When historians recount the history of separation of church and state in our time, one of the signature events may be a federal court case that didn’t even make it to the Supreme Court. It didn’t need to.

The 2014 case of *General Synod of the United Church of Christ v. Cooper* was a landmark event because, although the case was ostensibly about opposition to marriage equality, the decision upheld foundational notions of religious equality and equal protection under the law that bind this diverse and often fractious nation. It at once affirmed the equal standing under the law of all religious and non-religious points of view and showed that the Christian Right does not represent all of Christianity.

At issue was a 2012 amendment to the North Carolina state constitution that provided that same-sex marriages were invalid. Together with the state’s General Statutes, this amendment effectively criminalized the performance of same-sex marriage ceremonies. The upshot of the subsequent legal fight was that the million-member United Church of Christ (UCC), an historic Protestant denomination with roots dating back to the Plymouth Colony and more than 5,000 local churches, won a clear victory for both marriage equality and religious liberty.

"By depriving the Plaintiffs of the freedom to perform religious marriage ceremonies or to marry," the UCC complaint read in part, "North Carolina stigmatizes Plaintiffs and their religious beliefs." The complainants also argued that the law relegated same-sex couples "to second-class status." Along with same-sex couples, the plaintiffs included religious denominations and clergy from several traditions, including the Alliance of Baptists, the Association of Welcoming and Affirming Baptists, and the Central Conference of American Rabbis. The complaint continued:

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

As a result, clergy in the UCC and fellow complainants, who routinely perform same-sex marriage ceremonies, could have been subject to criminal prosecution. "We didn't bring this lawsuit to make others conform to our beliefs," UCC general counsel Donald C. Clark Jr. told *The New York Times*, "but to vindicate the right of all faiths to freely exercise their religious practices."

The case had a complicated legal trajectory, but the final decision came from U.S. District Court Judge Max O. Cognburn Jr., who, after the Supreme Court declined to hear an appeal by the State of North Carolina in another case, declared in his written decision: "It is clear...that North Carolina laws...threatening to penalize those who would solemnize such marriages, are unconstitutional."

This case did not fit the culture war narrative as promulgated by the Christian Right, wherein religious liberty debates simply pit secularism against Christianity. It demonstrated that religious freedom is neither owned, nor entirely defined, by the Christian Right.

Many religious freedom cases turn on claims by conservative religious groups or individuals—or corporations—that various public policies and the rights of others, with which they disagree, violate their constitutional rights. Most famously, such claims have been made regarding businesses providing services such as cakes and flowers for same-sex marriages or providing contraception through
insurance packages.

But Cogburn’s ruling, in addition to finding for the right to perform same-sex marriages, also underscored an idea that transcends the issues of the day: that religious liberty is only possible in the context of religious pluralism. By undermining the Christian Right’s narrative about how Christianity is under attack due to the advance of LGBTQ rights and marriage equality, it also cast into sharp relief what Christian Right leaders usually mean when they talk about religious liberty: not a broad understanding of religious freedom for all believers, but rather a narrowly-defined, theocratic religious supremacism.

The implications of the ruling weren’t lost on the Right. A caller to the Washington Watch radio program hosted by Tony Perkins, president of the Family Research Council (FRC), asked him about the “Christian organization” that he heard had filed the suit. “I would use that term ‘Christian’ very loosely,” Perkins replied. “Here’s a test of what is a true religious freedom: a freedom that’s based on orthodox religious viewpoints. It has to have a track record; it has to come forth from religious orthodoxy.” In April 2015, Mike Huckabee, the former Republican governor of Arkansas, similarly told a group of ministers participating in an FRC-organized conference call that supporting marriage equality meant opposing Christianity. Raising the stakes, he further warned that trends to legalize same-sex marriage across the country would lead to the “criminalization of Christianity.”

The UCC case highlighted the rise of a distinctly theocratic politics at the highest levels of government and indeed, constitutional law, in which theocratic elements are reframing so called culture war issues involving homosexuality and reproductive justice as issues of religious liberty. It might be hard to see, given the nature of press coverage, but the culture wars have always been about more than abortion and the definition of marriage. Recent legal battles over religious liberty help to illuminate how that’s so.

THE MINISTRY OF TRUTH

Though you might not know it to read the news about religious freedom debates, not all Christian—let alone all religious—leaders share the same concerns as Huckabee and Perkins. J. Brent Walker, executive director of the Baptist Joint Committee for Religious Liberty (BJC), a longtime leading proponent of religious liberty in Washington, D.C., represents much of the Baptist world beyond the conservative Southern Baptist Convention. The BJC does not have a formal position regarding marriage equality, “There is no more central tenet to our faith than religious freedom: a freedom that’s based on religious orthodoxy.”

In a stark contrast to Walker, Perkins’s and Huckabee’s talk about religious freedom echoes the late theocratic theologian R.J. Rushdoony, one of the most influential evangelical thinkers of the 20th Century. “In the name of toleration,” Rushdoony objected in his 1973 opus, Institutes of Biblical Law, “the believer is asked to associate on a common level of total acceptance with the atheist, the pervert, the criminal and the adherents of other religions.” Many other recent leaders of the Christian Right do not in fact believe in civic equality for those with whom they religiously disagree or otherwise do not approve. And they usually ignore those who represent major religious institutions that hold different views, like Rabbi Steven Fox, Chief Executive of the Central Conference of American Rabbis, who, along with other Reform rabbis, declared in a statement regarding marriage equality, “There is no more central tenet to our faith than the notion that all human beings are created in the image of the Divine, and, as such, [are] entitled to equal treatment and equal opportunity.”

As complicated as these issues can be, what is clear is that when we talk about religious freedom, we do not all mean the same thing. The United States, which led the way on Enlightenment-era approaches to the rights of individual conscience and separation of church and state in a pluralist society, is still trying to get it right. While civil liberties and civil rights need not be seen as mutually exclusive, navigating the conflicting interests of personal conscience and the public interest is fraught even in the best of times. This task is made more difficult when not everyone shares the values and vision of religious pluralism and constitutional democracy, and indeed may see those values as obstacles to their own ends.

The idea of religious exemptions is not new. While they have a longer history than the last 100 years, in the 20th Century, exemption debates famously included issues like how to deal with conscientious objection to military service, requirements for safety features on horse-drawn Amish buggies driven on public roads, and even legal require-
ments to seek medical treatment for children instead of relying on prayer. In more recent years, lawyers have litigated church zoning laws, regulations regarding religious homeschooleds and “troubled teen” group homes, vaccination requirements, and more.¹⁰

One of the guiding principles in weighing these decisions has been Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on religion, race, sex, and national origin. But even the Civil Rights Act created what are called “ministerial exceptions” for religious groups.¹¹

Elements of the Christian Right are now seeking to expand the definition of a religious organization, and the extent to which religious exemptions extend to individual beliefs and religious institutions. The contemporary Christian Right’s notion that individuals and institutions should have the right to choose which laws they will respect and which ones they won’t is arguably one of the more extraordinary developments in American legal history. They are not only claiming the right to be selective about complying with the law, but are also claiming the right to determine the criteria by which such decisions are made.

In recent years this notion has dramatically influenced U.S. political and legal discourse. Those who embrace what theocratic evangelicals call a biblical worldview or what Catholics call the magisterium of the Church see their particular religious traditions as the sources of law to which all law must conform. Despite their many differences, these conservative believers have adopted a common platform regarding issues—as they define them—of life, marriage, and religious liberty.¹² But there are deep repercussions to each of these major collateral tenets that are not always well reflected in public discourse.

On a wide range of matters—from abortion and contraception to LGBTQ civil rights and federal labor laws—the Christian Right, in both its evangelical and Catholic expressions, is seeking to find new approaches to ensuring that the law does not apply to them.

Sen. James Inhofe (R-OK), for example, offered an amendment to the 2015 congressional budget that sought to apply the broad framing of the Christian Right’s political agenda to the relationship between the federal government and private contractors. “Federal agencies,” Inhofe’s amendment read in part, “do not discriminate against an individual, business, or organization with sincerely-held religious beliefs against abortion or that marriage is the union between one man and one woman.”¹³ The amendment was unsuccessful, but it epitomizes the contemporary thinking of the Christian Right.

The current wave of state legislation allegedly seeking to protect the rights of conscience of people opposed to homosexuality generally, and marriage equality in particular, may be best understood as abuses of the historic idea of religious freedom. Or, as it’s often put, it’s conservatives using the idea of religious freedom to justify discrimination.

Inhofe’s amendment, for example, would not have protected the religious beliefs of those individuals and institutions whose conscience compels them to respect reproductive rights and moral consciences, or those who honor and celebrate same-sex marriages. In fact, major, historic religious traditions and institutions support the very rights opposed by the Christian Right. Thus when the Christian Right (and the politicians who pander to it) invoke religious freedom, often they’re using it as an excuse to deny religious freedom to others.

It’s also worth underscoring that, as a practical matter, the “religious” in “religious freedom” generically what is almost exclusively an initiative of conservative Christian institutions.

**RELIGIOUS JUSTIFICATIONS FOR THE INDEFENSIBLE**

Some of the most widely publicized contemporary religious freedom conflicts involve individual florists and bakers refusing to provide flowers or cakes for same-sex weddings. The notion that these private businesses’ denial of service amounts to a religious freedom battleground is based on the claim that the proprietors’ faith forbids them from supporting something contrary to their particular beliefs about God. Almost exclusively, this has meant their particular notion of Christianity.

Such claims may not ultimately prevail, but within living memory, religious justifications have often been successfully used to justify discrimination of many kinds. Politicians and preachers alike cited Christianity and the Bible were cited to support generations of racial segregation in the U.S. But while the argument that religious beliefs should protect racial discrimination has lost its standing, the broader idea that faith merits exemptions from other anti-discrimination measures lives on.

In the 1983 landmark Supreme Court case of Bob Jones University v. United States, the federal government took the view that the Christian fundamentalist school was not entitled to its federal tax exemption if it maintained its policy against interracial dating. The case became a cause célèbre among the then-budding Christian Right, and was credited by New Right strategist Paul Weyrich and historian Randall Balmer, among others, as the catalyst that politicized conservative evangelicals.¹⁴ The case, which began during the Nixon administration, was used as a political cudgel against Democratic President Jimmy Carter, turning many evangelicals against one of their own.

Bob Jones University argued that to censure an institution over this issue was a violation of religious freedom under the First Amendment. But the Supreme Court ultimately decided against them, declaring: “Government has a fundamental, overriding interest in eradicating racial discrimination in education... [which] substantially outweighs whatever burden denial of tax benefits places on [the University’s] exercise of their re-

The notion that these private businesses’ denial of service amounts to a religious freedom battleground is based on almost exclusively on the plaintiffs’ particular notion of Christianity.
religious beliefs.” The Court made clear, however, that its verdict dealt “only with religious schools—not with churches or other purely religious institutions.”

EXPANDING THE DEFINITION OF MINISTRY

A more recent Supreme Court case involved the expansion of the definition of religious ministry in ways that serve to broaden the set of institutions that qualify for exemptions from federal laws and regulations. Whereas these exemptions historically applied to a few highly specific cases, now a great range of religiously owned institutions is able to invoke them. There is a distinct trend in this regard, away from individual rights of conscience, and toward the rights of religious institutions.

This was on vivid display in 2015, when the Archbishop Salvatore Cordileone of San Francisco (following Catholic prelates in Cincinnati, Cleveland, Honolulu, and Oakland), declared that teachers—and perhaps all employees—in the Archdiocese’s schools would be required to conform to Catholic teaching in their personal lives. Cordileone wanted unionized employees to accept contract and faculty handbook language that condemned homosexuality, same-sex marriage, abortion, contraception, and artificial insemination. He also said that Catholic school employees must not publicly contradict Church teachings.

Union leaders were concerned that the Archbishop was attempting to reclassify not only teachers but all employees of the school as part of the church’s ministry. Cordileone was among at least 50 prelates who signed the Manhattan Declaration, the historic 2009 manifesto which formally aligned Catholic and evangelical leaders on a shared 21st Century culture war agenda.

The underlying legal justification for Catholic bishops to impose religious doctrine on school employees was the unanimous 2012 decision of the Supreme Court in Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission. In that case, a mainline Lutheran school had fired a kindergarten teacher over issues arising because of a disability, leading to a discrimination claim by the dismissed teacher. The church argued that the government had no right to intervene in its employment decisions because the teacher served in a ministry capacity. The Court agreed, and in so doing, expanded the definition of which employees are covered by the term—and who would then be exempt from normal employment protections.

Religious institutions themselves have long enjoyed a “ministerial exemption” from certain labor laws. Hosanna-Tabor expanded that and opened the door to further expansion. Catholic and evangelical colleges and universities may be among the first to walk through that door, as they are increasingly claiming creeping violations of institutional religious liberty—from concerns about the Obama administration’s “contraception mandate” (which may apply to church-related colleges and universities, the Hobby Lobby decision notwithstanding) to a 2014 ruling by the National Labor Relations Board that permits unionization of employees at religious and other private universities.

The reasons for religious freedom exemptions in churches’ employment practices are understandable. As Chief Justice John Roberts wrote in his opinion, “Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision...By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission through its appointments.”

Photo via Flickr and courtesy of American Life League.
ees as ministers is now a fair question. And it’s one that’s certain to be tested as conservative religious movement leaders seek to carve out zones of exemption from the advance of secular law. Christian Right leaders certainly see many opportunities in broadening the legal definition of ministry.

Dr. C. Peter Wagner, founder of the dominionist New Apostolic Reformation and a longtime professor of church growth at Fuller Theological Seminary, observed that “not only churches, but ministries supported by the church are included in [the Hosanna-Tabor] ruling. Schools are specifically mentioned, but how about a number of other kinds of ministries attached to our churches and apostolic networks? I would think they would fall under the same umbrella.”

Mormon Elder Dallin H. Oaks, a member of the Quorum of the Twelve Apostles of the church, said he found “comfort” in Hosanna-Tabor, against the “threat” of governmental actions that he believes would fall under the same umbrella.

Cardinal Timothy Dolan of New York came to a similar conclusion when he discussed the core issue in the landmark case of Burwell v. Hobby Lobby Stores, Inc. [discussed below] a few years later. The so-called contraception mandate, he declared, was primarily about “the raw presumption of a bureau of the federal government to define a church’s minister, ministry, message and meaning.”

This year, Jeff Mateer of the Liberty Institute, a Texas-based legal advocacy group, began preparing manuals for what the Institute suggested is an inevitable wave of anti-religious legal attacks against everything from churches to frat houses to for-profit corporations. They called for organizations to “religify” their organizational documents, from bylaws to employee job descriptions, to specifically reflect doctrine so that they may fall under the definition of ministry. This, they suggested, would be part of an inoculation against civil lawsuits and government regulation.

We have become familiar with how, when the goals of the Christian Right conflict with the rights of others, the conflict is framed as an attack on Christian or, more broadly, religion. Seen from their perspective, there’s logic to this argument. Conservative Christians have long understood that the origins and trajectory of religious freedom in America run against the hegemony of conservative Christian churches that enjoy a close relationship with the state and its leaders.

The Liberty Institute called for organizations to “religify” their organizational documents in order to fall under the definition of a ministry.

TURNING PHRASES

Many of the contemporary legal struggles rest on the definition of particular terms and phrases originating in federal legislation or Supreme Court decisions. In addition to ministry, one of the key terms on which religious exemptions to state and federal laws now turn is the phrase “sincerely held religious belief.” The current use of the phrase is rooted in the federal 1993 Religious Freedom Restoration Act (RFRA), which enjoyed overwhelming support in Congress and was signed into law by President Bill Clinton. RFRA was an answer to the Supreme Court’s 1990 decision in Employment Division v. Smith, which had upheld the right of the State of Oregon to deny unemployment benefits to Native American employees fired for using peyote in a religious ritual. Here Congress sought to restore the rights of Native Americans for whom peyote was part of their religious practice. More broadly, Congress wanted to reaffirm that a person’s sincerely held religious belief may not be substantially burdened unless the government can justify the law with a compelling state interest, show that the law is narrowly crafted to protect that interest via the “least restrictive means” possible.

A later Supreme Court decision limited the scope of the law to the federal government, leading some states to pass state-level versions of RFRA. Most of these laws were simply intended to replace the loss of the federal RFRA, but in the past few years, modified state RFRAs have been introduced with the obvious intention of justifying discrimination against same-sex couples by businesses and even government agencies.

Concepts that meant one thing in the federal RFRA have come to take on new meanings when applied at the state level in the wake of the 2014 Hobby Lobby case (and the related Conestoga Wood v. Burwell). That Supreme Court decision extended, for the first time, religious rights to a “closely held” private corporation, stating that the company—not a church, or school, but a chain of craft stores—did not have to offer certain contraceptives via the company health plan because the owners of the company believed these contraceptives to be abortifacients (a position contradicted by every major medical organization in the country). The Court held that Hobby Lobby was exempt from the Affordable Care Act’s requirement that insurance packages cover these contraceptive options because, as Justice Samuel Alito put it in the majority opinion, requiring the corporation to provide this contraceptive coverage imposed a “substantial burden” on companies’ sincerely held religious beliefs.

The four dissenting justices said the majority opinion expanded the federal RFRA to protect companies in ways unintended by Congress. Justice Ruth Bader Ginsburg wrote, “The court’s expansive notion of corporate personhood invites for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faiths.” She said, for example, that a company could decide that covering vaccinations or paying the minimum wage violates their religious beliefs. She also noted a past religious freedom challenge from a restaurant chain that didn’t want to serve African-Americans, and that of a photography studio that didn’t want to take pictures at a lesbian couple’s commitment ceremony.

Ginsberg’s concerns are being realized in the efforts to insert “Hobby Lobby-ized” provisions into state RFRAs. Conservative supporters of these bills have claimed that the state and federal RFRAs are all the same. This is not only false, but transparently so. The shorthand in the Indiana legislature for the state RFRA
was “the Hobby Lobby bill.” The fact is that the federal RFRA—and until recently, most state RFRA—applies only to government actions. The Hobby Lobby—ized state RFRA added language—at the behest of Alliance Defending Freedom, the Becket Fund, the Mormon Church, and allies at the United States Conference of Catholic Bishops—that sought to extend exemptions to third parties, such as corporations and individuals, on the grounds that providing services to LGBTQ people violates their consciences. In some cases the language may be broad enough to claim religious exemptions from standing civil rights laws in the manner that concerned Justice Ginsberg.

Indiana conservatives were open about their goals: they intended the state’s new Religious Freedom Restoration Act to provide a faith-based defense against discrimination claims, should a business decline to provide services on account of their beliefs. But, faced with widespread public outcry, the state’s governor and legislature were compelled to amend the law to explicitly state that their RFRA did not provide a license to discriminate against LGBTQ people. This in turn led to loud objections from Christian Right leaders, who correctly understood that the original bill would do just that. Tony Perkins of the Family Research Council said the clarification made matters worse by forcing “religious businesses and even nonprofits deemed ‘not religious enough’ to participate in wedding ceremonies contrary to their owners’ beliefs. If the government punishes people for living their faith, there are no limits to what government can control.”

**A NEW ERA FOR RELIGIOUS EXEMPTIONS**

As this article was going to press, the Supreme Court recognized marriage equality as a “fundamental right” in the case of Obergefell v. Hodges. The court was silent on the matter of exemptions, but Justice Anthony Kennedy, writing for the 5-4 majority, emphasized that religious institutions and individuals “may continue to advocate” in opposition.

“The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths,” he wrote, “and to their own deep aspirations to continue the family structure they have long revered.” The question of what constitutes “proper protection” may well lead to a continuation of the Christian Right’s approach to advocacy for many kinds of religious exemptions, albeit on a vastly altered playing field.

Perkins shed light on this strategy in a column in The Patriot Post:

The clash between religious liberty and same-sex “marriage” continues to explode in businesses across America, where shop owners, B&Bs, and other vendors try to come to grips with the government’s twisted definition of “tolerance.” Faced with losing their jobs, businesses, and life savings, most Christians want to know: isn’t there anything we can do?

There is. In at least 10 states, conservatives are fighting back with a string of Religious Freedom Restoration Acts (RFRA), [which] give men and women of all faiths a powerful tool to stop the government from walking all over their beliefs on issues like marriage and sexuality.

There will always be tensions in reconciling religious beliefs with the rights of others, but there will also always be people who will exploit the normal strains of a religiously plural society for their own political ends. The issues of the so-called culture wars have been recast as a battle over the definition of religious liberty.

There is a deep, dominant agenda in play here, with the battle over religious liberty at its cutting edge, and it is not limited to matters before the courts.

We live in theocratic times. Not in the sense that the United States has become a theocracy, but in that the uneasy theocratic coalition we refer to as the Christian Right remains one of the most powerful and dynamic religious and political movements in American history. Like any other large coalition, the interests of the main players are sometimes in conflict. But they remain bound together by a shared opposition to religious pluralism, the rights of individual conscience, and the separation of church and state.

Historian and Christian Right theorist Gary North argues that the ratification of the Constitution signified a clean “judicial break from Christian America.” He was referring to the proscription of “religious tests for public office” in Article VI, which he correctly observed erected a “legal barrier to Christian theocracy” that led “directly to the rise of religious pluralism.” Article VI is, of course, not the only codified barrier to Christian theocracy. But the theocratic activists of modern America are patient revolutionaries. For the rest of us, learning how to recognize, anticipate, and respond to the Christian Right’s theocratic agenda remains one of the central tasks of our time.

23. IRFA became a project of the Center for Constitutional Justice in September 2014. The CFJ is a self-described “Christian-democratic” and “principled pluralist” organization.