making it optional for counties to issue marriage licenses, so judges could avoid issuing licenses to interracial couples. As of October 2015, at least nine of Alabama’s 67 counties have quit issuing marriage licenses since the June *Obergefell* decision.⁴²

Legislatures are also weighing in. In North Carolina, the Family Policy Council (the state political affiliate of Focus on the Family) wrote a bill allowing clerk magistrates and registers of deeds to ask a judge to “recuse” them from performing all marriages by stating that performance of same-sex marriages would violate their religious beliefs. It passed over the governor’s veto and, as mentioned, is now in the courts. Even though the reason for the recusal may be same-sex marriage, the aim is apparently to avoid charges of discrimination since these elected officials would recuse themselves from participating in all marriages.⁴³

Even before *Obergefell* legalized same-sex marriage nationwide, the Christian Right was preparing



President Obama and Pope Francis in Washington, DC, September 2015.

conscientious objection strategies based on existing law in several states. In 2012, for example, ADF advised that officials responsible for issuing marriage licenses in Maine, Maryland, and Washington did not have to violate their religious conscience by personally issuing licenses to same-sex couples. They said existing state laws allowed them to delegate responsibility for issuing the licenses to others who do not have conscience-based objections.⁴⁴ No one took them up on it, and not all states have such provisions for conscientious objection. But the utility of the idea as a tactic became clear as marriage equality advanced.

Pope Francis highlighted religious freedom and the right to conscientious objection during his widely celebrated U.S. visit. The pontiff discussed religious liberty during his visit to the White House, in his address to Congress, and especially in

EXCEPTIONAL EXEMPTIONS IN INDIANA

Indiana is a hotbed of conflict over the politics of exemptions as this report goes to press. At stake are both a state version of RFRA and whether the statehouse can preempt and limit local LGBTQ nondiscrimination ordinances.

In 2015, after public outcry, Indiana's legislature amended a state RFRA it had just passed, specifying that the new law was not intended to legalize discrimination. The law had allowed for third parties, specifically businesses, to claim a right to discriminate if their owners had sincerely held religious beliefs against same-sex marriage. The so-called RFRA fix¹³¹ also clarified that it would not supersede local antidiscrimination ordinances.

But the story does not end there. Two Christian Right groups, the Indiana Family Institute and the American Family Association of Indiana, filed a federal lawsuit arguing that the amendment to the state RFRA is unconstitutional. They claim that specifying that RFRA does not afford anyone room to discriminate not only violates their religious liberty, but also their freedom of conscience, right to free speech and association, equal protection under the law, and right to due process.

The lawsuit also challenges the constitutionality of the city ordinances passed by Indianapolis a decade ago and Carmel in 2015, which banned discrimination based on sexual orientation and gender identity. The suit contends that protecting the rights of LGBTQ people in nondiscrimination laws violates the religious freedom of those who oppose homosexuality, as does the RFRA "fix." "The 'fix' makes people of faith second-class citizens," according to Indiana Family Institute president Curt Smith. The Institute's attorney, James Bopp Jr., further claims that the government is protecting LGBTQ-friendly religions while other religions will "suffer government punishment if they don't fall in line" and that "this discrimination between religious views is unconstitutional."¹³²

Many leaders of the Christian Right do not in fact believe in civic equality for those with whom they religiously disagree or otherwise do not approve. Indeed, the suit claims that by barring individuals and businesses from discriminating against LGBTQ people in employment, housing, and public accommodations, local antidiscrimination ordinances in Indiana compel conservative Christians "to associate with activities and social, political, and ideological messages with which they disagree, which are substantial burdens on free association."

This pitting of the religious rights of some against the civic equality of others is at the heart of many contemporary disputes about the meaning of religious freedom.

In the second conflict, a bill before the Indiana state legislature would ban local jurisdictions (cities, towns, and counties) from enacting their own laws governing everything from land use to minimum wage and other workplace issues, as well as LGBTQ non-discrimination ordinances. Such measures are part of a significant trend. Nearly all states, PRA's Mariya Strauss reports, "have already done away with cities' and towns' ability to pass local gun control laws; not quite as many states have blocked local control of tobacco, e-cigarettes, and environmental regulations."¹³³

Borrowing from anti-LGBTQ policies established in Arkansas earlier this year and Tennessee in 2011, the proposed legislation in Indiana would prohibit local ordinances that would be "more stringent or otherwise in conflict" with the bill.¹³⁴ The bill also borrows from the controversial "First Amendment Defense Act," introduced but not passed by Congress (see page 23 of this report). The bill would provide broad religious exemptions for individuals and organizations to discriminate, including adoption agencies, nonprofit schools, and religiously affiliated organizations "that provides social services or charitable services."¹³⁵

That such obvious discrimination is being so blatantly cloaked in a broad religious freedom claim is extraordinary. Yet Indiana Republicans claim the coarse bigotry in "Senate Bill 100 is a good-faith attempt to balance religious liberty and the civil rights of LGBT Hoosiers."¹³⁶

his speech in front of Independence Hall in Philadelphia.⁴⁵ On the flight back to Rome, Terry Moran, Chief Foreign Correspondent for ABC News, asked him about government officials who refuse to perform their duties because of religious objections to same-sex marriage. The Pope replied that “conscientious objection must enter into every juridical structure because it is a right, a human right.”⁴⁶ Soon afterward, news broke of his secret meeting with Kim Davis (which has since led to much speculation, confusion, and controversy,⁴⁷ with the Vatican asserting “his meeting with her should not be considered a form of support of her position in all of its particular and complex aspects.”).⁴⁸

There was no ambiguity in Pope Francis’ visit with the Little Sisters of the Poor while he was in Washington, D.C. “This is a sign, obviously of support for them [in their court case against the contraception waiver under the Affordable Care Act]” said Father Federico Lombardi, SJ, the head of the Vatican Press Office. “In this sense,” he added, “it is connected also to the words that the Pope has said in support of the Bishops of the United States in the speech to President Obama.”⁴⁹

No one should be surprised. In 2014, Francis slammed as “bastardized” any definitions of marriage and family that do not comport with Church teaching, including “new forms” of unions which are “totally destructive and limiting the greatness of the love of marriage.”⁵⁰

Meanwhile, the notion of accommodation took a different turn in Utah in April 2015. The state legislature passed a workplace and housing nondiscrimination law with strong religious exemptions, co-written by civil rights groups and the Church of Jesus Christ of the Latter Day Saints or LDS (commonly known as the Mormon Church). As PRA reported at the time, the Mormons collaborated with conservative legal theorist Robin Fretwell Wilson to help draft it. The bill added sexual orientation to the list of protected classes against whom employers and landlords cannot discriminate – but exempted faith-based schools, hospitals and organizations from conforming to the law.⁵¹

PRA Communications Director Eric Ethington criticized the “compromise” as a “watered-down nondiscrimination law” that undermines the LGBTQ and other minority communities. The price, he noted, was the de facto “endorsement by high-profile LGBTQ groups of the Right’s false contention that religious freedom is somehow at odds with LGBTQ rights, requiring a compromise.”⁵²



Religious Freedom Rally in Washington, DC, 2012.

The Church capitalized on the situation, secretly writing a second bill that granted county clerk employees a religious exemption from processing same-sex marriage licenses, as long as there was someone else in the office available to do the job. The Mormon Church then told lawmakers that if it didn’t also pass, the Church would withdraw its support for the so-called nondiscrimination law. Human rights groups were caught flat-footed and reluctantly released a statement saying they “did not oppose” the second bill.

Revealing a tension between the Christian Right’s notion of religious liberty and the LDS Church’s belief that it must always conform to the law, Mormon Elder Dallin H. Oaks, a member of the Quorum of the Twelve Apostles of the church, said that public officials “are not free to apply personal convictions – religious or other – in place of the defined responsibilities of their public offices.” Apparently referring to the Kim Davis episode, he added, “A county clerk’s recent invoking of religious reasons to justify refusal by her office and staff to issue marriage licenses to same-gender couples violates this principle.”⁵³

One way that the Christian Right is developing and promoting legal justifications and popular messaging is by publishing legal guides for individuals and institutions in order to generate popular resistance to legal and cultural safeguards against religious supremacy. For example, there has always been (and probably always will be) a degree of tension about when and how students and staff can engage in religious expression in public schools. But Liberty Institute is ramping up its efforts to expand reasonable accommodation, issuing a *Religious Liberty Protection Kit for Students and Teachers*.

CASE STUDY

WORKERS WIN VICTORY FOR RELIGIOUS FREEDOM AGAINST CHURCH-RUN HEALTH AND HOSPITAL COMPANY

In a major setback for Christian Right efforts to evade the law in the name of religious freedom, a federal appeals court held in December 2015 that a Catholic hospital pension plan was not eligible for a religious exemption from the Employee Retirement Income Security Act of 1974 (ERISA) protecting individuals in most private pensions by setting minimum standards. In *Kaplan v. St. Peter's Healthcare System*, the federal Court of Appeals, Third Circuit, determined that the hospital did not qualify as a church, and thus is not entitled to the religious exemption under the law.

The St. Peter's Healthcare System of New Brunswick, NJ, had established its own employee retirement plan, which it underfunded¹⁴² to the tune of \$30 million, claiming a church exemption to many of the provisions of ERISA, such as mandatory fiduciary and funding requirements. Pensioner Laurence Kaplan was concerned that the plan was underfunded and his lawsuit showed that indeed it was.

St. Peter's is a nonprofit healthcare system employing over 2,800 people. For more than 30 years it operated the plan according to ERISA standards. But in 2006, St. Peter's stopped fully funding the plan, seeking—and eventually receiving—a determination from the IRS that it was eligible for the church exemption under ERISA. But the federal courts disagree. St. Peter's must now comply with ERISA's protections including full funding of the plan.

Karen Ferguson, director of the Pension Rights Center, called the decision “a terrific victory for thousands of orderlies, cafeteria workers, nurses, and others who were told throughout their careers at Saint Peter's that they were fully protected by federal law.”¹⁴³ James Sonne of the Stanford Religious Liberty Clinic submitted an amicus brief on behalf of the Becket Fund for Religious Liberty on the side of St. Peter's. The Southern Baptist Convention also weighed in with an amicus brief for St. Peter's.¹⁴⁴

The Court noted the case is likely to be influential in a “new wave of litigation” challenging the exempt status of pension plans established by religiously affiliated hospitals claiming that their pension plans are “church plans.”¹⁴⁵

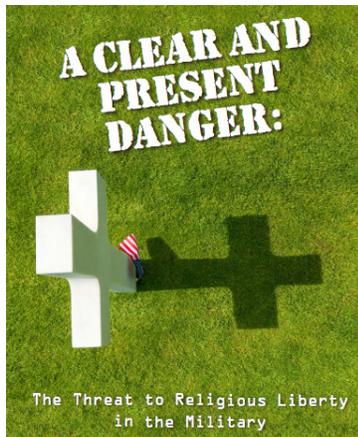
The booklet addresses a range of issues, from religious expression in class to Christmas celebrations. While not all of the information is incorrect, it is premised on the notion that a creeping antireligious secularism in the schools must be combated because, the Institute claims, it results in rising “crime and suicide rates...in our schools while academic scores and career readiness are falling.”⁵⁴ This too, is a carefully worded retread of a long disproved meme, linking the elimination of official school prayer to crime and other negative social and economic indicators. It is a meme that, like the claim of creeping secularism and its variants, falls apart under scrutiny.⁵⁵ It also conveniently ignores the high incidence of bullying and suicide among LGBTQ students.

Religious liberty struggles are also expanding in the military. Here Christian Right groups resist the

protection of the constitutional rights of all with demands for accommodation and legal exemptions for Christian expression—largely proselytizing—and religious coercion by the chain of command.

Tony Perkins and Lt. Gen. (Ret.) William G. “Jerry” Boykin of the Family Research Council claim that “pressures to impose a secular, anti-religious culture on our nation's military services have intensified tremendously during the Obama Administration.” They attribute this to targeting of the military by “anti-Christian activists.”⁵⁶

In 2013, the Washington, DC-based Family Research Council (FRC) published *A Clear and Present Danger: the Threat to Religious Liberty in the Military* as a prelude to launching a coalition made up of about two dozen Christian Right political and legal groups to address these issues.⁵⁷ This was at once an effort to control the definition of religious



**Tony Perkins
and the Family
Research
Council
published a
2nd edition
of *A Clear
and Present
Danger* in 2015.**

freedom in the military context, and a response to the Military Religious Freedom Foundation (MRFF), which opposes religious intimidation and coercion by people in positions of power (usually evangelical Christians) within the U.S. military. One group has alleged, for example, that MRFF is an “Anti-Christian Bigotry Group,” and that MRFF uses “lawsuits and intimidation to silence any reference to Christianity from the public square.”⁵⁸

Liberty Institute screens requests from members of the armed services for legal assistance, and refers potential cases to members of the coalition’s legal team and network of attorneys. The Institute produced a *Religious Liberty Protection Kit for the U.S. Military*, which emphasizes the key terms of RFRA and the recent court decisions hinging on it. Specifically, consistent with the language of RFRA (and RLUIPA) via *Hobby Lobby*, it claims that the military must accommodate “sincerely held religious beliefs” and that the government may “deny... religious expression only when it can show a compelling governmental interest and uses the least restrictive option in accomplishing that interest.”⁵⁹

INSTITUTIONAL EXEMPTIONS

The notion that businesses, schools, and other institutions have a right to the religious freedom accorded religious institutions and individual clergy is a key ground of contestation in the wake of the U.S. Supreme Court decisions relying on its interpretation of RFRA.

The Court’s *Hobby Lobby* decision concluded that private, for-profit businesses may be exempted from the law, but the ruling did not spell out how far religious liberty claims of exemption could go, and is likely to be tested in the courts for years to

come. The Little Sisters of the Poor case involves refusing to file the paperwork to request a religious exemption from the mandate. The federal government has made clear that the exemption would be granted, but the Becket Fund is arguing that it violates the order’s conscience even to have to request it.⁶⁰

Beyond this the Christian Right is seeking to advance its agenda by expanding the definition of ministry. Their legal groups’ key tactic is to build on the unanimous 2012 U.S. Supreme Court decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission (EEOC)*.

Briefly, in *Hosanna-Tabor*, a mainline Lutheran-owned school fired a social studies teacher over a disability, leading to the teacher’s claim that she suffered from discrimination. The church argued that the government had no right to intervene in its employment decisions since the teacher served in a ministerial capacity because she was “called” by the church (unlike lay teachers in the school), led students in prayer three times a day as part of her duties and taught religion four times a week. The Court agreed, extending the longstanding “ministerial exception” to the teacher, and saying that relationship trumped any unlawful discrimination charge.⁶¹ It thus raised Christian Right hopes that the Court will stretch the notion of ministry even more in the future. The words of Chief Justice John Roberts who authored the decision were encouraging. The court had opted not to “adopt a rigid formula for deciding when an employee qualifies as a minister.” The limited time the social studies teacher spent on religious duties was sufficient, in the view of the court, to define the role of a teacher as one of ministry.

“Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision,” wrote Roberts. “By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission through its appointments.”⁶²

Christian Right leaders and advocates for the interests of religious institutions saw *Hosanna-Tabor* as a “great victory” and a departure from “the usual focus on the religious rights of individuals.”⁶³ Dr. C. Peter Wagner, the evangelical founder of the theocratic New Apostolic Reformation⁶⁴ and a longtime professor of church growth at Fuller Theological Seminary, observed that: “not only churches, but ministries supported by the church are included in

INSTITUTIONAL IMPACT

Annual Revenues of Major Religious Right Legal Agencies

	FY 2010	FY 2011	FY 2012	FY 2013
Alliance Defending Freedom	\$35,145,644	\$38,269,840	\$39,891,396	\$42,532,567
Becket Fund for Religious Liberty	\$2,684,403	\$4,268,119	\$4,752,560	\$5,016,058
Liberty Institute		\$3,631,494	\$5,033,074	\$8,407,540
Liberty Counsel	\$3,584,145	\$4,750,490	\$3,869,603	\$4,206,852

The descriptions of the budget growth of organizations mentioned in this report are all based on the currently available, annual filings of the IRS Form 990s. The fiscal years of various organizations vary.

this ruling. Schools are specifically mentioned, but how about a number of other kinds of ministries attached to our churches and apostolic networks? I would think they would fall under the same umbrella.”⁶⁵ Mormon apostle Dallin H. Oaks said he found “comfort” in the decision, against the “threat” of governmental actions that he believes “are overshadowing the free exercise of religion by making it subordinate to other newly found ‘civil rights.’”⁶⁶

The *Wall Street Journal* editorialized, “The case is arguably among the most important religious liberty cases in a half century, and the concurrence of Justices across the ideological spectrum will be felt for years. Hallelujah.”⁶⁷ The Becket Fund called it “the greatest religious liberty case in 50 years.”⁶⁸ They may not be wrong about its significance—even though many opponents of the Christian Right agree that the Court ruled correctly in the case.

The Christian Right is already exploiting the open-endedness of the Court’s definition of ministry. The extent to which religiously affiliated institutions such as schools, charities, hospitals, and perhaps even for-profit businesses can define employees as ministers is now an active question—certain to be tested—as conservative religious movements and leaders seek to carve out zones of exemption from the advance of secular law, equality, and accountability.

The practical effects of *Hosanna-Tabor* are al-

ready being felt as several Roman Catholic dioceses have sought to reclassify teachers and other Catholic school employees as part of the “ministry” of the church.⁶⁹ This religification was on vivid display in early 2015, when Archbishop Salvatore Cordileone of San Francisco, following Roman Catholic prelates in Cincinnati, Cleveland, Honolulu, and Oakland, declared that teachers in the Catholic schools will be required to conform to Catholic teaching in their personal lives. (As chair of the Subcommittee for the Promotion and Defense of Marriage of the USCCB, Cordileone is a leading culture warrior.)⁷⁰ Cordileone wanted unionized employees to accept contract and faculty handbook language against homosexuality, same-sex marriage, abortion, contraceptives, and artificial insemination. He also said that all Catholic school employees—even non-Catholics—must conform with and not contradict Church teachings.⁷¹ Cordileone’s initiative was met with resistance in San Francisco, but the future battle lines in San Francisco and beyond are clearly drawn.

As employers, religious institutions themselves are subject to labor laws, including the Fair Labor Standards Act, federal income tax, and Social Security withholdings. But in recent years, a number of Roman Catholic colleges and universities have claimed, for example, that the National Labor Relations Board lacks jurisdiction over union organiz-

ing among their workers.⁷² They have thus far not succeeded, but they will surely continue testing the breadth and depth of implications of the *Hosanna-Tabor* decision.⁷³

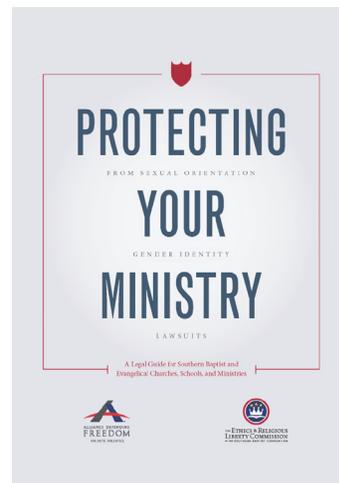
Cordileone's attempts to religify San Francisco's Catholic school employees were in fact part of a larger effort of the Christian Right's to religify religious—and also nonreligious—institutions and businesses by linking them and their employees to ministerial duties.⁷⁴ The tactic aims to advance and consolidate Christian Right gains at the Supreme Court, and stanch other losses.

Christian Right legal groups are issuing manuals for conservative churches and other organizations to inoculate themselves against private lawsuits and government enforcement of civil rights laws. Under the rubric of religification, the Liberty Institute urges institutions to specify, document, and enforce their beliefs as a defensive tactic against feared legal attacks. This includes

*examining articles of incorporation, bylaws, employee handbooks, policies & procedures, independent contractor agreements, and other documentation to ensure that churches, ministries, and faith-based businesses are prepared and protected against legal and financial ruin from individuals and organizations who are offended by traditional religious viewpoints—and seek to litigate employment or discrimination claims to further a larger political or cultural agenda.*⁷⁵

Having lost the main legal battle over marriage equality in the United States, the Christian Right is hunkering down for what they foresee as a long siege against conservative Christian churches, businesses, and organizations on this, and a range of concerns. The Liberty Institute's religification manuals demonstrate that Christian Right leaders of the culture war intend to fight LGBTQ rights and marriage equality in the states, in the towns and cities, and in many kinds of institutions for years to come.

In 2015, the Alliance Defending Freedom (ADF), joined forces with the Ethics & Religious Liberty Commission (ERLC) of the Southern Baptist Convention to issue another such handbook urging religification by revising documents—from employee job descriptions to facility rental agreements—for churches and related institutions. Workers and volunteers should be reclassified under a broad redefinition of “ministry,” and institutional functions



Alliance Defending Freedom and the Ethics & Religious Liberty Commission co-published *Protecting Your Ministry from Sexual Orientation Gender Identity Lawsuits.*

should be cast in terms of religious doctrine. The goal is to qualify for broad “ministerial exemptions” from the law.⁷⁶

The ADF and ERLC handbook, *Protecting Your Ministry from Sexual Orientation and Gender Identity Lawsuits: A Legal Guide for Southern Baptist and Evangelical Churches, Schools, and Ministries*, anticipates needing to “engage a hostile social and political culture... amid the gathering spiritual darkness.” Consistent with the dualistic framing that pits LGBTQ rights against religious freedom, the ERLC claims, “A new concept—that “sexual liberty” trumps religious freedom—has begun to impact churches, ministries, and Christians across this nation.”⁷⁷

The Liberty Institute sees it as “*not a matter of if but when* religious institutions will be faced with damaging, anti-religious legal attacks.”⁷⁸ [Emphasis in the original.] To prepare, the Institute advises institutions from churches and synagogues to fraternities and for-profit corporations to “religify.”⁷⁹

The Institute has also issued a *Religious Liberty Protection Kit for Christian Schools*, which, like their manual for churches, “provides templates and guides for writing legally defensible statements of faith, mission, purpose, school bylaws and constitutions, and more.”⁸⁰ The Institute plans to issue similar manuals for nonprofit organizations, businesses, and even fraternities and sororities.⁸¹

The Southern Baptist manual suggests assigning “... employees duties that involve ministerial, teaching, or other spiritual qualifications—duties that directly further the religious mission. For example, if a church receptionist answers the phone, the job description might detail how the receptionist

is required to answer basic questions about the church's faith, provide religious resources, or pray with callers."⁸²

While the courts may not buy the idea that a receptionist can be reasonably construed as a minister in the legal sense, this is the kind of thinking that is permeating the conservative Christian world in the wake of *Hosanna-Tabor*.

This religification project has immediate implications on matters of sexual identity. The Liberty Institute's template titled "Statement of Faith: Marriage and Human Sexuality" advances a strident, exclusivist, and detailed doctrine identifying permanent, heterosexual

marriage or celibacy as the only acceptable parameters of human sexuality, stating:

"All of our members, employees, and volunteers must affirm and adhere to this Doctrinal and Religious Ab-

solute statement on marriage and human sexuality to qualify for involvement with the ministry. This is necessary to accomplish our religious mission, goals and purpose."⁸³

The Institute's *Facility Use Policy* agreement would require outside groups and individuals to conform to a given church's views on faith, marriage, sexuality, and gender identity. This is intended to help these institutions avoid "legal and financial ruin" due to the activities of "individuals and organizations that are offended by traditional religious viewpoints and seek to litigate employment or discrimination claims to further a larger political or cultural agenda."⁸⁴ The goal, they say is to be able to "prove the sincerity of their faith—and protect themselves from coming legal attacks."⁸⁵

The Baptists claim that a reason for such measures is that malevolent intentions lurk behind the passage of local LGBTQ anti-discrimination ordinances. These laws "are not designed for the innocent purpose of ensuring all people receive basic services," they claim. "Rather, their practical effect is to legally compel Christians to accept, endorse, and even promote messages, ideas, and events that violate their faith." The manual avers that

religification cannot inoculate institutions from "all attacks by marriage counterfeits and those advocating for complete sexual license." But it concludes that these measures might place an organization in a "more defensible legal position should it face a lawsuit for discrimination."⁸⁶

This is also the goal of conservative Christian colleges that receive federal funds seeking exemption from Obama administration guidelines regarding matters of sex and gender identity, homosexuality, and marital status. Like other religifying institutions, the schools are seeking to put themselves in the most legally defensible position

they can if they are sued for discrimination.

These requests follow a religification-style template produced by the Springfield, VA-based Christian Legal Society, an early Christian Right legal project found-

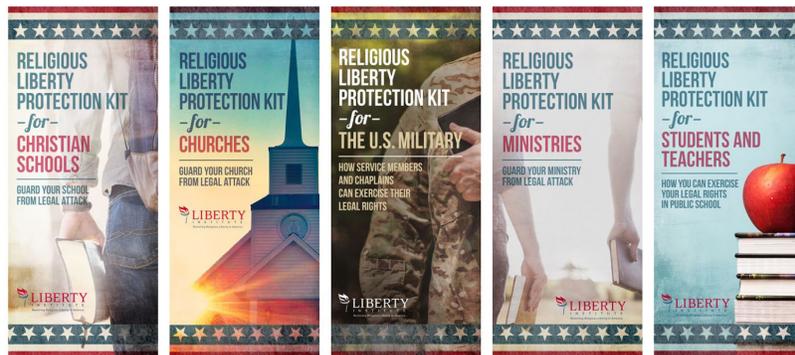
ed in 1961 that has specialized in education cases and wider religious freedom matters since 1980.

The U.S. Department of Education's Office of Civil Rights granted waivers to 27 religious colleges and universities in 17 states in 2014 and 2015. Most of these are conservative evangelical schools. Some are Roman Catholic. More applications are reportedly pending. The waiver granted to the Southern Baptist-affiliated Carson-Newman University in Jefferson City, Tennessee, includes women who have had an abortion or who may be pregnant.⁸⁷

When the U.S. Congress passed Title IX in 1972 to combat discrimination based on sex in education, Congress stipulated that a school that is "controlled by a religious organization" may be exempt if compliance "would not be consistent with the religious tenets of such organization."

Such requests were rare until 2014 when the Obama administration issued guidance that the Title IX discrimination prohibition extends to transgender and gender nonconforming people.⁸⁸

Belmont Abbey College, a Benedictine Catholic school near Charlotte, NC wrote regarding their policies on gender, sexual identity, and marital status, "We will make institutional decisions in light of this policy regarding housing, student admission



"Religious Liberty Protection Kits" published by the Liberty Institute

and retention, appropriate conduct, employment, hiring and retention, and other matters.”⁸⁹

Biola University (founded as the Bible Institute of Los Angeles) requires its faculty to sign a statement of creedal conformity; and requires non-faculty employees to state in what ways they are in disagreement and their reasons why. Their views on abortion and on traditional marriage are deemed non-negotiable and “require the full agreement and support of all employees.”⁹⁰

All of these religification measures aim to allow institutional leaders to at once justify and compel their institutions, staff, and students into deeper conformity with contemporary religious orthodoxies, including those at odds with the civil and Constitutional rights of others.

TERRITORIAL EXEMPTIONS INVOLVING ZONING AND LAND USE

Religious institutions invoke religious liberty to give them the upper hand in local zoning and land use issues using the Religious Land Use Institutionalized Persons Act (RLUIPA) signed by President Clinton in 2000.⁹¹ The law gives religious institutions access to the federal courts to make religious liberty claims in local zoning cases, and makes localities liable for damages and attorney’s fees. Professor Hamilton of Benjamin Cardozo School of Law argues that religious visions for property can lead to a sense of entitlement that transcends respect for, and fair treatment of the rights and interests of, others.⁹² Similar situations exist when churches seek to add childcare centers, homeless shelters, and other facilities deemed incompatible with residential land use regulations.

In RLUIPA you can see the main elements of the Christian Right’s approach to religious liberty and the expansive notions of religious exemptions that flow from it. It creates a presumption of antireligionism on the part of people who oppose a particular project. Resistance by residential neighborhoods to the addition or expansion of large modern religious institutions is, of course, not necessarily a matter of being anti-Christian, anti-Jewish or antireligious in any sense of the word. And yet, the charge that religious bigotry is involved is given great credence under RLUIPA.⁹³

The law’s biggest boosters are Christian Right ideologues like Anthony Picarello. A litigator for the Becket Fund for seven years, he is now the General Counsel for and Associate General Secretary for Policy and Advocacy of the Roman Catholic

USCCB.⁹⁴ “RLUIPA does not create ‘two classes of citizens’ across religious lines.” Instead, he claims, “it creates two classes of activities—land use that involves religious exercise, and land use that does not—and then reinforces the constitutional protection for all citizens who choose to use their land for religious exercise.” Hamilton observes in response, “In other words, religious land is more valuable than anyone else’s. Note also his sly use of the phrase ‘constitutional protection,’ as though RLUIPA is constitutionally required. It is not.”⁹⁵

The presumption of the superiority of religious uses of land over all others, and that opposition is rooted in hyper-secular or even antireligious animus, is in line with the underlying views of the signers of the *Manhattan Declaration*.

RFRA AND THE BIPARTISAN MEMO

A KEY BATTLEGROUND IS whether the Religious Freedom Restoration Act (RFRA) allows federal contractors and grantees to discriminate in their hiring. A legal analysis by the Bush-era Office of Legal Counsel of the Department of Justice justified such a reading of the law. This reading—what is referred to in D.C.-shorthand as “the OLC Memo”—continues to stand under President Obama despite the efforts of civil rights advocates.

Religious agencies use the OLC Memo to justify discriminating in favor of members of their own faith, even if the grant program in question requires recipients not to do so. The Memo’s influence extends deeply into federal programs including the 2014 reauthorization of the Violence Against Women Act (VAWA). Certain religiously affiliated organizations that receive federal funds under VAWA use religion as a criterion when hiring employees using taxpayer dollars, despite the law’s clear nondiscrimination requirement.

Following years of unsuccessful efforts to get the Obama administration to rescind the Memo, 130 civil rights, labor, and liberal organizations wrote to President Obama in August 2015 urging him to reconsider it.⁹⁶ As Americans United for Separation of Church and State (a leader in the effort) put it, the OLC Memo provides a legal rationale for “taxpayer-funded religious discrimination.”⁹⁷

The August 2015 letter states that “some have cited the OLC Memo in arguing that RFRA should broadly exempt religiously affiliated contractors from the nondiscrimination requirements” in an executive order barring government contractors from discriminating against LGBTQ workers. Others claim the Memo allows them to refuse to provide services or referrals required under federal funding agreements covering medical care for unaccompanied immigrant children who are victims of sexual abuse.

Despite saying the right things about religious and gender equality—and as a candidate vowing to repeal the Memo—President Obama is dragging his feet on the matter. The administration’s official inaction has allowed millions of dollars to be channeled to groups that engage in religious and anti-gay discrimination via the “faith-based” offices in 13 federal agencies and departments. The administration is secretive about the budgets, grantees and

their activities, as journalists and advocacy groups learn when they try to get information.⁹⁸

This trend of awarding ever greater special status to “faith-based” organizations runs deep in elements of both the Democratic and Republican parties.⁹⁹ What is more, this is among a number of faith-based points of discrimination that the Obama administration allows to stand; discredited HIV and abstinence-only pregnancy prevention programs still receive money, as journalist Andy Kopsa reported in *The Nation* in 2014.¹⁰⁰

Meanwhile conservatives in Congress are not only relying on the OLC Memo to support discrimination. They responded to the *Obergefell* decision legalizing same-sex marriage with an ill-fated piece of legislation called the First Amendment Defense Act (FADA).¹⁰¹ The Act would make it legal for businesses and public officials to use their religious beliefs as an excuse to discriminate against LGBTQ people. Christian Right groups also want state legislatures to approve similar measures that stop the government from discriminating against those who do not believe in marriage equality. The Conservative Action Project, a strategy group headed by Reagan-era Attorney General Edwin Meese, invoked the alleged threat to religious liberty to rally movement conservatives around the bill declaring, “No individual should lose their tax exempt status, face disqualification, be fined, or lose grants or contracts for following their beliefs.”¹⁰² In fact, such legislation has been introduced in Indiana. (See box)

Writing in support of FADA, the USCCB made an astounding claim that casts a fresh light on the Church’s intentions to legalize anti-LGBTQ discrimination even without relying on claims of religious conscientious objection. The bishops explained in supporting the bill that the “[a]ct would protect a wide array of persons, including individuals and organizations—both for-profits and nonprofits—regardless of whether or not they are religiously affiliated. Thus, business owners as well as faith communities would be protected.”

The USCCB argues that the legislation is needed to prevent the federal government from joining in an alleged growing intolerance of and discrimination by state governments “toward religiously-minded individuals and organizations who want to live by their conviction that marriage is the union of one man and one woman or that sexual relations are properly reserved to such a marriage.”¹⁰³ In other words, the Roman Catholic bishops want business owners to be able to discriminate against same-sex married couples even without the fig leaf of religious conscientious objection.

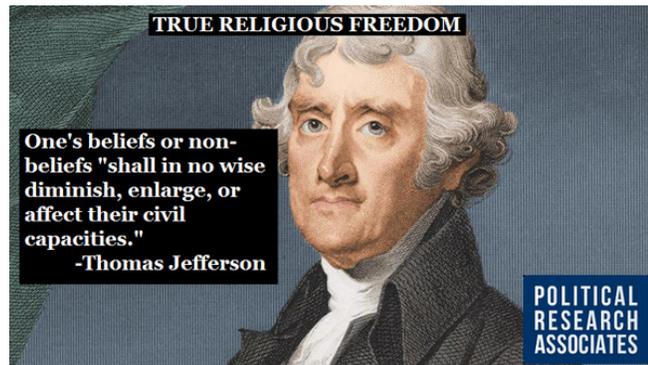
The proposal's implications go well beyond issues of discrimination. Walter Olsen of the libertarian Cato Institute observed that the proposed legislation would “even exempt federal workers who don't want to process benefits and rights claims made by married same-sex couples. There are at least 1,100 such benefits under federal law.” Olsen considers the bill to be one directional, protecting proponents of “traditional values” while denying equal protection to proponents of marriage equality or sex outside of one-man-one-woman marriage.¹⁰⁴

Every year since 1992, Religious Freedom Day has been recognized on January 16 with a presidential proclamation. The day commemorates the enactment of the Virginia Statute for Religious Freedom in 1786. This law is so integral to our history that Thomas Jefferson viewed his role in creating it as one of the three signature accomplishments of his life—along with writing the Declaration of Independence and founding the University of Virginia.

Here is why Jefferson thought it was that important.

Jefferson drafted the bill in 1777 but it took nearly a decade to be shepherded into law by James Madison, then a member of the House of Delegates. The law not only disestablished the Anglican Church as the state church of Virginia, but also declared that citizens are free to believe as they will, and that this “shall in no wise diminish, enlarge, or affect their civil capacities.”¹³⁷ Historians widely regard it as the root of how the framers of the Constitution approached matters of religion and government. It was as revolutionary as the era in which it was written.

Following the statute’s dramatic passage in 1786, Madison traveled to Philadelphia where he served as a principal author of the Constitution in 1787. As a member of Congress in 1789, he was also a lead author of the First Amendment, which passed in 1791. But the new nation was hardly unified on the matter of religious freedom. Some did not like the Virginia Statute any more than they liked the Constitution and its First Amendment. So before his death, Jefferson sought to get the last word on what it meant.



The Statute, he wrote, contained “within the mantle of its protection, the Jew and the Gentile, the Christian and Mohametan, the Hindoo and Infidel of every denomination.” These words ring down through time in the face of contemporary demagogues calling for religious tests on refugees and international travelers. Jefferson and the leaders of the founding era not only knew Muslims but that religious freedom only meant something if Muslims had equal protection under the law.¹³⁸

So with this clear and powerful statement Jefferson, almost 200 years ago, refutes contemporary claims that the United States was founded as a Christian nation. Jefferson further explained that the legislature had rejected proposed language that would have described “Jesus Christ” as “the holy author of our religion.” This was rejected, he reported, “by the great majority.”

The Virginia Statute for Religious Freedom does not fit the Christian Right’s narrative of history or justify its shining vision of a theocratic future. But they actively seek to minimize this problem. For example, topping the list from a Google search for Religious Freedom Day is ReligiousFreedomDay.com, run by a small outfit called Gateways to Better Education. It treats the Day as an opportunity to evangelize in the public schools. “Religious Freedom Day is not ‘celebrate-our-diversity day,’” they insist.¹³⁹

By contrast, in his 2015 proclamation, President Obama declared that religious freedom “protects the right of every person to practice their faith how they choose, to change their faith, or to practice no faith at all, and to do so free from persecution and fear.”¹⁴⁰

That’s why it was so significant that in 2015, the Washington DC-based Coalition for Liberty and Justice — composed of 60 organizations opposed to the imposition of “one religious viewpoint on all” — decided to seize the day.¹⁴¹ The Coalition, whose members include Americans United for Separation of Church and State, Catholics for Choice, National Council of Jewish Women, National LGBTQ Task Force, Secular Coalition for America, and the Religious Coalition for Reproductive Choice, took to the op-ed pages and social media and launched a conversation that continues.

THE POWER OF DUALISTIC THINKING

AN ANIMATING NOTION across the widest spectrum of the Religious Right is the idea that Christianity, and often religion itself, is under siege and that everyone from teachers, to LGBTQ activists, to reproductive health providers, and certainly atheists and advocates of “big government” are part of a continuum of an existential threat. One cannot understate the seriousness with which many on the Christian Right take this ancient and powerful idea, nor how it animates our contemporary politics.

Other Christian leaders and the organizations they lead are working to expose this dualistic narrative that this is a fight between the religious and the antireligious. The United Church of Christ (UCC) took this on in North Carolina, when it successfully challenged the anti-marriage equality amendment to the state constitution on grounds that it criminalized ceremonies which they and other religious communities considered to be valid and sacred. This was a religious freedom claim against a state law that privileged one group of religious views of marriage over others.

The North Carolina case underscores that religious freedom is only possible in the context of religious pluralism. It also reveals that when Christian Right leaders talk about religious liberty, they often really mean *theocratic supremacy of their own religious beliefs inscribed in government*. Tony Perkins, president of the Family Research Council, suggested that the UCC is not really Christian, and that those who support LGBTQ rights don't have the same rights as conservative Christians—because “true religious freedom” only applies to “orthodox religious viewpoints.”¹⁰⁵ UCC General Minister and President John Dorhauer responded, “There is no liberty intended” if it is “only for those who believe as we do.” He is confident that “our commitment to religious liberty” can withstand contemporary attacks by the Christian Right.¹⁰⁶

Still, in light of the growing support for the civil rights of LGBTQ people, Presidential hopeful Mike Huckabee (among others) has repeatedly claimed that the United States is moving toward “criminalization of Christianity.”¹⁰⁷ As preposterous as such claims may sound to many Americans, they resonate deeply with those who are grounded in the idea that Christianity is incompatible with marriage equality, reproductive rights, LGBTQ civil rights, and broad social inclusion.

Throughout American history, “established power brokers” have stirred up sexual fears when they feel their position is threatened, explain Rev. Dr. William J. Barber II, the president of the North Carolina NAACP, and Christian writer Jonathan Wilson-Hartgrove: “The widespread acceptance of interracial relationships makes ‘mongrelization’ a moot point in 21st-century America. But we who know this history can see that public expressions of concern about the ‘gay lifestyle’ are not about religious freedom. They are about dividing an increasingly diverse electorate that has twice elected a black president.” Referring to state level RFRA, they added, “As Southern preachers engaged in moral-fusion organizing, we say to our fellow ministers: ‘religious freedom’ laws are an immoral ploy to stir up old fears. As people of faith, we must oppose them.”¹⁰⁸

The academic Marci Hamilton also turns to history to challenge the Christian Right's dualistic notion that it is engaged in a battle between religiosity and its enemies. “Many of the early American colonists departed Britain to escape the theological mandates imposed on them by the European theocracies that blended sovereign and religious power,” she reminds us. “In this pluralist society, the pressure by a subset of Christians to push for a single moral vision... cannot be characterized other than as a drive to institute a theocracy in their own image.”¹⁰⁹

The narrative is powerful, but it cannot stand up to the facts of history, or to existing political and social reality. Acknowledgement of the very existence of religious support for reproductive rights and marriage equality blows up this notion. Yet even civil rights activists sometimes unwittingly fall into the narrative.

The values of religious freedom, pluralism and separation of church and state are essential guiding principles that can keep our religiously plural society from factionalizing to the point of religious warfare. Without them, the country risks splintering into what Hamilton calls “a collection of separate mini-theocracies” carved out in law.¹¹⁰ How contemporary religious rights and civil equality of religious minorities and dominant factions are respected and managed in a religiously plural society is something that the Revolutionary leaders could not have imagined. We need to wrestle with our lineage in the current moment. Our future on these matters is in our own hands.

The question in our time then becomes, what beliefs shall be accommodated, and if so, to what degree and by what standard? And perhaps most significant, who gets to decide?

CONCLUSION AND RECOMMENDATIONS

THE CONTEMPORARY CHRISTIAN Right has been developing and fine-tuning its approach to religious freedom for decades.¹¹¹ For the Christian Right, it is part of an integrated agenda of religious and political philosophies and issues, accompanied by steady strategic capacity building. The historic reframing of religious freedom as one of three main concerns outlined by Christian Right leaders in the 2009 *Manhattan Declaration* is underappreciated outside of the conservative Christian community. By the same token, the full implications of the major decisions of the Supreme Court outlined in this report will be felt for at least as many decades as it took for the Christian Right to develop a religious freedom agenda (and the coalitional, electoral, and legislative capacity to carry it out).

These conflicts are integral to the story of our time. We owe it to ourselves, our shared concerns, and to the preservation of the best of our history, culture and shared values to rise to these distinct and in many ways unprecedented challenges.

The Christian Right aims to profoundly reorganize our relationship to law, religion, government, and to each other. The rights of women, workers, and racial, religious, and sexual minorities, are all deeply threatened. More broadly, the ability of government to ensure equal protection under the law is under assault. To meet this threat will require more than a broadening of tactical coordination among racial equality, feminist, LGBTQ, labor, civil libertarian, progressive religious, and other constituencies. We face a decades-long struggle that will require our own long game, comprising durable strategies, alliances, and campaigns that include and transcend any specific legal, legislative, communications, or culture change approach.

Here are recommendations for how we might better seize the opportunity to defend religious freedom in our time.

THE DEVELOPMENT OF IDEAS, MESSAGE, AND STRATEGY

- 1. Envision and resource a long-term strategy.** The struggle cannot (and is not) only be waged in the courts. We must to develop, refine, and propagate our long game by:
 - › Resourcing a network of strategists,

scholars, and think tanks over the long term. This is vital for educating and empowering a wide range of constituencies and building coalitions. We need a clear and compelling analysis that contextualizes the stakes for constituencies not currently at the forefront of efforts to challenge the Right's legal and legislative initiatives, for example the historical use of religious exemptions to justify racial segregation in schools.

- › Strengthening the alliance between prochoice and pro-LGBTQ forces, as well as labor, religious, traditional civil rights, and other affected communities.
- › Refreshing historic alliances with liberal business owners, libertarians, and moderate Republicans.

These efforts should actively identify best practices where coalitions were successful and learn from where they were not.

- 2. Reclaim religious freedom as a fundamental democratic value.** This means embracing religious freedom as emphasizing the equality of all people including everyone's right to believe and to practice faith (or not) as we will, and to change our minds—free from undue influence of powerful religious institutions and government. Religious freedom also means the freedom to act on our beliefs as long as those actions do not harm or infringe on the rights of others. The notion of third party “harms” is a critical part of the discussion that needs to happen regarding the meaning of religious freedom in our time. All this is in keeping with the historic trajectory of the law in the United States, as well as international human rights conventions. We can develop a powerful religious freedom narrative that can answer and overcome many of the Right's claims.
- 3. Avoid reinforcing the dualistic narrative that pits civil rights concerns against religion.** Routinely framing public controversies as religious vs. secular plays into a false narrative. Similarly, pitting LGBTQ rights or reproductive rights against religious freedom also plays powerfully into the false narrative. There are no perfect solutions. But we can embrace religious pluralism as a value underlying the vision of the Framers of the Consti-

tution, modern Supreme Court decisions, and federal case law. Religious pluralism in this sense incorporates the equal rights of nonbelievers as well.

4. **Actively collaborate with and elevate religious communities.** Religious leaders are already playing key roles in the struggle for religious freedom, including those who have thwarted the passage of RFRA in Georgia and in North Carolina. We should
 - › Consult, support, and promote these religious leaders to social justice constituencies and to the news media.
 - › Catalyze the creation of a common “Call to Conscience” of religious and nonreligious people to rally defenders of religious pluralism, separation of church and state, and the religious freedom heritage of the framers of the Constitution.
5. **Create high-profile religious freedom events** to offer a clear and consistent positive alternative to the Christian Right’s redefinition of religious liberty. A key element in this approach could be to expand celebrations of Religious Freedom Day on every January 16th.¹¹² This day commemorates the enactment of the Virginia Statute for Religious Freedom, authored by Thomas Jefferson and sponsored in the legislature by James Madison. Historians recognize the statute as the direct precedent to the approach to religion and government by Framers of the Constitution and the First Amendment to the Constitution.¹¹³ This lineage provides a moral and historical high ground that we must not cede to the religious and political Right.¹¹⁴
6. **Counter misinformation.** Many conservative religious liberty claims rely on falsehoods, bogus history, and scare tactics. For example, in all of U.S. history, no clergy were forced under the law to perform any marriage of which they did not approve. This has not changed since the advent of marriage equality in Massachusetts in 2003. Social justice advocates must learn and be able to counter the Right’s go-to examples of spurious religious liberty violations while supporting religious freedom itself.
7. **Take seriously the influence of rightwing academics on policy and public debate.**

This means giving greater prominence and support to the fair-minded scholars who address this issue. Religious freedom is a complex topic which cannot be adequately addressed by short-term, message-oriented efforts of liberal interest groups.

8. **Question and challenge those denying and downplaying the ongoing political strength of the Christian Right.** While we celebrate movement victories and project a positive vision for the future, at the same time, social justice thought and strategy is held back by making wrong assumptions about the strength and resilience of the Christian Right. Phrases like “the Christian Right is dead” (or dying) and “the culture wars are over” (or declining) are indicators of ignorance and wishful thinking, at best.¹¹⁵
9. **Consider international human rights standards regarding religious freedom and the rights of conscience.** They are very strong and are consistent with a domestic agenda, and are part of the growing international dimension to this struggle. It is important not to allow the international Christian Right to appropriate the idea of religious freedom as it has sought to do in the United States.

THE POLITICAL ARENA

10. **Urge candidates and elected officials** to end legal justifications for all forms of discrimination under the rubric of religious freedom.
11. **Organize public discussion of how to best defend religious freedom** in the legal arena and all levels of government. This is not always clear. For example, Marci Hamilton of the Benjamin Cardozo School of Law has called for repeal of RFRA, RLUIPA, and state RFRA. The Center for American Progress has called for reforming RFRA, particularly by eliminating the “harms” to third parties.¹¹⁶ Still others think RFRA is benign and offers protections that would not be otherwise available, and that RFRA and LGBTQ civil rights are compatible. This is a public discussion worth having.
12. **Continue to urge the Obama administration to end discrimination** by faith-based contractors by reversing the OLC Memo before President Obama leaves office.

13. Develop a progressive electoral answer to the Right. The Right has been remarkably successful in developing an electoral capacity and strategy to gain control of the institutions of government, using the tools of democracy in order to undermine it. The campaign to redefine religious liberty is but one theme; its successes in this arena result from the Right's political power. Envisioning a broader and more robust response required for our time and circumstances is beyond the scope of this report. But it needs to happen. Repeating the pattern of ignoring the decades-long development of the Christian Right's vast electoral capacity and trajectory of success through the Republican Party is a formula for failure.

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ABOUT THE AUTHOR

Frederick Clarkson is Senior Fellow of Political Research Associates and an analyst of the Religious Right for over 30 years. He is a longtime contributor to PRA's quarterly *Public Eye* and a member of its editorial board. His work has appeared in a wide range of publications including *Mother Jones*, *Church & State*, *Ms. Magazine*, *The Christian Science Monitor*, *Salon.com* and *Religion Dispatches*. He has worked as an investigative editor at Planned Parenthood Federation of America, as Communications Director at the Institute for Democracy Studies, and cofounded the important group blog about the Christian Right, *Talk to Action*. He is the author, coauthor, or editor of several books, including *Dispatches from the Religious Left: The Future of Faith and Politics in America* and *Eternal Hostility: The Struggle Between Theocracy and Democracy*.

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