



Stop Privileging Religious Liberty Over All Other Interests

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Religious liberty is a core constitutional value. Unfortunately, it has been too often wielded as a sword to privilege the religious observer's interests over all others. No constitutional right is absolute, and religious liberty is no exception. I therefore propose, especially in the middle of a pandemic, the elimination of religious exemptions for vaccines. I also recommend that state and federal Religious Freedom Restoration Acts (RFRA) be amended to make clear that they do not create a religious right to discriminate. Finally, I urge that governments cease their promotion of Christian prayers and symbols. Government-endorsed Christianity strengthens Christian nationalism, a divisive movement that espouses religious hierarchies.

Eliminate Religious Exemptions for Vaccines

The novel coronavirus has taken an enormous toll on the United States. According to the Johns Hopkins Coronavirus Resource Center, over seven million Americans have been sickened with COVID-19, with more than 200,000 dying.¹ Few families have not felt its impact. Moreover, the burden has not fallen equally, with studies finding significant racial disparities. According to the CDC, compared to white non-Hispanic Americans, the number of cases has been 2.8 times higher among Native Americans, 2.8 times higher among Hispanic Americans, and 2.6 times higher among African Americans.²

Sometime in 2021, there will (hopefully) be a fully-vetted vaccine against COVID-19 that has been proven safe and effective for both adults and children. It will not be a

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¹ Johns Hopkins Coronavirus Resource Center (last visited Dec. 1, 2020).

² *COVID-19 Hospitalization and Death by Race/Ethnicity*, CTR. FOR DISEASE CONTROL AND PREVENTION (last updated Nov. 30, 2020).

panacea, but together with other scientifically-supported health measures, it will be critical to controlling the pandemic. But the vaccine will not succeed if people do not take it. Currently, all states require that children be vaccinated for certain preventable diseases, such as polio and measles. These laws will need to be expanded to add COVID-19 to the list and to cover adults as well as children.

The problem is that most states also allow exemptions from mandatory vaccination laws. Some exceptions are unavoidable: certain people cannot physically tolerate vaccines due to medical conditions. But most states also allow exemptions based on moral or religious objections.³ Only five states—California, Mississippi, West Virginia, New York and Maine—have no nonmedical exemptions. Several eliminated them after preventable outbreaks, where herd immunity failed because too many people had opted out.⁴ More states will need to eliminate religious exemptions for precisely the same reason: we cannot achieve herd immunity if too many people refuse COVID-19 vaccines.

Eliminating nonmedical exemptions from vaccine laws will have the added benefit of avoiding preventable outbreaks like the whooping cough and measles outbreaks that have occurred in recent years.

Amend Federal and State RFRAs to Preclude Challenges to Civil Rights Protections

Slowly but surely, the United States is moving towards greater LGBTQ equality. In 2015, the Supreme Court struck down as unconstitutional same-sex marriage bans in *Obergefell v. Hodges*. In 2020, in *Bostock v. Clayton County*, the Court held that “sex” in Title VII of the Civil Rights Act covers sexual orientation and gender identity. In one fell swoop, it has become illegal in the entire nation, not only select states or municipalities, to fire or demote someone just because they are gay or transgender. It is likely only a matter of time before courts find that federal laws that ban discrimination based on “sex” in areas such as education (Title IX⁵), housing (Fair Housing Act⁶), and health care are similarly inclusive.⁷

A loophole to full equality remains, however, in the form of religious liberty challenges to anti-discrimination laws. In particular, the federal Religious Freedom Restoration Act⁸ (applicable to federal laws) and its state counterparts⁹ (applicable to state laws) provide that religious objectors are entitled to an exemption from any law that imposes a substantial burden on their faith unless the law passes strict scrutiny. Strict scrutiny, which

³ *States with Religious and Philosophical Exemptions From School Immunization Requirements*, NAT’L CONF. OF ST. LEGS. (June 26, 2020).

⁴ Lena H. Sun, *California Vaccination Rate Hits New High After Tougher Immunization Law*, WASH. POST (Apr. 13, 2017); Aleksandra Sandstrom, *Amid Measles Outbreak, New York Closes Religious Exemption for Vaccinations – But Most States Retain It*, PEW RES. CTR. (June 28, 2019).

⁵ 20 U.S.C. § 1681 et seq.

⁶ HOUSING DISCRIMINATION UNDER THE FAIR HOUSING ACT, U.S. DEP’T OF HOUSING AND URB. AFF. (last visited Dec. 1, 2020).

⁷ *HHS Finalizes Rule on Section 1557 Protecting Civil Rights in Healthcare, Restoring the Rule of Law, and Relieving Americans of Billions in Excessive Costs*, U.S. DEP’T OF HEALTH AND HUMAN SERVS. (June 12, 2020).

⁸ Religious Freedom Restoration Act, 42 U.S.C. § 2000bb.

⁹ *State Religious Freedom Restoration Acts*, NAT’L CONF. OF ST. LEGS. (May 4, 2017).

requires that the law be the only way to achieve a compelling government interest, is a hard standard to satisfy.

Moreover, these laws are already expansive in scope, in large part due to the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.* (2014).¹⁰ To start, the Supreme Court held that in addition to religious individuals and nonprofits, even the multi-million dollar for-profit Hobby Lobby Stores, Inc. can bring a RFRA claim. In addition, the *Hobby Lobby* Court counseled lower courts to be deferential to religious objectors' claims of substantial burden. Consequently, if a religious baker or a religious social service organization claims that it substantially burdens their faith to hire an LGBTQ person or provide services to an LGBTQ family, the Supreme Court will probably agree.

Thus, the pivotal question is whether anti-discrimination laws will pass strict scrutiny. In *Masterpiece Cakeshop, LTD v. Colorado Civil Rights Commission* (2018),¹¹ when Justice Kennedy was still on the bench, the Supreme Court avoided answering that question. The Supreme Court today may not be so hesitant.

To prevent the misuse of RFRA to create a "religious right to discriminate," both federal and state versions should be amended to make clear that RFRA claims may not be asserted against civil rights protections. Indeed, such an amendment to the federal law was proposed in the Do No Harm Act.¹² Similar amendments ought to be enacted to close this potential loophole to anti-discrimination laws.

To Avoid Exacerbating Christian Nationalism, End Government-Sponsored Christianity

Christian nationalism is not a new phenomenon, but it is ascendant again.¹³ Christian nationalism maintains that the United States is, has always been, and should always remain, a Christian nation, and that the United States government must further Christian values. It envisions a perfect overlap between religious identity and national identity.

If America is a Christian nation, it follows that true Americans are Christian. The corollary is that non-Christians are not real Americans. In short, Christian nationalism necessarily implies a hierarchy based upon religion, with Christian insiders who truly belong and non-Christian outsiders who do not.

Polls reveals that this religion-based hierarchy is not a hypothetical but a real problem in the United States.¹⁴ One found that thirty-two percent—that is, almost a third—of Americans said that being a Christian is "very important" to being a true American, and another nineteen percent said it was "somewhat important."¹⁵

¹⁰ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

¹¹ *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

¹² Do No Harm Act, H.R. 1450, 116th Cong. (2019).

¹³ Paul Rosenberg, *Sociologist Andrew Whitehead: How Christian Nationalism Drives American Politics*, SALON (Feb. 29, 2020).

¹⁴ June 2015 Survey, PUB. RELIGION RES. INST. (2015).

¹⁵ Bruce Stokes, *What It Takes to Truly Be 'One of Us'*, PEW RES. CTR. (Feb. 1, 2017).

Moreover, this in-group/out-group dichotomy of who truly belongs to the polity has concrete consequences. In fact, a growing body of social-science literature has found that those with strong identification with Christian nationalism have more hostile attitudes towards out-groups, religious and otherwise, and more tolerance for policies that negatively impact them. That is, it does not simply lead to symbolic exclusion; it may lead to actual exclusion.

Government-sponsored Christianity both reflects and exacerbates Christian nationalism. Causation is not all one-way—it rarely is. The government, however, does play a significant role in shaping social and political norms. When the government supports Christian prayers and Christian symbols, it is also—whether explicitly or not, and intentionally or not— supporting Christian nationalism, which, at its core, is about a union of the state with Christianity.

Consequently, government at all levels should end the practice of promoting state Christianity. Governments should eliminate prayers before legislatures, as they tend to be overwhelming Christian.¹⁶ They should reverse laws mandating the availability of Bible study classes in public high schools.¹⁷ And governments should stop displaying Christian symbols like nativity scenes to celebrate holidays or Latin crosses to memorialize war dead.¹⁸ There is no shortage of American texts and symbols, such as the U.S. Constitution and the bald eagle. Unlike the symbols of a single-faith tradition, which do not speak to other religious observers, never mind those who live without religion, these symbols would represent American values shared by everyone.

¹⁶ *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565 (2014).

¹⁷ David Badash, *Bills Requiring Public Schools to Teach the Bible are Flooding State Legislatures – Some are Becoming Law*, NEW CIV. RTS. MOVEMENT (May 8, 2019).

¹⁸ *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019).