

Striking a Balance: *Advancing Civil and Human Rights* *While Preserving Religious Liberty*

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Executive Summary

The advance of legal equality for lesbian, gay, bisexual and transgender (LGBT) people is one in a long history of successes in challenging institutional discrimination and dismantling legal barriers to opportunity. The progressive advocacy community also has a strong record of supporting religious freedom for all Americans and working to protect the ability of all people, particularly religious minorities, to exercise their faith.

There is also a long history of religious arguments being used to justify opposition to anti-discrimination efforts and other social justice movements. Often referred to as religious refusals, because the person or entity perpetrating the discrimination is refusing to provide services or employment opportunities based on religious justifications, these efforts fly in the face of our nation's concept of both equality and religious liberty. Religious rationalizations have been used to defend slavery and Jim Crow segregation, oppose equal rights for women, and promote discrimination against Muslims.

Recently, the concept of religious liberty has been corrupted by those seeking to devise legal and political strategies to oppose and undermine protections against discrimination on the basis of sexual orientation and gender identity. In the Supreme Court's 2014 decision in *Burwell v. Hobby Lobby*,¹ the majority reinterpreted the federal Religious Freedom Restoration Act (RFRA) and opened the door to its use in ways Congress did not intend. While that case centered on the requirement under the Affordable Care Act that insurance coverage include contraception, the Court majority's reasoning and its determination that for-profit corporations could make a "religious exercise" claim under RFRA suggests potential new avenues for opponents of LGBT nondiscrimination protections to promote a variety of religious exemption laws.

These efforts do not threaten the interests of LGBT people alone. Among those whose interests are at risk are women and people with disabilities. Conservative political organizations are essentially trying to devise a legal regime that will allow individuals and businesses to broadly exempt themselves from policies they disagree with—a regime that often results in trampling the rights of others.

America has an honorable tradition of accommodating people's religious beliefs when reasonably possible. But that accommodation cannot come at the expense of others' rights. "The one thing we can't have is a rule—unwritten or explicit—that says discrimination is justified if the person discriminating really, really objects to the excluded group," writes law professor Garrett Epps. "Whether explained in religious terms or not, that undermines the entire idea of civil rights."²

In a year in which candidates will be elected to all levels of government, and in which misleading rhetoric about conflict between religious liberty and equality is already abundant, it is critical to challenge false framings of the issues and promote broader understanding of the vital principles at stake.

This report reviews the historical context of religious arguments that were marshalled in public policy debates, both to support the expansion of civil rights and legal equality and to support various forms of discrimination, including slavery, racial segregation, ethnically targeted immigration restrictions, the disenfranchisement of women, and suppression of workers' rights.

The report also examines the current legal and political landscape on which today's battles over the meaning and scope of religious liberty are being waged.

Finally, this report concludes with a set of recommendations by The Leadership Conference Education Fund that are designed to ensure that religious liberty and civil and human rights flourish in concert, rather than in conflict, in 21st century America.

Introduction

“Conservatives assert that any burden on religious liberty is inherently unacceptable, regardless of the tradeoffs, the harm to others and how attenuated that burden might be. That absolutist stance has allowed them to convert religious liberty from a shield against government intrusion into a sword that can be used in the political process.”

– Adam Sonfield, *Guttmacher Policy Review*³

Religious liberty is a fundamental civil and human right, a founding American value protected by the First Amendment to the U.S. Constitution. The guarantee of religious freedom to people of all faiths—and to those who profess no faith—is essential to the American ideal.

Similarly, equal protection under the law is a fundamental American and constitutional principle. The belief that each individual should be able to live free from discrimination is a core American ideal, whose still-incomplete realization has been advanced through generations of activism.

Unfortunately, these ideals are clashing as claims of religious liberty are being used to strike at the core of the principle of equal protection. In a legal and political struggle that is grounded in misinformation and obfuscation, opponents of anti-discrimination protections are using legal, legislative, and public relations tactics in an attempt to create expansive religious exemptions—far beyond the protections contemplated by the founding concept of religious liberty—to avoid compliance with nondiscrimination laws. Freedom of religion, like freedom of speech and other constitutional rights, is not absolute: one person’s religious liberty does not give him or her the right to harm another person or impose their religious beliefs or practices on someone else.

Kim Davis personifies this effort to interpret the concept of religious freedom too broadly, resulting in harm to

others. In the wake of the Supreme Court’s *Obergefell v. Hodges* marriage equality decision,⁴ the county clerk from Rowan County, Kentucky, refused to let her office process marriage licenses for same-sex couples, claiming it would violate her personal religious beliefs as an Apostolic Christian.⁵

As these conflicts intensify in the context of a divisive election year, and some presidential candidates play into and amplify the religious rhetoric being used to justify discrimination, The Leadership Conference Education Fund believes that Americans must continue to advance civil and human rights while ensuring that the foundational principle and Constitutional intent of religious freedom is faithfully preserved.

Chapter I: The Perversion of the Concept of Religious Freedom

The First Amendment's religious liberty clauses safeguard religious liberty in two ways: by protecting every person's freedom to believe and observe as they wish; and by preventing the government from promoting religion or advancing one religion over another.

These constitutional protections have allowed religious freedom to flourish in the United States. Indeed, religious voices have often been at the forefront of social justice movements that stood up for marginalized and oppressed people, as in the abolition of slavery and the civil rights movement. But religious arguments have also been used to justify injustices, like racial segregation and the suppression of workers' rights, and to restrict the rights of others, like the call today for discrimination against Muslim Americans and refugees.

Today's battles center on the effort to use religious arguments in ways that harm others, and to defend those harms in the name of religious liberty. In particular, as LGBT people have seen successes in advocating for the protection of their rights, those who oppose legal recognition and equality for LGBT individuals have increasingly framed their resistance as a question of religious liberty. A forceful statement of the expansive religious objection to LGBT equality can be found in the Manhattan Declaration, produced in 2009 by conservative evangelical and Catholic activists. Signers proclaimed in part that they will refuse to "bend to any rule purporting to force us to bless immoral sexual partnerships, treat them as marriages or the equivalent, or refrain from proclaiming the truth, as we know it, about morality and immorality and marriage and the family."⁶

Opponents of legal protections for LGBT people and same-sex couples are actively seeking to pass "religious refusal" legislation at both federal and state levels that would allow individuals and businesses to claim exemption from nondiscrimination laws, effectively allow-

ing them to discriminate against another individual by claiming a personal religious objection.

Many of these laws are based on the federal Religious Freedom Restoration Act (RFRA).

The federal RFRA was passed in 1993 with overwhelming bipartisan support. It was supported by a broad range of religious and civil and human rights groups and was intended to reinstate the longstanding legal balancing test that the Supreme Court had developed over decades, but which had been upended in [*Employment Division v. Smith*](#),⁷ a case allowing incidental burdens on religion for generally applicable laws, which many feared would lead to further restrictions on religious practices. Under RFRA, for any law that places a substantial burden on a person's exercise of religion, the government must show that the law is advancing a compelling governmental interest in the least restrictive way possible. RFRA and state-level versions of the law have often been used to protect religious minorities, like finding an employer's decision to reject a Muslim woman for a job because she wears a head scarf unlawful.⁸

But in 2014 in *Burwell v. Hobby Lobby*, the Supreme Court reinterpreted RFRA to have a much broader potential impact than was originally intended—an impact that would affect innocent individuals. The Court's interpretation could potentially make it easier for business owners and other entities to discriminate against employees and customers under the claim of a religious rationale.

The Hobby Lobby decision has emboldened opponents of LGBT equality to propose new state-level RFRA and other religious exemption laws that are much broader than the original RFRA. Since *Hobby Lobby*, political battles have raged from Arizona to Indiana and Arkansas to Georgia over legislation that would, in the name

of religious liberty, allow discrimination against LGBT people and same-sex couples by corporations and small business owners as well as religious institutions and nonprofit organizations.

The intensity of these debates has been magnified by some activists and public officials, like Alabama Chief Justice Roy Moore, who denounced the Supreme Court’s 2015 marriage equality ruling in *Obergefell v. Hodges*⁹ as an “illegitimate” decision that “destroyed the institution of God” and should be resisted rather than obeyed.¹⁰ That resistance became personified by Kentucky’s Rowan County Clerk Kim Davis, who spent six days in jail for contempt of court after she refused a judge’s order to have her office process marriage licenses for same-sex couples because of her religious objection.

The Constitution’s guarantee of religious freedom was not intended to create a means for limiting others’ freedom or opportunities. The supposed right to discriminate against LGBT people and same-sex couples that is asserted by Davis and her allies is not an equivalent counterweight to the principle of equal protection, but rather a distortion of the concept of religious liberty that is recognized by the First Amendment and protected in law. In the words of the Central Conference of American Rabbis (CCAR):

“Religious liberty is being misused to justify discrimination against LGBT individuals and families. ...Bigotry in the name of religion is bigotry. Recalling that religion was misused to justify American slavery—and later, Jim Crow—the CCAR insists that religion must not again be used as a state-sanctioned excuse for discrimination, against LGBT people or any person.”¹¹

Chapter II: The Tortured Legal Interpretations of Religious Liberty

The Supreme Court's 2014 *Hobby Lobby* decision misinterpreted—and essentially rewrote—the federal Religious Freedom Restoration Act (RFRA) in ways that could make it easier for companies and other organizations to claim religious justification for discriminating. The Court not only recognized, for the first time, that a for-profit corporation could exercise religious beliefs; it also radically altered the balancing test that was at the heart of RFRA. Rather than having to prove a substantial burden on the actual exercise of religion, under *Hobby Lobby*, a company making a RFRA claim must only assert that its owners' religious beliefs are offended.

The impact of the ruling is still unfolding, but it could result in changing RFRA's legal analysis from a reasonable balancing act to something Congress did not intend, in which religion will almost always be accommodated, even if it means serious injury to other people.¹²

Before *Hobby Lobby*, in order to safeguard individuals' religious freedom, the federal courts developed a legal approach that weighed competing interests and prevented the government from placing a substantial burden on an individual's exercise of religion unless the law or regulation was advancing a compelling interest. Under this framework, for example, Jehovah's Witnesses and members of other religious groups have been exempted from having to swear an oath in order to testify in court or to become a naturalized citizen. Similarly, Amish students have been exempted from compulsory school attendance laws.

Religious accommodation was explicitly included in Title VII of the Civil Rights Act, which requires public and private employers to accommodate employees' religious practice unless it creates an undue hardship on the employer or other employees. Title VII also includes a limited exemption from anti-discrimination provisions,

which allows religious organizations to hire only people that share their religion.

But in 1990, the Supreme Court decided a case that overturned long-established principles and caused concern among civil and human rights activists that it could threaten religious freedom, especially for religious minorities. The case, *Employment Division v. Smith*¹³ involved Native Americans who had been fired from their jobs in Oregon for using the drug peyote in their traditional religious practice. The state argued that the employees were not eligible for unemployment compensation because they had violated state drug laws.

The Court not only ruled for the state but also enunciated a legal principle that stunned civil rights and religious liberty advocates: unless a law specifically targeted a religious practice, a person whose exercise of religion was burdened by the law had no legal recourse. The ruling threw out decades of established precedent and left religious people, particularly religious minorities, vulnerable.

In 1993, with the backing of an exceptionally diverse coalition of religious, civil, and human rights organizations, Congress passed the Religious Freedom Restoration Act (RFRA) with overwhelming bipartisan support. Signed into law by President Bill Clinton, RFRA affirmed the pre-*Smith* legal landscape: If a law or regulation placed a substantial burden on an individual's exercise of religion, the government would have to show that the law advances a compelling government interest in the least restrictive way.

The Court later ruled that Congress could apply RFRA to the federal government but not to the states,¹⁴ and a number of states passed their own laws, which generally sought to strike the same balance as the federal RFRA. The broad coalition that had initially supported RFRA

began to fray, however, when some civil and human rights groups began to fear that state RFRA might be used to undermine state and local laws being passed to forbid discrimination against LGBT people in areas like employment, housing, and public accommodations.

Those fears have been confirmed in recent years, as opponents of marriage equality and other LGBT legal protections began to push for a new round of state RFRA that had clear discriminatory intent. As the *New York Times* editorial board noted in January 2015, a “religious freedom” bill being considered by the Georgia legislature, “like others around the country, would do little more than provide legal cover for anti-gay discrimination.”¹⁵

Efforts to push back against these restrictive, discriminatory state RFRA laws have brought together many of the religious, civil and human rights groups that supported the original RFRA. In concert with leaders of the business community and others, these advocates are rallying opposition to new RFRA and other religious refusal laws in states like Arizona, Indiana, and Georgia.

Some supporters of proposed state RFRA claim that new legislation is needed to keep ministers from being dragged from the pulpit and prosecuted if they refused to marry same-sex couples. In reality, the First Amendment protects the free exercise of religion and the right of pastors to preach and to make their own decisions about what relationships to bless. “So this aspect of religious liberty was in no danger in Indiana,” wrote law professor Garrett Epps, “just as it has never been endangered by the Civil Rights Act of 1964 or the numerous state and local anti-discrimination laws passed over the past half-century.”¹⁶

However, the Supreme Court’s 2014 *Hobby Lobby* decision has made it more likely that both the federal and state RFRA could successfully be invoked in defense of anti-gay discrimination. Although *Hobby Lobby* does not directly control how state courts interpret their own state’s RFRA laws, it is likely that courts will look to the Supreme Court for guidance. In fact, the Family Research Council, an organization whose mission is “to advance faith, family and freedom in public policy and the culture from a Christian worldview,”¹⁷ referred to Indiana’s 2015 RFRA legislation as “the Hobby Lobby bill.”¹⁸

Among the ways that religious objections are used that result in discrimination or other harm include:

- Religiously affiliated schools firing women because they became pregnant while not married;
- Business owners refusing to provide insurance coverage for contraception for their employees;

- Graduate students, training to be social workers, refusing to counsel gay people;
- Pharmacies turning away women seeking to fill birth control prescriptions; and
- Bridal salons, photo studios, and reception halls closing their doors to same-sex couples planning their weddings.¹⁹

One proponent of broad religious exemptions, The Becket Fund for Religious Liberty, goes well beyond asserting the right of a merchant not to “facilitate” a same-sex couple’s wedding; its vision of religious liberty extends to protecting companies that refuse to hire people in same-sex marriages, refuse to extend spousal benefits to married same-sex couples, or rent them housing.²⁰

In a number of high-profile cases, courts have declined to recognize a religious right to discriminate against LGBT individuals that would trump government’s interest in combatting discrimination. In a 2013 case involving a wedding photographer, the New Mexico Supreme Court unanimously upheld a finding that the business had violated the state’s human rights ordinance by refusing to photograph a same-sex couple’s commitment ceremony. In a concurring opinion, Judge Richard Bosson wrote that the business owners “are free to think, to say, to believe, as they wish, they may pray to the God of their choice and follow those commandments in their personal lives wherever they lead.” But, he said, in operating a business, the owners have to channel their conduct, calling it a compromise that “is part of the glue that holds us together as a nation, the tolerance that lubricates the varied moving parts of us as a people.” It is, he wrote, “the price of citizenship.”

Similarly, in September 2015, a Colorado Court of Appeals three-judge panel ruled against Masterpiece Cake Shop, upholding the state’s civil rights commission decision that the owners’ refusal to make a wedding cake for a same-sex couple was a “discriminatory and unfair practice.”

These rulings are viewed by proponents of broad religious exemptions as evidence of tyranny. The conservative website *The Federalist* reported the Colorado ruling under the headline, “Hey, Christians, Say Goodbye to Religious Freedom.”²¹

However, this conservative approach could endorse a legal principle that would be used to justify a business owner refusing to provide a service for an interracial or interfaith couple, a member of a certain religion, or a person based on his or her race. During debate over a proposed RFRA law in Arizona, one journalist wrote, “If these ‘Christians’ in Arizona are permitted to deny

their services to same-sex couples, then atheist small-businesses owners in Berkeley are perfectly within their rights to hang a sign: ‘No Christian evangelicals served.’ It would be crazy for courts to open that door.”²² During that same controversy, Van Jones, a CNN host and political commentator, said, “The one great achievement in the last century, we took out of American lexicon six words: ‘We don’t serve your kind here.’ . . . ‘We don’t serve your kind here’ is not acceptable anymore. Those ‘no blacks allowed’ signs came down, we don’t want to see ‘no gays allowed’ signs in this country.”²³

Chapter III: Historical Uses of Religion to Deny Equality

Throughout American history, religion has animated—and people of faith have helped to lead—social justice movements designed to advance the common good and bring America’s lived reality more in line with its stated ideals. The movement to abolish slavery drew inspiration and strength from the religious beliefs of evangelicals and Quakers. The 20th century African-American civil rights movement found its strength in religious leaders’ moral vision as well as attorneys’ legal strategies. Rev. Martin Luther King Jr. appealed both to American constitutional values and to Jewish and Christian scriptures to rally people of faith and people of good will to the cause of freedom. More recently, Americans of many faiths have joined an ecumenical global movement that seeks to abolish modern-day slavery and human trafficking.

But religion and appeals to religious liberty have also been used throughout our history to resist and suppress those same justice-seeking movements, and to condone and defend discrimination.

Slavery, Segregation, and Miscegenation

While some opponents of marriage equality today dismiss religious opposition to inter-racial marriage as a fringe position that is inauthentic and irrelevant to today’s debates, the theology that undergirded segregation was in fact well-developed and widely held. Its influence spanned slavery and the Jim Crow era. The civil rights movement’s reliance on religious leaders and sacred language reflected, in part, organizers’ understanding of the importance of the religious foundations of segregation.²⁴

Defenders of slavery in the United States, both North and South, claimed justification in the Bible.²⁵ Confederate President Jefferson Davis said slavery “was established by decree of Almighty God” and was “sanctioned in the Bible, in both Testaments, from Genesis to Revelation.”²⁶ An 1852 book, *Bible Defence of Slavery*:

And Origin, Fortunes, and History of the Negro Race, includes the assertion that “the institution of slavery received the sanction of the Almighty in the Patriarchal age; that it was incorporated into the only national constitution which ever emanated from God, that its legality was recognized, and its relative duties relegated by our Saviour, when upon earth.”²⁷

After slavery was abolished, political and religious leaders claimed religious support for segregationist policies and racial discrimination.²⁸ For example, Theodore Bilbo, a two-time governor and U.S. senator from Mississippi who helped filibuster anti-lynching legislation, grounded his racism in religious belief.²⁹ Bilbo wrote that allowing “the blood of the races to mix” was an attack on the “Divine plan of God.” An 1867 ruling by the Pennsylvania Supreme Court, which was later cited in *Plessy v. Ferguson*’s promulgation of the doctrine of “separate but equal,” cited “divine” natural law to uphold racially segregated railway cars.³⁰

Gov. Allen Candler of Georgia defended segregated schools in 1901, saying, “God made them negroes and we cannot by education make them white folks.”³¹ Half a century later, in 1958, Rev. Jerry Falwell decried the *Brown v Board of Education* decision, saying “If Chief Justice Warren and his associates had known God’s word and had desired to do the Lord’s will, I am quite confident that the 1954 decision would never have been made.”³² Some southern pastors declared that, since segregation was divine law, integration would bring God’s judgment on the nation. In language that is strikingly similar to today’s warnings that marriage equality will bring down the wrath of God, Pastor James Burks of Norfolk, Virginia, said shortly after the *Brown* decision:

“Spurning and rejecting the plain Truth of the Word of God has always resulted in the Judgment of God. Man, in overstepping the bound-

ary lines God has drawn, has taken another step in the direction of inviting the Judgment of Almighty God. This step of racial integration is but another stepping stone toward the gross immorality and lawlessness that will be characteristic of the last days, just preceding the Return of the Lord Jesus Christ.”³³

Ross Barnett was elected governor of Mississippi in 1960, after he asserted that “the good Lord was the original segregationist.”³⁴ Also in 1960, Bob Jones Sr., founder of Bob Jones University, gave an Easter sermon that was broadcast over the school’s radio station. He railed against the “Satanic,” “hellish,” “communistic” plan to “disturb” the established (i.e. segregated) order. God, he said, is “the author of segregation.”

“White folks and colored folks, you listen to me. You cannot run over God’s plan and God’s established order without having trouble. God never meant to have one race. It was not His purpose at all. God has a purpose for each race. ...I want you folks to listen—you white and you colored folks. Do not let these Satanic propagandists fool you. This agitation is not of God. It is of the devil. Do not let people slander God Almighty.”³⁵

Opposition to integration was often justified by the supposed threat of miscegenation, or “race-mixing,” which was itself deemed hostile to God’s design. The Daughters of the American Revolution asserted in 1958 that “racial integrity” was a “fundamental Christian principle.”³⁶ In 1963, when former President Harry Truman was asked whether he believed integration would lead to interracial marriage, he responded, “I hope not. I don’t believe in it. The Lord created it that way. You read your Bible and you’ll find out.”³⁷ Judge Leon Bazile, who in 1965 refused to vacate the 1959 conviction of Richard and Mildred Loving for violating Virginia’s law against interracial marriage, stated, “Almighty God created the races white, black, yellow, Malay and red, and he placed them on separate continents. ...The fact that he separated the races shows that he did not intend for the races to mix.”³⁸

The Bible also played a role in the filibuster that was waged against the Civil Rights Act of 1964. As part of his contribution to the filibuster, Senator Robert Byrd of West Virginia read into the Congressional Record a passage from Genesis that had been used to justify slavery, portraying the story of Noah cursing Canaan as a biblical rationale for discrimination.³⁹

Religion-based opposition continued even after passage of the Civil Rights Act of 1964. The 1968 case of *Newman v. Piggie Park Enterprises*⁴⁰ involved the owner of

several South Carolina barbeque restaurants who argued that his religious beliefs compelled him “to oppose any integration of the races whatever.” The court rejected the restaurant owner’s defense, holding that the owner “has a constitutional right to espouse the religious beliefs of his own choosing, however, he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens.”⁴¹

And when the U.S. government started going after the tax-exempt status of racially discriminatory schools during the 1970s, Bob Jones University (BJU) fought all the way to the U.S. Supreme Court. BJU argued that it had a right to federal tax-exempt status even while enforcing racially discriminatory policies, because those policies were grounded in its religious beliefs. In 1983, BJU lost at the Supreme Court 8-1,⁴² but the federal government’s crackdown on racial discrimination in religious schools offended many conservative evangelicals and helped launch what became the Religious Right political movement.⁴³ BJU later apologized for its long commitment to a “segregationist ethos.”⁴⁴

Proponents of religious exemptions to allow discrimination against same-sex couples argue that comparisons to racial segregation are inappropriate.⁴⁵ For example, at the Heritage Foundation—a research and educational institution dedicated to promoting conservative public policies⁴⁶—research fellow Ryan Anderson⁴⁷ writes that “it is reasonable to make judgements about actions. While race implies nothing about one’s actions, sexual orientation and gender identity are frequently descriptions for one’s action.”⁴⁸ Anderson goes on to explain that “Bans on interracial marriage and Jim Crow laws ... were aspects of an insidious movement that denied the fundamental equality and dignity of all human beings and forcibly segregated citizens.” Whereas, in contrast, “religious liberty concerns [around marriage equality for LGBT individuals] focus on the nature of marriage and the virtue of chastity. Many religions, quite reasonably, teach that we are created male and female, and that male and female are created for each other in marriage. Nothing comparable exists with respect to race.” Anderson’s comments however, ignore the fact that laws that banned interracial sex and interracial marriage were undeniably targeting conduct, punishing a person not for who that person was but what he or she did.⁴⁹

Discriminatory Immigration Policies

Religion has also been used as a rationale to support racially discriminatory policies against Asian immigrants and Asian Americans.

The federal Chinese Exclusion Act of 1882, which was grounded both in overt racism and concerns that immigrants were suppressing wages,⁵⁰ was further justified

with an appeal to religion as one reason Chinese people could not be successfully assimilated.⁵¹

Religiously charged sentiments were widespread during Congressional debate on the Act. These beliefs, which helped lead to the passage of the Exclusion Act, included a report by the California State Senate to Congress in 1877:

“The pious anticipations that the influence of Christianity upon the Chinese would be salutary have proved unsubstantial and vain. ... There are few, painfully few, professing Christians among them, but the evidence confirms us in asserting that with these the profession is dependent to a great extent upon its paying profit to the professor. Those Christians who hailed with satisfaction the advent of the Chinese to our shores, with the expectation that they would thus be brought beneath the benign influences of Christianity, cannot fail to have discovered that for every one of them that has professed Christianity, a hundred of our own youth, blighted by the degrading contact of their presence, have been swept into destruction.”⁵²

Further, Rep. Emory Speer of Georgia said, “The Chinese are morally the most debased people on the face of the earth.”⁵³ And Sen. Samuel Bell Maxey of Texas claimed:

“They bring every character of vice, degradation, and a pagan religion along with them to poison the minds of those less intelligent of our people with whom they have been brought in direct contact—the colored race—and it would be injurious in every sense of the word to the people among whom I live.”⁵⁴

A few decades later, after World War I, Japanese immigrants became targets, especially on the West Coast. In 1920, Rep. Albert Johnson of Washington state convened hearings on whether to bar Japanese immigration and citizenship claims. Johnson was a co-author of 1924 legislation that effectively closed America’s borders to non-white immigrants for the next 40 years.⁵⁵ Johnson’s campaign was part of a broader campaign of “racial agitation” against Asian immigrants by politicians, newspapers, some laborers and ranchers, and groups such as the Anti-Japanese League. One of the arguments pressed by the *Seattle Star* was religious: “Any person of Japanese heritage who practices the Shinto religion will be ultimately devoted to the government of Japan.” This religious opposition was not universal, however. The Seattle Ministerial Union opposed measures restricting the rights of Japanese Americans and immigrants.⁵⁶

Today, nearly a century later, our airwaves are filled with religious justifications for discrimination against Muslim Americans and Muslim immigrants. Some conservative movement activists argue that the United States was founded as a Christian nation.⁵⁷ Others say that the First Amendment does not apply to non-Christian faiths⁵⁸ and have supported efforts to block Muslim Americans from building mosques.⁵⁹ The American Center for Law and Justice, which portrays itself as a champion of religious liberty, helped lead opposition to the construction of a Muslim community center in New York City, to which opponents gave the inflammatory name the “Ground Zero Mosque.”⁶⁰ Late last year more than half the nation’s governors declared that their states would not accept Syrian refugees⁶¹ and presidential candidate Sen. Ted Cruz said the United States should accept only Christian refugees.⁶² Presidential candidate Donald Trump called for barring all Muslims from entering the United States.⁶³ And one lawmaker in Rhode Island even suggested that any Muslim refugees settled in that state be sequestered in camps.⁶⁴

Discrimination against Women

Religious beliefs about gender roles have long been used to justify discrimination against women and to oppose women’s social justice activism.

Bitter resistance to the women’s suffrage movement drew so heavily on religious arguments that Elizabeth Cady Stanton wrote “The Woman’s Bible” to directly challenge the use of religion to justify discrimination against women.⁶⁵ For example, Rev. Justin Fulton declared in 1869 that those who supported women’s right to vote were not “lovers of God.”⁶⁶ Catholic officials also opposed women’s suffrage, drawing on theology dating back to St. Augustine.⁶⁷

Arguments about the natural role of women were also made against women who had been public advocates for abolition. In 1837, the Massachusetts Congregational Clergy sent a pastoral letter decrying women abolitionists, saying essentially that women’s role was a domestic one and that “when she assumes the place and tone of man as a public reformer, our care and protection of her seem unnecessary...and her character becomes unnatural.”⁶⁸

Nearly a century and a half later, religious arguments about the nature and God-given role of women were marshalled against passage of the Equal Rights Amendment (ERA). In 1980, Rev. Jerry Falwell said the women’s liberation movement was made up, in part, of women who “have never accepted their God-given roles.” He called the ERA a “delusion” and a “definite violation of holy Scripture.”⁶⁹ That same year, the Mormon Church opposed the ERA, saying it could “endanger time-honored moral values” by challenging

laws that safeguarded the family and protected women. “Our Creator has especially suited fathers and mothers, through physical and emotional differences, to fulfill their own particular parental responsibilities,” said the Church. “Legislation that could blur those roles gives cause for concern.”⁷⁰

And just last year, at the World Congress of Families summit in Salt Lake City, Utah, opposition to marriage equality, parenting by same-sex couples, and laws against discrimination on the basis of sexual orientation and gender identity were grounded in claims about divinely ordered gender roles and the complementarity of the sexes.⁷¹

Discrimination against People with Disabilities

The Americans with Disabilities Act (ADA),⁷² the landmark 1990 civil rights law that provides protections for people with disabilities, addresses discrimination in public accommodations and employment among other areas.

During consideration of the bill, opposition came from religious groups that worried about federal intrusion into internal church employment matters⁷³ and costly changes to church buildings—opposition that ultimately resulted in churches being exempted from the requirements of ensuring accessibility.⁷⁴

The National Association of Evangelicals argued that employment provisions in the law would represent “an improper intrusion” by the federal government into the internal regulation of churches.⁷⁵ In 2012, the Supreme Court unanimously ruled in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*⁷⁶ that a church-run school could designate its teachers as “ministerial” staff whose employment matters are essentially beyond the reach of the government. The case was brought by a teacher who was fired for invoking the ADA, in violation, the school said, of religious doctrine requiring the use of an internal conflict resolution process. The *New York Times* responded:

“Although the [Supreme Court] does not provide much guidance on how to proceed in future lawsuits against churches as employers, the ruling has broad sweep. It abandons the court’s longtime practice of balancing the interest in the free exercise of religion against important government interests, like protection against workplace bias or retaliation. With a balancing test, courts consider whether a general law, if applied to a religious institution, would inhibit its freedom more broadly than justified and, in those circumstances, courts could exempt the church.”⁷⁷

Last year, an Ohio woman who relies on a service dog tried to board a church bus with her dog and grandson, but the church refused to allow her dog on the bus. That would have been a violation of the ADA for a non-religious entity.⁷⁸

In fact, blind people with service dogs frequently have trouble getting picked up by taxis, a phenomenon that has been documented by civil rights advocates⁷⁹ and is the subject of a 2015 lawsuit filed against Washington, D.C., taxicab companies.⁸⁰ A similar suit was filed against Uber in 2014.⁸¹ News reports suggest that some refusals may be grounded in drivers’ interpretations of religious teachings. A 1999 article by a blind Muslim woman challenged “the refusal by some of our Muslim brothers who own businesses or drive taxis to serve blind and other disabled people who are accompanied by guide and service dogs on the grounds that their religion prohibits them from allowing these persons into their businesses, taxis, etc.”⁸² In a 2015 article for *Generation Progress*, Hannah Finnie argued that federal and state RFRAs opened “a floodgate of discrimination against people with disabilities,” and could, for example, allow a for-profit transportation company to cite the owner’s religious belief that dogs are unclean to justify denying a person and their service dog access to a bus or taxi.⁸³

People with disabilities have also faced difficulties from religiously affiliated group homes that may not allow them to live with romantic partners—even in the case of a heterosexual married couple. In one case, the court dismissed a lawsuit against group homes, including a religiously affiliated group home that refused to allow a married couple with intellectual disabilities to live together.⁸⁴ While recent federal regulations now more clearly require residential service providers for people with disabilities the choice of roommate and overnight visitors, allowing religiously affiliated residential service providers a religious exemption to these rules could dramatically undermine their clients’ right to pursue relationships and exercise fundamental rights of association.

Chapter IV: Discrimination “Masquerading as Religious Conviction”

The 2015 *Obergefell* decision recognizing the right of same-sex couples to marriage equality nationwide was a landmark civil rights ruling, but it also accelerated efforts by social conservatives and conservative organizations to resist marriage equality and to secure legal exemptions to prevent individuals, organizations, private companies, and even public officials from having to recognize the legitimacy of same-sex couples’ marriages or LGBT individuals’ civil rights.

There are no explicit provisions in federal law protecting LGBT people from discrimination, although the Equal Employment Opportunity Commission now interprets the Civil Rights Act’s ban on sex discrimination “as prohibiting discrimination against employees on the basis of sexual orientation and gender identity.”⁸⁵ In 2014, President Barack Obama signed an executive order prohibiting federal contractors from discriminating on the basis of sexual orientation or gender identity.⁸⁶ The executive order did not provide religious exemptions beyond the previously existing rule that allows religious institutions to hire people of a particular faith.⁸⁷

Because of the lack of explicit federal protection from discrimination based on sexual orientation or gender identity, the *Obergefell* ruling has exposed the dangers that LGBT individuals face in the many states that lack nondiscrimination protections for LGBT people.⁸⁸ Couples who get married in states without such protections may have no recourse in the face of a hotel clerk refusing to provide a hotel room, a landlord refusing to rent an apartment, or an employer terminating an employee for seeking spousal benefits, something that happened repeatedly last year.⁸⁹

Last year’s state legislative sessions were crowded with anti-LGBT equality bills. According to the Human Rights Campaign, more than 115 pieces of anti-LGBT legislation were introduced in state legislatures in 2015,

including more than 25 RFRA bills.⁹⁰ In Texas, at least 20 bills were introduced that would have allowed, promoted, or required discrimination against LGBT Texans, often in the name of religious liberty.⁹¹ Some laws did pass, including one in Michigan allowing religiously affiliated adoption agencies to discriminate against same-sex couples,⁹² and one in North Carolina allowing magistrates to opt out of performing weddings.⁹³

According to the Movement Advancement Project, a think tank focused on research that advances equality for LGBT people, as of January 26, 2016, 20 states and the District of Columbia have employment nondiscrimination laws covering sexual orientation and gender identity; two additional states cover sexual orientation only. Nineteen states and D.C. have housing laws covering sexual orientation and gender identity, with three more covering only sexual orientation. Public accommodation laws covering sexual orientation and gender identity are in place in 17 states, with four more covering sexual orientation only. On the other end of the spectrum, in three states, there is no general state employment anti-discrimination statute governing private employers.⁹⁴ In addition, two states, Tennessee and Arkansas, have state laws preventing passage or enforcement of local nondiscrimination laws.⁹⁵

While Indiana’s RFRA, written more expansively than the federal law, was being debated in the state legislature in early 2015, a lawmaker offered an amendment prohibiting the law from being used to undermine local nondiscrimination ordinances (there are no statewide prohibitions on discrimination on the basis of sexual orientation or gender identity). That provision was rejected, and when Gov. Mike Pence signed the legislation into law, he was surrounded by representatives of religious groups who had advocated for a broad religious exemption. This is the legislation that the Family Research Council referred to as “the Hobby Lobby bill.”⁹⁶

Almost immediately after the bill was signed into law, a powerful backlash ensued. Pence and other state leaders were stunned at the strength of the reaction, and by the fact that it was led by members of the business community, who opposed state-supported anti-LGBT discrimination. Facing potentially severe economic consequences, Pence reversed himself. The legislature amended the new RFRA to clarify that it could not be used to justify discrimination or denial of service to LGBT people. One supporter of the original legislation [compared](#) Pence's signing the revised bill to Judas's betrayal of Jesus.⁹⁷ Some proponents of religious exemptions viewed what happened in Indiana as a "terrible blow" and a "major setback" in their effort to use "religious freedom" as "both a slogan and the legal answer to the growing gay rights movement."⁹⁸

The Indiana backlash probably slowed momentum in some states that were considering their own state RFRAs. However, it did not prevent passage of a RFRA in Arkansas. While the governor asked for changes to bring the proposed law more closely into alignment with the federal RFRA, he had allowed an arguably more damaging bill to become law, one that overrode local nondiscrimination ordinances and prohibited future ones.⁹⁹ Many LGBT Americans are protected by county and municipal nondiscrimination ordinances, but in 2015, at least six states considered bills to override them.¹⁰⁰ Such preemption bills targeting local LGBT ordinances are reportedly being tracked by advocates in South Carolina, Virginia, Oklahoma, and Indiana, with bills expected in North Carolina, Mississippi and West Virginia.¹⁰¹

A significant setback for nondiscrimination protections came in Houston in 2015, where a ballot initiative overturned the city's equal rights ordinance¹⁰² and where supporters of dismantling the ordinance had generated an inflammatory campaign suggesting that protections for LGBT people would create an open door for child abuse. Religious liberty became a rallying cry of the law's opponents when a city attorney subpoenaed sermons and other documents from five pastors who had been outspoken about the law; although the subpoenas were withdrawn, they had the effect of making the pastors—now known among conservatives as the "Houston Five"—into folk heroes.¹⁰³ Religious liberty was also a rallying cry in the successful campaign to convince voters in Springfield, Missouri, to overturn that city's nondiscrimination ordinance.¹⁰⁴

Also notable last year was the adoption of the so-called "Utah compromise," in which the Mormon Church agreed to support passage of legislation adding sexual orientation and gender identity to laws protecting against discrimination in employment and housing

in return for broad religious exemptions. The compromise, supported by local LGBT advocates and the ACLU, was criticized by some on both the right and left. Some religious conservatives were dismayed that their reliable ally, the Mormon Church, had acquiesced on the basic principle that LGBT people deserved legal recognition and protection. And a number of LGBT activists argued that the religious exemptions in the Utah law were too broad to be considered an acceptable model for other states to follow.¹⁰⁵

The legislative landscape has been in constant flux. In 2016, advocates for LGBT equality will be pushing to have more Americans covered by nondiscrimination ordinances while simultaneously fighting efforts to expand religious exemptions from both existing and future nondiscrimination laws. According to legislative tracking by Americans United for Separation of Church and State's [Protect Thy Neighbor](#) project, state RFRAs and RFRA-related legislation has been introduced this year, or carried over from last year, in Florida, Georgia, Hawaii, Indiana, Iowa, Kentucky, Michigan, New Mexico, North Carolina, Oklahoma, and West Virginia.¹⁰⁶

Several bills have been introduced in Indiana that would create legal protections against discrimination for LGBT people, but with broad religious exemptions. Gov. Mike Pence has said that he would not support additional LGBT protections if he thought they came at the expense of religious freedom. Lambda Legal has [called](#) the bills "non-starters for us" and said they would hurt, not help, LGBT people.¹⁰⁷

Florida's HB 401, "[Protection of Religious Freedom](#)" bill, has been described by Jonathan Capehart of the *Washington Post* as "discrimination masquerading as religious conviction." He says the law would go "well beyond what was proposed in Indiana."¹⁰⁸

In Georgia, [multiple](#) "religious freedom" bills have been introduced.¹⁰⁹ New bills introduced this year include one that would allow business owners to refuse service to same-sex couples and a so-called Pastor Protection Act that would affirm the right—already protected under the First Amendment—of religious officials not to perform marriage ceremonies that conflict with their religious beliefs.¹¹⁰

On February 19, during debate on a "religious liberty" bill that would allow any business or organization to ignore laws that conflict with their religious beliefs about marriage, sponsor Sen. Greg Kirk acknowledged that the Ku Klux Klan could qualify as a faith-based organization under the legislation.¹¹¹ According to Americans United for Separation of Church and State, the bill would allow individuals, businesses and taxpay-

er-funded organizations to “refuse anyone else rights, services, and benefits because they are part of an interracial couple; are part of an interfaith couple; are a single mother; are part of a same-sex couple; are divorced; are remarried; live or have lived with a partner without being married; or have had sex outside of marriage at any time in their life.”¹¹²

It is important to highlight that during the controversies over state RFRA proposals, not all the religious voices were promoting broad religious exemptions. The Central Conference of American Rabbis noted that the group had supported the federal RFRA, but said new state bills were “motivated by animus against LGBT Americans.”¹¹³ Last April, the North Carolina Council of Churches responded to introduction of religious liberty bills in North Carolina, explaining that while it supported the concept of a law like the federal RFRA, the proposed state RFRA created broader exemptions. The council declared, “We will oppose any legislation which would permit religious beliefs to be used as a justification for discrimination.”¹¹⁴ The Religious Action Center of Reform Judaism (RAC) also opposed the North Carolina RFRA, saying it “would allow discrimination against minorities and vulnerable populations.” The RAC, which played a leading role in passage of the federal RFRA, said the state bill “would allow businesses and individuals to discriminate in almost any situation, regardless of existing protections in the law,” explaining: “When RFRAs are used in this fashion, they not only sanction harm to vulnerable communities but they also undermine the fundamental, bedrock American value of religious freedom.”¹¹⁵

Chapter V: Federal Efforts: Are Religious and LGBT Rights in Conflict

At the federal level, there are simultaneously bills intended to protect LGBT rights, to limit the reach of RFRA, and to expand the scope of RFRA. Currently before Congress is the Equality Act,¹¹⁶ a bill introduced in the House and Senate last year, which would amend the Civil Rights Act of 1964 to ban discrimination on the basis of sexual orientation, gender identity, and sex in employment, housing, public accommodations, public education, federal funding, credit and the jury system. Its critics decry it as a threat to religious liberty.¹¹⁷

There is also an effort to clarify and reign in the bounds of RFRA. Legislation is expected to be introduced in Congress that would amend RFRA to ensure that it can't be used to engage in discrimination and harm to others.

Some lawmakers and religious groups are pressing for passage of the First Amendment Defense Act (FADA), which its supporters say “would bar the federal government from discriminating against individuals and organizations based upon their religious beliefs or moral convictions that marriage is the union of one man and one woman or that sexual relations are properly reserved to such a marriage.”¹¹⁸ The Family Research Council's Tony Perkins calls the bill a “first and vital step.” The National Organization for Marriage, an organization that defends “marriage and the faith communities that sustain it,” used a fundraising post on Kentucky county clerk Kim Davis to demonstrate “powerful evidence of why it is simply *imperative*” that FADA be enacted.¹¹⁹ Many current and former candidates for the 2016 Republican presidential nomination have pledged that, if elected president, they would push for congressional passage of FADA in their first 100 days in office.¹²⁰

But FADA would, in effect, grant legal protections to individuals and organizations that discriminate against LGBT people based on their religious beliefs about “traditional marriage.” Despite support among social

conservatives and religious groups and individuals, there has been significant criticism of FADA from across the political spectrum.¹²¹ While the bill “purports to address ‘conflicts between same-sex marriage and religious liberty’ and declares the importance of ‘preventing government interference’ with ‘the free exercise of religious beliefs and moral convictions about marriage,’”¹²² the framing of the issue as two rights in conflict is a false frame. The kind of broad exemption included in FADA goes well beyond the kind of balancing test inherent in RFRA; people seeking an exemption do not have to show that their free exercise rights have been substantially burdened and the government does not have the opportunity to show that the burden is justified by a compelling state interest, like ending discrimination.¹²³ Legal scholar Nancy Knauer argues that exemptions that “are designed to make sure that LGBT rights end where a religious objection begins” represent “a radical expansion of our understanding of religious liberty” and “a significant departure from our traditional understanding of free exercise rights.”¹²⁴

Chapter VI: Potential Harms from Religious Exemption Laws

In her *Hobby Lobby* dissent, Justice Ruth Bader Ginsburg wrote that the Court’s majority had “ventured into a minefield” with the decision. “Suppose an employer’s sincerely held religious belief is offended by health coverage of vaccines, or paying the minimum wage, or according women equal pay for substantially similar work?” she asked. How would the Court justify applying its logic only to religious views about contraception? “Indeed,” she wrote, “approving some religious claims while deeming others unworthy of accommodation could be ‘perceived as favoring one religion over another,’ the very ‘risk the Establishment Clause was designed to preclude.’”¹²⁵

Some have argued that social conservatives are using laws like RFRA “to erode rights, programs and services that they wish to eliminate entirely but have been unable to do so directly through other means.”¹²⁶

The potential harms from overly broad religious exemptions extend well beyond same-sex couples who are denied service by a baker or florist. A 2015 [report](#) by the National Women’s Law Center documented that in the year following the Supreme Court’s *Hobby Lobby* decision, there were “attempts to use RFRA to challenge laws that: protect women, LGBTQ individuals, and students from discrimination; protect employees by allowing them to unionize; promote public health by requiring vaccinations; and require pharmacies to fill lawful prescriptions.”¹²⁷

The scope of possible harms also suggests the potential breadth of partners in a fight for advancing LGBT rights and limiting religious refusals. For example, the extremely broad language of some RFRA proposals has generated concern among child welfare advocates and law enforcement officials that religious beliefs about disciplining children or the submission of women to a man could be invoked in child abuse or domestic violence

cases. In addition to concerns about legal precedents giving consideration to religious arguments in these contexts, vague laws could tie up state and local governments in expensive litigation. Such concerns united an extremely broad coalition of organizations that successfully urged North Dakota voters to reject a proposed “religious liberty” constitutional amendment in 2012.¹²⁸

The concerns and potential impact can also be seen on other communities and interest groups.

Labor

Some influential conservative religious activists teach that the Bible opposes minimum wage laws, collective bargaining, “socialist union kind of stuff,” and progressive taxation.¹²⁹ It is possible that the *Hobby Lobby* ruling could open another front in the already raging war on unions.¹³⁰ For example, some commentators have suggested that business owners could use the ruling to argue that their company should not be subject to National Labor Relations Board rulings by arguing that their religious beliefs prohibited them from dealing with unions.

This is already the case for faculty at religiously affiliated schools and colleges. The Cardinal Newman Society says that allowing any jurisdiction by the National Labor Relations Board over religiously affiliated schools is “an assault on religious liberty.”¹³¹ Religious colleges assert that they are exempt under previous Supreme Court rulings and under the federal RFRA, and there have been years of legal wrangling over the details. An NLRB ruling in December 2014 in the *Pacific Lutheran* case¹³² found that, in the words of one news report, “just because a college is religious doesn’t mean that its faculty members can’t unionize” and said Pacific Lutheran’s adjuncts did not seem to be performing religious work.¹³³

Duquesne University, affiliated with a Catholic religious order, has been engaged in a battle against efforts by the

United Steelworkers to organize its part-time adjunct faculty. Duquesne professes its commitment to the rights of workers generally to organize, but says this case is about its right under the First Amendment to be free of government intrusion.¹³⁴ In June 2015, the university announced that it would appeal a decision by the local NLRB office in favor of the faculty organizers.¹³⁵ In a legal brief filed in that case, the university threatened to fire adjuncts who participated in the union organizing effort. Under fire, Duquesne defended the threat, saying that the university is “within its rights to state it may fire those who detract from its religious mission.” In the fall of 2015, Duquesne made good on its threat, firing 10 of 11 adjuncts in the English Department.¹³⁶

In contrast, Jesuit-run Georgetown University [chose](#) to [bargain](#) and reach a labor agreement with its adjunct instructors, a decision reflecting its adoption of a Just Employment Policy grounded in its identity as a Catholic and Jesuit institution.¹³⁷ *America Magazine*, published by the Jesuits, [praised](#) Georgetown and other Catholic schools that have chosen to work with unions, saying “Catholic Colleges and universities face many challenges to their religious mission and identity in modern America, but labor unions are not one of them.”¹³⁸

Health Care

The *Hobby Lobby* case and the subsequent cases now before the Supreme Court are using the federal RFRA to expand the scope of religious exemptions to apply to regulations on reproductive health care. Existing religious exemptions allow medical professionals and health care institutions to deny women access to some kinds of reproductive care, exemptions that can have life-altering and life-threatening [consequences](#).¹³⁹

Broad exemptions that have been granted to health care providers and institutions around abortion and contraception, combined with the sometimes dominant market presence of Catholic hospitals, can leave women unaware of the urgency of their medical condition and their options for treatment. Women have suffered and died when Catholic hospitals operating under the bishops’ Ethical and Religious Directives for Catholic Health Care declined to perform an abortion in emergency situations.¹⁴⁰

Some religiously affiliated nonprofits that provide health care to immigrants under government contract are refusing to provide girls or young women who may have been the victim of sexual assault with information about all their treatment options, or even to coordinate with government officials who could find others to provide those services. The nonprofits [contend](#) that they should be free “from any requirement to provide, facilitate the provision of, provide information about, or refer or

arrange for items or procedures to which they have a religious or moral objection.”¹⁴¹

A similar objection to the accommodation crafted by the Obama administration for religious nonprofits opposed to contraception requirements will be heard in March by the Supreme Court, which consolidated seven cases for oral argument as *Zubik v. Burwell*.¹⁴² These nonprofits contend that it is a substantial burden on their exercise of religion even to inform the federal government of their objections to providing contraception, since that notice would trigger an alternative means for employees to access drugs or devices to which the employers object.¹⁴³ Each side has extensive support in the form of friend-of-the-court, or *amicus curiae*, briefs.

Families of same-sex couples are also vulnerable to denial of health care. In 2014, for example, a married same-sex couple in Michigan brought their six-day-old baby to meet her pediatrician. But they discovered that the doctor had decided, based on her religious beliefs, to refuse to care for their baby.¹⁴⁴

Chapter VII: The Future of RFRA, Nondiscrimination Laws, and Religious Exemptions

The Supreme Court’s reinterpretation of the federal RFRA and efforts to use state RFRA to protect discrimination have weakened support for the law among some groups that backed its original passage.

The *Washington Post*’s editorial board [responded](#) to the *Hobby Lobby* decision by calling on Congress to narrow RFRA to “repair the federal government’s ability to provide for wholly legitimate common goods such as public health and marketplace regulation.”¹⁴⁵ Last summer, the ACLU, which backed the federal RFRA and has used it to defend, for example, the ability of a Sikh to participate in Army ROTC with his beard and turban, [declared](#) it “can no longer support the law in its current form.”¹⁴⁶ In October, Elliot Minberg, a senior fellow at People For the American Way and one of the authors of the original RFRA, [wrote](#), “In the long run, only reconsideration or limitation by the Supreme Court of that ruling, or a decision by Congress to amend RFRA’s language to restore its original purpose, will truly repair the damage that has been done by the Court majority.”¹⁴⁷

Moving to protect LGBT Americans from discrimination would put lawmakers squarely in line with the majority of the American public. Americans reject the false dichotomy that a person cannot be in favor of religious liberty and equality. According to a June 2015 [survey](#) by the Public Religion Research Institute, nearly 70 percent of Americans support laws to protect LGBT people against discrimination in jobs, public accommodations, and housing. A solid majority—60 percent—oppose allowing a small business owner to refuse products or services to gay and lesbian people, even if doing so violates their religious beliefs. Strong support for equality and nondiscrimination is also evident among religious Americans. Religious exemptions are opposed by 64 percent of Catholics, 63 percent of non-white Protestants, and 59 percent of mainline Protestants. Some African-American

clergy who would not conduct marriages for same-sex couples in their churches on religious grounds are nevertheless opposed to legal discrimination.¹⁴⁸

“I know what it’s like to be discriminated against, and our people do, so I don’t want them to be discriminated against,” said Bishop George Battle Jr., senior bishop of the African Methodist Episcopal Zion Church, which opposes same-sex marriage. “If their money is green and you’re taking green money, I think you should take it all.”¹⁴⁹

The clamor for broad religious exemptions to public accommodations laws is sure to continue, especially in an election year in which presidential candidates are seeking votes by portraying religious liberty as under siege in the United States.

But activists and scholars are making a strong case against exemptions. Louise Melling, director of the ACLU’s Center for Liberty, has argued that calls for religious exemptions come with real costs to the principles at stake and to individuals denied jobs, services, and benefits; and they undermine the purpose of anti-discrimination laws, which is to create norms about whether society should sanction discrimination.¹⁵⁰ Simply arguing that a same-sex couple seeking wedding-related services can find another florist or caterer when they are turned away ignores the deep insult such a rejection poses to them and to the equal dignity of LGBT people.¹⁵¹ The protection of that human dignity is a core civil rights principle.

Conclusion

After decades of oppression and discriminatory treatment, LGBT individuals in the United States, and throughout the world, are finally beginning to gain political, cultural and legal recognition and are finding some success in attaining anti-discrimination protections. As they do, opposition to recognition and equality for LGBT individuals and families—much of it grounded in religious arguments—has grown, creating a groundswell of discrimination cloaked in the language of religious freedom.

While religion has been used throughout history to justify opposing equality and justice in many contexts, the danger is that, rather than claiming the right to practice religion free from government interference, these religious arguments pervert the foundational notion of religious freedom and, rather than balancing the right of religious expression against the government's compelling interest, radically expand the notion—a significant departure from the intent of the Constitution or RFRA.

Religious liberty is a core American value, support for which crosses religious and political lines. But opponents of legal recognition and nondiscrimination protections for LGBT people have portrayed religious freedom and LGBT equality as incompatible, and have tried to use religious arguments to restrict rights and opportunities of innocent parties—a political strategy that fundamentally misconstrues the concept of religious liberty and expands it to become a force to impede the rights of others.

The Leadership Conference Education Fund believes that while the freedom to exercise one's religion and to be free of government sponsored religion is a fundamental value, the nation must continue to work together to dismantle institutionalized discrimination that denies opportunity and legal equality to some people. Efforts to permit discrimination on religious grounds are anti-

thetical to these foundational principles and cannot be allowed to undermine these efforts.

Recommendations

The Leadership Conference Education Fund makes the following recommendations for policymakers and advocates:

For Federal, State and Local Policymakers

Where states are unwilling or unable to protect against discrimination, federal law must step in to safeguard those left vulnerable and unprotected by the actions of their state and local policymakers.

A number of actions could accomplish this goal. These include:

- Preventing any legislation whose aim or effect is to perpetuate discrimination against any individual, including members of the LGBT community.
- Enacting comprehensive nondiscrimination protections at the national, state and local level that do not include overly broad religious exemptions.
- Reforming the federal Religious Freedom Restoration Act (RFRA) and similar state laws to clarify that these laws cannot be used as a defense to discriminate or to cause other harm to third parties.

For Federal, State, and Local Advocates

Opinion leaders, community leaders, and advocates working to educate, inform, and/or prevent harmful religious exemption legislation must:

- **Build Diverse Coalitions:** What is needed is a broad, robust coalition of local, state and national partners, including not only civil rights organizations that inform their communities and/or advocate on behalf of LGBT individuals, but those groups working toward fair and equal treatment for individuals regardless of race, ethnicity, gender, disability, veteran status and others. Community leaders must recognize their obligation to assist in this effort. This

coalition should work to engage unusual allies and unexpected voices, such as business leaders, religious leaders, celebrities, and others.

- **Educate Policymakers:** Policymakers must be on the right side of history. There is both a moral and economic impact on communities when legislation justifying discrimination under the guise of religious belief is passed, or even introduced. Many policymakers simply don't realize the negative impact these discriminatory laws have on their state's well-being. The economic consequences to states that have passed these laws have been severe, including declining tourism and diminished economic opportunities. Businesses overwhelmingly oppose laws of this nature because of both the moral and economic implications. Importantly, policymakers often are unaware of the overwhelming public support for anti-discrimination protections.
- **Educate the Public:** The widespread use of religious arguments to perpetuate what is, in effect, state-mandated discrimination is not well understood by most Americans. Education and/or advocacy campaigns to help the public understand the impact of these laws, to galvanize support, and to create action are critical. There is a need to broaden public support for the underlying values of equality and fair treatment that motivate support for nondiscrimination protections and ensure that the public understands the harmful impact of religious exemption laws.
- **Communicate Strategically:** Community leaders, opinion leaders, policymakers and advocates alike must encourage understanding and acceptance for the good of all. It will be important to develop a public narrative to demonstrate momentum, to establish that support is strong, and to show that there are real harms to real people if these

exemption laws are passed. This includes training key state, local and national leaders to become media spokespeople and promoting stories that highlight the harms of discrimination and the dangers of discriminatory laws to Americans and to the nation's values.

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