MARCH 2013

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Challenging the Right,
Advancing Social Justice

REDEFINING RELIGIOUS LIBERTY

The Covert Campaign Against Civil Rights

BY JAY MICHAELSON

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REDEFINING RELIGIOUS LIBERTY

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BY JAY MICHAELSON

PREFACE

ALMOST AS SOON AS THE U.S. SUPREME COURT made women's access to abortion a constitutional right in Roe v. Wade, the Senate passed the first "conscience clause" allowing private (largely Roman Catholic) hospitals receiving federal funds to refuse to provide abortions or sterilizations on "the basis of religious beliefs or moral convictions." Over the years, antichoice forces have won more "conscience clauses," allowing health care professionals like pharmacists and physicians to refuse care based on their own religious or other beliefs.

These same struggles reverberate through the effort to expand health care coverage in the Affordable Care Act (ACA). To try to secure votes from antichoice Democrats, President Obama issued an executive order that reinforced and expanded the legal reach of the 1977 Hyde Amendment, barring federal funding of abortions except in the case of rape, incest, or when the life of the woman would be endangered. It outlined new legal protections for health care facilities and providers who are unwilling to provide, pay for, provide coverage of, or refer people to abortion care. Finally, the executive order prohibits tax credits and cost-sharing reduction payments to pay for abortion services (except in cases of rape or incest, or when the life of the woman would be endangered) in the health insurance exchanges beginning in 2014. In the end, the ACA passed with only Democratic votes in favor of the law and zero support by Republicans.

Although most reproductive justice advocates agree that the landmark Patient Protection and Affordable Care Act provides unprecedented gains for women's health by ending discrimination based on pre-existing conditions, expanding Medicaid eligibility, and requiring contraceptive coverage, the antichoice Right's long term work to dismantle abortion remains effectively intact. And as reproductive justice advocates also argue, if reproductive healthcare is compromised for low-income women, often women of color, by encroaching funding restrictions, we cannot even begin to claim we've achieved comprehensive healthcare coverage for women.

As researcher and activist Jay Michaelson shows in this report, a coalition largely made up of Roman Catholic elites and right-wing evangelicals continues its battle to undermine the promise of the Affordable Care Act by pushing for an even broader realm of religious exemptions in the name of defending religious liberty. Michaelson names the key intellectuals, Religious Right organizations, such as the U.S. Conference of Catholic Bishops, and legal groups, like the Becket Fund, that are working together to advance a discriminatory agenda that would allow employers to put contraception coverage out of reach of their employees.

The Religious Right, writes Michaelson, is working to redefine existing constitutional protections of freedom to (and from) religion to mean the right of conservative Christian individuals and businesses to practice discrimination otherwise prohibited by law. That means, for instance, expanding exemptions to allow major companies, like the craft-store giant Hobby Lobby, to refuse contraceptive coverage in its employee healthcare plans. With 525 stores in 42 states, Hobby Lobby's founder David Green is a substantial employer; the Becket Fund is representing the company in court.

To date, according to this report, there are 49 pending cases, many represented by the Becket Fund, of companies and nonprofits—including universities—claiming that observing the contraceptive coverage requirement is a violation of their religious liberty.

Finally, the right-wing campaign peddles propaganda rich with misinformation about the health care law, scaring small business owners and attempting to create public sympathy for multimillion dollar companies like Hobby Lobby.

In unpacking the Right's sophisticated campaign to redefine religious liberty, Michaelson shows how reproductive justice and the LGBTQ community are just the Right's latest targets of old fashioned discrimination—excused on religious grounds. As in the age-old debate about prayer in schools or the display of crèches on public land, the Right inverts who is the oppressor and who is the victim. "The Christian Right turned antidiscrimination arguments on their heads," he writes. "Instead of public prayer oppressing religious minorities, Christians are being oppressed by not being able to offer them." We should not be fooled when women's and LGBTQ rights are at stake.

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FOREWORD

POLITICAL CONSERVATIVES SEEM TO HAVE FOUND A POTENT ARGUMENT in current debates about LGBTQ equality and reproductive health when they claim that their religious liberty is threatened. The potency comes not from the truth or validity of this claim, but from the fact that such a claim puts progressives into a quandary. Religious liberty is one of the most cherished values of American society, and progressives esteem this principle no less than conservatives do. As a result, progressives often tread too delicately in this area, for fear that they will be forced to choose between falsely competing values of liberty and equality.

This dilemma becomes exacerbated if, like me, you are a progressive person who strongly identifies with a faith tradition. As a Catholic who works for LGBTQ equality, my loyalties to faith and justice sometimes pull me in opposite directions when the argument for religious liberty is raised. As a practicing Catholic, I want to be sure that the government is not going to interfere with my church's ability to govern itself. As an advocate for LGBTQ issues, I want to make sure that equality is served. Added to this dilemma is the uncomfortable knowledge that my church's bishops are often the ones sounding the alarm for religious liberty, and often in spurious ways.

With the appearance of Jay Michaelson's report, "Redefining Religious Liberty: The Covert Campaign Against Civil Rights," these tense internal tugs of war between liberty and equality and between faith and justice have been greatly ameliorated. With fairness and precision, Michaelson documents how arguments for religious liberty have been manipulated to play on the fears and values of both conservatives and progressives, as well as people of faith and secularists. His analysis clears a path through the morass of contradictory allegiances that many people experience when the question of religious liberty is raised.

This report serves as a primer for all interested in the many intricacies surrounding the religious liberty debates. Legal, political, and religious observers alike will benefit from the succinct history, the objective reliance on facts and data, and the analysis of how arguments are constructed, and how they can be refuted. Advocates will learn strategies to engage in debate in intelligent, compassionate, and effective ways.

Michaelson is uniquely positioned to report on this matter. With a Ph.D. in Jewish Thought from Hebrew University and a J.D. from Yale Law School, he offers a perfect bridge between the worlds of religion, politics, and jurisprudence that impact the religious liberty debate. As the founder of the Tibet Oral History Project, which records the testimonies of Tibetan victims of the Chinese Occupation, Michaelson is certainly not a stranger to the personal and political realities of religious and governmental entanglement and oppression.

His dual background in law and religion brings a depth to this report which is missing from many other discussions of the topic. Most refreshing and inspiring in Michaelson's report is that he maintains a balance of a deep respect for religious leaders and tradition—and, indeed, their liberty—while also deeply valuing the civil liberties tradition of American history and culture. His analysis is a reminder that the goal of this debate is not to have a victor and vanquished, but to build an American society where honesty, fairness, and equality reign.

Michaelson throws out the traditional binaries in this debate—religious vs. secular, conservative

vs. progressive. The realities are much more complex than these categories can express. For example, not all religious people feel that their faith is threatened by policies which promote LGBTQ equality and reproductive health for women. In fact, for many religious people, it is indeed their faith which motivates their advocacy for these principles. So framing the debate as a war between church and state is not only inaccurate, but it also plays into the hands of proponents of the religious liberty argument who want to claim victim status.

Similarly, those who espouse religious liberty arguments against progressive measures often fail to recognize that in doing so they are in fact trampling on the liberty of religious people who support such measures. Political conservatives are not the only ones whose religious liberty needs protection. No single religious leader speaks for all religious people. No single Christian leader speaks for all Christians. Not even does any single Catholic leader speak for all Catholics. Religious liberties of various faiths can sometimes conflict—one reason why this issue needs to be mediated by neutral parties.

Because of these complexities, Michaelson wisely advises supporters not to fall into the trap of demonizing religious people, many of whom, in fact, agree that religious liberty is not under attack by progressives. Demonizing serves no productive purpose and only feeds the opposition's paranoia that they are being attacked. The religious liberty debate must be won on its merits, on the fairness inherent in the American value system, and not on alarmist rhetoric about secret and manipulative enemies. Both sides court peril when they seek to demonize.

Indeed, one of Michaelson's most important recommendations from this report is that a faith-based response to the religious liberty argument is strongly needed to be part of this conversation. Such a response would not only prove invaluable strategically, but it would help to save religious groups from the worst elements within their ranks. For example, while Catholic leaders have been among the most vociferous proponents of the religious liberty argument, there are many Catholic thinkers who oppose this strategy because they uphold the lesser-known Catholic principle that an individual must ultimately be ruled by one's conscience, not by the dictates of doctrine or authorities. A faith-based response to religious liberty would help to unearth the hidden gems within faith traditions which value conscience, equality, and justice. Such resources are needed to arrive at faith-based answers to the question of religious liberty, which will coincide with our American political tradition.

The evident power and strength of the advocates of the religious liberty argument indicate that this debate will continue to be part of our national conversation for a long while to come. Michaelson's contribution can reshape the landscape of the debate so that the civil rights of individuals and our heritage of religious liberty do not have to be opposed, but can live in harmony and mutual support of each of these important traditions. Both religious and secular leaders will find his report an important tool in their work to build a nation where liberty, equality, and justice interact to protect all people and institutions.

Francis DeBernardo
Executive Director,
New Ways Ministry
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-Jay Michaelson

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EXECUTIVE SUMMARY

A HIGHLY ACTIVE, WELL-FUNDED network of conservative Roman Catholic intellectuals and evangelicals are waging a vigorous challenge to LGBTQ and reproductive rights by charging that both threaten their right-wing definition of "religious liberty." The Christian Right campaign to redefine "religious liberty" has been limiting women's reproductive rights for more than a decade and has recently resulted in significant religious exemptions from antidiscrimination laws, same-sex marriage laws, policies regarding contraception and abortion, and educational policies. Religious conservatives have succeeded in reframing the debate, inverting the victim-oppressor dynamic, and broadening support for their agenda.

While the religious liberty debate is a growing front in the ongoing culture wars, it is actually an old argument repurposed for a new context. In the postwar era, the Christian Right defended racial segregation, school prayer, public religious displays, and other religious practices that infringed on the liberties of others by claiming that restrictions on such public acts infringed upon their religious liberty. Then as now, the Christian Right turned antidiscrimination arguments on their heads: instead of African Americans being discriminated against by segregated Christian universities, the universities were being discriminated against by not being allowed to exclude them; instead of public prayers oppressing religious minorities, Christians are being oppressed by not being able to offer them.

In the "religious liberty" framework, the Christian Right attacks access to contraception, access to abortion, same-sex marriage, and antidiscrimination laws—not on moral grounds (e.g., that contraception is morally wrong or that LGBTQ rights violate "family values") but because they allegedly impinge upon the religious freedoms of others (e.g., by forcing employers to violate their religion by providing contraception coverage).

The nerve center of the conservative "religious liberty" campaign is a small group of conservative Roman Catholic intellectuals and scholars concentrated around the Becket Fund for Religious Liberty, a public interest law firm based in Washington, D.C., and the United States Conference of Catholic Bishops (USCCB). Anthony Picarello, former counsel of the Becket Fund, left in 2007 to serve as USCCB's general counsel to work against marriage equality. These Roman Catholic organizations are supported by conservative evangelical allies, including organizations such as the Alliance Defending Freedom, Christian Legal Society, and Family Research Council. These alliances were forged in the antichoice movement, which has provided strong turnout of supporters at "religious liberty" events. These alliances were expressed in the Manhattan Declaration, which launched in 2009 when 150 Roman Catholic and evangelical clergy signed a statement to defend "life, marriage and religious liberty." Examination of these affiliations, history, and current activities makes clear that the campaign to redefine "religious liberty" aims not simply to win religious exemptions to the law, but to contest the authority of secular law itself.

The conservative "religious liberty" campaign's methods include:

- conducting a PR campaign to convince Americans that religious liberty is under attack and deploying misleading exaggerations to scare voters, for instance, by falsely claiming that churches will be required to sacralize same-sex weddings and employers forced to pay for abortions;
- reframing questions of discrimination (e.g., in the Boy Scouts) as questions of the religious liberty of those who wish to discriminate;
- filing lawsuits to limit LGBTQ rights on religious liberty grounds and exploiting ambiguities in the law to conduct a nationwide litigation campaign;
- exploiting the structural ambiguity in civil rights law that emerges when fundamental rights clash, as that between religious expression and civil rights;
- scaring the public by eliding the differences in legal standards between discrimination against LGBTQ people and discrimination against African Americans and other racial minorities, and suggesting that protections for the latter will be extended to the former;
- influencing legislation to obtain exemptions from antidiscrimination laws, and enabling Christian organizations to discriminate (e.g. student clubs in the Virginia university system);
- limiting access to reproductive health

care, first through a series of religious exemptions for abortion and now by attempting to limit insurance coverage for contraceptives under the federal Affordable Care Act;

- attempting to expand existing religious exemptions beyond religious organizations to include private businesses (such as the retailer Hobby Lobby, the plaintiff in a prominent current case); and
- marshaling the support of influential academics such as Douglas Laycock, a distinguished professor at the University of Virginia Law School who successfully argued a key religious liberty case before the U.S. Supreme Court for the Becket Fund, and longtime conservative Catholic campaigner Robert P. George of Princeton University, who was coauthor of the Manhattan Declaration and is a board member of the Becket Fund. They and other scholars provide intellectual leadership for the movement, both within the Christian Right and more broadly.

The "religious liberty" campaign's influence on contemporary politics and debate is increasingly visible. For example:

- It was a significant topic in the 2012 vice-presidential debate;
- It was the Christian Right's primary argument opposing same-sex marriage in the North Carolina, Minnesota, and Maine ballot initiatives in the fall 2012;
- The Ethics and Public Policy Center in Washington D.C. is developing religious liberty caucuses in state legislatures to promote the Christian Right public policy agenda opposing LGBTQ and reproductive rights (At least nine states currently have such caucuses);
- The conservative "religious liberty" argument has been instrumental in winning exemptions from same-sex marriage laws and reducing women's access to contraception coverage;
- While a June 2012 survey by the Public Religion Research Institute found only 39 percent of Americans believe religious freedom is threatened, polls also show the argument is effective when the Right sows confusion among the public; for instance, in suggesting that ministers would be forced to marry LGBTQ couples if a state legalizes same-sex marriage.

Aside from its power in legal arguments, the Right's "religious liberty" claims appeal to both conservative and moderate Christians by resonating with core martyrdom and persecution narratives. Moreover, among Roman Catholics, it resonates with the memory of Protestant separationists' anti-Catholicism; among moderates, it resonates with the American civic value of religious freedom. Finally, the Right's "religious liberty" arguments have won intellectual respectability even among some liberals. Unlike the Christian Right's usual claims, grounded in religious dogma, the conservative "religious liberty" argument appeals to liberal values enshrined in the Constitution and has the support of respected academics. Liberals may support many of these "religious liberty" causes and key players in the campaign to redefine religious liberty—such as the Becket Fund—have litigated in defense of Muslims as well as Christians. And there is a strong popular appeal to some basic arguments; after all, few want to abridge religious freedom.

Yet there should be no mistake: the Right's "religious liberty" campaign is a key front in the broader culture war designed to fight the same social battles on new-sounding terms, and is part of a movement with old roots in Christian Dominionism (a form of theocracy) and ties to conservative Catholics who launched the antichoice movement. Its deliberate inversion of victim-oppressor dynamic has led to limits on women's and LGBTQ people's real freedoms in the name of defending chimerical ones. Proponents may sincerely believe that they are defending religious freedom, but the campaign's endgame is a "Christian nation" defined in exclusively conservative terms. And it is thus far inadequately opposed.

To contest the Right's "religious liberty" argument, social justice forces must publicize the existence of a coordinated campaign to redefine religious liberty, support a faith-based response to it, counter common misinformation, contest the rhetorical frame of "religious liberty," foster robust academic responses, and take a pro-active rather than reactive political role. Specifically, this report recommends that social justice advocates:

1. Define and Publicize the Coordinated Campaign to Redefine Religious Liberty.
While grassroots evangelicals are active in the conservative "religious liberty" campaign against LGBTQ and reproductive rights, it is a coordinated fight led by well-established right-wing institutions like the Becket Fund and Alliance Defending Freedom. The Roman Catholic Church hierarchy and conservative Catholics are important thought leaders for the campaign. The evangelical/Roman Catholic alliance builds on relationships forged in the antichoice movement.

2. Organize A Unified Response
There is need for further mapping, coordinating, and building out alliances among advocates countering the Right's campaign. We need to strengthen the alliance between prochoice and LGBTQ forces, and ally with emerging faith-based responses. Alliances must also be made with liberal business owners and libertarians; this can increase the effectiveness of existing efforts.

3. Counter Misinformation
Many conservative "religious liberty" claims rely on falsehoods and scare tactics. Simply put, clergy will never be forced to perform a same-sex marriage. Social justice advocates must learn and be able to counter the Right's go-to examples of spurious "religious liberty" violations. Understanding and clarifying the Right's use of the martyr narrative and inversion of the victim-oppressor dynamic is a good start to countering right-wing rhetoric.

4. Reclaim the Religious Liberty Frame
The term "religious liberty," like the phrase "family values," has become a code for the larger culture wars. While religious belief and expression are valid and protected constitutional claims, religious liberty is not the freedom to discriminate and harm others. It does not allow a boss to tell an employee what health care they can obtain, taking away the employee's ability to make moral and religious choices. Nor does sexual and gender equality have to be pitted against religious liberty. The clash is not just between secularism and religion, or equality and religion, but of competing religious values. Challenging the conservative frame also means distinguishing between commercial and religious acts, and valuing competing civil rights; an effective response requires sustained intellectual and legal challenges to the Right's argument.

5. Develop Academic Responses
Social justice advocates must take seriously the influence of right-wing academics on policy and public debate. Religious freedom is a complex topic, which can too often become co-opted by the conservative "religious liberty" campaign. That this happens, often unknowingly, to fair-minded academics and legal scholars is something that can be reversed by raising awareness of the issue, including with academic conferences on the topic.

6. Leverage Religious Communities
We must build on existing interfaith work to counter the conservative "religious liberty" narrative, informing and organizing more in faith communities. The social justice community must create unity by issuing a common "Call to Conscience" of religious people seeking to maintain their religious liberty against the conservative proposals and policies. LGBTQ faith communities, Jewish and progressive faith organizations, in particular, must be supported in countering the Right's claims about what religious liberty means.

7. Ongoing Research and Monitoring
Social justice advocates and defenders of true religious freedom must become better informed about the right-wing campaign to redefine religious liberty—including its principal players, strategies, and vulnerabilities. Ongoing investigative research into U.S. conservatives' use of religious liberty legal and rhetorical strategies, both domestically and abroad, is needed to keep advocates and journalists informed about strategically significant developments. Moreover, we must track the influence of conservativec academics on policy and public debate.

INTRODUCTION

"GAY MARRIAGE IS THE TIP OF THE spear, the weapon that will be and is being used to marginalize and repress Christianity and the Church," said a confidential 2009 strategy document from the National Organization for Marriage (NOM).[1] That same year, the Manhattan Declaration—a manifesto signed by Roman Catholic, evangelical, and orthodox Christian leaders—publicly promised to resist "any rule purporting to force us to bless immoral sexual partnerships," though no same-sex marriage law has ever been contemplated to do so.[2] And in the summer of 2012, the United States Conference of Catholic Bishops organized the "Fortnight for Freedom," which took on both reproductive health care and same-sex marriage as threats to "religious liberty."[3]

This rhetoric is not new: it has been used by religious conservatives to warn against the dangers of birth control, abortion, women's liberation, legalized gambling, the abandonment of the gold standard, and even the Protestant Reformation itself. Yet what is new is that it is no longer confined to the Christian Right. For example, in the vice presidential debate of October 11, 2012, Paul Ryan accused the Obama administration of "assaulting the religious liberties of Catholic charities, Catholic churches, Catholic hospitals. Our church should not have to sue our federal government to maintain their religious liberties."[4] In January, 2013, Stanford Law School inaugurated the first "Religious Liberty Clinic," thanks to a $1.6 million grant from the Becket Fund, a leading ultra-conservative, Roman Catholic-affiliated "religious liberty" organization. And conservative "religious liberty" advocates have won religious exemptions from same-sex marriage laws, limited access to contraception and abortion, and inverted the terms of civil rights debates.

> Since the rise of the Christian Right in the 1970s, conservative Roman Catholics and evangelicals have insisted that Christianity is under attack.

How has this situation come to pass, where mainstream organizations and politicians are parroting Christian Right rhetoric? Where did this narrative come from? And how has it so succeeded in limiting the rights of women and sexual minorities, where other tactics have failed?

Ever since the founding of the United States, a tension has existed between the conception of the separation of church and state and that of a "Christian nation." This tension exists right in the First Amendment, which on the one hand prohibits the government from favoring or establishing religion, and on the other guarantees the free exercise of it. When a student offers a graduation prayer, is she exercising her individual religion, or impermissibly establishing it collectively? When a government funds parochial schools, is it properly nondiscriminatory, or improperly subsidizing religion? When a court finds religious values insufficient grounds for the government's restricting a woman's reproductive freedom, does violate the First Amendment? These questions have never been definitively answered, because such conflicts are intrinsic to the American conception of civil rights.

It is thus no surprise that the notion of religious liberty has been contested since the founding. At first, it was largely invoked both by members of marginal and oppressed religious communities—Mormons in the 19th century, Jehovah's Witnesses in the 20th century, Muslims in the 21st century—seeking protection for their minority practices. Yet since the rise of the contemporary Christian Right in the 1970s, organizations representing conservative Roman Catholics and conservative evangelicals have insisted that Christianity itself is under attack by forces of secularism, and that notwithstanding Christianity's dominant position in American culture, Christians' religious liberty is threatened. This position often manifests itself when there have been blocks on imposing the Christian faith on others—such as a stopping a city from displaying a crèche on Christmas, or—as in the latest "religious liberty" campaign—limiting others' health care choices, and discriminating against racial and sexual minorities under the guise of religion. More broadly, abortion, the lack of school prayer, changes in end-of-life care, even popular culture's supposed "War on Christmas," are all signs, in this narrative, of threats to the "Christian nation" and to the very practice of Christianity.

Now, there is some basis to these claims, for there are times when the interests and values of secular society trump the value of religious freedom. The most important example, historically, was the federal government's challenge to

religiously justified racial segregation at Bob Jones University. At the end of a long legal battle, the Supreme Court in 1982 allowed the government to strip tax-exempt status from the evangelical university because of its policies banning interracial dating.[5] This decision did prioritize a secular American value (desegregation) over self-described religious values. Scholar Randall Balmer even argues the contemporary Christian Right was constituted in the ruling's aftermath.[6] Prefiguring contemporary battles, the Right's characterization inverted the sense of who is the victim and who the oppressor: instead of the African-American students being stigmatized and discriminated against, the Christian Right argued that the university was the true victim, the latest in a long line of Christian martyrs. Yet all the government actually did was strip a tax benefit from an institution discriminating against minorities.

The rhetoric of victimhood notwithstanding, the conservative "religious liberty" campaign is today a well-financed strategy that has successfully limited the civil rights of others. In the last decade, groups have successfully deployed religious liberty arguments in the culture war **politically**, seeking legislation exempting religious acts from civil rights laws and opposing various political actions; **rhetorically/culturally**, recasting antidiscrimination and reproductive health rights as oppressive of religion, creating a sense that the dominant religion in America is, in fact, being persecuted; and **legally**, challenging laws supporting lesbian, gay, bisexual, transgender, and queer (LGBTQ) people, defending antigay plaintiffs, and carving out religious exemptions on constitutional grounds.

A small network of conservative Roman Catholic intellectuals leads the "religious liberty" campaign, supported by a much wider base of conservative, evangelical Christian Right organizations. Aside from the slight involvement of the Cato Institute and Heritage Foundation, the latest campaign is made up entirely of religious organizations.[7] This alliance—Catholic intellectual leadership, evangelical base—is drawn from the antichoice movement. For example, on October 20, 2012, a coalition of over 60 local and national organizations—the Stand Up for Religious Freedom coalition[8] —held a series of national rallies around the country that, by its own count, drew 18,222 people.[9] Notably, however, over half of the participating organizations were antichoice organizations, and the national rallies were coordinated by leaders from the Prolife Action League and Citizens for a Prolife Society. Despite the antichoice composition of the coalition, the rhetoric of the action, from its name through the propaganda on its website, was entirely phrased in terms of "religious freedom."[10] [11]

> This coalition of religious conservatives and academics focuses on two major issues: reproductive health and LGBTQ rights.

As the Stanford Law School's "Religious Liberty Clinic" makes clear, however, the conservative "religious liberty" campaign is distinguished from other fronts in the culture war by a significant mainstream academic presence. Professor Douglas Laycock of the University of Virginia Law School, for example, has for decades been a champion of religious freedom in alliance with liberals; recently, he served as the lead attorney for the Becket Fund, a Roman-Catholic dominated public interest law firm steeped in the conservative "religious liberty" campaign, in arguing an important "religious liberty" court case and has written numerous religious exemption provisions that have been ratified into law. Laycock is not known as an ideologue; indeed, his letters to state lawmakers—signed by many other academics—go out of their way to support same-sex marriage in some form. Judging by the invitation lists at conservative "religious liberty" conferences, there is a regular consortium of these scholars, including Laycock, Marc Stern (counsel at the American Jewish Congress)[24], Mary Ann Glendon (a leading antichoice theorist and former U.S. ambassador to the Vatican who is the Learned Hand Professor at Harvard Law School), Carl Esbeck (a distinguished professor at the University of Missouri School of Law), Edward Gaffney, Richard Garnett, and Robin Fretwell Wilson. Many of these academics make highly conservative political arguments, send letters to state legislators, and take direct roles in the drafting of legislation. These academics may well believe that religious liberty is threatened, but their work has been enlisted by a mass movement of seeking to end access to reproductive health care and restrict the civil rights of sexual and gender minorities.

Jews also play a small role in the conservative "religious liberty" campaign. Orthodox organizations such as the Orthodox Union (represented by Nathan Diamant), Yeshiva University (represented

PROFILE

MANHATTAN DECLARATION PROJECT

The Manhattan Declaration[12] was co-authored in 2009 by Dean Timothy George of Beeson Divinity School, Samford University; Roman Catholic scholar Robert P. George of Princeton; and the late evangelical Chuck Colson to protest Christianity's (alleged) growing marginalization in American society. The Manhattan Declaration is available online with a list of its key signers[13] and discusses the sanctity of human life, the preservation of traditional marriage, and religious liberty.[14] More recently, the Project has attacked insurance coverage for contraceptives under the federal Affordable Care Act.

In the section on Religious Liberty, the writers describe efforts to weaken conscience clauses (religious exemptions for doctors wishing not to perform abortions), and complain that:

> *We see this, for example, in the effort 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 of various sorts to comply with activities they judge to be deeply immoral or go out of business.*[15]

It states that the signers will not respect any law that compels their institutions to participate in any "anti-life" act.

The Declaration garnered significant media exposure at first, attracting most of its current signatories in the two weeks following its release, and gaining coverage from the *New York Times*[16] and the *Los Angeles Times*[17] as well as right-wing[18] and Christian[19] news sources[20] emphasizing its popularity.[21] It surfaced again in 2010, when Apple refused to approve a homophobic app that would mobilize supporters to sign.[22] Yet while the Declaration is touted on the Right as a significant achievement and rallying point for a powerful social movement, it has apparently lost steam and will likely not meet its original goal of one million signatures, which backers initially claimed it could reach in one month.[23] Still, the Declaration has no doubt deepened the Roman Catholic/evangelical coalition and helped popularize conservative religious liberty arguments.

by Meir Soloveitchik), Agudath Israel, and Young Israel[25] have long provided a multireligious figleaf for Christian Right theocratizing. Recently, however, these Jewish organizations have been joined by more mainstream groups, like the American Jewish Congress, mainly through its general counsel Marc Stern, and the Union for Reform Judaism.[26]

This coalition of religious conservatives and academics allied with, or perhaps unknowingly co-opted by them, focus on two major issues: reproductive health and LGBTQ rights. Regarding the former, Christian Right organizations have for decades pushed for ever more exemptions ("conscience clauses") for doctors, pharmacists, religiously affiliated hospitals, and other organizations to opt out of providing abortion services; now, the battle has shifted to employers wishing not to provide coverage for contraception in Affordable Care Act ("Obamacare") compliant health plans. Regarding the latter, conservative "religious liberty" activists have successfully persuaded several state legislatures to grant religious exemptions to organizations and individuals wishing not to recognize an otherwise legal same-sex marriage, in effect creating two classes of legal marriage. They have also successfully exempted many employers from antidiscrimination law. They have won one Supreme Court case, *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, which held that "ministers" are not covered by employment discrimination law (as discussed below, this case may be less significant than conservative "religious liberty" activists suggest). They have depicted bullies as victims, and hegemonic Christianity as an oppressed, minority religion. And antigay activists have also challenged California's recent ban of "reparative therapy," aimed at curing gays, on free speech and freedom of religion

PROFILE

THE BECKET FUND

Revenue 2010: $2,692,006

Named for the martyred Archbishop of Canterbury, the Becket Fund was founded in 1994 by attorney Kevin 'Seamus' Hasson. Originally nonpartisan and an advocate on behalf of many religious interests, the Becket Fund has become more conservative under the leadership of William Mumma. It is the intellectual leader of the right-wing "religious liberty" campaign—it recently litigated and won the landmark *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* case in 2012, allowing religious groups to hire and fire clergy without regard to employment discrimination law.

Notwithstanding Becket's intellectual orientation, it has advanced the specious claim that marriage equality laws will force Roman Catholic churches to perform marriage for gay or lesbian couples. Becket is also at the forefront of the spate of adoption cases in Massachusetts and Illinois, where Catholic Charities pulled out of adoption networks rather than place children with gay or lesbian couples.[27] The Becket Fund names the Affordable Care Act as one of the top religious freedom issues facing the United States, and has filed seven suits against it. Not all its projects, however, are culture-war related. For example, the Becket Fund has prosecuted cases in international fora, including representing Muslims before the European Court of Human Rights.[28]

Organizationally, the Becket Fund is a public interest law firm that represents states, municipalities, and members of many different religious faiths with the goal of defending the constitutional right to free expression of religion. The Becket Fund is at the center of a small, Roman Catholic-dominated group of "religious liberty" activists. Its entire leadership and funder base is made up of conservative Roman Catholics: current executive director William Mumma, founder Kevin Hasson, general counsel Anthony Picarello (who joined the the Knights of Columbus and USCCB[29] in 2007 as its general counsel to work against marriage equality, and who recently led the bishops' campaign regarding "religious liberty"), board members Robert P. George (coauthor of the Manhattan Declaration) and Mary Ann Glendon (former U.S. ambassador to the Holy See and a leading antichoice theorist).

Despite its nonsectarian presumptions, the Becket Fund can be viewed as a virtual arm of the Roman Catholic Church. Financially, the ties are clear and deep, as are the personal religious affiliations of key Becket leaders. And philosophically, the Becket Fund is continuing a Roman Catholic campaign that is at least 150 years old to create separate domains for religious people and organizations that are removed from public scrutiny and laws—even as they receive public funds and subsidies. This goes beyond religious freedom; it is about creating a separate religious magisterium beyond the rule of law. Together with Becket's overlap with neoconservative Roman Catholic thinkers and theological orientations (fights between relativism and objective truth, for example), not to mention the organization's very name, this situates the Becket Fund within a clear and conservative Catholic context.

Given the Catholic-heavy nature of the organization, it is no surprise that the Becket Fund is the second largest recipient of political funding from the Knights of Columbus, according to a report released by the Roman Catholic progressive coalition Equally Blessed in October 2012.[30] The report also found the Knights disbursed $15.8 million to anti-marriage-equality groups between 2005-2012, $6.25 million directly to oppose marriage equality and $9.6 million to "build a conservative religious and political culture to oppose marriage equality." The Equally Blessed report determined that the leadership of the Becket Fund, the USCCB, and NOM are "closely intertwined." During this period, according to the report, NOM received $1.9 million from the Knights, the USCCB $1.2 million, and the Becket Fund $1.5 million. Today, the Becket Fund's lead donors are the Lynde and Harry Bradley Foundation and the John M. Templeton Foundation.

grounds, with at least one court success.

What is the history of the religious liberty movement, and who is behind it? When has the movement succeeded—and when has it failed? And what can progressives do to combat it? This report proceeds as follows:

- An explanation of the **history of the conservative "religious liberty" movement** as a sociological and legal phenomenon, situating this latest campaign as part of the culture war.
- An analysis of **the campaign's major themes**, including victim narratives, the war on religion, and others, situating them in the context of the Christian Right.
- A discussion of the **application of right-wing "religious liberty" rhetoric** to issues of LGBTQ equality and reproductive rights, and offers an **assessment of the movement's current success and future prospects.**
- The report concludes with a number of **recommendations for those activists seeking to counter this attack on civil rights** in the name of religious freedom.
- Appendices at the end provide a list of leading religious liberty organizations.

HISTORY

ALTHOUGH THE CURRENT APPLICATION of right-wing "religious liberty" arguments to questions of institutionally provided health care and antidiscrimination laws is relatively recent, the deployment of the value by conservative Christians is not. This section describes the early history of religious liberty in American culture, and addresses the legal history of conservative "religious liberty" claims from then until now.

EARLY HISTORY

In conservative rhetoric, the fight for religious liberty dates all the way back to the Pilgrims' flight from England. To an extent, of course, this is true: not only were the Pilgrims religious refugees, but they were quite conservative as well, aiming to set up not a pluralistic society where all could worship as they wished, but a specific theocratic society, apart from the England that oppressed them. In both popular and scholarly texts today, conservatives see themselves as heirs to these religious dissenters and seek to restore an older, better, more religious United States that, in their view, the founders intended.[31] The sense in books such as Donald Wildmon's *Speechless* and David Limbaugh's *Persecution* is that "Christians"—by which is meant conservative Roman Catholics and evangelical Protestants—are now the persecuted minority.

The actual history is somewhat different. As told by Sarah Barringer Gordon in *The Spirit of the Law*,[32] from the 1770s through the 1840s, the establishment and free exercise clauses of the First Amendment did not apply to the states, and the exercise of minority religious practice was sharply curtailed by state and local governments. In 1787, six of the original thirteen states had official, established churches, though all had disestablished them by 1833.[323] Religious liberty was simply not a matter of federal protection or concern, and as a result, minority religious practices were often suppressed.

From the 1840s until the 1930s, a middle period reigned. While mainstream religious practices would be protected by courts and the federal government, it was clear that states had the "police power" to punish religious dissent (blasphemers, experimental religious groups, etc.) and neither the Supreme Court nor the federal government did much to protect religious minorities—the primary case in point being the Mormons, who were persecuted in several states as they traveled across the country. The 1879 Supreme Court decision in *Reynolds v. United States* is instructive: "While laws cannot interfere with mere religious belief and opinions, they may with practices."[34] This dictum shows how distant the historical reality was from religious liberty rhetoric. Evangelicals, too, had their freedoms curtailed during this period. Forgotten today, the Salvation Army's original mission was indeed salvation; in a period of declining church attendance, they held huge outdoor parades, revivals, and rallies in the late 19th century. These ran afoul of local nuisance laws, and Salvation Army figures were often jailed and beaten. Unlike the Mormons, they had some success in obtaining judicial relief, and were arguably the first conservative religious group to prevail on the grounds that their religious liberty was being impaired by secular governmental action. Overall, however, constitutional protection of religious liberty was limited to mainstream religious activities until the 1930s.

The notion that the U.S. Constitution protects all religious liberty came about in the last 80 years, and is the result of work done by marginal religious groups, not mainstream ones.

Because the subsequent seven decades of this history has been shaped by crucial Supreme Court cases, we will now examine three of those cases as a lens through which to view the history as a whole.

BARNETTE

The notion that the U.S. Constitution protects all religious liberty is really a creation of the last 80 years, and the result of the work of marginal religious groups, not mainstream ones. Chief among these were the Jehovah's Witnesses, who refused to salute the flag or recite the Pledge of Allegiance, a controversy that reached fever pitch in the 1930s and 1940s. Initially, in 1940, the Jehovah's Witnesses lost in the Supreme Court, which held (8-1) that the state's interest in teaching patriotism trumped the Witnesses' religious freedom interests.[36] This opinion was overturned only three years later, in 1943's *West Virginia State Board of Education v. Barnette* opinion,[37] now seen as a landmark case for religious liberty, though in

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CHRISTIAN RECONSTRUCTIONISM

A more far-reaching and militant version of the culture war in the context of right-wing "religious liberty" claims is waged by the movement of Christian Reconstructionism/Dominionism, which holds that biblical law is the only valid basis for American law.

As developed in the writings of Rousas John Rushdoony, Gary North, and others, this claim goes beyond commonly-held views that the United States is a "Christian nation" and argues clearly for theocracy, including the civil implementation of biblical capital punishment laws. This movement, though less active in today's "religious liberty" campaigns, was ahead of the curve in articulating "religious liberty" beliefs. As early as 1979, the Rutherford Institute (profiled in the next section) successfully defended the firing of a gay church organist,[35] a case which prefigures the recent *Hosanna-Tabor* case.

Conceptually, while Reconstructionists would obviously object to incursions upon religious institutions, and might well adopt conservative "religious liberty" rhetoric in doing so, their arguments are distinct from today's campaigns, and their institutions (such as the Chalcedon Foundation and the Rutherford Institute) have not taken a leading role in conservative "religious liberty" activism.

Indeed, the views of conservative "religious liberty" campaigners and Reconstructionists are often opposed. Reconstructionists vehemently oppose public schooling, for example, opting for home schooling or Christian academies; "religious liberty" activists have been heavily involved in fighting for "religious liberty" within public schools by, for example, defending prayer in schools. Reconstructionism is also harder right than the conservative "religious liberty" campaign; Reconstructionists oppose women's suffrage, for example. Thus while Reconstructionism may be an influence on key "religious liberty" figures, and while Reconstructionists may adopt the rhetoric, evidence has not shown that Reconstructionists are behind the current "religious liberty" campaign.

reality it rested on free speech grounds (i.e. that no one could be compelled to recite the pledge).

Barnette ushered in protections against compulsory secular expression. Yet it was followed by cases which ushered in protections against potentially coercive compulsory expression of religious views. For example, the *bête noire* of the Christian Right is *Engel v. Vitale*, the 1962 case that ushered in the contemporary period of separationist jurisprudence[378] and outlawed state-sponsored prayer in public schools, even nonsectarian and noncompulsory prayer. Subsequent cases such as *Wallace v. Jaffree* (1985), banning moments of silence,[39] and especially *Lee v. Weisman* (1992), banning clergy-given prayers at graduation,[40] convinced many traditionalists that there is a secularist war against Christianity. Really, however, they are but the complement to *Barnette*: religious acts may not (usually) be restrained, yet they may not be compelled either. Indeed, the irony of today's conservative "religious liberty" campaign is that the same logic of these much-loathed cases is now being applied to Christian religious "dissenters."

BOB JONES

The most important case for contemporary "religious liberty" claims and the Christian Right itself is the *Bob Jones University v. United States* case, decided in 1983.[41] This was a controversial case at the time, inspiring countless legal and academic articles,[42] and, according to some accounts, was the most formative event in the creation of the Christian Right and the politicization of American evangelicals.[43] Notably, Bob Jones University was part of a last ditch effort to maintain racially discriminatory institutions; then as now, the "religious liberty" in question was the liberty to discriminate against others.

The evangelical Bob Jones University had originally barred African Americans from admission. By the late 1970s, these restrictions had been relaxed, but the university still banned interracial dating on religious grounds. The United States Internal Revenue Service (first under President

Nixon, though President Carter—an evangelical—is usually blamed by the Christian Right) revoked the school's tax-exempt status, stating that a nondiscrimination policy was required for tax exemption. The Supreme Court agreed, stating that since the exemption was a privilege, it could only be obtained if one comported with law and public policy.[44] Though the decision neither shut down Bob Jones University nor compelled it to change its policies, this perceived infringement on religious liberty fueled the contemporary Christian Right, and was hotly debated in the press.[45]

The parallels to contemporary "religious liberty" cases are obvious, and the questions asked are the same: may the government compel religious institutions to adhere to the rule of law, or are religious institutions exempt from doing so? The school itself has now become a symbol: When George W. Bush sought to burnish his conservative credentials in 2000, he did so by giving a speech at Bob Jones University.[46] Interestingly, this incident thrust the university back into the limelight, and it ultimately removed its discriminatory policy. And to this day, conservative legal theorists and Christian Right writers decry *Bob Jones* as a wrong decision.[47] Moreover, the creation of such enclaves has only increased since, with the increase in home-schooling, Christian academies, and para-academic institutions such as Liberty University (associated with televangelist Jerry Falwell) and Regent University (associated with Pat Robertson).

Bob Jones also prefigures the inversion of the victim-oppressor dynamic that marks contemporary "religious liberty" rhetoric. The real victims

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RELIGIOUS FREEDOM RESTORATION ACT (1993)

The Religious Freedom Restoration Act (RFRA) was enacted by Congress in 1993 in response to *Employment Division v. Smith,*[478] which upheld that while states have the power to accommodate otherwise illegal acts done for religious purposes, they are not required to do so. RFRA applies standards that are more protective of the exercise of religion than the constitutional standard. It prohibits government from "substantially burdening" a person's free exercise of religion, even if the burden is the result of a generally applied rule, unless the government demonstrates that the burden is the least restrictive means of furthering a compelling government interest.[49]

In 1997, however, RFRA was held unconstitutional as applied to the states.[50] It found that Congress could not decree "the substance of the [First] Amendment's restrictions on states."[501] RFRA does still apply, however, to the federal government. RFRA demonstrates the pattern of protections for minority religions being subsequently used by majorities: though RFRA was passed at least nominally to address unfairness regarding Native American peyote use, this bill and others similar to it have become a way for the Christian Right's "religious liberty" campaign to proceed.

State-level RFRAs began to be enacted shortly after *Boerne v. Flores*[512] (Florida's RFRA[523] is an example of this state-level legislation.), and the American Religious Freedom Program of the Ethics and Public Policy Center (EPPC-discussed in the next section) lists state RFRAs as a suggested type of legislation to be enacted by state-level religious freedom caucuses.

Finally, arguments that the HHS contraceptive provision violates the 1993 RFRA were formed shortly after the announcement of the benefit in early 2012[54] and have persisted since then.[55] EPPC's Ed Whelan has been particularly vocal.[56] Lately, HHS benefit opponents have found some initial legal success under RFRA, though only in winning such measures as preliminary injunctions, not in rulings on the merits.[57] Florida Senator Marco Rubio[58] failed to win passage of his effort to expand the religious exemption clause of the HHS benefit, with the Religious Freedom Reformation Act of 2012.[59] Similarly, the Blunt Amendment, which attempted to allow any employer or insurer to refuse to provide any health care service required under the ACAm was defeated in the Senate in 2012.

were Black students at Bob Jones—not the university. Today, the conservative "religious liberty" frame claims that the real victims are not gay students being bullied, women denied accessible health care, and nonreligious students coerced into participating in a religious ceremony. Conservative "religious liberty" rhetoric says that true victims are the university, the bully, the woman's employer, and the graduation speaker who is not able to recite a prayer. Instead of a conflict between civil rights, this rhetoric focuses only on the rights of the person doing harm to another.

HOSANNA-TABOR

An important "religious liberty" case was decided in 2012: *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*.[60] This case was argued by Douglas Laycock for the Becket Fund, and, in a 9-0 decision, the U.S. Supreme Court expanded the First Amendment's "ministerial exemption" to employment discrimination laws, holding that churches and other religious groups must be free to choose and dismiss their leaders without government interference.[61] It allows churches and some religious institutions to apply religious precepts in hiring and firing of ministers broadly conceived as including religion teachers—including, presumably, allowing employers fire LGBTQ people. *The Wall Street Journal* called it "one of [the] most important religious liberty cases in a half century."[62]

Today, the conservative "religious liberty" frame claims that the real victims are not gay students being bullied, women denied accessible healthcare, and nonreligious students coerced into participating in a religious ceremony.

It is not clear that this is so, however. The facts of the case were strange and limited: the employee in question was dismissed because she opted to pursue an employment discrimination claim for her narcolepsy rather than work out the dispute within the church hierarchy, as required by church doctrine. These unusual facts render the exact ambit of *Hosanna-Tabor* unclear, and though the decision was 9-0, the justices split among multiple opinions. Most importantly, it is limited to ministers and others who perform minister-like functions. Who falls under this category is unclear; Laycock has opined a theology teacher would, but an English teacher would not. Chief Justice Roberts specifically limited *Hosanna-Tabor* to employment discrimination—it does not preclude sexual harassment claims or criminal investigations. *Hosanna-Tabor* is important, but it is likely not as expansive as conservative sources say it is. It simply holds that churches decide who serves as a minister, and can hire and fire ministers without regard to employment nondiscrimination law.

> *The [First Amendment's] Establishment Clause prevents the government from appointing ministers," wrote Chief Justice Roberts, "and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.*[63]

However, several additional factors raise the importance of the case. First, Chief Justice Roberts spent several pages of his opinion discussing the history of religious freedom in America from a conservative perspective, fulfilling the fondest hopes of conservative "religious liberty" advocates. Second, even liberal justices rebuffed the government's argument that churches should be treated like other employers, holding that the First Amendment clearly states that they should not be; although the actual significance of this holding is to undermine "religious liberty" hyperbole that churches might be compelled to solemnize same-sex weddings (a scare tactic used in recent marriage equality battles). But the most important aspect of *Hosanna-Tabor* may be an issue never discussed in the case: its application to sexual and gender minorities. Surely, though, it is obvious that churches may dismiss ministers for any violation of religious law, including church doctrine on homosexuality or gender identity—as the liberal justices in *Hosanna-Tabor* agreed. And *Hosanna-Tabor* is about ministers, not church employees uninvolved in religious teaching or affiliates. So while the Religious Right may celebrate *Hosanna-Tabor*, it was a 9-0 decision precisely because it is hard to see it going the other way.

CURRENT STATE OF THE LAW

The current state of law and public policy is, by all accounts, mixed and inconsistent. As commentators have noted, the multiple sources of religion cases—some in antidiscrimination law, some in

health care policy, some in free speech contexts—has led to a confusing mishmash not only of law but also of perception and public policy.

Naturally, conservative "religious liberty" advocates exploit this situation, selectively choosing the most outrageous cases for their purposes. For example, many books in the genre described cases that were filed, even though they were later dismissed. Or, regarding discrimination law, in scholar Martha Minow's words, "religious groups largely receive no exemptions from laws prohibiting race discrimination, some exemptions from laws forbidding gender discrimination, and explicit and implicit exemptions from rules forbidding sexual orientation discrimination."[64] Many "religious liberty" texts omit this distinction, stating that the same level of scrutiny applied to race cases would be applied to those involving sexual orientation, which is flatly incorrect. Third, religious organizations already receive a large assortment of exemptions—hardly evidence of a war against religion. Minow again: "The state and local governments have expanded exemptions for religious groups when their activities bump up against property and sales taxes, unemployment benefits,[65] pension law requirements, collective bargaining, and day-care licensing requirements."[66] These exemptions are not available to secular nonprofit organizations.[67]

> The conflict between the free exercise of religion and civil rights is as old as the Republic, and is better understood as a conflict between one set of civil rights and another.

Minow helpfully points out that the conflict between the free exercise of religion and civil rights is as old as the Republic, and is better understood as a conflict between one set of civil rights and another.[68] As she puts it, "'Civil rights' include rights that are potentially at odds with one another. The term refers to not only the hard-won bans against racial subordination and gender-based and sexual orientation-based discrimination; it also safeguards the free exercise of religion."[69] The free exercise of religion is, itself, a civil right. So it is not that it is being sacrificed (or not) as against "civil rights;" rather it is one civil right that occasionally comes into conflict with others.

CURRENT STATE OF THE CONSERVATIVE "RELIGIOUS LIBERTY" MEME

As first described by Richard Dawkins, a "meme" is a unit of culture that replicates and perpetuates itself in different contexts. The conservative "reli-

PROFIILE

UNITED STATES CONFERENCE OF CATHOLIC BISHOPS

www.usccb.org • www.marriageuniqueforareason.org

The United States Conference of Catholic Bishops (USCCB) has been at the leadership of the conservative "religious liberty" campaign as applied both to health care and LGBTQ issues. In November 2011, the USCCB created an initiative called Marriage: Unique for a Reason, which emphasizes sexual difference between partners as crucial to marriage and conservative "religious liberty" concerns: the legal definition of marriage as between one man and one woman not only protects marriage as an institution, but also protects the religious freedom of those who adhere to that definition.

In 2012, the USCCB has provided the organizational and PR muscle to complement the Becket Fund's intellectual leadership on the HHS provision. Their "Fortnight for Freedom" (June 21-July 4) was a national series of events about religious liberty issues, chiefly the HHS provision and same-sex marriage (including the non-placement of children with same-sex couples). While it won attention in the conservative press, it was largely ignored by the mainstream press. There is a second Fortnight for Freedom scheduled for summer 2013. While the USCCB is an organization established by church law, it has limited powers: any decree of binding legislation must be reviewed by the Vatican before it takes effect, and the USCCB is not permitted to speak on behalf of all the bishops in the United States unless each and every bishop has given his consent.

gious liberty" meme has had just such a life. Henry Ford preached about a "war on Christmas and Easter" in 1921[70]; Bill O'Reilly picked up the theme in 2005. In the mid-twentieth century, Roman Catholics described the separation of church and state as a Protestant war against Catholicism; in the twenty-first, Protestants and Catholics describe it as a secular war against Christianity.

The contemporary use of this latest contemporary "religious liberty" meme evolved in the 1990s in crafting "conscience clause" exemptions to abortion access, and in response to the LGBTQ rights movement. The Acton Institute for the Study of Religion and Liberty, for example, was founded in 1990, and began publishing *Religion and Liberty* magazine in 1991. The earliest prominent use of the conservative "religious liberty" argument in the gay rights context appears to be the 1992-1996 fight over Colorado's Amendment 2, which would have prevented any locality from enacting a gay rights ordinance. In the subsequent court battle, which ended with the amendment being found unconstitutional by the Supreme Court, Colorado argued that one of the state's interests in the amendment was protecting the freedom of religion.[71] This appears to be the first time in which this argument, familiar from the contexts described above, was applied to questions of gay rights. It was also apparently the first time when religious exemptions to gay rights laws were mentioned in a court opinion, when the Colorado Supreme Court suggested they would be a better remedy for religious freedom concerns.[72] Outside of these contexts, one does not find such arguments made in the contexts in which we find them today until the last decade. For example, it is striking that "religious liberty" arguments are almost absent in Didi Herman's comprehensive 1998 study of the Christian Right's antigay rhetoric, *The Antigay Agenda*.

This conservative "religious liberty" campaign gained steam beginning in the 2000s, when a small group of conservative Roman Catholic-affiliated scholars and think tanks, who had been making various religious liberty arguments for decades, injected the argument into the new contexts of health care and LGBTQ issues. It is reasonable to wonder whether some of this must have been tactical: faced with changing attitudes on LGBTQ rights and a decline in traditional homophobia, such organizations turned to "religious liberty" as a fallback. However, this research did not find hard evidence to support this theory. On the contrary, these arguments predate the successes of the contemporary LGBTQ rights movement in the last five years. In 2003, Alan Sears of the Christian Right legal group Alliance Defending Freedom named the so-called homosexual agenda "the principal threat to religious freedom," well before that agenda enjoyed its recent successes.[73]

The current "religious liberty" campaign gained steam when a small group of conservative Roman Catholic-affiliated scholars and think tanks injected an old argument into new contexts: health care and same-sex marriage.

By now, conservative "religious liberty" arguments are standard fodder on Fox News and among the right-wing punditry. Phyllis Schlafly, for example, writes that "the policies of the Obama administration represent the greatest government-directed assault on religious freedom in American history."[74] Rush Limbaugh, too, has alleged that the president is assaulting religious liberty[75]—and recall that Limbaugh's comments disparaging Sandra Fluke, the Georgetown law student advocating for women's health rights, came in the context of a key "religious liberty" battle, the HHS provision debate.[76]

The conservative "religious liberty" claim is firmly embedded in American political culture as well. In the 2012 presidential debates, Republican standard bearer Gov. Mitt Romney briefly mentioned it, saying "in that line that says we are endowed by our creator with our rights, I believe we must maintain our commitment to religious tolerance and freedom in this country."[77] It became an important topic in the vice-presidential debate of October 11, 2012. During the debate, Rep. Paul Ryan (R-WI) said:

> *What troubles me more is how this administration has handled all of these issues. Look at what they're doing through Obamacare with respect to assaulting the religious liberties of…Catholic charities, Catholic churches, Catholic hospitals. Our church should not have to sue our federal government to maintain their religious liberties.*[78]

This was a clear reference to the HHS debate and a high-profile replication of the standard conservative "religious liberty" argument on the issue. Note how the generalizations of "religious liberty" rhetoric misstate the issue: No church has had to fight to maintain its religious freedoms; at issue is whether church-affiliated businesses (not churches) must provide the same health coverage (not violate their conscience) as required for all businesses.

Vice President Biden's response was emphatic and accurate, but seemed less persuasive than Ryan's victim narrative:

> *With regard to the assault on the Catholic church, let me make it absolutely clear, no religious institution, Catholic or otherwise, including Catholic Social Services, Georgetown Hospital, Mercy Hospital, any hospital, none has to either refer contraception, none has to pay for contraception, none has to be a vehicle to get contraception in any insurance policy they provide. That is a fact.*[79]

This response was true on the surface due to Biden's precise language: no institution has to refer contraception, or directly pay for it, or "be a vehicle to get contraception." But, as right-wing blogs quickly pointed out, institutions (including some hospitals) do have to include contraception in their insurance plans.[80] In any case, the vice presidential debate represented a high water mark for the visibility of the right-wing "religious liberty" argument. We now turn to the major themes of that argument, and their application to issues of women's and LGBTQ rights.

PROFILE

ETHICS AND PUBLIC POLICY CENTER (EPPC)'S AMERICAN RELIGIOUS FREEDOM PROGRAM (ARFP)

http://www.religiousfreedom.org/ • EPPC Revenue 2011: $2,906,363

Founded in 1976 by Ernest Lefever, a conservative American political theorist, the Ethics and Public Policy Center describes itself as "Washington, D.C.'s premier institute dedicated to applying the Judeo-Christian moral tradition to critical issues of public policy." It is primarily a think tank that organizes conferences and publishes materials on issues relating to public policy. Its nine program areas include "American Religious Freedom" as well as issues such as "Evangelicals in Civic Life," "Bioethics," and "Catholic Studies." It styles itself as a multi-faith organization. Rick Santorum was a senior fellow at EPPC from 2006 to 2012, and directed EPPC's Program to Protect America's Freedom. The Board of Advisors is about half Roman Catholic, with a few Protestants and one Orthodox Jew. (Of its 23 fellows and scholars, all 23 are white, and 21 are male.) Its funders include the Lynde and Harry Bradley Foundation ($3 million between 2001 and 2010), Koch family foundations, Scaife family foundations, Castle Rock Foundation, and the Pew Charitable Trusts. The EPPC has an impressive record of influencing public policy on issues such as abortion, stem-cell research, foreign policy, and now religious freedom.

ARFP's most interesting strategy is to develop "religious freedom caucuses" in nine state legislatures. These caucuses came to fruition in October of 2012, where they were formed in the legislatures of Arizona, Colorado, Florida, Idaho, Kansas, Missouri, New Hampshire, Oklahoma, and Tennessee.[105] Modeled on the International Religious Freedom Caucus established in the U.S. Congress in 2006, these new caucuses pursue both state-specific conservative "religious liberty" strategies and "educational materials." At its National Religious Freedom Conference in May 2012,[106] the EPPC announced a goal of forming these religious freedom caucuses in all 50 states by the end of 2013.[107] The ARFP has worked closely with the Becket Fund on this initiative.[108] This strategy marks a shift, however, from the Becket Fund's previous focus on litigation. Rather than waiting for lawsuits to be filed, legislators are urged to go beyond the courts in providing religious liberty "protections." They seek the state equivalents of the federal Religious Freedom Restoration Act.[109]

FACT AND FICTION

There is a confusing mixture of fact and fiction in right-wing "religious liberty" rhetoric. For example, in North Carolina, equality opponents warned that religious leaders who preached against homosexuality could be arrested for hate crimes.[81] This is absolutely not the case; the First Amendment's existing "ministerial exemption" would obviously protect this speech. In marriage equality battles, Christian Right advocates continue to claim that pastors will be required to officiate at same-sex weddings, which is also not the case.

Yet there is some factual basis for conservative "religious liberty" claims, depending on how they are phrased. Some organizations and individuals must recognize same-sex weddings but only if they operate "public accommodations." Some employers must pay for insurance plans that include contraception but not directly for contraception itself. Unfortunately, these are subtleties, and "religious liberty" rhetoric often is painted in broad strokes.

There is a confusing mixture of motives as well. Clearly, much oaf the motivation in this discourse is political, either in a naked partisan sense or in the broader sense of fighting the culture war. This is yet another line of attack against women, LGBTQ people, et cetera. There is ample evidence for this: the organizational alliances, the inconsistent rhetoric, the peculiar focus on precisely those areas of sexuality and gender that have been at issue in the culture wars, the funding from the Roman Catholic Church, the antichoice alliances, and the ease with which "religious liberty" is simply appended onto existing culture war narratives. At the same time, many conservative Christians sincerely believe their religious freedom is threatened, and they are correct to the extent that their religious hegemony is eroding over time, though of course they are incorrect that this is a Manichean war waged by secularists. Moreover, as has been noted, thoughtful academics have taken "religious liberty" positions. Once again, this makes responding to "religious liberty" arguments more difficult. It is simply inaccurate to claim that this is merely the latest front for the culture war, like intelligent design, for example.[82] This issue is not simply culturally based, but can be a complex legal predicament.

> There is a confusing mix of fact and fiction in right-wing "religious liberty" rhetoric.

THE WAR ON RELIGION

Since the 1970s, conservative evangelical Christians have adopted the earlier Catholic narrative that there is a determined secularist campaign to destroy religion and replace it with "humanism."[83] Francis Schaeffer, Tim and Beverly LaHaye, Jerry Falwell, and Adrian Rogers (the leader of the Southern Baptist Convention following the conservative 'coup' of 1979), and many others drew on what historian Richard Hofstadter would call "paranoid" themes in right-wing American anticommunism, dislocations in traditional life brought on by post-1960s flights to the suburbs,[84] and changes wrought by the civil rights, women's, and gay liberation movements to depict an overall war on religion itself. Secularism has become the new socialism[85]—though in the racist way President Obama is depicted in some of this literature, it seems the themes are reunited.

To some, this battle is literally the battle between God and Satan. Tim LaHaye, for example, demands that Christians "resist the devil and... put on the whole armor of God."[86] Beverly LaHaye wrote in 1984 that secularists are "priests of religious humanism and are evangelizing our children for Satan."[87] Donald Wildmon's outrageous tome *Speechless* is of the same ilk. These formulations seem unlikely to appeal to more moderate Christians, and on the contrary are likely to turn them off. Yet they have a strong appeal among evangelicals. In a 1990 survey reported by Sarah Barringer Gordon, more than 90 percent of those who self-identified as evangelicals (not just conservative evangelicals but evangelicals in general) agreed with the statement that "Christian values are under serious attack in the United States today."[88]

This rhetoric, even in its extreme form, is not simply propaganda but reflects a sincere sense, justified by opinion polls, that show the country moving away from traditional religion[89]—that an old Christian order is waning. Rather than ascribe this trend to socioeconomic, scientific, psychological, or other factors, the Christian Right narrative[90] looks for an enemy: Satan, socialism, communism, liberals, the War on Christmas, secularists, Barack Hussein Obama, feminists, homosexuals, evolu-

tion, abortionists, socialists, humanists—or, best, a hodgepodge of all of the above. "Religious liberty" rhetoric is part of this narrative. Christianity is not losing its power in this narrative; someone is taking it away.

Christianity is still the dominant religion in America, but its power is changing. One recurring theme in the right-wing literature is the sense of a "coming storm," to quote from an anti-marriage equality commercial by the National Organization for Marriage.[91] Like the red menace, the secularist danger is imminently looming. The metaphors are appropriately biblical: soon there will be a flood of litigation, a firestorm of controversy. Indeed, these apocalyptic pronouncements resonate closely with the millennialism that one finds in conservative evangelicalism generally and Christian Reconstructionism/pre-millennialism specifically. The "coming storm" and the End Times are not distant from one another.

The theme of the "war on religion" also intersects with the conservatives' blend of fact and falsehood in their "religious liberty" arguments as discussed in the previous section. For instance, Roman Catholic legal theorist Thomas Berg writes that "if sexual-orientation discrimination should be treated in all respects like racial discrimination—as many gay-rights advocates argue—then the precedent of withdrawing federal tax-exempt status from all racially discriminatory charities, upheld in *Bob Jones University v. United States*, would call for withdrawal from all schools and social service organizations that disfavor same-sex relationships."[92] Note the elisions here: from "many gay-rights advocates argue" to a position that no court has ever taken, from withdrawing tax-exempt status to overall "withdrawal," from a racist policy to "disfavor." The "coming storm," is highly unlikely to come in this way.

In more intellectual circles, the "war on religion" is attributed to a false distinction liberals supposedly make between freedom of conscience, worship, or belief on the one hand and the free exercise of religion on the other.[93] According to this narrative, as described in such books as Stephen Carter's *The Culture of Disbelief*, liberals misunderstand religion and are seeking to circumscribe how religion can be exercised. What Carter called the privatization of religion has now become a trope in conservative "religious liberty" discourse: that the "war on Christianity" in part results from an improper circumscription of religious liberty to simply what one believes in private, or within the church walls on Sunday, rather than what one practices in all aspects of life.[94] It is this theory that allows conservative "religious liberty" advocates to insist that their employment decisions and commercial life are also the "free exercise of religion," and to project a straw man secularist who believes that religion should only happen on Sundays. Of course, this "misconception" is not actually present in progressive thought on this subject; rather, the claim is that one's free exercise of religion is one of many civil rights, and that it may not necessarily trample on the rights of another.

MARTYR NARRATIVE

In describing the war on religious freedom, conservative "religious liberty" discourse may seem paranoid, but to traditionalists, it resonates with significant moments in Christian history, such as the early Christian martyrs in the Roman period. The "martyr narrative" is best understood as theological, rather than political, speech. Indeed, while many progressives of all faiths see themselves as resisting an overbearing, conservative Christian dominance in public life, many Christian conservatives see themselves as resisting a secular, anti-Christian hegemony, a perception that taps directly into narratives of Christian martyrdom, including that of Christ himself.

> In describing the war on religion, conservative "religious liberty" discourse taps into the martyr narrative found in Christian history.

Many conservative "religious liberty" campaigners have analogized the "persecution" in the United States to that in Nazi Germany. Recently, for example, the pastoral outreach director for Minnesota for Marriage said that the way Hitler persecuted Jews was that he "removed their voices in the public square and removed their control of their own businesses. So, he stopped Jewish people from speaking out in public and he silenced them."[95] This, of course, is not new rhetoric either: the American Family Association's Bryan Fischer once attributed the idea of church-state separation to Hitler.[96] In similarly offensive fashion, Pastor Rick Warren and others have called the Hobby Lobby case the "equivalent

of the Birmingham bus boycott."[97]

INVERSION OF THE VICTIM-OPPRESSOR DYNAMIC

Relatedly, the conservative "religious liberty" argument has more to do with framing than with facts. On the question of whether an employer must provide contraception coverage in health insurance plans, whose rights are at stake? In the "religious liberty" frame, the employer's religious liberty rights are threatened. In the civil rights frame, the employee's reproductive rights are threatened. Same facts, but different frames lead to different potential "victims," likewise in LGBTQ cases. In one case frequently cited by conservative activists (and discussed below), a New Mexico wedding photographer was fined roughly $6,000 for refusing to photograph a same-sex couple. Whose rights are at stake? In the conservative "religious liberty" frame, it is the photographer's religious interest in not sanctioning a same-sex union. In the civil rights frame, it is the couple's right to be free from gender discrimination.

There are several common moves that conservative "religious liberty" advocates make in such cases. To illustrate, we will focus on one case that is cited many times, that of a New Mexico wedding photographer who faced legal liability for refusing to photograph a same-sex couple. About this case, Thomas Berg writes that "It is likely in the future that religious dissenters, organizations, and individuals, will more frequently face a Hobson's choice between facilitating same-sex marriages against their conscience and giving up their charitable activities or small businesses."[98] Let us examine this claim.

First, there is no mention here that refusing to "facilitate same-sex marriages" is an act of discrimination against other people, and comes at the expense of their rights. In fact, there is not a single "religious liberty" claim that does not involve abridging someone else's rights.

Second, conservative arguments generally invent religious practices where none had existed before. There is no Christian teaching forbidding one from photographing something they may find objectionable. Suppose the photographer were a conservative Catholic who agreed with Pope Benedict XVI's statement that other religions are "deficient." Would she be barred by Roman Catholic doctrine from taking pictures of a Jewish couple? What about taking a photograph of an interfaith couple? Or an interracial one? Is taking a photograph, as a professional who advertises doing so as a business, a religious act at all?

Third, note Berg's vague language of "facilitating." This suggests that the photographer enabled or perhaps solemnized the marriage, which is incorrect; she was merely a photographer.

Fourth, Berg's claim elides the difference between commercial and personal acts. No one is asking the photographer to personally approve of a same-sex wedding; rather, as a business hanging out a shingle, her studio must adhere to non-discrimination laws, just as it must adhere to environmental laws (even if she disagrees with them), labor laws (even if she disagrees with them), and truth-in-advertising laws. Likewise with large corporations whose officers object to providing comprehensive insurance coverage. Businesses are commercial actors. When one enters the marketplace as a business, one agrees to a whole host of rules. Perhaps one's religion teaches that it is acceptable or even required to defraud unbelievers; nonetheless, doing so is illegal. Perhaps one's religion teaches that women's hair must always be covered; nonetheless, one may not require such observance among one's customers. In all cases, believers are rendering unto Caesar what is Caesar's by obeying the secular civil law.

> Conservative "religious liberty" arguments often have more to do with framing than with facts.

As Professor Chai Feldblum has discussed in several articles,[99] religious liberty claims are not absolute. When they bump up against other civil rights, they may prevail, or may fall. Yet conservative "religious liberty" rhetoric is asymmetrical and unclear. What is abridged in cases such as the New Mexico one is the ability to act in a nonreligious, discriminatory way on the basis of a professed religious conviction. Taking a photograph is not facilitating a marriage, or blessing it, or solemnizing it. It is not a religious act at all but a commercial one, subject to a host of laws, and affecting other parties' rights.

STAGES OF DOMINION

Finally, who may abridge those rights is constantly at play in "religious liberty" discourse. Typically

there are five tiers of actors:

1. Churches, clergy, and religious institutions
2. Religious organizations
3. Religiously affiliated organizations
4. Religiously owned businesses
5. Religious individuals

The law treats these tiers differently: churches are rarely required to obey antidiscrimination laws, for example, but religious organizations may be, and religious-owned businesses are. Conservative "religious liberty" rhetoric deliberately misstates harms upward, and tactically expands exemptions downward. On the one side, no clergy will ever have to solemnize any marriage against her/his beliefs, yet restrictions on tier 4 or 5 individuals are cynically extended by conservative messaging to tier 1.

On the other side, conservative "religious liberty" advocates are clearly pursuing a staged plan to migrate extensions downward. In the current HHS benefit battle, for example, the Obama administration first exempted tiers 1 and 2, and then, in February 2013, exempted tier 3. Yet still the Becket Fund has objected that "millions of Americans"—i.e., tiers 4 and 5—are still unprotected. Similarly, in the New York same-sex marriage debate, existing law exempted tier 1, Republican state senators won exemptions for tiers 2 and 3, but at least one senator held out for tiers 4 and 5, and ultimately voted against marriage equality. Through litigation, legislation, and politicizing, the Becket Fund and others are pushing for "corporate religious exemptions" (tier 4) that would enable corporations to evade a host of civil rights laws because of the religious claims of their shareholders.[100]

This staged policy must be understood as an attempt to create not religious exemptions, but the evisceration of civil rights protections themselves. If any individual or business can refuse to recognize a person's civil rights on the pretext of religious belief, those rights are functionally meaningless. It is to the specific rights in question that we now turn.

PROFILE

BERKLEY CENTER AT GEORGETOWN UNIVERSITY, RELIGIOUS FREEDOM PROJECT

http://berkleycenter.georgetown.edu/rfp

Georgetown's Berkley Center is part of the intellectual arm of the conservative "religious liberty" campaign, with Catholic perspectives on "religious freedom" worldwide and domestically.[110] This project of the Berkley Center is explicitly Roman Catholic (even more so than the Becket Fund) and features clergy as well as law professors. It recently published *Religious Freedom and Violent Religious Extremism: A Sourcebook of Modern Cases and Analysis* in December 2012 and is responsible for two key books, Roger Trigg's *Equality, Freedom, and Religion*, and Timothy Shaw's *Religious Liberty, Why Now?* Unlike ADF, the Berkley RFP is primarily an academic enterprise. Nevertheless, its scholarship is picked up by conservative ideological entities and its work is part of the troubling nexus between suppression of women's and LGBTQ rights on the one hand, and academic discourse on the other.

ISSUES AND EFFECTIVENESS

This section discusses the major issue areas and effectiveness of the conservative "religious liberty" campaign. Before turning to those specific areas, we note that current data on the effectiveness of the strategy overall are mixed. According to data from the Public Religion Research Institute (PRRI), 56 percent of Americans do not believe that religious freedom is threatened in America today, with 39 percent stating that it is being threatened.[101] Correlating those data with statistics on Americans' religious beliefs generally—e.g., 46 percent believe in creationism[102]—this suggests that only very traditionally religious people believe religious freedom is actually being threatened. In other words, Becket and others may be preaching to the choir. Of course, there is a distinction between responding to a poll that one believes religious freedom is threatened in general, and responding to effective messaging saying a particular act may threaten religious freedom. Moreover, conservative "religious liberty" campaigns are multifaceted and may have success in the courts and legislatures, even if public opinion lags behind.

To shift from opposing same-sex marriage outright, to opposing same-sex marriage as a violation of religious liberty, activists must twist the facts.

Interestingly, the PRRI data showed no significant difference between Roman Catholics and Protestants on this issue: 57 percent of Catholics said religious freedom was not being threatened, 38 percent said it is. Even more interestingly, however, white Catholics tended to be more concerned: 49 percent said religious liberty is threatened, 47 percent said it is not.

It is also worth noting that, amid all of the "coming storm" and sky-is-falling rhetoric, there may be some truth to the Christian Right's fears that America is growing less religious—and, demographically, looks to continue doing so. An October 2012 Pew report found that the "nones"—Americans who are religiously unaffiliated—are rapidly growing, and now comprise 19.6 percent of Americans,[103] with higher percentages among younger age groups. It is also true, of course, that gay rights have made astonishing advances in recent years (even as women's rights to health care have diminished over the same period). And as David Kinnaman, president of Barna Group and author of the book *unChristian* has observed, Protestant religious privilege certainly is decreasing, in an age of a multifaith America, which has led to the accurate perception of a loss of religious power, framed in an inaccurate assessment of why that power has been lost.[104]

So, as we evaluate the effectiveness of conservative "religious liberty" arguments, the overall metric of effectiveness may be these deeper trends, which portend a diminishment in the power of religion generally to influence public opinion. This is not to encourage complacency, but merely to recognize that (a) the conservative fears of secular encroachment have some basis in a deeper trend that religious communities have yet to successfully address, and (b) strategies for responding to "religious liberty" claims should be cognizant of such deeper trends and the potential for cutting these strategies down at the roots, rather than merely the branches.

LGBTQ ISSUES: SAME-SEX MARRIAGE AS FLASHPOINT

Few issues have galvanized the Christian Right more than same-sex marriage. As views on the subject have evolved with a majority of Americans now supporting it,[111] "religious liberty" rhetoric has provided a new frame for old animus. Yet to shift from opposing same-sex marriage outright, to opposing same-sex marriage as a violation of religious liberty, activists must twist the facts. The broadest, and least accurate, "religious liberty" claim is that members of the clergy will be forced to solemnize same-sex marriage. "Once federal and state laws uphold gay marriage, gays will be entitled to sue anyone licensed by the state that refuses to perform a marriage," writes Brad O'Leary in *The Audacity of Deceit: Barack Obama's War on American Values*.[112] This is universally untrue. All same-sex marriage laws specifically exempt clergy from being forced to sanctify any marriage of any kind. This, of course, is already the case without such exemptions; Orthodox rabbis cannot be forced to sanctify an intermarriage, for example. Yet this myth is an effective one, as we will see below.

It is also not the only myth that appears in this rhetoric. There are a handful of cases which appear again and again as anecdotes, and yet are misrep-

PROFILE

FAMILY RESEARCH COUNCIL

2011 Revenue: $13,061,417 • www.frc.org

The Family Research Council (FRC) is a well-established evangelical organization that is now part of the conservative "religious liberty" campaign. "Religious Freedom" is now one of the three main headers on the frc.org website, and one of 18 subheaders on the sidebar. FRC has produced a number of op-eds and short articles on the subject. They operate a Center for Religious Liberty (CRL), directed by Ken Klukowski. It is unclear how much of FRC budget is allocated to these activities. The CRL falls under the larger umbrella of Religion and Culture at the organization. The organization recently released on its website a webcast, co-sponsored by Voice of the Martyrs entitled the "Threat to Religious Liberty around the World", hosted by the president of the FRC. While the title mentions "religious liberty" broadly, the webcast focuses on Christians worldwide who face religious persecution.[121] The CRL also publishes articles on topics ranging from the persecution of Christians to the HHS provision.[122]

In addition to the organization itself, FRC affiliates, such as the Family Policy Council of West Virginia (*www.familypolicywv.com, 2011 Revenue: $154,785, founded 2007*) have also been active in "religious liberty" campaigns. Recently, FPC-WV has been very active in Chick-Fil-A protests and had a large campaign going to require premarital education for all West Virginia families. Similarly, the North Carolina Family Policy Council *(www.ncfamily.org, 2010 Revenue: $604,603, founded 1992)*, was a significant backer of North Carolina's recent same-sex marriage vote, where conservative "religious liberty" played a strong marketing role in the campaign. One policy statement in the campaign warned that religious leaders who preached against homosexuality could be arrested for hate crimes—obviously untrue. NC-FPC's website traces the 20-year history of the homosexual assault on Christianity.

resented every time. For example:

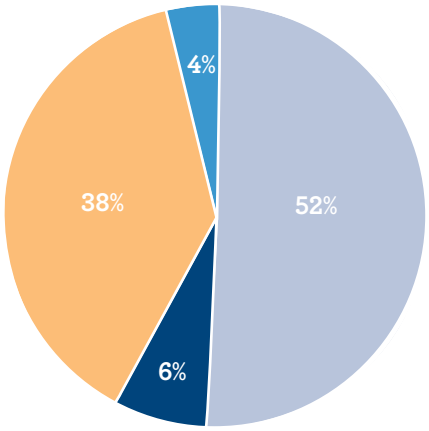
- In *Willock v. Elane Photography*,[113] discussed above, a photographer in New Mexico refused to take wedding photos of a same-sex couple. The couple sued and won. This case is sometimes used in anti-same-sex marriage arguments, yet the actual holding never mentioned marriage, and there was no same-sex marriage in New Mexico when the case was decided. Rather, the holding was based entirely on antidiscrimination law and on the fact that the photographer was operating a public business. Nonetheless, because it involves a wedding photographer, *Willock* is routinely trotted out by anti-marriage activists.[114]
- A second marriage-related case is *New Jersey's Bernstein v. Ocean Grove Camp Meeting Association*.[115] The Ocean Grove Camp Meeting Association is a Methodist organization which runs a beachfront boardwalk pavilion open to anyone, but they refused to host a same-sex marriage. The court specifically noted that this was not a case involving a churchhouse, which would be exempted from antidiscrimination laws: the pavilion was found to be a "public accommodation," and was open to all kinds of events (including non-Christian and secular ones). Thus, it could not discriminate on the basis of sexual orientation. As a result of the discrimination, the pavilion lost its tax exemption, and was promptly assessed $20,000 in back taxes.[116] Once again, this case actually had nothing to do with same-sex marriage, which is still not valid in New Jersey. Nor was anyone required to sanctify anything. Nor was the pavilion, or the church, even shut down; it merely lost a tax benefit.

RELIGIOUS LIBERTY CONCERNS

Allowing gay and lesbian couples to marry legally

- Favor
- Favor With Religious Liberty Assurance*
- Oppose
- Don't Know/Refused

***Question Wording:** "If the law guaranteed that no church or congregation would be required to perform marriages for gay and lesbian couples, I would support allowing them to legally marry." Asked among those who did not initially support same-sex marriage.



Source: Public Religion Research Institute, PRRI/RNS Religion News Survey, March 2012 (N=1,007)

This case was about a boardwalk pavilion that happened to be run by a Methodist organization.

- A third favorite case is *Parker v. Hurley*.[117] Here, a religious family objected to a public school curriculum that included same-sex families in a curriculum on diversity. The family lost. This case is not new in theory; there are numerous previous cases where individual parents have tried to change objectionable (to them) elements of a school curriculum, and they have almost always lost. Once again, this case is not actually about same-sex marriage, but about whether one family's religious views trump the interests of every other student—as determined by the school board, at least—in receiving an education. Yet this case is often presented as evidence that same-sex marriage means children will be taught that the "gay lifestyle" is "equally valid."

EFFECTIVENESS OF THE SAME-SEX MARRIAGE CAMPAIGN

One PRRI study[118] asked individuals who initially did not support same-sex marriage if their opinion would be different if the law guaranteed that no church or congregation would be forced to perform same-sex marriages. Despite the law already making this guarantee, astonishingly, 50 percent of those respondents said they would now support same-sex marriage.

This shift comports with data assembled by marriage equality advocates in Minnesota, the closest of the four state contests in the fall of 2012. There, Minnesotans United found that—due to deliberate misinformation by marriage equality opponents—a large plurality of marriage opponents believed that, were same-sex marriage to be legal, churches would have to solemnize same-sex marriages. As we have just noted, this, of course, is not at all the case. Yet many people believed it.

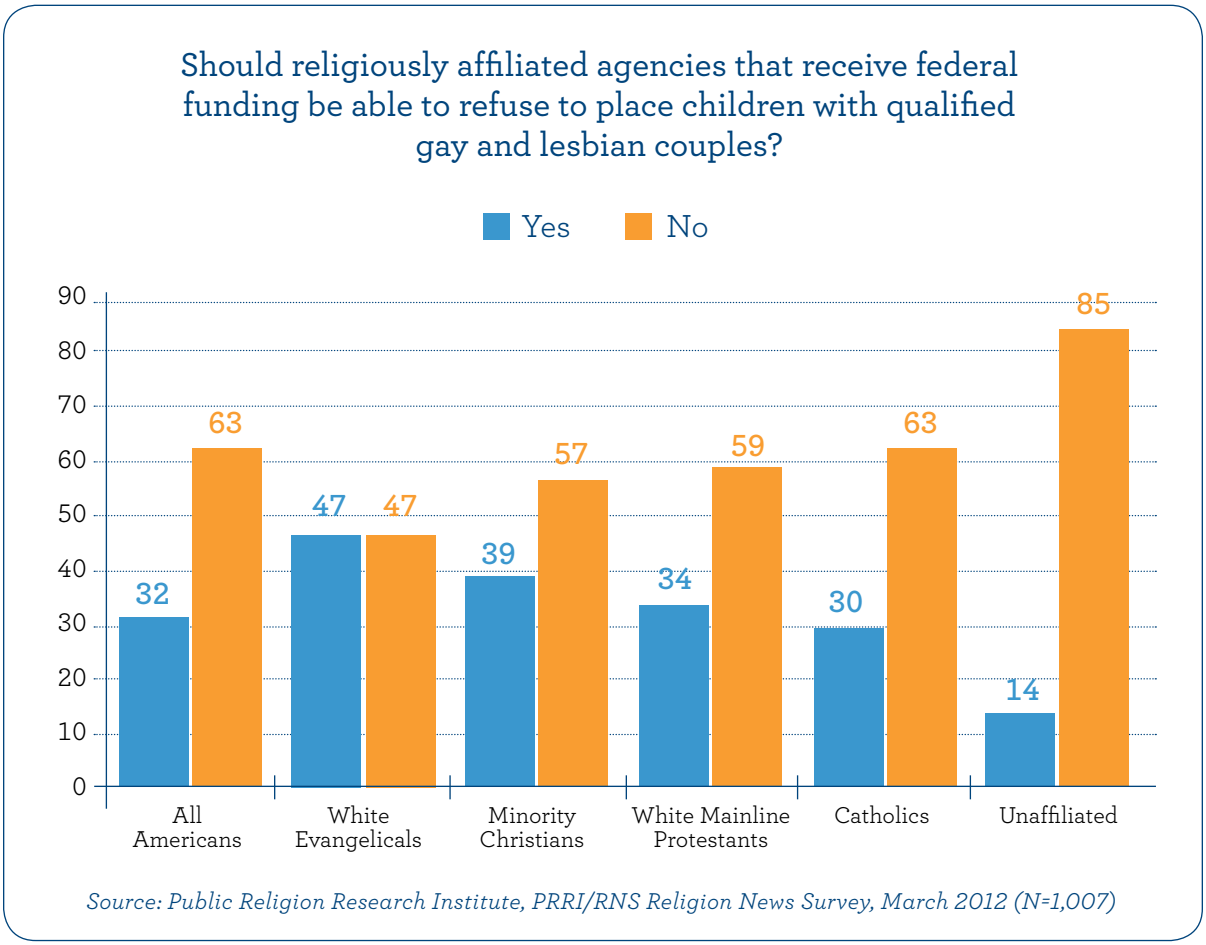
This data suggest that conservative "religious liberty" advocates will succeed if they can continue to blur the lines regarding what same-sex marriage legislation would actually do. By sowing confusion based on cases such as the *Ocean Grove*/Methodist pavilion case, they can successfully tap into this fear. On the other hand, the positive aspect of these findings is that if progressives state clearly and loudly that no church will ever be compelled to perform a same-sex marriage, the PRRI data suggests that many opponents will now become supporters.

However, marriage is not the only arena where

the conservative "religious liberty" campaign is contesting LGBTQ rights. Another major battleground is around adoption. In a well known move, the Catholic Charities of Massachusetts withdrew from the state's adoption system rather than place children with same-sex couples. Interestingly, that position on adoption has not had the traction one might expect. The graph below from a March 2012, PRRI study[119] is instructive.

As the data shows, 63 percent of Americans do not believe that religiously affiliated agencies should be able to refuse to place children with same-sex couples, if those agencies receive federal funding. This may surprise some, but the data shows the weakness of conservative "religious liberty" arguments outside the already-faithful. This may be because the question included the question of federal funding—many may not know that Catholic Charities benefits from millions of dollars of federal funding. Of the groups sampled, White evangelicals said "yes" the most. This is consistent with our finding that while the latest conservative "religious liberty" campaign is led by a small coterie of Roman Catholic conservative intellectuals, its followers are largely evangelicals and not Roman Catholics.

"Religious liberty" campaigns against LGBTQ rights are also found in educational contexts. Virginia stands ready to approve a law allowing campus groups to exclude gay members, for example,[120] and religious liberty has been used in the current debate surrounding the Boy Scouts. Bullying may be the weak link in the movement's inversion of the victim-oppressor dynamic. It may be more difficult for right-wing "religious liberty" activists to successfully defend bullies' right to "religious freedom" in their taunting of gay teenagers, given the realities: LGBTQ teenagers are at a high risk for suicide and self-destructive behavior.



Source: Public Religion Research Institute, PRRI/RNS Religion News Survey, March 2012 (N=1,007)

REPRODUCTIVE RIGHTS: THE HHS PROVISION AS FLASHPOINT

On October 20, 2012, a coalition of over 60 local and national organizations held a series of national rallies around the country against the Health and Human Services (HHS) contraception provision enacting the 2010 Affordable Care Act ("Obamacare"). As the Stand Up for Religious Freedom coalition describes it on their website:

> The new Mandate would requiring [sic] nearly all private health insurance plans to include coverage for all FDA-approved prescription contraceptive drugs and devices, surgical sterilizations and abortion-inducing drugs—drugs that interfere with implantation in the womb and therefore destroy the life of a human being in the earliest stage of development.[123]

Though hardly ever reported in the media, this provision did not originate with "Obamacare." In 2000, the Equal Employment Opportunity Commission held that failure to provide contraceptive coverage violates the 1978 Pregnancy Discrimination Act, an amendment to Title VII of the 1964 Civil Rights Act that outlaws, among other things, discrimination based on sex.[124] Thus, contraception coverage has been the law for all employer-sponsored health plans for businesses with more than 15 employees for twelve years.

In addition, over half of the states already have their own state laws that require contraceptive coverage. Some of these laws contain exemptions for certain religious employers that are almost identical to the religious employer exemption in the HHS Benefit; two of those have been challenged unsuccessfully in court. The highest courts in both New York and California upheld their state laws against challenges, finding that the laws do not violate free exercise of religion.[125]

Countless editorials have omitted this fact, suggesting that it was simply HHS's idea to narrowly construe "religious employers."[126] Moreover, the Affordable Care Act itself required that contraceptive coverage be made available without a co-pay; HHS was enacting the law. They were following the law as set forth by the EEOC and several state courts. The only difference between the HHS provision and the previous law was that under the new requirement, employees would no longer have cost sharing with employers since they don't pay the deductible associated with contraceptive care.

What transpired, however, was anything but settled. In January 2012, HHS Secretary Katherine Sebelius announced the new policy. Though it exempted churches and religious organizations (tiers 1 and 2), Catholic churches and charities immediately objected.[127] On February 11, 2012, HHS announced a compromise, in which insurance providers, rather than employers, would absorb the cost of the deductible.[128] This would have seemed to remove the conscience-offending causality, but by now the Catholic Church (and in particular the USCCB) was empowered, and took on the entire HHS provision, including the part that was already part of settled law.

PROFILE

THE ACTON INSTITUTE FOR THE STUDY OF RELIGION AND LIBERTY

2010 revenue: $7.2m • www.acton.org

The Acton Institute for the Study of Religion and Liberty has published Religion & Liberty magazine since 1991. This group of Catholic-influenced economic libertarians/social conservatives heavily promotes Eric Metaxas, a conservative theorist advancing a conservative "religious liberty" agenda. Like many conservative Catholic organizations, Acton frames debates in terms of a fight between values and "relativism." It is now significantly involved in healthcare—first against "socialized medicine," now on the grounds of religious freedom.[133] As with the other organizations, Acton's intellectual leadership seems less committed to conservative "religious liberty" specifically than to the ideological aims of the culture war generally. That said, they have framed these particular issues in conservative "religious liberty" terminology since the early 1990s, longer than most others.

PROFILE

ALLIANCE DEFENDING FREEDOM (FORMERLY ALLIANCE DEFENSE FUND)

2011 revenue: $35,145,644

Formerly known as the Alliance Defense Fund, this legal ministry was created in 1994, and advocates for religious freedom. Headed by Alan Sears (president, CEO, and general counsel), author of *The Homosexual Agenda*, ADF has assisted in the passage of Defense of Marriage Acts (DOMAs) in several states,[169] and currently has a campaign in the works to defend Christian student groups at public universities. ADF is still active on Proposition 8, the California ballot measure invalidating same-sex marriage in that state, in the name of defending religious freedom and the democratic process. The other members of the leadership are either conservative policy people or big firm litigation partners. They are litigating the HHS provision, assisting in defending DOMA, etc. Claims a network of 2,200 lawyers. Major donors are cofounders D. James Kennedy (Coral Ridge Ministries) and James Dobson (Focus on the Family) and their organizations; as well as the Bill and Berniece Grewcock Foundation, Richard and Helen DeVos Foundation, and the Bradley Foundation.

The current status of the HHS provision is uncertain.

While the provision is in place, implementation in some cases is stayed pending an appeal, filed by the Becket Fund, at the D.C. Circuit Court of Appeals. Becket lost the first round, at trial court, when the trial court held that the benefit's "safe-harbor" provisions protects religious institutions (the named plaintiffs are two Christian colleges, Wheaton and Belmont Abbey) from suffering any imminent harm and that the lawsuits were thus premature. (Note, this is essentially a procedural question as to whether the case is ripe or not—not a ruling on the actual merits.) However, the controversy rages on. Thirteen states filed amicus briefs in the HHS provision case, as well as The Catholic University of America, The Catholic Archbishop of Washington, D.C., and Catholic Charities of the Archdiocese of Washington, D.C. According to the Becket Fund, there are now 49 cases nationwide challenging the HHS provision.[129]

> Though hardly ever reported in the media, the HHS contraception provision did not originate with "Obamacare."

On February 1, 2013, the Obama administration proposed allowing faith-based hospitals and universities—not merely churches and religious organizations—to issue plans that do not provide birth control (i.e., tier 3, in addition to tiers 1 and 2). They would not have to contract, arrange, pay or refer for any contraceptive coverage to which they object on religious grounds. The women who work for this second group would still get birth control coverage, but it would come through a separate individual plan, not from the religious organization's plan. This is a proposed rule and has not yet been finalized.

This is a huge concession, and should represent a victory for the "religious liberty" campaign. Yet in a statement, the Becket Fund said the new rule "does nothing to protect the religious liberty of millions of Americans"—and promised "to study what effect, if any, the Administration's proposed rule has on the many lawsuits" involving Becket's clients.[130] The campaign has had such success that it is now focused on winning the entire game, and obtaining religious exemptions for any corporation that wishes to obtain them. Despite these remarkable gains, the prophetic rhetoric has reached fever pitch. A June 2012 video by the Acton Institute warns that the HHS provision will literally mean "The End of America."[131] Acton bloggers have called it "an unconscionable threat to conscience."[132]

EFFECTIVENESS OF THE HHS CAMPAIGN

In 2012, Planned Parenthood commissioned a poll by Public Policy Polling that showed that 56 percent of Americans supported "the decision to require health plans to cover prescription birth

PROFILE

CHRISTIAN LEGAL SOCIETY, CENTER FOR LAW & RELIGIOUS FREEDOM

www.clsnet.org • Founded 1980 • 2011 Revenue: $1,364,102

CLS is a Christian legal advocacy group. Since 1980, CLS has operated a Center for Law and Religious Liberty, which has sought to argue high-profile cases and advise congress on legislation that can impact religious freedom.[134] The organization is largely focused on educational cases. Its website provides resources for issues regarding public schools and universities, faith-based organizations, health care rights, and religion clause theory. Kim Colby has been senior counsel for the Center for Law and Religious Freedom since 1981, when she graduated from Harvard Law School.[135]

In 2010, CLS lost an religious liberty case (*Christian Legal Society v. Martinez*[136]) before the Supreme Court[137] in which they defended a student group denied recognition after stripping voting rights from group members who supported LGBTQ rights. The 5-4 decision in Martinez, written by Justice Ginsberg, has been the cause of some controversy.[138] CLS has brought similar cases against universities. In *Beta Upsilon Chi Upsilon Chapter v. Machen*,[139] CLS brought a case against the University of Florida (UF) on behalf of Beta Upsilon Chi (BYX), a Christian fraternity. UF refused to grant recognition to the fraternity due to its failure to comply with UF's nondiscrimination policy. BYX made the case that such refusal violated its first and fourteenth amendment rights. The case was declared moot after UF amended its nondiscrimination policy to exempt student organizations "whose primary purpose is religious," allowing BYX to limit membership based on religious beliefs. BYX further pursued its case, claiming that UF amended its policy simply to avoid liability. The case, however, was dismissed.

Lately, CLS has been pursuing the case (not yet filed as a legal matter) against Vanderbilt University for its new policy of nonrecognition of student organizations that require leaders to accept specific religious beliefs.[140] This effort has been led by Colby.[141] The issue received a fair amount of attention from the press[142] and from CLS.[143] In February, an open letter was written to board members at Vanderbilt to address what the attorneys and authors of the letter called an "impasse," and to ask that a sentence be added to the university's nondiscrimination policy similar to the one added to UF.[144] However, in May, Tennessee Governor Bill Haslam vetoed a bill[145] (House Bill 2576) that was passed by large majorities in both houses of the state legislature (19-12 in the Senate and 61-22 in the House) that would have overridden VU's new "all-comers" policy regarding student groups. Haslam said that though he disagreed with VU's policy, the government "should not dictate the policies of a private institution."

Much of the work of CLS prior the past couple of years has been in the same vein as the Vanderbilt University controversy and the University of Florida case.[146] They often represent Christian groups that are seeking a constitutional basis to discriminate against non-Christians, typically arguing that it is an exercise of first amendment rights. In 2006, CLS released a brochure on the topic of teachers and religion in public schools.[147] In addition to these cases, CLS has also taken issue with the HHS provision, filing an amicus brief in support of Wheaton College and Belmont Abbey College.[148] They have also proposed a bill,[149] which would amend the Affordable Care Act to overturn the HHS provision.[150] CLS does not appear to collaborate significantly with many other organizations.

One notable member of the CLS board is Carl H. Esbeck, Professor of Law at the University of Missouri who has published extensively on the topic of religious liberty and church-state relations.[151] Recent and relevant publications include a chapter[152] on the first amendment in the edited volume *No Establishment of Religion*,[153] and an article entitled "Religious Freedom, Church-State Separation, and the Ministerial Exception" in the *Northwestern Law Review Colloquy*.[154]

In 2011, CLS spent a total of $1,112,958 on program services.[155] Of that, $293, 958 went to attorney ministries; $103,784 went to legal aid ministries; $297,143 went to conferences; $120,677 went to law student ministries; and $297,396 went to the Center for Law and Religious Freedom. CLS hosts a number of ministries to help current and future attorneys "integrate their faith with the practice of law."

control with no additional out-of-pocket fees,"[174] and that 57 percent of Americans (and 53 percent of Roman Catholics) think that women employed by Catholic hospitals and universities should have the same rights to contraceptive coverage women employed elsewhere.

Notably, however, the PPP study phrased the question both in terms of the institution and the individual: "Which view do you agree with—Catholic hospitals and universities should be exempted from covering prescription birth control, or that women who are employed by Catholic hospitals and universities should have the same rights to contraceptive coverage as other women?" This likely distorted results. The phrasing of the question ("should have the same rights" triggering fairness concerns, no strong justification to be "exempted") is extremely weighted to the pro-HHS side.

At roughly the same time as the PPP study and the HHS provision controversy, the Pew Research Center released a different study with different results.[175] Among those aware of the issue, 48 percent supported a religious exemption and 44 percent opposed an exception for religious groups. Among Roman Catholics, 55 percent were in favor of an exception, with 39 percent opposed. Not surprisingly, most Republicans supported an exception while most Democrats oppose one, and most men support an exception while most women oppose it. Among Roman Catholics who attend church at least once a week, 63 percent support an exception (25 percent opposed), while those who attend less often split evenly (48 percent favor, 49 percent oppose). However, the same poll also showed that only 15 percent of Catholics believed contraception to be morally wrong, while 41 percent say it is morally acceptable and 36 percent say it is not a moral issue.[176]

The conservative campaigners are seeking to sway public opinion with what they see as sympathetic victims of the contraception provision. To illustrate this, let us focus on a single recent example as a case study. In a USA Today op-ed

PROFILE

THE RUTHERFORD INSTITUTE

www.rutherford.org • Revenue 2011: $1,458,181

Founded in 1982 by John Whitehead (funder of Paula Jones' lawsuit against President Clinton and a disciple of R.J. Rushdoony and Francis Schaeffer), The Rutherford Institute is one of the key links between the conservative "religious liberty" movement and Christian Reconstructionism.[156] The Institute has taken up several high-profile cases, often litigating what most lawyers call 'establishment clause' cases (e.g. students leading prayers on behalf of schools) as if they were free exercise cases (i.e. students exercising their own free exercise rights).

While the language of the organization supports religious freedom generally, most (though not all) of its work is on Christianity. The Rutherford Institute, like Reconstructionism itself, is ideological, not pragmatic. The subjects of opinion pieces written for the website are, for example, the dangers of aligning the Christian right too closely with the political establishment;[157] the likening of right-wing religious radicalism to the work of Christ;[158] and an appeal to allow the celebration of Christmas in public schools.[159] One "religious liberty" case taken up by the organization regards an Arizona pastor, Michael Salman, who was sentenced to 60 days in jail in 2009 after hosting Bible sessions in his home and violating zoning ordinance and construction code.[160] Non-Christian cases include defending the right to wear Muslim head scarves[161] in schools, challenging zoning laws that would affect a local rabbi in New Jersey,[162] and defending an interfaith retreat in Virginia suffering from local opposition.[163]

There is some controversy surrounding RI's president John Whitehead,[164] who has invoked distrust in the President, Congress, and courts,[165] and has warned of schools becoming "authoritarian police states."[166] Additionally, on RI's weekly "vodcast," Whitehead discusses various sensationalist issues that he substantiates with little empirical or real evidence. Two particular examples include one on the topic of the politics of fear in America,[167] in which he calls Obama a "hitman," and another discussing Obama's "track record" on civil liberties.[168]

published September 12, 2012,[177] David Green, CEO of the crafts company Hobby Lobby, made a strong case for conservative "religious liberty" in the context of contraception coverage. He explained that his company Hobby Lobby, though now quite large, remains a Christian and family-run company, and that to fund "abortion-causing drugs" (e.g. the morning-after pill) is against his beliefs.

> The conservative campaigners seek to sway public opinion with what they see as sympathetic victims of the HHS contraceptive provision.

Responding to this plea is challenging because doing so relies on nuance, rather than a broad brush. Thus far, progressives have tried to focus on the individual seeking coverage. This response, however, does not solve the problem of an appealing plaintiff sincerely pleading his or her case. Thus it may be necessary to draw other distinctions. First, Hobby Lobby is not paying directly for contraception. The company does not choose, the employee does, and the company has no moral agency in that individual's choice. Similarly, Hobby Lobby doesn't control how employees spend their salary. Second, as in the New Mexico florist case, the provision of health care is part of the responsibility of being a large employer. Hobby Lobby does, as Green's op-ed states, live up to its Christian values in many ways. However, in addition to its religious duty it also has its civic duty to provide health coverage to its employees. Here, although the payment is to an insurance company rather than to the government, the responsibility being discharged is a civic duty.

The legal campaign against the HHS provision is finding mixed results. In at least one recent case, a Missouri federal district court found that the requirement did not substantially burden the exercise of religion, finding paying for insurance benefits to be no different from paying salaries to employees, who of course could use the money in any number of ways.[178] Obviously, that case is being appealed, and there are now over 100 plaintiffs challenging the HHS provision.[179] With the reelection of President Obama, this recourse to the courts is likely to intensify.

PROFILE

CHALCEDON FOUNDATION

www.chalcedon.edu • 2011 Revenue: $961,264

Christian Reconstructionist in orientation, the Chalcedon Foundation was founded in 1965 by Rousas John Rushdoony.[170] Chalcedon believes in Dominion Theology, or the belief that God's law, as codified in the Bible, should exclusively run society, to the exclusion of secular law.[171] R.J. Rushdoony, widely credited as the father of Christian Reconstructionism, died in 2001, and was succeeded by his son Mark as president of the organization. A notable member is Gary North, an economist who is often cited as a co-founder of Christian Reconstructionism. Whereas other organizations claim to seek to prevent government intrusion on the expression and practice of one's religious ideas and convictions, the Chalcedon Foundation unabashedly espouses the replacement of civil law with biblical law. In various articles published by the foundation, it argues that there ought not to be a separation between church and state,[172] and that "the only way to ensure the liberty that a well-educated citizenry can maintain is to return to the home/Christian school system that gave us the 99.7 percent national literacy rate that America enjoyed in 1803."[173] The foundation goes on to say that public education cannot be fixed because the problem itself is state involvement. Thus, although some have suggested a close linkage between Chalcedon and the conservative "religious liberty" movement, research suggests that Chalcedon is better seen as pursuing a more wholesale transformation of civil law.

RECOMMENDATIONS

SOCIAL JUSTICE ADVOCATES FACE a unique challenge in the combinations of respectable and specious arguments, liberal and illiberal claims, well-regarded scholars and ideologues, that one finds in conservative "religious liberty" discourse. In most political battles over reproductive health, for example, it is not difficult to identify one's adversaries, and identify the religious basis for their claims. Here, however, the case is quite different. First, conservatives and liberals have found some agreement in religious liberty cases. For example, prior to joining the U.S. Supreme Court, Judge Samuel Alito authored a 1999 opinion holding that the city of Newark violated the free exercise rights of Muslim policemen by not exempting them from the department's "no beard" policy.[1] The Becket Fund, which has led the fight on the HHS provision, has also taken unpopular cases, such as supporting a mosque in Murfreesboro, Tennessee.[2] And there are numerous cases in which members of minority religions are protected by the free exercise clause of the First Amendment, creating some libertarian common ground between some conservatives and the Left. This makes it even more important for social justice forces to more vigorously lay out their religious freedom arguments so that the Right does not take over the territory.

In most political battles, it is not difficult to identify one's adversaries, and identify the religious basis for their claims. Here, however, the case is quite different.

Second, there are respected academics who are allying themselves with the conservative "religious liberty" cause, either knowingly or unknowingly. Most importantly, Prof. Douglas Laycock has for decades been a champion of religious liberty, and as we noted, Laycock's letters to state lawmakers in support of religious exemptions are both signed by many other academics, and written in support same-sex marriage in some form. Yet Laycock's allies in these letters, his funders (Becket Fund most importantly) and the academics he chooses for inclusion in anthologies are all making damaging, specious arguments that have political intention and import. Similarly, the announcement in January 2013 that Stanford Law School had opened a Becket-funded "Religious Liberty Clinic" should be seen as an enormous victory for the conservative "religious liberty" movement and a catastrophe for protecting civil rights. That Catholic-affiliated Georgetown has such a center is perhaps unsurprising—but Stanford is quite another matter. In sum, this battle is different from cases where only a few marginal scholars support the other side's point of view. And let us recall that there is a basic moderate popular appeal to "religious liberty," unlike the limited appeal of antichoice or biblical antigay arguments, with subtle distinctions being crucial.

Finally, even though conservative Roman Catholics play an important role in the battle, it is crucial to not paint entire religions with a single brush. True, this is in large part a sectarian battle, led by the world's most powerful religious organization. Moreover, the Roman Catholic predominance in the conservative "religious liberty" movement is ironic; obviously the Catholic Church does not tolerate "religious liberty" within its own ranks.[3] Even within the Church hierarchy—let alone as between the hierarchy and lay Catholics—there are multiple camps, often in sharp disagreement with one another; Opus Dei adherents and neoconservatives curry no favor with many American nuns, Jesuits, or Passionists, for example, on economic[4] or social issues.[5] And of course organizations such as Catholics for Choice, Dignity, and others have articulated Catholic positions diametrically opposed to that of the Church hierarchy.[6] The Roman Catholics represented in the movement are among the more conservative voices within the Church, and much of the intellectual discussion is about natural law, parochial schools, and respecting the Catholic magisterium. "Religious liberty" is narrowly defined even within Roman Catholicism.

To contest the Right's "religious liberty" argument, social justice forces must publicize the existence of a coordinated campaign to redefine religious liberty, support a faith-based response to it, counter common misinformation, contest the rhetorical frame of "religious liberty," foster robust academic responses, and take a pro-active rather than reactive political role.

SPECIFICALLY, THIS REPORT RECOMMENDS THAT SOCIAL JUSTICE ADVOCATES:

1. Define and Publicize the Coordinated Campaign to Redefine Religious Liberty.
While grassroots evangelicals are active in the conservative "religious liberty" campaign against LGBTQ and reproductive rights, it is a coordinated fight led by well-established right-wing institutions like the Becket Fund and Alliance Defending Freedom. The Roman Catholic Church hierarchy and conservative Catholics are important thought leaders for the campaign. The evangelical/Roman Catholic alliance builds on relationships forged in the antichoice movement.

2. Organize A Unified Response
There is need for further mapping, coordinating, and building out alliances among advocates countering the Right's campaign. We need to strengthen the alliance between prochoice and LGBTQ forces, and ally with emerging faith-based responses. Alliances must also be made with liberal business owners and libertarians; this can increase effectiveness of existing efforts.

3. Counter Misinformation
Many conservative "religious liberty" claims rely on falsehoods and scare tactics. Simply put, clergy will never be forced to perform a same-sex marriage. Social justice advocates must learn and be able to counter the Right's go-to examples of spurious "religious liberty" violations. Understanding and clarifying the Right's use of the martyr narrative and inversion of the victim-oppressor dynamic is a good start to countering right-wing rhetoric.

4. Reclaim the Religious Liberty Frame
The term "religious liberty," like the phrase "family values," has become a code for the larger culture wars. While religious belief and expression are valid and protected constitutional claims, religious liberty is not the freedom to discriminate and harm others. It does not allow a boss to tell an employee what health care they can obtain, taking away the employee's ability to make moral and religious choices. Nor does sexual and gender equality have to be pitted against religious liberty. The clash is not just between secularism and religion, or equality and religion, but of competing religious values. Challenging the conservative frame also means distinguishing between commercial and religious acts, and valuing competing civil rights; an effective response requires sustained intellectual and legal challenges to the Right's argument.

5. Develop Academic Responses
Social justice advocates must take seriously the influence of right-wing academics on policy and public debate. Religious freedom is a complex topic, which can too often become co-opted by the conservative "religious liberty" campaign. That this happens, often unknowingly, to fair-minded academics and legal scholars is something that can be reversed by raising awareness of the issue, including with academic conferences on the topic.

6. Leverage Religious Communities
We must build on existing interfaith work to counter the conservative "religious liberty" narrative, informing and organizing more in faith communities. The social justice community must create unity by issuing a common "Call to Conscience" of religious people seeking to maintain their religious liberty against the conservative proposals and policies. LGBTQ faith communities, Jewish and progressive faith organizations, in particular, must be supported in countering the Right's claims about what religious liberty means.

7. Ongoing Research and Monitoring
Social justice advocates and defenders of true religious freedom must become better informed about the right-wing campaign to redefine religious liberty—including its principal players, strategies, and vulnerabilities. Ongoing investigative research into U.S. conservatives' use of religious liberty legal and rhetorical strategies, both domestically and abroad, is needed to keep advocates and journalists informed about strategically significant developments. Moreover, we must track the influence of conservative academics on policy and public debate.

APPENDIX: ORGANIZATIONS AND FUNDERS

AMICUS BRIEFS SUPPORTING PETITIONER IN HOSANNA-TABOR CASE

- American Association of Christian Schools
- American Center for Law and Justice and the Intervarsity Christian Fellowship/ USA
- American Jewish Committee and the Union for Reform Judiasm
- American Bible Society et al.
- Council for Christian Colleges and Universities
- Evangelical Covenent Church et al
- International Center for Law and Religious Studies at Brigham Young University
- International Mission Board of The Southern Baptist Convention et al.
- Justice and Freedom Fund
- Lutheran Church-Missouri Synod
- Michigan and 7 Other States
- Muslim-American Public Affairs Council et al.
- Professor Professor Eugene Volokh et al [sic]
- Religious Organizations and Institutions
- The Rutherford Institute
- Jewish Educational Center et al
- Religious Tribunal Experts
- Trinity Baptist Church in Support of Jacksonville
- The United States Conference of Catholic Bishops
- Wallbuilders, Inc.

AMICUS BRIEFS SUPPORTING GOVERNMENT

- NAACP Legal Defense Fund et al
- People for the American Way
- Bishopaccountability.Org
- Anti-Defamation League
- Americans United for Separation of Church and State et al
- American Humanist Association and American Atheists, Inc.
- National Employment Lawyers Association
- Antitrust Professors and Scholars
- Law and Religion Professors
- Neil H. Cogan Urging Affirmance

INSTITUTIONS LEADING THE CONSERVATIVE "RELIGIOUS LIBERTY" CAMPAIGN:

- Acton Institute for the Study of Religion and Liberty *(see page 33)*
- Alliance Defending Freedom (formerly Alliance Defense Fund), *(see page 34)*
- American Family Association
- The Becket Fund for Religious Liberty *(see page 16)*
- Catholic Charities USA
- Catholic League for Religious and Civil Rights
- Chalcedon Foundation *(see page 37)*
- Christian Legal Society, Center for Law & Religious Freedom *(see page 35)*
- Ethics and Public Policy Center *(see page 24)*
- Family Research Council *(see page 30)*
- Focus on the Family
- Heritage Foundation
- Liberty Counsel/Liberty University
- National Organization for Marriage
- The Rutherford Institute *(see page 36)*
- United States Conference of Bishops *(see page 22)*

OTHER ORGANIZATIONAL PLAYERS

- Agudath Israel
- American Center for Law & Justice (ACLJ)
- American Civil Rights Union
- Americans for Truth about Homosexuality
- Breakpoint / Chuck Colson Center for Christian Worldview
- Cato Institute
- Christian Apologetics and Research Ministry
- Eagle Forum
- International Christian Concern
- National Hispanic Christian Leadership Conference
- Orthodox Union
- Pacific Justice Institute
- Religious Freedom Coalition
- Ruth Institute, see National Organization for Marriage
- The Lynne and Harry Bradley Foundation
- Thomas More Law Center
- Traditional Values Coalition
- Voice of the Martyrs
- Witherspoon Institute

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178. Steven Ertelt, "Judges Dismisses Suit: HHS Mandate No Threat to Religious Freedom," *LifeNews*, Oct. 1, 2012, http://www.lifenews.com/2012/10/01/judge-dismisses-suit-hhs-mandate-no-threat-to-religious-freedom/.

179. Sarah Torre, "Plantiffs Against the HHS Mandate Reach More Than 100 Strong," *The Foundry* blog, The Heritage Foundation, Oct. 12, 2012, http://blog.heritage.org/2012/10/11/plaintiffs-against-the-hhs-mandate-reach-more-than-100-strong/

RECOMMENDATIONS NOTES

[1] Fraternal Order of Police v. Newark, 170 F.3d 359, 360 (3d Cir. 1999).

[2] http://www.newschannel5.com/story/19055935/federal-judge-allows-murfreesboro-mosque-to-open

[3] Ross Murray, "Does Religious Liberty Mean Bullying Your Own Flock of Believers?" The Huffington Post, October 12, 2012, http://www.huffingtonpost.com/ross-murray/does-religious-liberty-mean-bullying-your-own-flock-of-believers_b_1961211.html.

[4] The relationship between Catholic economic and social doctrines is complex, and beyond the scope of this report. According to experts, there is an active conservative campaign (on the part of Michael Novak, Thomas Woods, Robert Sirico, and others) within the Church to marshal support for neoliberal or even libertarian economic policies, neither of which have been supported in the recent past. It is possible that some of the secular libertarian support for conservative "religious liberty" is part of this effort, although evidence has not been found to support this theory, and the conservative "religious liberty" claims that secular libertarians make are generally civil libertarian in nature, i.e., in accord with their general views. Further, it is also clearly the case that the intra-Catholic disputes are in large part a conservative reaction to Vatican II. This, too, is outside the parameters of the current study.

[5] See Frank Cocozzelli, "The Politics of Schism in the Catholic Church," Public Eye, Fall 2009. http://www.publiceye.org/magazine/v24n3/politics-schism-catholic-church.html

[6] For examples in the recent "religious liberty" debate, see, e.g., http://www.catholicsforchoice.org/news/pr/2013/Whatisthematterwiththebishops.asp .

ABOUT THE AUTHOR

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Michaelson holds a J.D. from Yale Law School and a Ph.D. in Jewish Thought from the Hebrew University of Jerusalem. He is a contributing editor to the *Forward* newspaper and a frequent contributor to *The Daily Beast*, *Religion Dispatches*, and *The Huffington Post*. In 2009, Michaelson was included on the *Forward* 50 list of influential American Jews, and in 2010 he won the New York Society of Professional Journalists' award for opinion writing. Michaelson has held teaching positions at Boston University Law School, City College of New York, and Yale University, and is based in New York City.

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