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The Weaponization of the Free-Exercise Clause

The Supreme Court's majority is transforming this onetime protection into a sword to strike down hard-fought advances in civil rights.

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There was a time when the Constitution's protection of the "free exercise" of religion was a sort of shield, a protection for religious minorities from the prejudices of the powerful. No longer. The Supreme Court's conservative majority is in the process of transforming this First Amendment clause into a sword that politically powerful Christian conservatives can use to strike down hard-fought advances in civil rights, especially for LGBTQ individuals and women.

At issue is whether religious believers who object to laws governing matters such as health care, labor protections, and antidiscrimination in public accommodations should have a right to an "exemption" from having to obey those laws. In recent years, religious pharmacists have claimed that they should not be required to fill prescriptions for a legal and authorized medical procedure if that procedure is inconsistent with their beliefs. A court clerk whose religion defined marriage as a union of a man and woman has claimed a free-exercise right to refuse marriage licenses to same-sex couples who have a constitutional right to marry. Religious business owners, such as bakers and florists, who object to same-sex marriage have claimed a right to refuse service to same-sex couples. And employers have successfully asserted a right to deny their workers health-care benefits that they would otherwise be entitled to, such as contraception or abortion counseling.

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Providing such religious exemptions has required a dramatic change in the law by the Supreme Court. In 1990, in *Employment Division v. Smith*, the Supreme Court held that the free-exercise clause of the First Amendment cannot be used as a basis for an exception to a general law, no matter how great the burden on religion, unless the government's action can be shown to be based on animus to religion. The case involved a claim by Native Americans for a religious exception to an Oregon law prohibiting consumption of peyote.

Justice Antonin Scalia wrote the opinion for the Court ruling against the Native Americans and explained that it would be impossible to provide religious exemptions from civic obligations whenever a person disagreed with the law—there are just too many civic obligations and too many different religious views about

approach would force the Court to make intrinsically controversial and discriminatory decisions about which religious views were most deserving of special accommodation and which social values should be considered less important than the favored religious views.

This decision was in line with the approach taken by the Supreme Court, in almost all cases, through American history. Courts long held that the Constitution did not require an exception to general laws on account of religious beliefs—that parents could not deny medical aid to their children, that they could not have them work in violation of child-labor laws, even if the work involved dispensing religious literature, that religious schools could not violate laws against racial discrimination, and that a Jewish Air Force psychologist could not ignore the uniform requirement by wearing a yarmulke.

Unfortunately, the conservative justices on the current Court reject Scalia's reasoning and may be about to overrule *Employment Division v. Smith.* If they do so, the Supreme Court's conservative majority will in essence be saying that the views of Christian conservatives are more important than legal protections for workers and people who seek to engage in ordinary commercial activity without suffering discrimination.

The first sign of this shift came with the 2014 decision in *Burwell v. Hobby Lobby*, when for the first time in American history, the Court held that the religious beliefs of a business's owner allowed it to refuse to provide employees with a benefit required by law. Under the Affordable Care Act, employers are required to provide health-insurance coverage, including coverage for contraceptives for women. The Affordable Care Act had already carved out an exemption for religious not-for-profit organizations, so that, for example, a Catholic diocese would not have to provide contraceptive care to its employees. (Legislatures can choose to give religious exemptions, even though the Constitution does not require them.) But at issue in *Hobby Lobby* were the rights of the owners of a purely secular business. The five conservative justices held that a family-owned corporation could deny contraceptive coverage to women employees based on the business owners' religious beliefs.

[Read: When the religious doctor refuses to treat you]

embracing persons of diverse beliefs, clear as it is, constantly escapes the Court's attention," and wondered about religious employers who were offended by health coverage of vaccines, or equal pay for women, or medications derived from pigs, or the use of antidepressants. At the very least, there is a compelling interest in protecting access to contraceptives, which the Supreme Court has deemed a fundamental right.

In June 2020, the Court ruled in *Our Lady of Guadalupe School v. Morrissey Berru* that teachers at a Catholic school could not sue for employment discrimination. The two cases before the Court involved a teacher who had sued for disability discrimination after losing her job following a breast-cancer diagnosis and a teacher who had sued for age discrimination after being replaced by a younger instructor.

Previously, in *Hosanna-Tabor Lutheran Evangelical Lutheran Church and School v. EEOC* (2012), the Court said that a narrow exception protects religious organizations from being held liable for choices they make about their "ministers," which traditionally have been considered "exclusively ecclesiastical questions" that the government should not second-guess. But now the Court has expanded that exception to all religious-school teachers, meaning that the schools can discriminate based on race, sex, religion, sexual orientation, age, and disability with impunity.

This reflects a Court that is likely to expand the ability of businesses to discriminate based on their owners' religious beliefs. A few years ago, the Court considered in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* whether a baker could refuse, on account of his religious beliefs, to design and bake a cake for a same-sex couple. This should be an easy decision: People should not be allowed to violate antidiscrimination laws because of religious beliefs, or any beliefs. For more than half a century, courts have consistently recognized that enforcing antidiscrimination laws is more important than protecting freedom to discriminate on account of religious beliefs. A person cannot invoke religious beliefs to refuse service or employment to Black people or women. Discrimination by sexual orientation is just as wrong. Although the justices in this case sidestepped the question of whether the free-exercise clause requires such an exemption, a number of other courts have ruled that compliance with general antidiscrimination laws might impose an impermissible burden on the free exercise of the owner's religious beliefs, at least when the beliefs are Christian and the protected class includes gay and lesbian

In recent months, the Court expanded civil-rights protection for gay, lesbian, and transgender individuals, but there is reason to fear that the conservative justices are about to undercut this. In June 2020, the Supreme Court ruled that the federal law Title VII, which prohibits employment discrimination based on sex, forbids employment discrimination based on sexual orientation or gender identity. But Justice Neil Gorsuch's majority opinion left open the possibility of giving an exception to employers who discriminate because of their religious beliefs. The Court should emphatically reject such claims. Selling goods and hiring people on the open market is not the exercise of religion, and stopping discrimination based on sexual orientation or gender identity is a compelling government interest that judges should not dismiss because members of a favored religion disagree with the policy.

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Unfortunately, the Court appears to be headed in exactly the opposite direction. Next term, which begins in October, the Court will consider, in *Fulton v. City of Philadelphia*, whether free exercise was violated by a city's barring a Catholic Social Services agency from participating in placing children in foster care, because the agency refused to certify same-sex couples as foster parents—in violation of the city's general nondiscrimination policy. One of the questions before the Court is whether to "revisit" *Employment Division v. Smith.*

Five justices may be about to do just that—paving the way for the Court to allow religious organizations and persons to ignore nondiscrimination laws that protect the LGBTQ community, as well as ignore federal requirements to provide full health benefits to women.

Creating a free-exercise right to flout laws that protect other people would entangle judges in endless claims about which religions deserve this special treatment, to the great detriment of true religious liberty. Conservative Christians claim that if they are not given a privileged position in the political system to harm people in these ways, the government is demonstrating hostility to religion. But requiring religious people in the ordinary course of their lives to follow the rules that apply to everyone else is not hostility; it is equality.