A SUTHERLAND INSTITUTE
POLICY PUBLICATION

Protecting Religious Freedom

in the 21st Century

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A NEW BIRTH OF FREEDOM

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Protecting Religious Freedom
in the 21st Century

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Introduction

A new, 21st-century approach to preserving religious freedom should fit the realities of a 21st-century American public that has grown more secular over time.

With increasing polarization around nearly every issue, perhaps it is not surprising that religious freedom, once a unifying aspiration for the nation, has become contested. Because the on-the-ground reality has changed – the support of the people required to preserve any substantive right and responsibility has evolved on religious freedom – the principle of prudence suggests that the strategic and tactical approach of those concerned about religious freedom should change, too.

Rather than opposing legislative compromise and gambling on the judiciary to forever protect religious expression, the new approach would preserve religious freedom as an aspiration by reducing opportunities for conflict between the freedom of people of faith and religious organizations to act on their beliefs, and the interests of those who feel limited by or discriminated against by the actions of those who profess faith.

In other words, a 21st-century approach to preserving a contested religious freedom would reduce the areas of life in which religious freedom is contested. This can be accomplished in two ways: (1) in instances of religious expression that generates little or no opposition, pursue a policy of substantive, new religious accommodation, and (2) in instances where religious expression is considered controversial, pursue legislative compromise that trades new religious accommodations for protections of the interests of secular society.

This publication begins with foundational information on the law of religious freedom, including the current laws that govern conflicts between government actions and religious exercise. It describes current controversies between religious liberty and the potential legal solutions to them. Finally, it lays out the alternative approach, including new legislation that adopts this concept.

Sources for the Law of Religious Freedom in the United States

If you were asked what the law of religious freedom was, where would you look to find out?

Constitution

A good answer would be the U.S. Constitution. The Constitution creates the framework for making the decisions that govern our national community and, critically, identifies limitations on the power of government. So the primary source for the law of religious freedom is the First Amendment[1] to the Constitution,[2] which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

We will focus on the second clause, which precludes any action by Congress that limits the ability of religious people or organizations to act on (or exercise) their beliefs. This is a strong, categorical statement and is the ideal to which we aspire as a nation, but it does not necessarily answer the many practical questions that arise.

Thankfully, the framers of the Constitution created other sources for legal rules that might address specific conflicts.

Legislation

The first source for legal rules that address religious freedom is Congress, which is the branch of government assigned by the Constitution to make law. Congress can, in its laws, protect religious freedom. For instance, when the military was unwilling to let servicemen wear yarmulkes (Jewish skullcaps), Congress enacted a law[3] that allowed religious apparel for soldiers in uniform. It can, on the other hand, create burdens on religious practice, such as when Congress prohibited a substance[4] used in religious ceremonies.

Administrative regulations

The second is the executive branch. While it does not have formal lawmaking powers, in practice it creates many legal rules. When Congress passes a broad statute, it often formally assigns authority to administrative agencies to fill in details in the law. These regulations can also create protections or burdens for religious exercise. For example, in 2019 the Supreme Court decided a case[5] with both types of regulations – the contraception mandate (commonly known because of the Hobby Lobby case),[6] which required some religious organizations to provide contraception to employees, and the broad conscience exception to the mandate. Both regulations were adopted at different times by the same agency – the Department of Health and Human Services.

Court decisions

The Constitution gives to the Supreme Court and lower federal courts the authority to determine how the other sources of law apply in specific disputes. They can invalidate laws[7] that infringe on religious freedom, like the state regulation that prevented parents in Montana from using a private school scholarship at religious schools. They can also interpret other laws[8] in ways that allow the government to limit religious practice of citizens,

like the Native American drug counselor who was fired for attending a religious ceremony where peyote was used.

An example

Burwell v. Hobby Lobby[9] (referenced above) illustrates how these various legal sources interact and can contribute to the legal climate for religious freedom.

In that case, Congress enacted a law requiring employers to offer certain health benefits to female employees at no cost, delegating the responsibility to determine which ones to the Department of Health and Human Services. The department created a regulation mandating that employers would have to offer contraceptives. Hobby Lobby sued because it objected, on religious grounds, to offering contraceptives that it believed would cause an abortion. The Supreme Court analyzed the Constitution (which the court said did not help the employer's claim) and another federal statute (Religious Freedom Restoration Act) to determine that the company did not have to offer the specific drugs. Ultimately, the court decided Hobby Lobby did not have to provide this health service to employees.

At the state level

Each state has the same sources for legal rules, and the free exercise clause has been interpreted[10] as applying to state governments as well. The presence of state constitutions, laws, regulations and court decisions creates additional layers of protection for or burden on religious exercise, which can create areas of conflict. For instance, the Supreme Court case about whether Montana parents could use a state-funded, private school scholarship at a religious school was a state regulation and state judicial decision that the court said conflicted with the U.S. Constitution.

As we begin our discussion of ways to protect religious freedom in law and in practice, it will be helpful to think of how these sources of law interact to protect or threaten the ability of groups and individuals to act on their own beliefs.


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What Is the Current Law of Religious Freedom?

In a 2020 decision, a bare majority of the Supreme Court declined to hear a challenge[11] to a Nevada law that shuttered churches during the pandemic but allowed casinos to open. How is it possible that opening casinos but not churches would be permitted? To begin, we can look at the current legal rules related to religious freedom.

The First Amendment, Supreme Court decisions, and some state and federal statutes provide important legal protections for religious freedom. However, the law does not address every possible circumstance. Conflicts arise when government agencies create new regulations, when current laws are vague, or when other situations come up that the courts have not yet addressed. These areas create uncertainties for people of faith and religious groups.

U.S. Constitution

Under the current interpretation of the Constitution's free exercise clause, the government is permitted to create burdens on religious exercise (requiring people to do things against their beliefs or prohibiting religious practices), as long as the requirement applies to nonreligious actions in the same way. So, in the currently controlling case, *Employment Division v. Smith*, the First Amendment was interpreted in 1990 to allow firing[12] a Native American Church member for using peyote in a religious ceremony because no one else could use the drug regardless of religious motives.

This rule has been subject to criticism since its adoption, and that criticism appears to be having an effect. In June 2021, in *Fulton v. City of Philadelphia*,[13] the Supreme Court declined an opportunity to abandon the Smith decision, but a majority of justices openly expressed their belief that the test should be replaced in an appropriate case.

A law that singles out religious practice for treatment worse than nonreligious practice, however, would be unconstitutional. That's why the Supreme Court recently struck down a Montana law[14] that allowed parents to use private school scholarships for any schools except religious schools, and an earlier decision struck down a city ordinance that allowed killing chickens unless it was part of a religious ritual.[15]

This is an important legal development but a mixed blessing. It ensures that religious freedom is not singled out for disfavor – but if this is all the courts look for, that could do a disservice to the concept of religious freedom. Religious practice is singled out for protection[16] in the Constitution not just because religious people might be treated differently from others, but because religious faith, and the ability to act on it, is so central to the identity, motivations and loyalties of citizens. That means infringements of that freedom uniquely impact them, even if the result of the infringement is that they are treated the same as others.

The Supreme Court has also interpreted the First Amendment to prevent courts from hearing disputes over whom a church chooses as a minister or other religious representative. The two major cases, one in 2012[17] and one in 2020,[18] involved teachers in private religious schools who claimed the schools had discriminated against them by firing them from teaching positions in which they taught the religious faith of the school to their employees. Notably, the majority rulings in these cases drew support from both legal conservatives and legal liberals.

Without this rule, the core work of religious organizations would always take place under a cloud. It is a way of policing the separation of church and state from the church's side of the fence; it keeps the government from getting involved in second-guessing religious decisions that make up the core of the faith, such as who will represent the church or what its official doctrines are.

State constitutions

The majority of state supreme courts[19] either interpret their state religious freedom protections in the same way the U.S. Supreme Court has interpreted the free exercise clause, or they have not yet had a case that has settled the issue. About a dozen states have adopted more protective approaches to religious freedom in the text or interpretations of their state constitutions.[20] In these states the approach of the courts would be similar to the Religious Freedom Restoration Act discussed below.

Legislation

As noted in the first part of this series,[21] Congress can enact laws that protect or threaten religious freedom. To prevent the latter possibility, Congress overwhelmingly approved the Religious Freedom Restoration Act (RFRA)[22] in 1993. It was drafted after the Supreme Court stepped back[23] from a very protective interpretation[24] of the free exercise clause that had been applied since the early 1960s. Congress wanted to ensure the federal government gave as much protection as possible to religious practice. (Originally, it was also meant to control the states, but the Supreme Court ruled it lacked authority[25] to govern state actions.)

In short, RFRA lays out an approach to any federal law or policy that would affect religious exercise. It says if the government creates a burden on that exercise, it must show that the burden is justified by a compelling reason (e.g., protecting life or public health). Even if the law is connected to such a purpose, it must also be crafted so it affects only the religious exercise necessary. For instance, if public health reasons necessitate restrictions on religious gatherings, the government will have to show that there is no narrower way to accomplish its protective purpose. So, a ban on religious services is less likely than a mask requirement to be compliant with RFRA.

Twenty-one state legislatures have enacted RFRAs,[26] and the rule described above would apply to any of their actions that might implicate religious freedom.[27]

Some state and federal laws include specific exemptions from laws that might burden religious

practice (e.g., a federal statute that allows religious universities[28] to have sex-segregated facilities or that exempts the Amish[29] from Social Security taxes). These can be helpful in specific areas where conflict between government policies and religious practice are foreseeable. In fact, Congress enacted a statute dealing with the specific contexts of prison and zoning[30] for this reason.

Administrative regulations

By their nature, administrative regulations tend to be very specific, so there is no general administrative law of religious liberty like Supreme Court decisions or the RFRA statute. In fact, administrative decisions are governed by these other two sources of law.

Having said that, there are all kinds of ways administrative regulations can impact religious freedom, such as military uniform policies, health insurance mandates, or government contracts. Even though federal regulations (or similar state rules where the state has a RFRA) are governed by RFRA, this is not invariably the practice. So, litigation by religious people affected by administrative requirements (like the Hobby Lobby case) are likely to continue in the 21st century.

Summing up

If a religious organization or person of faith feels that a government action is asking them to do something contrary to their faith (or preventing them from doing something dictated by their beliefs), what can they do under current legal rules?

Although the answer will of course be specific to the circumstance, the rules we have described so far suggest the following general approach:

1. They could invoke the protection of the U.S. Constitution if the government is singling them out for negative treatment (e.g., a government program that allows all schools except religious schools to apply for a playground safety grant) or if the government tries to get involved in a dispute over who can lead or represent a religious organization.

2. If they live in a state with a more protective state constitutional rule or a state RFRA, or if the federal government is the actor, they can sue to require the government to show it has a compelling reason for burdening their religious practice and has written its laws or policies as narrowly as possible to avoid religious conflicts. Whether they win will depend on the specific facts of the case and the approach of the judges who hear the case.

3. In some very specific circumstances, they can avoid litigation altogether by invoking a targeted exemption, enacted by a state legislature, that protects them.

This snapshot suggests there are many important protections of religious freedom in the law today but also some critical gaps. These gaps are most pronounced in situations where the potential protection of a religious practice depends on the judges deciding the case.

So, why do we hear so much about religious freedom and threats to religious freedom today? Are these threats real, and if so, where do they come from?

Current Conflicts Between Religious Freedom and Government Actions

Readers of Laura Ingalls Wilder's Little House on the Prairie books[32] will remember DeSmet, South Dakota,[33] where the Ingalls family settled in the late 1870s. The small town – really a handful of families at the time – is a good setting for a thought experiment about religious freedom conflicts.

Thought experiment

Imagine that as the town grows, a local church wants to ensure that no family is ever at risk of starvation (as the townspeople were during the long winter of 1879). So, they build an outbuilding on church property that can be used as a soup kitchen and food bank and hire a local resident to gather and store food and share it in time of need.

What would the legal implications of such a decision be at the time? Probably none. What about today? Well, there could be plenty: Is the property zoned for that kind of use? Does the facility follow regulations on food safety and preparation? If there are enough employees, did the church violate any discrimination rules in hiring them? Do the employees have a benefit plan that could be subject to federal regulations? You get the point.

With the increase of legal regulations since the time of Wilder's books, there are far more opportunities for such rules to impact activities by a person of faith or a church or other religious organization.

Conflicts with discrimination laws

Over the past few decades, the most prominent example of religious freedom conflicts has centered on laws at the federal, state or local level that prohibit discrimination on various grounds.

Why would this be? There are a couple of observations that can help explain this.

First, the nature of religious faith is that it involves appeals to conscience. This may be manifest in a belief that we are accountable to a Supreme Being or in a commitment to higher principles. This means that religious people do not measure their choices solely by whether they think they can get away with them as a legal technicality. So, there is always the possibility that a person of faith might believe a government regulation is at odds with the demands of conscience.

Second, and following from the first, religious belief often involves drawing lines. Many religions have formal structures with membership. Most subscribe to commandments or teachings that are obligatory for believers.

Third, this line-drawing can often be at odds with government priorities. In our country, we favor openness and equal opportunity, but for a religious organization, considerations like membership in good standing can be more important. It may make

sense to disregard an applicant's belief when hiring a chef, but not so much when hiring a pastor.

Fourth, recent and powerful social trends have placed some choices or statuses (related to sexuality, for instance) within the realm of legal protection against discrimination, even though these are at odds with longstanding religious teachings. So, the Catholic Church that would not take race into consideration in hiring may still want to be allowed to make a distinction between an employee who is cohabiting and one who is married.

Sexual orientation and gender identity

All of this leads to the conflict that often gets the most attention – the concern among people of faith that discrimination laws including categories like sexual orientation and gender identity will create duties or prohibitions at odds with the faith commitments of people of faith or religious groups. The parallel concern among people who want to ensure that LGBT people are provided equal treatment is that religious conscience could be used as an excuse for unfair treatment.

We see this conflict in the lawsuits over wedding professionals[34] who want to decline to participate in same-sex wedding ceremonies for religious reasons, or those in which religious schools are sued[35] for firing employees in same-sex marriages. The conflict touches on a wide variety of practices like employment benefits, tax exemption, provision of social services, interactions with clients, etc.

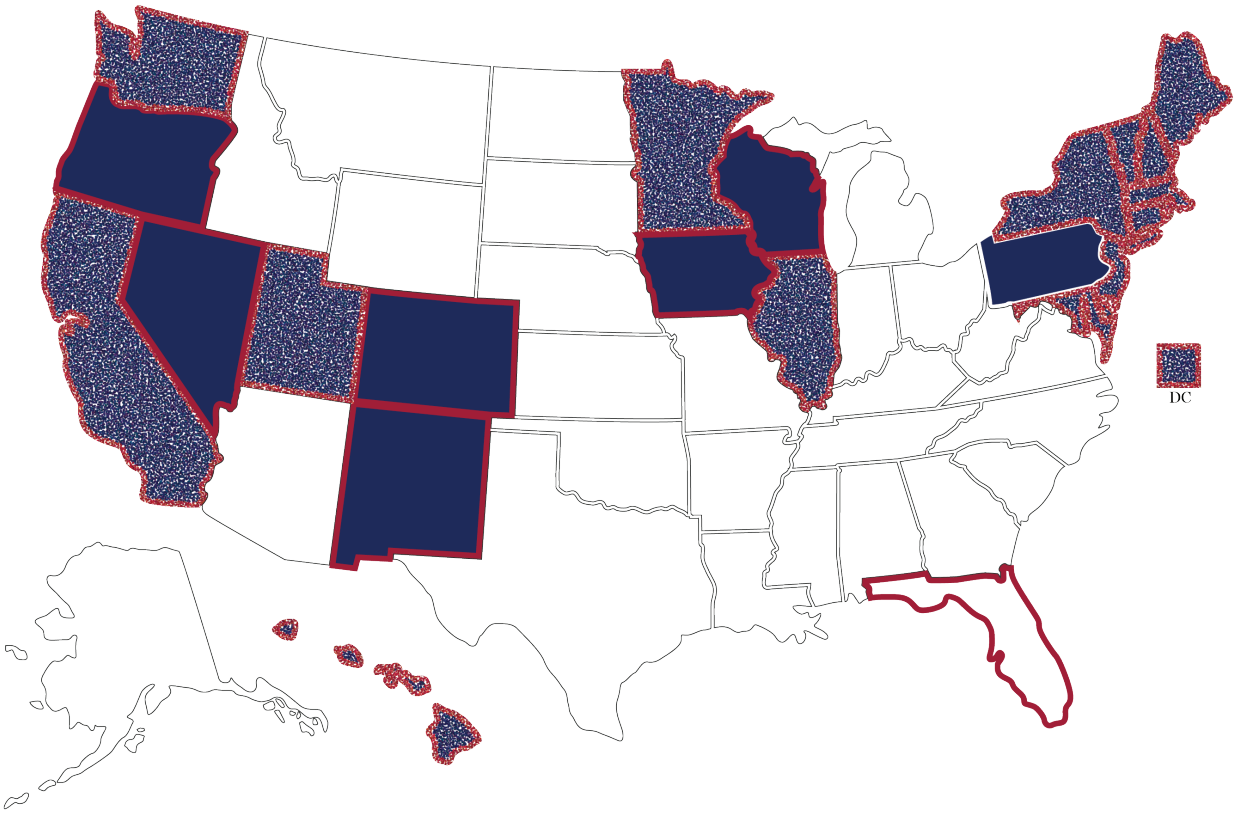
The concerns related to this conflict have now been dramatically heightened by the U.S. Supreme Court's recent decision[36] that interprets federal employment law banning discrimination on the basis of sex as also prohibiting discrimination on the basis of sexual orientation and gender identity. Not only does that decision implicate hiring decisions, but there are already lawsuits to expand the reach of other areas of the law, like healthcare,[37] that also prohibit sex discrimination.

At the beginning of 2020, 22 states prohibited discrimination in employment on the basis of sexual orientation and gender identity. Now, employers in every state are required to follow this legal rule.

Importantly, since this change was accomplished by a court decision, it merely ruled the change was required; it could not balance the effect of the change with religious exemptions that might limit its negative impact while maintaining most of its positive impact.

Need for resolution

This is an unresolved potential conflict for religious freedom, and there are others too. Without resolution of some kind, we can expect continued litigation and a patchwork of state solutions that will be supportive of, or hostile to, religious interests. The bottom line is that the situation will remain unstable.



Religious Freedom Conflicts Can Ensnare Schools, Healthcare Workers

While conflict between religious freedom and LGBTQ+ discrimination (or other forms of discrimination) often gets attention, there are two other prominent contexts for conflict to arise: healthcare and education.

Conscientious objectors in the medical context

In 2004, a devout Catholic nurse at the Mount Sinai Hospital in New York told her employers that she had a religious objection to participating in any abortion procedure. This objection did not create any problems with her employment until May 2009, when the hospital told her she would be disciplined[38] "if she did not honor a last-minute summons to assist in a scheduled late-term abortion." Eventually, the federal government investigated, and the hospital agreed to stop[39] mandating participation in abortions.

More recently, the Office of Civil Rights at the Department of Health and Human Services has reportedly intervened in a recent case involving a Catholic nurse in Vermont[40] who says she was told to help a woman who had miscarried, only to find out that the hospital actually wanted to make her participate in an abortion procedure.

In healthcare, religious freedom conflicts are most likely to arise in this type of context – where a medical professional is asked to do something at odds with their religious beliefs. In 2008, the California Supreme Court ruled[41] that a doctor could not decline to participate in the artificial insemination of a patient in a same-sex relationship despite the doctor's religious misgivings.

The most well-known recent case involved a pharmacy in the state of Washington.[42] In 2007, the Washington State Pharmacy Commission adopted a rule drafted by Planned Parenthood that would require pharmacies to dispense drugs that some believed cause abortions (the commission initially rejected the rule, but the governor replaced two of its members). Though a pharmacy could refer a potential customer to others for nonreligious reasons, there was no specific religious exemption.

A pharmacy run by a family with religious objections to dispensing these drugs challenged the law. They pointed out[43] that they were willing to refer customers to "one of over 30 pharmacies within a five-mile radius that willingly offer these drugs." A federal court sided with the pharmacy after a trial, but a panel of judges on the Ninth Circuit Court of Appeals sided with the state, and the Supreme Court declined to take the case.

Separation of church and state, and religious discrimination

Religious freedom issues in schools are complicated by the Supreme Court's interpretation of part of the First Amendment, the Establishment Clause. An influential interpretation of this provision is that it requires a "separation of church and state,"[44] so the government cannot do anything that has the

purpose of benefiting religion in schools[45] (though this rule is extremely controversial among current Supreme Court justices).

The well-known 1962 decision[46] holding that it was unconstitutional for a public school to create a voluntary nondenominational prayer for students to say at the beginning of the school day (an Establishment Clause case) is based on this premise, but it can have the effect of limiting the religious exercise of others, like students chosen to speak[47] at the beginning of a school football game who opt to pray.

More recently, the potential conflict (between the concerns that the state is benefiting religion and the ability of private citizens to act on their beliefs) has focused on government funding of education. Many states adopted Blaine Amendments[48] – originally motivated by a desire to protect the de facto Protestant character of public schools against competition from Catholic schools – which prevent any government funding from going to religious schools.

In 2004, the Supreme Court upheld a Washington state policy[49] that excluded recipients of a state scholarship from using the money to study theology. Since then, however, the court has dealt with the free exercise implications of those kinds of exclusions.

In 2017, the court struck down a Missouri policy[50] that prevented a religious school from receiving a government grant for playground safety. And in July 2020, the court struck down a Montana policy[51] that precluded parents from using publicly administered scholarship money for tuition to a religious private school. The principle appears to be that the Establishment Clause cannot be used as an excuse to impose unique disadvantages on religious people.

Need for clarity

As the cases described above show, these kinds of conflicts are far from settled. There is need for clarity from federal and state governments so that students, parents, teachers, nurses, doctors, other medical professionals, etc., know precisely what they can and can't do as they reconcile the demands of conscience and pressure from government or employers to act in ways contrary to their beliefs.

The above-described conflicts are not insoluble, and there have been several efforts proposed to resolve them.

Who Should Resolve Religious Freedom Conflicts, and How?

Since religious freedom is a core aspiration of our nation, we naturally dislike the idea that current conflicts over religious practice may continue indefinitely without any kind of lasting settlement. Precisely how to structure such a settlement is the hard part. It requires answering questions about who should create the ground rules for a resolution and how they should be framed.

Who should mediate conflict?

In practice, the U.S. Supreme Court justices and the other federal judges are the de facto religious freedom decisionmakers for our nation today. Their decisions in specific controversies – the contraception mandate, education funding, school hiring policies – establish the contours of religious freedom.

The most outstanding recent foray for Congress into religious freedom, the Religious Freedom Restoration Act (RFRA), dates to 1993 – and because it establishes such a broad rule, it inevitably requires judicial application.

There are benefits to this approach. Judges are relatively insulated from political pressure, and this might make them more amenable to the pleas of religious groups that have little political power. This is what happened in the cases won by the Jehovah's Witnesses[52] in the Supreme Court in the 1940s, such as the right to proselyte and to refuse to participate in the Pledge of Allegiance.

Even the most well-drafted statute or constitutional amendment will have some ambiguities that require interpretation by the courts, and/or new situations will arise where the courts need to act in the absence of legislative direction.

There are, however, significant problems with this approach. The first and most significant is leaving these crucial decisions entirely to the courts.

First of all, lawsuits can be expensive and lengthy. Even a successful lawsuit can be punishing in terms of stress, negative attention and consumption of time. In fact, these factors can lead people to simply not pursue a lawsuit. If lawmakers are also unwilling to resolve controversial policy debates, the financial, mental and emotional costs of lawsuits can perpetuate injustices against communities of faith.

Second, judges are not infallible, and some are more[53] or less sympathetic[54] to religious claims, raising the possibility of inconsistency in their application of protections.

Third, the nature of lawsuits in our legal system means that each case will have a winner and a loser. That may not seem troubling in a case where the government is clearly imposing on people of faith

(like expelling children who won't say the Pledge of Allegiance), but it does not work as well when the courts have to balance a broad range of interests.

Congress, or state legislatures, should play a larger role – indeed, the preeminent one, as our constitutional system intends. James Madison said[55]: "In republican government, the legislative authority necessarily predominates." One concern is that they might not adequately protect the rights of religious minorities. That has not necessarily been the case, though. RFRA was enacted to protect religious minorities after the Supreme Court narrowed its interpretation of the Constitution in a way that arguably put religious exercise at risk.

One reason the Constitution's framers wanted Congress to play this key role is that a legislature has the advantage of greater ability and public pressure to reach consensus around compromise that balances interests in ways the court can't. For instance, as the Supreme Court noted in its *Hobby Lobby* decision,[56] under rules created by Congress, the government had the option of protecting religious groups and providing access to contraceptives. The court could determine only whether a religious group needed to provide that coverage.

What Should Consensus Look Like?

Laws protecting religious freedom fall into two basic categories: general principles and specific exemptions.

Typically, courts formulate general principles, but legislatures can as well. The best example is RFRA, which sets out factors for the government to consider in conducting its operations. Does this action burden a religious practice? If so, is it justified by a compelling need? If so, is there a way to meet that need without burdening religion?

But the approach of using principles (e.g. RFRA) as a protection has drawbacks. It allows for subjectivity because some legislators, agency officials, or judges may find a purpose compelling, while others may not. More practically, if a religious organization or person of faith believes they are being compelled to do – or not do – something at odds with their convictions, they will need to convince a court that the government has no compelling reason for its policy or at least could advance that policy in a less restrictive way. This requires a significant investment in time and money.

There is a very important benefit to using principles (e.g. RFRA), however. Government officials may not be aware of how their actions could impact religious practices, particularly minority religious practices. There are instances where it might not be intuitive to a lawmaker that their actions could have religious implications. For instance, requiring reflective tape on vehicles has implications for Amish religious practice,[57] but that might not be apparent to a lawmaker with little knowledge of their beliefs.

This point relates to the major limitation of the other approach: creating specific exemptions from general laws to protect religious practice. If a minority religion lacks political influence or is not well known, it is unlikely to be granted an exemption (or the need for an exemption may not be known). Government officials are sure to know that shutting down worship services has implications for free exercise, but they may not realize that requiring soldiers to be clean-shaven could also fall into that category.

There are definite advantages to specificity, though. When there is a specific exemption in the law, there is no need to go to court to secure protection for that exempted practice.

Given the pros and cons of these two approaches, both seem essential to protecting religious freedom. Specific exemptions provide certainty, but general principles ensure comprehensive protection.

Looking to the future

As we approach solutions to protect religious freedom while still advancing other important government interests, these baseline questions have to be addressed: Who will set the rules, and how best should they do that? Understanding potential tradeoffs of court versus legislative action, of specific exemptions versus general principles, allows for a broad, comprehensive strategy.

Advocates of religious freedom need to continue litigation activity but must begin to pay more attention to legislation. We need to promote general principles (i.e., legislation such as the principles laid out in RFRA) but increasingly make the case for specific exemptions and accommodations that help religious people avoid the punishing process of litigation.

How is this best done? There are some discouraging examples. But Utah happens to be a rare state that has recently grappled with these difficult questions, and in one of the most difficult contexts – anti-discrimination law – with some success.

Utah Offers Way to Prevent Religious Freedom Conflicts

Religious freedom advocates have been encouraged by recent Supreme Court decisions applying constitutional and statutory religious freedom protections in a range of very specific scenarios. These decisions are important and welcome, but they are stopgap measures. Some of the most pressing conflicts, like in healthcare, education and discrimination, are likely to keep roiling public policy.

Take the *Little Sisters of the Poor*[58] decision. The court approved a Trump administration regulation that exempted the nuns from providing contraceptive coverage to their employees. That regulation, in turn, reversed an Obama administration regulation that required the coverage. After the Supreme Court ruling, however, then-presidential candidate Joe Biden criticized the decision[59] and promised to restore the old rule.

So, religious groups and the nuns themselves have no certain guide as to what is required of them in regard to contraceptive coverage. Of course, they can hope for a sympathetic administration, but certainly that is not the type of religious freedom protection envisioned by the framers of the Constitution.

The source for effective and powerful protections for religious freedom is legislation (something that has not been tried much lately). There have been, however, two recent unsuccessful attempts to address religious freedom in legislation, reflecting entirely opposite priorities.

A comparison of these bills illustrates why Congress has made so little progress in creating specific religious freedom protections since it enacted the general principles of the Religious Freedom Restoration Act in 1993.

Equality Act

The first bill is the Equality Act,[60] which has been pending in the Senate since May 2019. It would add the categories of sexual orientation and gender identity to all federal discrimination laws. This would allow LGBT individuals who have been discriminated against in employment, housing, education, or use of some commercial businesses, to sue for relief.

The bill does not stop there, though; it goes on to specifically limit the reach of the federal Religious Freedom Restoration Act so that it cannot be used to protect religious groups or people of faith where there are conflicts between this new nondiscrimination policy and their religious faith, as in use of religious facilities, hiring by religious nonprofits, etc.

First Amendment Defense Act

The second bill is the First Amendment Defense Act (FADA),[61] which was introduced in 2018 but did not get a vote. It focused on religious freedom by singling out certain "sincerely held religious belief[s], or moral conviction[s]" for protection, such as that marriage should be the union of a

man and a woman or that "sexual relations outside marriage are improper."

What the bill did not do is address the concerns of those who fear being fired from their jobs when their employer learns they are in a same-sex marriage.

Clearly, neither of these bills addresses the concerns of both sides of the issue.

A lesson from Utah

It is not surprising, given the polarized approach exemplified by these bills, that progress in religious freedom protections has been difficult. The perspective that religious freedom must always yield to discrimination claims and the opposing view that religious claims must always trump anti-discrimination policies seem to garner roughly equal support, preventing either from gaining enough consensus to become law.

If a one-sided approach leads to stalemate, a different approach is necessary.

This insight spurred Utah's Legislature to try something new in 2015.

The Utah legislation (which consisted of two bills) had some features in common with the Equality Act – it added the categories[62] of sexual orientation and gender identity to the state's laws prohibiting discrimination in housing and employment. It also had some features in common with the First Amendment Defense Act – protecting people from being punished for their religious beliefs about marriage and sexuality in employment and professional licenses or by government penalties.

More, in enacting the LGBT protections, it ensured that[63] religious groups and people of faith were protected in their use of facilities, provision of social services, or in officiating at weddings. At the same time, it ensured parallel protections to those given to people of faith for LGBT people in their workplace speech or comments outside of work hours.

The salient point is that by trying to accommodate a range of interests in the same package of legislation, the Utah effort avoided the polarized approach that characterizes the Equality Act and FADA and, by extension, made less likely the possibility that one "side" would be so disadvantaged that they would reject the legal change completely.

Utah's pioneering effort has earned attention nationally and is now the basis for an alternative approach to federal legislation.

Protecting Religious Freedom at the Federal Level

Federal legislation that focuses only on religious freedom or only on anti-discrimination seems to be stalled (at least for now). In the absence of legislative efforts to reconcile these priorities, intermittent lawsuits for specific conflicts will continue to arise, some heartening one "side" and others bolstering the position of the other.

Do we need a federal law?

What can Congress do? If Utah has established a positive pattern, can't other states just adopt the principles to create their own nonpolarized solution? Why another federal law?

Other states can, and probably should, carefully draw lines to ensure that religious freedom is protected at the same time nondiscrimination laws protect the vulnerable, but in many cases that has not happened. The states that have added sexual orientation and gender identity to their discrimination laws have not come close to ensuring the kinds of protections[64] Utah has.

Already there is a federal nondiscrimination law plus the 2020 Supreme Court decision *Bostock v. Clayton County*[65] which has significantly impacted the application of that federal law to the question of religious freedom.

That decision interpreted the 1964 Civil Rights Act,[66] which prohibited discrimination in employment on the basis of race and sex. The court majority said the reference to sex in the law includes the categories of sexual orientation and gender identity. This has the effect, in the context of employment at least, of adopting the main provision of the Equality Act.[67] Ongoing lawsuits seek to extend the reach of that ruling to other areas of the law where sex discrimination is prohibited.

The federal civil rights statute does include a modest religious exemption, primarily for churches, which was adequate for the types of conflicts that arose prior to the *Bostock* decision. Few, if any, religious organizations wanted to treat people differently because of race or sex, but that might not necessarily be the same when it comes to sexual orientation and gender identity. Most churches teach tolerance of all people, but they, and other groups motivated by faith, may be impelled by their beliefs to make distinctions based on sexual behavior.

So, in hiring decisions, use of facilities, employment benefits and other areas, religious organizations are faced with new challenges as their beliefs about sexual morality might lead to decisions at odds with federal nondiscrimination laws.

The Utah legislation avoided most of these controversies. But since the decision to adopt new categories for federal nondiscrimination law was made by the court and not Congress, this was done without adopting balancing religious protections.

Fairness for All approach

This is the backdrop for current debates about discrimination and religious freedom in federal law. The Supreme Court's interpretation of the

U.S. Constitution and the Religious Freedom Restoration Act provides some protections (for religious schools,[68] for instance), but many potential conflicts are not addressed.

So Congress should act to ensure that discrimination laws apply as intended, to protect people in need without threatening the work of religious groups and people of faith.

In 2019, Rep. Chris Stewart proposed a bill, the Fairness for All Act,[69] modeled after the Utah legislation – designed to prevent discrimination while preserving religious freedom. That law has not yet been voted on, but some of its features provide an excellent starting point for discussions on how to protect all interests at the federal level.

In addition to ensuring protection for LGBT people in employment, housing and public accommodations and providing exemptions for churches, the act includes some helpful additional protections for religious freedom:

- It clarifies that religious groups can participate in federal programs (such as for infrastructure assistance or in scholarships to students choosing religious schools) regardless of their beliefs, teachings or standards or whether they have religious symbols on their property.
- It requires employers to make a significant effort to accommodate an employee's religious practice, including allowing leave policy to be used for religious reasons (to celebrate religious holidays, for instance).
- It ensures that both religious and nonreligious employees will not be fired for engaging in protected speech outside the workplace.
- It allows churches to set guidelines for how those who use their facilities must act to ensure the sacredness of those buildings.
- It prohibits the government from punishing religious institutions (such as by denying accreditation to religious schools, refusing to give professional licenses to people of faith, or creating religious tests for public office) because of their beliefs.
- It prohibits denying nonprofit status to religiously motivated nonprofits because of their beliefs.

Including these types of provisions in federal legislation would go a long way toward ensuring a balanced approach to protecting religious freedom and the principle of nondiscrimination.

If the debate over these issues continues to be polarized, dominated by zero-sum competition and sporadic courtroom battles, it will ensure that the rancor surrounding Supreme Court nominations will continue. Justices will be making the final decisions on the most divisive issues, risking sometimes-wild shifts in enforcement of religious protections from administration to administration. In short, it will guarantee continued uncertainty and division.

Conclusion

As described above, states would be wise to actively seek opportunities to create targeted accommodations where they are needed in various areas of the law. That begins with an openness to learn from the concerns of religious people, including – and perhaps especially – those in minority religions whose beliefs and practices may not be well known.

In the 2021 legislative session, Utah's Legislature did just this, directing the state's education officials to ensure that college and university students who want to practice their religious beliefs are accommodated in areas such as religious holidays. This specific policy can prevent unnecessary conflicts and encourage mutual understanding.

In addition to targeted accommodations, states should adopt and enforce generalized protections that allow religious liberty to be protected when a specific religious practice comes into conflict with a government policy and there are no relevant accommodations currently in place. Coupled with specific accommodations to prevent a conflict from occurring, these general principles can ensure there is a safety net for religious practices that could be accommodated once the government becomes aware of them, but which are not yet included in the law.

Finally, government leaders and responsible citizens should seek to understand and publicize the social benefits that stem from robust religious participation. The historical contributions of religious groups and people of faith to the development and protection of constitutional rights – and the continuing contributions of these groups and individuals to meeting social needs from alleviating hunger to strengthening mental and emotional resilience – demonstrate that all people, religious and nonreligious, benefit when our laws create room for people of faith to live consistent with their beliefs.

Appendix
Supreme Court Year in Review: 2021

The Supreme Court decided two important religious freedom cases and a closely related case in 2021.

Fulton v. City of Philadelphia

Description: Catholic Social Services has "served the needy children of Philadelphia for over two centuries," including recently under contract with the city of Philadelphia's Department of Human Services. When a child needs to be placed with a foster family, a contracting agency provides names of available foster families that work with the agency.

In 2018, the city ended its contract with Catholic Social Services because that agency would "not certify unmarried couples—regardless of their sexual orientation—or same-sex married couples." The city said this belief constituted discrimination on the basis of sexual orientation under the city's law and refused to make any exceptions that would allow CSS to continue to work with the city.

Foster parents who had partnered with CSS challenged the policy, but the trial court and court of appeals ruled in favor of the city because the policy applied to both religious and nonreligious agencies.

Analysis: The Supreme Court unanimously concluded[i] that Philadelphia's exclusion of Catholic Social Services from foster care contracts violated the First Amendment's free exercise clause. The main opinion (joined by six justices) concluded the Philadelphia exclusion was unconstitutional because it treated religious and secular agencies differently, but it declined to address the question of whether the court's use of neutrality as the measure for determining whether a burden on religious freedom is constitutional.

The majority said government actions are not neutral if they are "intolerant of religious beliefs or restrict practices because of their religious nature" or if they prohibit "religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."

Here, the main problem for the majority was that the city's law allowed the department to exempt agencies from requirements of the law, so the policy applied to CSS was actually not generally applicable. In addition, the city's argument (that it was just applying a law that required all businesses open to the public not to discriminate on the basis of sexual orientation) was ruled inapplicable, since foster parent certification is not a service "accessible to the public," unlike other services like "staying in a hotel, eating at a restaurant, or riding a bus."

The majority recognized that the city's interests in maximizing foster families and preventing discrimination are important but said the "city offers no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others."

The opinion concluded: "The refusal of Philadelphia to contract with CSS for the provision of foster care services unless it agrees to certify same-sex couples as foster parents cannot survive strict scrutiny, and violates the First Amendment."

Thomas More Law Center v. Bonta (consolidated with Americans for Prosperity Foundation v. Bonta)

Description: The court also decided an important freedom of association case. The case involved a California policy that required all charities that solicit donations in the state to register with the state. That requirement was uncontroversial. In 2012, however, the state attorney general's office added a requirement that the nonprofits file parts of the federal 990 form that include donor names and other sensitive identifying information.

Two nonprofits, Americans for Prosperity Foundation and the Thomas More Law Center, challenged the requirement. The latter organization is motivated by a sense of religious mission to litigate issues that are highly controversial. As a result, the center has received "threats, harassing calls, intimidating and obscene emails, and even pornographic letters." The former advocates free market policies. It has also roused opposition and, as the Supreme Court noted, at least one death threat.

These organizations were joined by a wide range of other organizations who felt threatened by the rules, "from the American Civil Liberties Union to the Proposition 8 Legal Defense Fund; from the Council on American-Islamic Relations to the Zionist Organization of America; from Feeding America—Eastern Wisconsin to PBS Reno." The Supreme Court said, "The deterrent effect feared by these organizations is real and pervasive, even if their concerns are not shared by every single charity operating or raising funds in California."

The trial judge ruled in favor of the nonprofits finding "that the Attorney General's promise of confidentiality 'rings hollow,' and that '[d]onors and potential donors would be reasonably justified in a fear of disclosure.'"

The court of appeals reversed, leading the Supreme Court to take case.

Analysis: Chief Justice John Roberts wrote the majority opinion,[ii] joined by all but three justices. The court explained: "When it comes to the freedom of association, the protections of the First Amendment are triggered not only by actual restrictions on an individual's ability to join with others to further shared goals. The risk of a chilling effect on association is enough, '[b]ecause First Amendment freedoms need breathing space to survive.'"

Since the California policy impacted constitutional rights, the state was required to offer justifications for its policy that would justify the burden on the right of association. The court discounted the state's claim that the policy was necessary to prevent fraud. It said: "California casts a dragnet for sensitive donor information from tens of

thousands of charities each year, even though that information will become relevant in only a small number of cases involving filed complaints."

The court also said that the fact that the policy made potential investigations easier for the state could not justify the chilling effect the law had on nonprofits' right of association.

South Bay Pentecostal Church v. Newsom

Description: Initial COVID restrictions in California made a distinction between essential industries (including Hollywood) and other activities, including indoor worship services. South Bay Pentecostal Church in the San Diego area challenged the prohibition on indoor worship.

They were initially unsuccessful, and in January 2021, the U.S. Court of Appeals for the Ninth Circuit ruled against the church. The church then sought an injunction from the Supreme Court that would allow indoor worship services to resume, lift a cap of 25% capacity for indoor worship, and end a restriction on singing and chanting in services.

The first of these requests was granted. A 6-3 majority[iii] determined the state's prohibition on indoor worship could not be enforced while the South Bay Pentecostal Church's case was pending at the Supreme Court. Three of the justices, Neil Gorsuch, Clarence Thomas and Samuel Alito, described in some detail why they supported this decision: "California has openly imposed more stringent regulations on religious institutions than on many businesses." These justices noted the state's interest in reducing the risk of infection was "compelling" but faulted it for failing to "explain why it cannot address its legitimate concerns with rules short of a total ban" and "to explain why narrower options it finds sufficient in secular contexts do not satisfy its legitimate interests." The opinion concludes:

> As this crisis enters its second year—and hovers over a second Lent, a second Passover, and a second Ramadan—it is too late for the State to defend extreme measures with claims of temporary exigency, if it ever could. Drafting narrowly tailored regulations can be difficult. But if Hollywood may host a studio audience or film a singing competition while not a single soul may enter California's churches, synagogues, and mosques, something has gone seriously awry.

Varying majorities of the justices allowed the state to continue to enforce the percentage capacity limit (5-4) and the singing restriction (6-3) to continue. On the latter point, Gorsuch felt the singing restriction was unfair because "California's powerful entertainment industry has won an exemption."

In agreeing with the majority's decision, Roberts made an important observation that "the State's present determination—that the maximum number of adherents who can safely worship in the most cavernous cathedral is zero—appears to reflect not expertise or discretion, but instead insufficient appreciation or consideration of the interests at stake."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With increasing polarization around nearly every issue, perhaps it is not surprising that religious freedom, once a unifying aspiration for the nation, has become contested. Because the on-the-ground reality has changed – the support of the people required to preserve any substantive right and responsibility has evolved on religious freedom – the principle of prudence suggests that the strategic and tactical approach of those concerned about religious freedom should change, too.

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