



## COMMENTARY Religious Liberty

### Proxy Wars over Religious Liberty

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### KEY TAKEAWAYS

Religious liberty is one human value at stake, but not the only or even the primary one.

This unwillingness to engage the substantive moral debates that actually divide us in the culture war leaves us fighting proxy wars over religious liberty.

To succeed in embracing religious liberty is not to succeed in transforming society. More is required.

The past decade has witnessed some intense battles over religious liberty. But when you consider the character of those battles, it's often hard to avoid the conclusion that both sides have treated religious liberty as the subject under debate in order to avoid the real points of dispute between them. The resulting political arguments have given us all the impression that religious liberty is more controversial with the American public than it really is, and therefore that the progressive enemies of religious liberty have the political winds at their back. To recover a clearer sense of the matter, we need to be more careful in what we expect of religious liberty and how we understand it.

Since the early Obama years at least, progressives have sought, with considerable success, to advance the objectives of the sexual revolution through aggressive government mandates. It's a familiar story by now: A movement that claims merely to want personal freedom ("live and let live") first repeals laws that purportedly limited their freedom, then uses government to

subsidize their preferred choices, then to mandate that other people subsidize them, and finally to punish anyone who disagrees with them. The right to abortion becomes a right to government-funded abortion, and then a right to have Hobby Lobby pay for abortion, and now a right to punish pharmacists for not providing abortifacients and doctors and nurses for refusing to participate in or refer for abortions. The "freedom to marry" becomes the duty to bake the cake.

Americans who are harmed by these increasingly aggressive actions, and those who seek to protect the people who are harmed, respond with appeals to religious liberty. But religious liberty can't be the only response to such coercive efforts. Religious liberty is one human value at stake, but not the only or even the primary one. Other human goods and aspects of human flourishing, and ultimately human nature itself, are more central to these debates. After all, religious liberty is about the right to stand by the truth about the more basic values at stake. But very few people want to engage on those terms, taking sides on the substantive issues in these debates. They prefer the safer, more respectable, less icky ground of religious liberty.

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This is true even of the Trump administration. Ten years after the Obama administration issued the Health and Human Services contraception mandate, all the Trump administration has even attempted to do is broaden the religious and conscience-based exemptions from the mandate.

It's hard to blame the administration, however, as there haven't really been many voices calling for anything else. Over the past decade, there has been little willingness to challenge the very existence of the mandate—on moral grounds, health-care grounds, or government-authority grounds. Few people have argued that contraception is immoral, and that therefore a government mandate requiring coverage of it is unjust—for everyone, not just religious or conscientious objectors. Few people argued that even if contraception is moral, it isn't health care (it doesn't cure a disease or make sick people well), and certainly not an essential aspect of preventive care—and thus inappropriate to include in a preventive-services health-care mandate. And while plenty of people were willing to criticize Obamacare as a whole, few were willing to say that even if you think contraception to be moral and to be health care,

there's no reason whatsoever for the federal government to be mandating its coverage in all employers' plans.

Various people with various underlying moral and political beliefs could have been making any or all of these various criticisms. Instead we heard appeals to religious liberty. Even the Catholic bishops didn't lead with—or teach the truth of—an underlying moral argument.

This unwillingness to engage the substantive moral debates that actually divide us in the culture war leaves us fighting proxy wars over religious liberty. These wars confuse the issue, and put at risk our capacity to defend the rightful place and purpose of religious liberty.

## THE LAW AND THE TRUTH

Given that so many of the battles in the culture war are fought in the courts, it's understandable that religious liberty tends to be the parlance of our arguments about them.

None of the arguments above regarding core moral questions would have been effective in the courts, especially given the composition of the Supreme Court at the time that Hobby Lobby and Little Sisters were litigated. Truth be told, even a Court full of Antonin Scalia wouldn't have changed things, as there is no free-standing "moral truth" clause of the Constitution. So the lawyers made no mistake in arguing in terms of religious liberty and litigating under the Religious Freedom Restoration Act.

In a legal culture in which a contraception mandate exists, where the Court has declared a constitutional right to contraception and to abortion, legal arguments that stake their force on the truth of underlying moral arguments have little chance of success. If you are defending a client in a legal environment where such mandates exist, the best you can hope for may be a religious-liberty exemption. If you could convince a majority of people about the immorality of the underlying government act of overreach, you probably wouldn't need to be litigating to begin with.

And so the various criticisms offered by some conservatives of the lawyers—and even of the judges—involved in these cases missed the mark. This is particularly true of people who criticized the use of language such as "sincere religious belief," or who faulted judges who didn't adjudicate other aspects of these larger cultural questions but stuck to the actual law. If the law protects sincere religious belief, it's not necessary, and may in fact prove counterproductive, to argue in court that the religious beliefs in question are also true. You can't, or at least shouldn't, attack winning legal strategies for not being more philosophically

pure. While the lawyers made winning legal arguments, other voices should have made the philosophical, theological, and political arguments. And criticizing the lawyers when the bishops seem afraid to speak on these issues is absurd. So, too, is criticizing judges for refusing to be philosopher kings.

The lawyers and judges who litigated and decided *Masterpiece Cakeshop*, then, made no mistake in framing the matter as an issue of free speech and religious liberty rather than an issue about the nature of marriage. So long as Anthony Kennedy was still on the Court, there was absolutely no chance of the *Windsor* and *Obergefell* decisions being overturned. Instead, the lawyers argued that cake-shop owner Jack Phillips's beliefs about marriage weren't invidious bigotry and that he hadn't discriminated. It wasn't the role of the lawyers or judges to be adjudicating the truth of Phillips's beliefs in this forum. But that shouldn't have prevented various religious leaders—Catholics, evangelicals, and others—from defending the truth about marriage that Phillips sought the freedom to live by. That there was silence from these other voices is not the fault of our legal doctrines on religious liberty.

Of course it's not just religious leaders who failed to speak out. Most elected officials were and are afraid, too—as are most public intellectuals, who need to remain employed and respectable. With a few honorable exceptions, even tenured professors at elite schools claim they can't speak out on the substantive questions that underlie these public debates.

And so today it's very hard to find prominent public figures who are willing to not merely state that they believe marriage is the union of husband and wife, but to publicly defend such a belief as true. When Senator Cory Booker interrogates various judicial nominees about their beliefs on sexuality, the defense is religious liberty—this time not in terms of RFRA but in terms of the "no religious tests" for office clause. Very few are the people who directly defend the substantive commitments of these nominees.

Remarkably, even the debate over "gender identity" has been framed as one about religious liberty. But while religious liberty may be one matter at stake in these debates, it's far from the only concern. How about the damage being done to young people's bodies and minds? Or the privacy and safety and equality of girls, when boys who identify as girls can share female-only spaces—like showers and locker rooms and bathrooms—and when boys who identify as girls dominate female athletic competitions? How about the ability of doctors to practice good and honest medicine? Or the rights of parents to find the best care for their kids? Secular people have all these same concerns—they aren't about religious liberty.

## TRUTH AND COMPROMISE

Sadly, some religious organizations have decided to focus on devising and hatching compromises on policy—not alongside but instead of publicly defending the truth about the human person. A practical compromise may be necessary as a strategic or tactical matter, or it may not be. But a practical compromise cannot mean giving up on the underlying truth over which the compromising sides are divided.

So for instance, presumably motivated above all by a desire to protect their institutions against coercive policies, these groups have supported adding the phrase "sexual orientation and gender identity" (SOGI) to federal civil-rights law in return for certain religious-liberty protections. They call this approach "Fairness for All." But bad public policy doesn't become good by inserting exemptions for oneself that do nothing for the privacy, safety, equality, and liberty of others, including members of one's own faith in their familial and professional lives. And passing laws that in essence enshrine your beliefs about the truth as bigotry in exchange for certain religious-liberty protections for specifically religious institutions undermines the long-term purported goal of teaching the truth. To express concerns about such laws only in terms of religious liberty is to sow misunderstanding about the nature of your own objections and priorities.

Indeed, most of the opposition to SOGI laws has been framed and understood as a set of concerns about religious liberty. Religious Freedom, LGBT Rights, and the Prospects for Common Ground, a roughly 500-page edited collection from Cambridge University Press, just takes as axiomatic that the only people who could be worried about any of these matters are religious people, and that their only valid worry is about religious freedom. My own chapter in the book raises substantive concerns both about human nature and about a proper understanding of civil rights.

When it comes to SOGI, the Trump administration has been only slightly better than its predecessor. To its credit, the Trump administration rescinded the Obama-era "Dear Colleague" letter from the departments of education and justice that redefined the word "sex" in Title IX to include "gender identity"—and then instructed all schools to redo their policies regarding bathrooms, locker rooms, housing, athletics, and the like. This was an easy lift, though, because the administration could argue on procedural grounds that the departments had overstepped their authority in redefining a key word in a duly enacted statute.

President Trump himself has been unwilling to rescind President Obama's executive order elevating SOGI to a protected class for the employment of federal contractors. And the Trump HHS has not (as of this writing) rescinded an Obama-era regulation that redefined the word "sex" in Obamacare's civil-rights protections to include "gender identity." While that regulation was struck down by a federal judge before it ever went into effect, three years later the Trump administration has not formally rescinded it. When it was first leaked in October 2018 that the administration was about to do so, the New York Times ran a story titled "'Transgender' Could Be Defined Out of Existence Under Trump Administration." In May 2019, HHS proposed a reform of that regulation. But as of March 2020, eight months before Election Day, it has not been finalized.

Even when President Trump himself acted to protect religious liberty with a major executive order on the topic, he refused to address directly any of the conflicts created by same-sex marriage and transgender identities. Whereas earlier, leaked drafts of the order contained such direct protections, the version that was promulgated did not include them. So not only do we have trouble publicly defending substantive arguments on these substantive issues, we even have trouble advancing explicit religious-liberty protections regarding them. But that, again, is because we're asking too much from religious liberty in expecting it to be our only response.

The pro-life movement, thankfully, did not make this mistake. It did not ask simply to be left alone in peace with a sincere religious belief about the sanctity of life. It has demanded that *Roe v. Wade* be overturned and that unborn children be protected by law. The pro-life movement was able to walk and chew gum at the same time—to protect people's right not to be complicit in the evil of abortion while simultaneously working to reshape both law and culture to respect and protect unborn life.

Indeed, the pro-life movement was more successful at protecting religious liberty precisely because it also mounted a public, substantive defense of the sanctity of human life. A political community is less likely to protect the liberty of people it finds morally repulsive. So consider how religious liberty for racists compares to religious liberty for pro-lifers. Now apply that to SOGI issues. If orthodox beliefs about human sexuality come to be seen as akin to racist bigotry—irrational animus attacking the dignity of others—then it's not hard to predict where appeals to religious liberty on these issues will end up. But until the Obamacare HHS mandate, very few were the mainstream liberals willing to say that pro-life Americans should have to pay for abortion. Indeed, it was only at the 2016 Democratic National Convention that

the Democrats changed their party platform to oppose the Hyde Amendment, which prohibits direct federal funding of abortion.

Efforts to resist the various acts of administrative aggression on behalf of progressive moral priorities are more likely to succeed when there are more voices with more messages, rather than a least-common-denominator approach by which everyone resorts to the same religious-liberty message. Let legislators cut deals to block the worst and pass the best legislation. Let lawyers make the strategically prudent arguments to win in a court of law. But then have a variety of people making a variety of arguments to win in the court of public opinion—both for the short term and the long term.

Religious Americans and their leaders and institutions should be playing a long game. Their goal should be to evangelize, to teach the truth about the human person and human sexuality. This would then allow other voices—lawyers, politicians, media talking heads—to make the more limited arguments, about religious liberty in particular: "As an atheist, I disagree with Archbishop Chaput about gay marriage, but I think he has a right...." But staking everything on religious liberty alone dooms these arguments to fail.

## THE FIRST OF MANY FREEDOMS

It is important to recognize the proper limits of religious-liberty arguments not because those arguments don't run deep but precisely because they do. As Robert Louis Wilken masterfully documents in his recent book, *Liberty in the Things of God: The Christian Origins of Religious Freedom*, religious liberty isn't merely a concession, or a *modus vivendi*, or a tragic necessity given the fact of pluralism. It's an authentic, natural, human right. It protects the space for people to freely respond to God as they understand God. It is thus essential, and we need to defend it.

But part of defending it means distinguishing its boundaries and understanding it as part of a larger moral vision that is also in need of defense in its own terms. Today's debates about religious liberty are frequently debates about human sexuality, just reframed so the "losers" don't have to defend the truth of their convictions. This is why the ACLU will still defend religious liberty in certain contexts—Catholic churches objecting to the border wall, Muslim inmates growing beards—but will sue to force Catholic institutions to pay for abortions, place children for adoption with same-sex parents, and perform sex-reassignment procedures.

A 21st-century case for religious liberty has to recognize the unique circumstances of religious believers and moral traditionalists in our time. Those circumstances have created a new context for religious-liberty arguments, in two distinct ways in particular.

First, as one reads through Wilken's book on the Christian origins of religious liberty, it becomes clear that it is missing part of the syllogism in favor of religious liberty in our time. It's there in the very first sentence: "Religious freedom rests on a simple truth: religious faith is an inward disposition of the mind and heart and for that reason cannot be coerced by external force." Over and over, Wilken cites various Christian thinkers pointing out that for religion to be authentic, it must be voluntary. A coerced relationship with God is worthless. But this isn't a standalone argument for religious liberty. There's a missing premise: that religion is good.

We might think of the case for religious liberty as consisting of two premises and a conclusion. The first premise is that it is good for man to practice religion. The second is that authentic religion must be voluntary. And the conclusion is that, because religion is good and (to be authentic) must be voluntary, man should have a certain sphere of liberty to pursue his relationship with God.

Traditionally, it is the second of the premises that has been under assault and has required the protection of religious liberty. But part of our challenge in protecting religious liberty in 21st-century America is that, today, it is the first premise that more often is under assault. You can think authentic religion must be voluntary while also thinking authentic religion is bad for us. You can think that religious faith shouldn't be coerced because you think religious faith shouldn't be encouraged. Indeed, you can think that religious faith shouldn't be coerced, but also think that religious practice shouldn't be accommodated. Between religious coercion and religious accommodation is a wide gulf: "We're not coercing Jack Phillips's religious beliefs; he's free to believe whatever he wants. We just refuse to accommodate his bigotry." And so part of the challenge is to defend religion, and the full breadth of religious practice—not simply belief and worship.

Something similar is true for conscience. If conscience is understood as just being true to oneself, then it's unclear why anyone else should care. Why should I worry if Jack Phillips is true to himself or not? But where conscience is understood as being true to the truth, then it is understandable why other people should accommodate the claims of conscience. As St. John Henry Newman explained, "Conscience has rights because it has duties." Only this



understanding of conscience can ground the rights of conscience. And so as God, religion, and moral truth have all faded from the discourse of our culture-shaping elite, it's not surprising that religious liberty and the rights of conscience are having a tough go of it.

Second, in addition to serious changes in our society's attitude toward religion, there have been serious changes in our society's attitude toward government. A presumption of liberty has been replaced with a presumption of regulation. Citizens used to think that liberty was primary and that government had to justify its coercive regulation. Now people assume that government regulations are the neutral starting point and citizens must justify their liberty.

If Thomas Jefferson and James Madison came back to America today and heard about the plight of the Little Sisters of the Poor, their first response would not be to cite the First Amendment; it would be to ask what the Department of Health and Human Services is and what authorizes it to issue a preventive-care mandate. The best protection of religious liberty may very well be limited government. Regardless of whether one thinks liberalism has failed, whatever new forms of common-good politics are developed need to be attentive to the real—though limited—good of liberty.

All of this suggests that, in our time in particular, the case for religious liberty must be part of a larger public argument for and from the underlying truths that religious people seek to defend and advance.

## THE PUBLIC SQUARE

Answering today's attacks against religious liberty requires more than a defense of religious liberty. It requires a defense of the substance of what that liberty protects. And it also requires some prudence about American culture and politics.

Religious liberty has been defended almost exclusively by lawyers, pastors, academics, and other people at nonprofit organizations in our time. As Maggie Gallagher has often noted, social conservatives have largely ignored actual politics. We talk about politics, and we litigate to keep the courts from deciding issues against us, but we rarely engage in the actual electoral and political process.

Only one side has flexed political muscle. As Mike Pence will tell you, big business will make it painful for an elected official to do the right thing on these issues. Social conservatives need 501(c)(4)s, PACs and super PACs, 527s, and other organizations to engage in direct political action, supporting bills and politicians that are good for religious liberty and

human sexuality—and opposing those that do them harm. What the Susan B. Anthony List has done for the pro-life cause should be done for religious liberty and human sexuality. There's a Club for Growth, but no Club for Virtue. The NRA can whip members into voting to protect gun rights, but when it comes to human sexuality and religious liberty, we merely ask members to do the right thing because it's the right thing. We don't make it painful to do the wrong thing because we don't do politics—we merely talk.

And conservatives must avoid following the left's lead in treating religious liberty as a partisan or tribal issue. In abandoning the religious liberty of conservative believers, the left has betrayed a fundamental human right. Some on the right seem inclined to commit their own version of this mistake by denying the religious-liberty rights of Muslims, such as when towns refuse to let Muslims build mosques. But the same legal standard must apply to all faiths because the same human right is at stake.

Provided they don't harm the common good, violate human rights, or otherwise offend justice, Muslims should be free to be authentically Muslim, just as Jews should be free to be authentically Jewish and Christians should be free to be authentically Christian. All of America is better off when these freedoms are protected, as they allow room for all of us to live according to our consciences—and to appeal to other people's consciences in seeking to persuade them of the truth.

To embrace religious liberty in this way is not to embrace relativism. On the contrary, it is to embrace a commitment to the truth. As we engage in disagreements about religious truth, we need to leave legal room for that disagreement to play out in worthy and healthy ways—among people who are free to persuade and convert.

To succeed in embracing religious liberty is not to succeed in transforming society. More is required. Protecting religious liberty for all, however praiseworthy in itself, is not a prudent or effective way on its own to fight a proxy war over human sexuality. Religious liberty protects a crucial space in our society. But religious communities must fill that space, and work to draw their neighbors into it. Religious liberty is a prerequisite for a moral life, but it is not the substance of it. A proxy war is not a substitute for the hard work of moral argument and moral formation.

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