

The Future of Religious Liberty

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Religious liberty risks being a victim of its own success in the United States. In a society that has traditionally been highly protective of religious liberty, claims for religious accommodation and religious exemptions have been weaponized. Federal statutes—the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act—as well as religious freedom laws and state constitutional protections in 32 states, have given religious claims of exemption a preferred status. Under these protective provisions, government can deny a conscience exemption from a regulation that imposes a substantial burden on religious exercise only if it can show a compelling interest and can demonstrate that there is no less religiously restrictive way to achieve its goal.

In a country in which 21% of the population is religiously unaffiliated—and many others have only a weak identification with a religious tradition-- it is fair to ask whether this preference for religious exemptions can survive politically as the scope and variety of religious exemption claims continue to expand.

Generally applicable regulatory laws are directed at protecting the health, safety and welfare of individuals who are unable otherwise to shield themselves from unfair treatment. A religious exemption from regulation removes the protection that a third party would otherwise enjoy. A stark example is the impact on clergy and various other employees of religious institutions of the Supreme Court’s “ministerial exception” doctrine. Because of it, pastors and others who propagate the faith—individuals who are often already underpaid in relation to the market value of their skills—lack basic protections against discrimination based on race, gender and national origin even when the discrimination has no grounding in religious doctrines of the employer. Concerned for church autonomy, courts give short shrift to employee rights.

The special power of religious liberty claims for exemptions from regulatory laws granted by RFRA and similar statutes is not constitutionally required. All that is constitutionally mandated is that a law not be aimed at religious practice or at a particular religious faith. The added protection against the impact of neutral, generally applicable laws rests on statutes that are subject to reconsideration by political majorities. In deciding that in the 1990 *Smith* case, Justice Scalia sounded a warning:

Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," ... and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind....

Broad political majorities disagreed with that assessment in enacting federal and state religious freedom laws, but the recent proliferation of religious liberty claims threatens that consensus. This threat comes because exemption claims have become inextricably entwined with both political partisanship and the "culture wars." Claims of conscience are particularly fragile when the religious claim is an objection to becoming an attenuated aider and abettor to some third party's act that violates the claimant's religious beliefs.

The challenge for Christian higher education is how to take account of this reality. Original proponents of religious freedom statutes envisioned claims by members of discrete and insular minority religious groups—Amish, Seventh Day Adventists, and similar small well-recognized sects—whose nonconformity with the cultural norms of a largely Protestant Christian society impacted few outsiders. However, in recent years, the highest profile religious battles have pitted conservative Christians against an increasingly secular society. Three seemingly unrelated developments have exacerbated the social tensions created by these religious liberty claims:

(1) Small businesses as well as individuals are allowed to become religious objectors, assuring that religious claims for exemptions will impact those outside the faith community whose beliefs are being accommodated;

(2) Individuals may assert their own idiosyncratic interpretations of scripture. If sincerely held, those beliefs must be given the same deference as well reasoned theological positions of organized religions; and

(3) Advocacy groups have increasingly become eager to "push the envelope" on all sides of religious liberty battles, sometimes painting their causes in apocalyptic terms and relishing the fundraising potential of high profile contests.

These trends have made it difficult to cabin the impact of conscience exemptions. They have also made it difficult to separate accommodation requests motivated by true mandates of religious faith or doctrine from those that instead are merely attempts to make a political or

social statement. All of this invites courts and legislatures to weaken the protection for religious liberty.

The confusion of political positions with religious ones will be exacerbated if the pledge that Donald Trump made during the campaign to repeal the Johnson Amendment is carried out. That tax code amendment prohibits non-profits, including churches, from actively participating in political campaigns. If church pulpits begin to be used to endorse partisan political candidates, it will become much more difficult for churches to successfully argue that positions which have had a high political profile are truly issues of religious doctrine.

Judges generally are poor theologians. If Christian higher education wishes to play a role in preserving religious liberty, perhaps its most urgent task is to develop and articulate an authentic theological position on how to approach the question of substantial burden. Whenever a religious accommodation is sought under RFRA or a similar state statute, a court must determine whether the law or regulation at issue poses a “substantial burden” on the “religious exercise” of the individual seeking the accommodation. Christian theologians also need also to clarify which governmental mandates impact “religious” exercise. It is their task to help the faithful separate truly religious beliefs from those beliefs that are merely cultural or political.

These tasks are neither easy nor simple. A theologian who posits that certain governmental infringements on religious belief are insubstantial runs the risk of being charged with “moral relativism.” It is easier to take absolutist positions in the name of doctrinal purity. The theologian who argues that certain beliefs are cultural and not religious is certain to be countered by a Biblical verse that reflects similar cultural assumptions of Biblical times. Again, it is tempting to merely accede to a superficial understanding of a Scriptural text rather than examine its theological and historical context.

Charles Dickens began *A Tale of Two Cities* by writing” “It was the best of times. It was the worst of times.” The same might be said today for religious liberty. America is unique in its encouragement of religious pluralism, and in the success religion has demonstrated in capturing the loyalty of adherents. However, pluralism depends on a live-and-let-live ethic that is at odds with the resurgence of fundamentalism across religious traditions that we have witnessed around the world in recent years. The challenge for Christian higher education—and indeed for higher education of all major religious traditions—is to find ways to remain authentic while respecting the broader secular world. Only then will political majorities continue support for a robust protection for religious liberty.

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