

MISPLACED PRIORITIES

United States & “Religious Freedom” Madness: What’s Next for Anti-Democratic ‘Religious Exemptions’

Thursday 5 October 2017, by [MICHAELSON Jay](#) (Date first published: 16 November 2014).

With wins in federal and state legislatures, Republicans gear up to exempt religious conservatives from any laws they don’t like (especially the ones about gays and women).

Elections are funny things. They’re often about issues that governments cannot actually control: jobs, cultural shifts, viruses. And yet, they result in massive changes in what government does control—like the makeup of the federal courts, or environmental regulations. Or, this year, the ways in which religious liberty (both real and imagined) is balanced against civil rights.

Few voters, it’s safe to say, cast their ballots based on the Religious Freedom Restoration Act. Yet, the headline-grabbing religious liberty conflicts of 2014—the *Hobby Lobby* case [1], Arizona’s “Turn the Gays Away” bill [2]—have not cooled off. On the contrary, with the results of this year’s elections, they are about to heat up.

Here are four developments we’re likely to see in 2015.

State RFRA.

Say it after me: RFRA. Riff-rah. It stands for “Religious Freedom Restoration Act.” The federal RFRA was passed in 1993, nearly unanimously, with liberals and conservatives uniting in response to a Supreme Court case, *Employment Division v. Smith*, which upheld anti-drug laws being used against Native Americans ingesting peyote. Outraged by this intrusion on a minority religious practice, RFRA provided that the government can only “substantially burden” the exercise of religion if it has a “compelling state interest.”

That language isn’t just legalese; it decided *Hobby Lobby*. But thanks to a 1997 Supreme Court decision, it only applies to the federal government, not the states.



At the same time, right-wing activists have redefined “religious liberty” from a shield for minorities

(like Native Americans) into a sword for majorities (like Christians who want to discriminate against gays or women). And so, since 1997, they have been busily passing RFRAs in 20 states (and counting), and strengthening the ones that already exist—applying them to businesses, for example, or creatively redefining “substantial burden” as any burden, no matter how insubstantial.

RFra madness is just getting started. In 2014, new or strengthened RFRAs were proposed in eight states. The “Turn the Gays Away” bill in Arizona was one of them. Now, with Republicans controlling 68 out of the 99 state legislative chambers [3] (up from 59 before the election), expect to see State RFRAs proposed across the country. At least five (in Arizona, Georgia, North Carolina, Texas, and Utah) have already been announced.

What would this mean? Individuals and businesses could exempt themselves from anti-discrimination laws by proffering religious objections to them. You could hang a big “No Gays Allowed” sign on your hotel’s front door. Or, more insidiously, you could send the same message by not recognizing your employees’ legal spouses if they happen to be of the same sex.

Of course, conservative activists took a beating when they tried this in Arizona last year. But they’ll be smarter next time. Especially because of the...

Gay Marriage Backlash.

Let’s face it: the arguments for religious exemptions look a lot better in red states that have suddenly had same-sex marriage “forced” on them by courts. Republican legislatures are looking for any way to stem the tide, and religious exemptions are one way to do that.

Examples? Allow corporations to refuse benefits to same-sex spouses. (Remember, corporations have religious consciences now, thanks to *Hobby Lobby*.) Allow adoption agencies not to place kids with same-sex couples. Allow small businesses—for-profit wedding chapels, caterers, florists—to discriminate against gays. All of these exemptions already apply to religious organizations, but by way of RFRAs and other methods, they can be extended to corporations and individuals as well.

The goal? Keep the scare quotes around gay “marriage,” or at least put an asterisk after it. By allowing religious individuals to reject a legal status, it’s a little less legal. Or, perhaps more cynically, Republicans can cater to their religious conservative base [4] while hiding beneath the neutral-sounding value of religious liberty. After all, who’s against religious liberty?

***Hobby Lobby*: The Judicial Sequels**

On March 25, I stood in line outside the Supreme Court, waiting to get into the *Hobby Lobby* oral argument. As luck would have it, right in front of me were lawyers from the same firm representing the plaintiffs. And so, we had a collegial conversation in the last snowfall of the season. They felt confident of victory (and I tended to agree) and were talking about next steps.

The first is to extend *Hobby Lobby* to all contraceptives, not so-called “abortofacients,” a made-up, unscientific term that would soon be recognized as the meaningless distinction it has always been.

Next is to extend the holding to all corporations, not just “closely-held” ones. And to other parts of the Affordable Care Act, not just the so-called “contraception mandate.” And even to the opt-out forms that the ACA has given religious organizations as an alternative to providing contraception coverage.

To win this last battle, the Right has found the best-named plaintiff in the history of activist litigation: the “Little Sisters of the Poor,” a Catholic order that believes that by signing the “No”

form—as in, No, we won’t cover contraception—they are effectively enabling someone else to say “Yes.” Thus, they are complicit in the provision of such coverage, the exercise of such coverage, the use of an IUD, and the death of a sweet little blastocyst that the Sisters believe has a soul.

Of course, “No means Yes” is a novel logical syllogism, but anything is possible. And if the Little Sisters prevail, the entire contraception mandate falls. Which is likely in any case as part of...

Hobby Lobby : The Congressional Sequel

Republicans are champing at the bit to overturn as much of Obamacare as possible, and the “contraception mandate” is a weak link in the chain. Religious and “religiously-affiliated” organizations are already exempt from that provision; now, under *Hobby Lobby*, closely held corporations are as well. But there’s no need to wait for the courts to expand Hobby Lobby’s exemption; in their zeal to tear up as much of the ACA as they can, expect bills to sail through the 114th Congress widening as many exemptions as possible.

Examples? Ripping out the entire “contraception mandate,” full stop.

Allowing religiously affiliated organizations to opt out of Obamacare, period. Allowing corporations to avoid covering not just contraception, but any provision that they deem religiously offensive—which could be, well, anything.

Each of these steps would threaten the integrity of Obamacare as a whole, but of course, that’s exactly the point.

All four of these developments are already underway, in think tanks, in media comments from public officials, and in draft legislation. And the big money is just getting started. Funders like the National Christian Foundation (\$1.2 billion in assets); the Koch Brothers; and the Green (of Hobby Lobby fame), DeVos, Ahmanson, and Templeton foundations, continue to pour money into the “religious liberty” movement, funding organizations like Alliance Defending Freedom, The Becket Fund, The Ethics and Public Policy Center [5] (headed by key leaders of The Gathering) [6], The First Amendment Partnership, and a variety of pseudo-autonomous state groups like the Center for Arizona Policy, Sutherland Institute [7] (Utah), and dozens of others. If nothing else, the sheer size of the “religious liberty” movement indicates its seriousness of purpose.

So does its breadth. At one extreme, these same conservative funders have founded biased “religious liberty” centers at Georgetown, Stanford, Princeton, and other leading universities. In the respectable guise of religious liberty, the zombie-like Culture War soldiers on.

At the other extreme, populist religious rhetoric has grown so outrageous, it’s hard to be shocked anymore. The Obama administration is routinely analogized to Nazi Germany [8] for conducting a “war on religion.” The crusty conservative battle-ax Phyllis Schlafly is giving speeches saying that Obama worships government like a god [9]. And somehow, this incendiary rhetoric is detached from the supposedly moderate, respectable “religious liberty” lawyers and academics who are funded by the same conservative billionaires.

In the 1970s, conservatives who had lost the moral battle on civil rights demanded exemptions to desegregation. In the 2010s, conservatives who have lost the moral battle on LGBT equality are demanding exemptions to same-sex marriage. The first effort failed, but gave birth to the Christian Right as we know it [10]. Here comes the sequel.

Jay Michaelson

P.S.

* 11.16.14 5:45 AM ET:

<https://www.thedailybeast.com/rfra-madness-whats-next-for-anti-democratic-religious-exemptions>

Footnotes

[1] ESSF (article 42152), [US Supreme Court & “religious liberty”: Why Hobby Lobby Will Be Bad for Conservatives.](#)

[2] <http://forward.com/opinion/193378/will-arizona-go-the-anti-gay-way-of-uganda/>

[3] https://ballotpedia.org/State_legislative_elections,_2014

[4] <http://radiowest.kuer.org/post/religious-liberty-campaign>

[5] <https://eppc.org/arfp/>

[6] <https://www.thedailybeast.com/the-dollar1-billion-a-year-right-wing-conspiracy-you-havent-heard-of>

[7] <https://www.thedailybeast.com/the-kremlins-favorite-anti-gay-hate-group-is-coming-to-utah>

[8] <http://www.rightwingwatch.org/post/staver-obamas-america-is-worse-than-nazi-germany/>

[9] <http://dailycaller.com/2012/07/25/phyllis-schlafly-for-obama-no-higher-power-than-government/>

[10] <http://www.politico.com/magazine/story/2014/05/religious-right-real-origins-107133>