WHEN EXEMPTION IS THE RULE
The Religious Freedom Strategy of the Christian Right
by Frederick Clarkson
EXECUTIVE SUMMARY

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

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

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

Among this report’s findings:

- The network of Christian Right legal institutions advancing the redefinition of religious freedom is growing in its capacity to affect legal, political and cultural change.
- The Becket Fund, which has litigated landmark Supreme Court cases like *Hobby Lobby* and *Hosanna-Tabor,* grew 86 percent in just four years, from FY2009 to FY2012.
- The national legal network Alliance Defending Freedom increased its annual revenues by $5 million during the same period (a 21% increase) while also expanding its effort to seek influential legal precedents in international courts.
- In an important mainstreaming move, the conservative John Templeton Foundation funneled $1.6 million through the Becket Fund to establish a religious liberty clinic at Stanford University Law School. It opened in January 2013.
- The Christian Right’s appropriation of religious freedom to justify discrimination is plainly visible in the U.S. Supreme Court’s 2014 *Hobby Lobby* ruling, which for the first time recognized limited religious rights for closely held, private corporations to deny the Affordable Care Act’s contraceptive mandate. This ruling has transformed not only federal jurisprudence, but the national conversation about the meaning and scope of religious freedom. One result was that the religious beliefs of the owners trumped the consciences and health interests of their employees.
- The Christian Right is seeking to undermine and evade civil rights law beyond the courts by “religifying” organizations. This means rewriting mission statements, contracts, and job descriptions to claim that the entire organization or jobs within it are essentially religious in nature and subject to the longstanding exemption of clergy from the Civil Rights Act. Under this logic, a religified business or nonprofit would have the right to discriminate against an LGBTQ client, or others with whom they may religiously disagree, by excluding people who do not conform to their doctrines. The groups promoting this tactic, such as Alliance Defending Freedom and Liberty Institute, have issued handbooks to help organizations protect against “dangerous antireligious attacks.”
- Religification efforts are attempting to build on the 2012 U.S. Supreme Court ruling in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission* (EEOC) that the religious duties of a teacher fired in a discriminatory way insulated the mainline church school from antidiscrimination laws under the longstanding-

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

• The Christian Right is seeking to pass state-
level Religious Freedom Restoration Acts
(RFRA) that would allow for-profit businesses
to seek religious exemptions in the way the
Hobby Lobby case made possible under the
federal RFRA. The Right has succeeded in
Mississippi, and, controversially, in Indiana,
where the state RFRA was revised under
pressure to make clear that it did not justify
discrimination against LGBTQ people.

• Today's arguments echo those made by op-
ponents of civil rights advances for African
Americans in the 20th century—notably the
fundamentalist Bob Jones University when it
defended its policy against interracial dating
because of its religious beliefs. In a major de-
defeat for the nascent Christian Right, the U.S.
Supreme Court ruled in 1983 that the Greenville,
SC, college was not entitled to a federal
tax exemption if it maintained this racist
policy because the government's interest in
eradicating racial discrimination in educa-
tion trumped the school's claim to the First
Amendment right to religious freedom.

• President Obama has failed to rescind a
George W. Bush-era legal memo that allows
federal contractors and grantees to discrimi-
nate in their hiring on religious freedom
grounds.

• The Christian Right has carved out these vic-
tories following decades of building its politi-
cal and institutional power. To avoid fighting
within its frame and definition of religious
liberty, progressives and their allies must
build their own long game. One of the ways
to do this is to avoid dualisms that distort the
issue and play to the Christian Right framing,
such as suggesting that LGBTQ civil rights
(or reproductive rights) and religious free-
dom are somehow mutually exclusive.

While winning many victories, the Christian
Right has lost some important battles in its
campaign to redefine religious freedom. This
is particularly so when other religious groups
have taken the lead in opposing the Right. The
United Church of Christ successfully sued to
overturn a 2012 amendment to the North Carolina
state constitution asserting not only that same-
sex marriages were invalid, but effectively
criminalizing same-sex marriage ceremonies.
Coalitions involving religious groups have also
thwarted the passage of state RFRA's that justify
discrimination in Georgia and North Carolina.
Elsewhere, workers and pension advocates took
the lead. In December 2015, a federal appeals court
ruled that the St. Peter's Catholic health system in
New Jersey was not exempt on religious grounds
from following federal law protecting pensioners
and that it needed to fully fund its pension.

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

Among our other recommendations, we must,

• **Reclaim religious freedom as a fundamen-
tal democratic value.** This means embracing
religious freedom as emphasizing the equal-
ity of all people, including everyone's right
to believe and to practice faith (or not) as we
will, and to change our minds—free from the
undue influence of powerful religious institu-
tions and government. The right to believe
differently from the rich and the powerful is a
prerequisite for free speech and a free press,
the other two elements of the First Amend-
ment of the U.S. Constitution.

• **Increase our capacity to respond to reli-
gious freedom-related issues.** This would
include but not be limited to resourcing a
network of researchers, writers, political
thinkers, and scholars to develop and inform
strategy with respect to religious liberty and
civil rights.

• **Expand and refresh historic alliances that
have extended civil and labor rights** in the
20th century more widely and deeply than at
any other time in our history.

• **Expand celebrations of Religious Freedom
Day on January 16th** and other events to of-
fer a clear, consistent, positive, and historically rooted alternative to the Christian Right’s redefinition of religious liberty.

• **Counter misinformation.** Many conservative religious liberty claims rely on falsehoods, bogus history, and scare tactics. For example, clergy have never been forced under the law to perform any marriage of which they do not approve.

• **Urge candidates and elected officials to end legal justifications for all forms of discrimination** under the rubric of religious freedom. This includes demanding that President Obama end discrimination by faith-based contractors justified by the Bush-era legal memo.

• **Consider international human rights standards** regarding religious freedom and the rights of conscience. They are very strong and are consistent with a domestic agenda, and are part of the growing international dimension to this struggle.

• **Develop electoral answers** to the Right’s long-term efforts to control various levels of government.

_for a full list of recommendations, see page 27._