


Free Exercise and the Resurgence of the Religious Freedom Restoration Act

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Abstract

This article considers the development of protections of the Free Exercise of Religion, initially under the First Amendment, and later, following Congress's discontent with the Supreme Court's decision in *Employment Division of Oregon v. Smith*, under the Religious Freedom Restoration Act. The article discusses how this development resulted in the Court's controversial split decision in the case of *Burwell v. Hobby Lobby* in 2014, and considers why commentators take such diverse views of that case.

Keywords

First Amendment, free exercise, Religious Freedom Restoration Act, *Burwell v. Hobby Lobby*

Following the Supreme Court's decision in *Burwell v. Hobby Lobby*, the grandstanding on both sides appeared to outweigh reasoned consideration of what free exercise of religion should mean, and whether the conjuncture of legislation and jurisprudence represented by the decision is likely to take U.S. society where Americans want it to go.

The Christian right was pleased. "Today's decision is . . . a further repudiation of the heavy-handed and blatantly unconstitutional overreach of President Barack Obama and his administration," announced the Southern Baptist Theological Seminary. Steve Deace crowed that "the Green family . . . just became the Rosa Parks of the religious liberty fight. . . . the Green's refusal to comply with Obamacare's unjust edict can accomplish the same for a similarly worthy cause." And, Erick Erickson quipped that under *Hobby Lobby*, "my religion trumps your 'right' to employer subsidized consequence-free sex."

On the other side, Jessica Valenti of the National Abortion Rights Action League lamented that the case was "really about a fear of women's sexuality." *The New York Times* opined that the decision granted "owners of closely held, for-profit companies an unprecedented right to impose their religious views on employees." And Justice Ruth Bader Ginsburg seemed to contribute to the unreasoned response with her own dissenting comment that the exemption upheld by the Court "would deny legions of women who do not hold their employers' beliefs access to contraceptive coverage that the ACA would otherwise secure."

Overriding regulatory requirements in the name of free exercise of religion can thus be simultaneously viewed as upholding fundamental civil rights on one hand, and a retreat to medieval moral oppression on the other. But wherever one's sympathies lie, the legal protection of free exercise of

religion requires the development and articulation of a rule of law that defines the degree to which religious belief authorizes departure from otherwise binding legal rules. In the United States, the search for such a rule was underway at least by the time of the drafting of the Constitution, but has more recently been clarified through a series of key Supreme Court decisions and the enactment of the Religious Freedom Restoration Act (RFRA). The rule, in essence, calls for strict scrutiny of government action that creates a substantial burden on sincere religious practice.

This article will trace the development of free exercise from the original concept envisioned by the Framers and embodied in the First Amendment, to its ascendancy in the *Sherbert* case, followed by its nadir in the *Smith* case, and leading to its statutory enshrinement in RFRA, and explain how the Court drew from that Act to arrive at the *Hobby Lobby* decision.

Origins of the First Amendment Free Exercise Clause

Throughout the long summer of 1787, the delegates to the Philadelphia convention worked mightily to draft the Constitution. The convention then adjourned, and the tumultuous ratification debates began. For a variety of reasons, fatigue perhaps being primary, the delegates had not

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incorporated a formal list of fundamental rights reserved to the people. The absence of a “Bill of Rights” quickly became the flashpoint of what would be known as “anti-federalist” opposition.

Pennsylvania’s James Wilson, among the proponents of ratification, dismissed the necessity of such a feature, arguing that it was not necessary because the Constitution only granted express, limited powers to the federal government. This view was, of course, belied in the first instance by the presence in Article I, Section 9 of a sort of mini-Bill of Rights—a short list of prohibitions imposed on the federal government—that would not be necessary but for the danger that the government would go beyond what was otherwise allowed to it.

James Madison was initially not inclined to include a Bill of Rights, primarily because of his general distrust of “parchment barriers.” Initially, he did not anticipate that the provisions of the Bill of Rights would come to be effectively used in litigation to block government actions. He was inclined to rely on the structure of government that the Framers had created, pitting one branch against another, and the states against the federal power, as a more reliable check on government overreaching. However, Madison did accede that recurrence to a Bill of Rights might be helpful to remind the people of their fundamental rights.

In correspondence with Madison, Jefferson (1789) more presciently foresaw how courts would come to enforce the provisions of the Bill of Rights in legal actions when he wrote, “In the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary.” (pp. 165-166)

As reluctant ratifying states had insisted, the First Congress in 1789 promptly considered the addition of a formal Bill of Rights to the Constitution. As to the protection of religion, Madison introduced language that provided that the “civil rights of none shall be abridged on account of religious belief or worship, . . . nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed” (Schwartz, 1980, 5:1026). After changes in committee and before the full House, the eventual wording of the establishment and free exercises clauses was approved and sent to the Senate, but with the phrase “nor shall the rights of Conscience be infringed” appended. Following work by the Senate and a joint committee to reconcile differences, the familiar language of the First Amendment was sent to the states for ratification, and became law in 1792.

Familiar though it may be, the First Amendment says nothing about the contours of the religious liberty it protects. In debate in the Virginia House of Burgesses in 1776, Madison had disputed with George Mason and recommended that religious exercise should only be curtailed if “the preservation of equal liberty, and the existence of the State be manifestly endangered” (Semonche, 1986, pp. 9-10). Today this would be regarded as a strict scrutiny approach. Madison’s

view was not generally shared at the time. Even Roger Williams believed that religious belief could not legalize conduct that would otherwise be barred by valid civil law. Madison’s writings concerning the relationship between religion and government have been intensively scrutinized, but little attention has been paid to his expansive view of free exercise in 1776 (Semonche, 1986). As with other matters of constitutional interpretation, it would eventually fall to the Supreme Court to determine the extent of protection conferred by the First Amendment on the “free exercise of religion.”

Reynolds, Sherbert, Smith, and RFRA

The Mormon practice of polygamy and the federal government’s persistent efforts to eliminate it provided the Supreme Court with its first substantial exploration into the meaning of the Free Exercise clause of the First Amendment. George Reynolds, secretary to Mormon church leader Brigham Young, was chosen by Mormon leadership to challenge the Morrill Anti-Bigamy Act, which targeted the Mormon practice of plural marriage (as well as the property dominance of the Mormon church in the Utah Territory). Although Lincoln signed the Act into law on July 8, 1862, he chose not to enforce it and gave Brigham Young tacit permission to ignore it in exchange for not becoming involved in the Civil War. Lincoln reportedly compared the Mormon Church with a log he had encountered as a farmer: It was “too hard to split, too wet to burn, and too heavy to move, so we plowed around it. That’s what I intend to do with the Mormons” (Firmage & Mangrum, 2001, p. 139).

But with the Civil War resolved, Congress resumed its attack on the Mormons, and the Church decided to test the law. Reynolds was a good candidate for the test. He was 32 years old at the time, and had only two wives, both of them near to him in age. He thus defied the perception held by many non-Mormons that polygamists were old with many young wives. Told by Church leaders that he was to challenge the law, Reynolds met with the prosecutor and provided information that resulted in his indictment. The territorial court on a technicality threw out his initial conviction, but he was indicted and convicted again, and sentenced to 2 years of hard labor and a US\$500 fine. He then turned to the Supreme Court.

Reynolds raised numerous issues on appeal, but the bulk of the Court’s opinion was devoted to Reynolds’ claim that the trial court failed to properly instruct the jury on a crucial point involving the First Amendment. Reynolds wanted an instruction to the effect that if he had engaged in polygamy as a result of sincere religious conviction, he could be acquitted. The trial court declined to give it, and Reynolds argued that was error. *Reynolds v. United States* (1879) became a landmark case because of Chief Justice Morrison R. Waite’s analysis of whether the Free Exercise Clause of the First Amendment would excuse otherwise criminal conduct.

"The inquiry," as Waite explains it, "is . . . as to the guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong," in light of the First Amendment guarantee of free exercise of religion. In considering the question, Waite refers to the debate and action of the 1784 Virginia House of Delegates. There, Madison objected to a proposed bill "establishing provision for teachers of the Christian religion," and argued "that religion, or the duty we owe the Creator," is not within the cognizance of civil government. The defeat of the establishment bill led to the introduction of another, drafted by Jefferson, whom Waite describes as "an acknowledged leader of the advocates of the [First Amendment]." Jefferson's bill recited "that to suffer the civil magistrate to intrude his powers into the field of *opinion* . . . is a dangerous fallacy which at once destroys all religious liberty," but it is not improper that civil government "interfere when principles break out into *overt acts* against peace and good order" (emphasis added). "In these two sentences," Waite wrote, "is found the true distinction between what properly belongs to the church and what to the State." Waite further observed that Jefferson, in his well-known letter to the Danbury Baptist Association, had similarly written, that under the First Amendment, "the legislative powers of the government reach *actions only*, and not *opinions*" (emphasis added). Waite made no mention of the contrary view of George Washington, as set forth in a letter to the Quakers written shortly after independence, that

the conscientious scruples of all men should be treated with great delicacy and tenderness: and it is my wish and desire, that the laws may always be as extensively accommodated to them as a due regard for the protection and essential interests of the nation may justify and permit.

Following Jefferson's line, for Waite and the Court, "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order." And, they had little doubt that polygamy was such an action, since it "has always been odious among the northern and western nations of Europe," belonged only to "Asiatic and African people," was treated in England as an "offence against society," and was only introduced into North America by "the Mormon Church." Therefore, it was within the rightful power of Congress to ban polygamy.

Arguably, the Reynolds Court drew a bright line between belief and action, protecting one but not the other. The "free exercise" of religion that the First Amendment purported to protect, was nothing more than freedom of *opinion*. One might well ask why a constitutional guarantee of the freedom of such "exercise" was necessary. After all, it is a long-established principle of the Anglo American criminal law that a crime must always include an *actus reus*, that is, a wrongful act. And, the requirement of an *actus reus* is properly included in

the Constitutional requirement of due process. Arguably, the Reynolds Court's interpretation reduces the Free Exercise Clause to mere surplusage, a step generally discouraged in constitutional interpretation.

But Waite ignored that interpretative principle. Rather, he argued that if those "who make polygamy a part of their religion" were excepted from the operation of the statute, *this exception* would introduce "a new element into the criminal law." It is not clear what *new element* he had in mind. Surely not *mens rea*, culpable mental state, which is as much a part of the definition of every crime as the *actus reus*. But regardless, Waite pushed ahead to a classic example of that cherished judicial exercise, the "parade of horrors." To excuse compliance with the law because of religious belief, Waite warned, would "permit every citizen to become a law unto himself," government would then "exist only in name" as a widow would soon be burning herself "upon the funeral pile of her dead husband" and others would be carrying out "human sacrifices" justified by religion.

By the Court's decision, Reynolds' guilty verdict would stand, although his punishment was changed to imprisonment without hard labor.

In Utah, Mormon leaders decried this narrow definition of free exercise. "Liberty, then, not of mere opinion alone, but religious liberty of practice, is my natural and indefeasible right," wrote George Cannon, whose arrest in 1874 had initiated the matter. As for polygamy, Cannon continued, "our actions do not injure others. We do not trespass on private right or the public peace." Can a court of law not distinguish, he rhetorically asked, between "human sacrifice" and "human propagation" in excepting compliance with a challenged law based on religious belief (Urofsky, 2012).

Such protests notwithstanding, non-Mormons applauded the Reynolds decision. *The New York Times*, for example, in a story about the case titled "A Blow Against Polygamy," wrote approvingly that "courts have made short work of George Reynolds and his celebrated test case" and struck down this "relic of barbarism."

The divided reception of the Reynolds case aptly illustrates that one's views on such judicial decisions will depend on whether one is more concerned with the harm that flows from the conduct being prohibited (or mandated), or the harm to religious freedom arising from the prohibition (or mandate). However, nearly a hundred years would elapse before the Supreme Court was obliged to revisit and modify the rule of Reynolds and recognize that free exercise should encompass both religious belief and the religious practice that it often compels.

In 1961, in the case of *Braunfeld v. Brown*, Orthodox Jewish merchants argued that a Pennsylvania Sunday closing law was unconstitutional. While upholding the law, the Court edged closer to a more exacting standard for evaluating legislation challenged on free exercise grounds. In a plurality opinion, Chief Justice Earl Warren noted that the state could not achieve its important secular goal of a uniform day of rest

through any alternative means that was less burdensome on religious practice. Possibly, then, government action that imposed a substantial burden on religious practices would be upheld only if (a) it served an important state interest and (b) such interest could not be advanced by a less restrictive means.

Government action beyond those limits was presented to the Court in 1963, in *Sherbert v. Verner* (1963), where a Seventh Day Adventist was denied unemployment compensation from South Carolina after she was terminated for refusing to work on Saturday (her Sabbath), and declined to accept other work offers that required Saturday work. The South Carolina Unemployment Compensation Act provided that to be eligible to receive benefits, a claimant must be “able to work and . . . available for work” and, further, that a claimant is ineligible for benefits “[i]f . . . he has failed, without good cause . . . to accept suitable work when offered him by the employment office or the employer.” The Employment Security Commission found that Ms. Sherbert’s unavailability for Saturday work disqualified her from receiving benefits.

The Court majority, for the first time, carved out a religious exception to a generally valid law based on the Free Exercise clause of the First Amendment. The Court first asked whether the disqualification for benefits imposed a burden on the free exercise of Ms. Sherbert’s religion, and found that it did. “The [state’s] ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand,” Justice Brennan wrote, and this was akin to “a fine imposed against appellant for her Saturday worship.”

The Court next considered whether “some compelling state interest . . . justifies the substantial infringement of appellant’s First Amendment right.” The Court found none. And, if there were such an interest, “it would plainly be incumbent upon the [state] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.”

Thus, was born the Sherbert Test, generally described as requiring an initial determination that the plaintiff’s religious belief is sincere, and that the government’s action imposes a substantial burden on the plaintiff’s ability to exercise her religion. If these two criteria are satisfied, then the government must prove that there was a “compelling state interest” justifying the government’s action, and that it could not have been pursued in a way that did not infringe on the plaintiff’s freedom of religion.

The Sherbert Test is a particular variant of the general strict scrutiny test that the Court uses in deciding cases involving fundamental rights. In theory, if a strict scrutiny test is applicable in a case, the Court must then balance the interest of the individual against the interest of the state, as the test requires. In fact, however, it has been suggested that the application of the strict scrutiny test turns out to be “strict

in theory, but fatal in fact,” and is generally the “death knell” for challenged legislation. But for all its seeming potency, the Sherbert Test itself has almost never been used by the Court to overturn any state action apart from the *Sherbert* case itself, and possibly *Wisconsin v. Yoder* (1972) where a Wisconsin compulsory school attendance requirement was successfully challenged by an Amish family.

In *United States v. Lee* (1982), for example, the Court determined that free exercise would not excuse participation in the social security system because, as in *Braunfeld*, and unlike *Yoder*, there was no other way to achieve the state’s lawful objective. “[I]t would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs.” The *Lee* opinion closes almost petulantly, and with a perhaps untoward emphasis on the significance of choosing to participate in commercial activity:

Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. (*United States v. Lee*, 1982)

(The Court would have a chance to consider further in *Burwell v. Hobby Lobby* whether entering into commercial activity should mean abandoning free exercise claims related thereto. However, there the Court would not be construing the Constitution, but a statute designed to preserve the Sherbert Test.)

In denying the free exercise challenge in *Bob Jones University v. United States* (1983), the Court arguably followed the *Sherbert* approach, without citing it, in determining that the “[religious] interests asserted by petitioners cannot be accommodated with that compelling governmental interest [in eradicating racial discrimination in education], and no ‘less restrictive means,’ are available to achieve the governmental interest” (citations omitted). Cases where *Sherbert* was not followed include *Bowen v. Roy* (1986; declining to apply *Sherbert* in finding that the governmental interest in preventing welfare prevailed over religious objection to obtaining a Social Security number) and *Goldman v. Weinberger* (1986; declining to apply *Sherbert* in finding that the First Amendment does not require the military to accommodate the wearing of a yarmulke contrary to uniform dress regulations). Although these cases found against the parties claiming free exercise rights, most observers believed that *Sherbert* set forth the principle that defined the degree to which the right of free exercise authorizes the adherent to violated otherwise valid legal rules. It was not until the case of *Employment Division of Oregon v. Smith* (1990) that the Court indicated that the Sherbert Test applied only to a

narrow category of unemployment compensation cases, and had “nothing to do with an across-the-board criminal prohibition of conduct.”

This came as a surprise to most observers. The case appeared to be similar to *Sherbert* and other unemployment compensation cases that the Court had considered, favorably to the parties seeking accommodation. Alfred Smith and Galen Black were fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which they were both members. When they applied for unemployment compensation from Oregon, the state determined them to be ineligible because they had been discharged for work-related “misconduct.”

Four justices (Brennan, the author of *Sherbert*, Marshall, Blackmun, and O'Connor) believed that the Sherbert Test should be applied. But a majority (Scalia, Rehnquist, White, Stevens, and Kennedy) found *Sherbert* inapplicable, and although Justice O'Connor would have applied it, she would have denied the claims of Smith and Black as failing to override the compelling state interest in preventing the physical harm caused by the use of peyote. Gone from the Court were the notable individual rights stalwarts Earl Warren, Hugo Black, and William O. Douglas. In their absence, the Court retreated from its earlier Free Exercise jurisprudence.

The *Smith* decision unabashedly raised the banner of *Reynolds*, ignoring both the specific targeting of the Mormon Church by Congress in passing the anti-polygamy statute and the jarringly ethnocentric language of Justice Waite's opinion. *Smith* confirmed the validity of *Reynolds*' distinction between “mere religious belief and opinions” and “practices.” And, Justice Scalia explained that the Court had “never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate.”

He wrote, “Because [the] ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug.”

The concurring/dissenting minority charged the majority with “mischaracterizing this Court's precedents” by finding that “traditional free exercise analysis [is] somehow inapplicable to criminal prohibitions . . . and to state laws of general applicability.” In short, the dissenters wrote, “it effectuates a wholesale overturning of settled law concerning the Religion Clauses of our Constitution.”

The *Smith* decision ignited a firestorm of opposition, and was one of those relatively rare moments in modern political history that brought left and right together in common outrage. Under the new standard, Senator Ted Kennedy decried, “dry communities could ban the use of wine in communion services, Government meat inspectors could require changes in the preparation of kosher food and school boards could force children to attend sex education classes [contrary to

their religious beliefs].” Kennedy joined forces with Utah senator Orrin Hatch, himself a Mormon, to work for the passage of the RFRA, designed to bring back the Sherbert Test, in effect overturning the Supreme Court's interpretation of the Free Exercise Clause. RFRA passed Congress in 1993 by a 97-3 vote in the Senate, and unanimously in the House. President Clinton, who commented, “What this law basically says is that government should be held to a very high level of proof before it interferes with someone's free exercise of religion,” signed it into law.

Congress's audacity in seeking to assert its interpretation of free exercise over that of the Court resulted in a further constitutional skirmish. Although the preeminence of the Court in declaring the meaning of constitutional language is not expressly set forth in the Constitution, the power of judicial review was contemplated at the time of the framing, and enshrined in the *Marbury v. Madison* decision in 1803. As Chief Justice John Marshall famously wrote,

It is emphatically the province and duty of the judicial department to say what the law is. . . . If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution, . . . the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. . . . Thus, . . . a law repugnant to the constitution is void. (*Marbury v. Madison*, 1803)

The Article V amendment process, of course, provides a pathway to overturning a Supreme Court decision. And, the Court may abandon *stare decisis*, as it has in cases such as *Brown v. Board of Education*, *Gideon*, or *Barnette*. But can Congress impose on the states a more expansive view of the Free Exercise Clause than the one set forth in *Oregon v. Smith*? Many, including Rep. Henry Hyde, then chair of the House Judiciary Committee, doubted that it could. “Congress,” Hyde wrote, “is institutionally unable to restore a prior interpretation of the First Amendment once the Supreme Court has rejected that interpretation. We are a legislature, not a Court.”

Well, perhaps Congress cannot overrule a Supreme Court interpretation of the First Amendment. But in fact, the *Smith* case, and any case where the actions of one of the several states are challenged as violative of the First Amendment, involves not only the First Amendment, but First Amendment rights as incorporated by the Fourteenth Amendment to be applicable against the several states. And, the Fourteenth Amendment contains Section 5, which specifically vests in Congress the “power to enforce, by appropriate legislation,” the other sections of the Fourteenth Amendment. Could Congress, in the exercise of its Fourteenth Amendment, Section 5 powers (as to the several states), and leading by example (as to federal legislation which it can tailor as it sees fit), the *Smith* decision notwithstanding, effectively make the Sherbert Test the law of the land as to all legislation, including state criminal statutes that infringe on free exercise?

This was the express intent of RFRA. In a mandate directed to both *federal and state* governments, and all their subdivisions, RFRA provided that

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability [unless the government can show that the burden] (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

This is an exact restating of the Sherbert Test, as understood by Justice O'Connor and the *Smith* dissenters.

RFRA, as applied to conduct of the states, was tested in *City of Boerne v. Flores* (1997). There, local zoning authorities denied the Catholic Archbishop a permit to enlarge a church based on a local ordinance governing historic preservation. The Archbishop challenged the ordinance under RFRA. As the Supreme Court viewed the matter, the central question was

whether RFRA is a proper exercise of Congress's [14th Amendment, Section 5] power "to enforce" by "appropriate legislation" the constitutional guarantee that no State shall deprive any person of "life, liberty, or property, without due process of law" nor deny any person "equal protection of the laws."

In addressing the question, it was not disputed that Congress' enforcement power under the 14th Amendment might under some circumstances extend beyond merely requiring compliance with the Constitution. For example, the Court upheld a suspension of literacy tests and similar voting requirements under Congress' parallel power to enforce the provisions of the Fifteenth Amendment (*South Carolina v. Katzenbach*, 1966).

However, the Court balked at allowing Congress to determine the meaning of the First Amendment, which was the avowed purpose of RFRA.

Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation.

The power to determine what constitutes a constitutional violation, the Court took pains to point out, "remains in the Judiciary." Thus, Congress could not impose the Sherbert Test on the states. But it could still impose the Sherbert Test on itself, as Justice Ginsberg noted in oral argument. And to that extent, RFRA remained valid and available to challenge any act of Congress "unless such law explicitly excludes such application by reference to [RFRA]."

In 2000, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA) as a response to the

Supreme Court striking RFRA down as applied to the states. In general, RLUIPA relies on the Commerce Power and the Spending Power to impose the Sherbert Test to some degree on the states by tying state free exercise protection to federal funding. In addition, RLUIPA redefines "exercise of religion" for RFRA purposes from "the exercise of religion under the First Amendment" to "any exercise of religion, whether or not compelled by, or central to, a system of belief," and also mandates that the law "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."

The Hobby Lobby Case

On September 26, 2013, the Supreme Court agreed to hear two cases in which a closely held plaintiff corporation contended that the Affordable Care Act's (ACA) mandate that employer-sponsored health plans cover all U.S. Food and Drug Administration (FDA)-approved contraceptives (the Mandate) illegally infringed upon the corporation's freedom to exercise religion. Although the plaintiffs asserted both constitutional and statutory claims, the outcome ultimately turned on the application of RFRA. The cases were decided together on June 30, 2014, in *Burwell v. Hobby Lobby*. The decision resolved a split between the Third Circuit Court of Appeals, which previously upheld the Mandate as applied to Conestoga Food Specialties corporation, and the Tenth Circuit Court of Appeals, which previously struck down the Mandate as applied to Hobby Lobby Stores and Mardel.

Conestoga makes wood cabinets and is owned by the Hahns, a Mennonite family. The Mennonite Church opposes abortion and believes that "[t]he fetus in its earliest stages . . . shares humanity with those who conceived it" (Mennonite Church USA, 2003). The Hahns are the sole owners of the business, control its board of directors, and occupy the position of president and CEO. They believe they are required to run their business "in accordance with their religious beliefs and moral principles."

Hobby Lobby has more than 500 stores and more than 13,000 full-time employees, and is owned by the Greens, a Christian family. Mardel is a smaller affiliated business. The Greens have organized the businesses around the principles of their faith and their understanding of Biblical precepts, one of which is the belief that the use of contraception is immoral. Hobby Lobby's statement of purpose commits the Greens to "[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles." Like the Hahns, the Greens believe that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point.

In both cases, the family business owners objected to four FDA-approved contraceptive methods that, notwithstanding the FDA position, they consider to be abortifacients, and in

both cases, the federal district court had denied their applications for preliminary injunctions.

On appeal, in *Conestoga*, the Third Circuit considered the threshold question of whether a for-profit, secular corporation could engage in religious exercise within the meaning of RFRA, and determined that it could not. Then, reasoning that the Mandate did not impose any requirements on Conestoga's owners, members of the Hahn family, the appellate court found no need for further RFRA analysis, and affirmed the lower court's denial of a preliminary injunction.

In *Hobby Lobby*, the Tenth Circuit, in contrast, found that the businesses were "persons" within the meaning of RFRA, and proceeded to apply RFRA's provisions to determine whether an exemption was required. It reversed the lower court and held that the businesses had established a likelihood of success on their RFRA claim because the Mandate substantially burdened their exercise of religion, and the Department of Health and Human Services (HHS) had not demonstrated a compelling interest in enforcing the Mandate against them, and in the alternative, the Mandate was not the "least restrictive means" of furthering a compelling government interest.

The Supreme Court first considered whether the corporations were "persons" under RFRA. RFRA applies to "a person's" exercise of religion, but RFRA itself does not define the term *person*. The Dictionary Act is a federal statute that provides authoritative default definitions for words commonly used in other statutes that are not specifically defined in those statutes. The Court therefore looked to the Dictionary Act definition of "person." Under the Dictionary Act, "unless the context indicates otherwise . . . the word[] 'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."

The Court found "nothing in RFRA that suggests a congressional intent to depart from the Dictionary Act definition" and further observed that free exercise claims have been brought numerous times in the past by nonprofit corporations. Noting that although the term *person* sometimes excludes corporations and other artificial persons, the Court found that "no conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations."

As to whether corporations can exercise religion as required by RFRA, the Court observed that RFRA's application to nonprofit corporations is not in dispute, and therefore the question becomes whether "RFRA does not protect for-profit corporations because the purpose of such corporations is simply to make money." In the Court's view, "While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so." And although the distinction between "ecclesiastical and lay" corporations has long been recognized, Blackstone himself observed that

"'lay' corporations might serve 'the promotion of piety,'" and in so doing, seek to "perpetuate religious values shared."

Further, the Court pointed to the retail merchants in *Braunfeld* and asked, if "a sole proprietorship that seeks to make a profit may assert a free exercise claim, why can't Hobby Lobby, Conestoga, and Mardel do the same?" In answering that question, the Court stated, "When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of [the people associated with the corporation including shareholders, officers, and employees]."

Among the dissenters, only two, Ginsberg and Sotomayor, maintain that RFRA could not apply to the corporations at issue because they are not "persons" able to exercise religion. The other two, Breyer and Kagan, specifically decline to join Justice Ginsburg on this point. It thus appears that seven of nine Supreme Court justices may, albeit grudgingly, acknowledge that RFRA should be applied to determine whether the objecting businesses should be exempted from compliance with the Mandate.

The Court next considered whether RFRA's prerequisite of substantial burden was satisfied. The Court found that if the Hahns and Greens and their companies did not violate their religious beliefs, they would be facing more than US\$500 million in additional annual taxes, and "[t]hese sums are surely substantial." The Court dispensed with the option that the companies could drop insurance altogether and pay only about US\$30 million per year in penalties, possibly less than the cost of the insurance provided, by noting that the government had not made this argument, and expressing

doubt that the Congress that enacted RFRA—or for that matter ACA—would have believed it a tolerable result to put family-run businesses to the choice of violating their sincerely held religious beliefs or making all of their employees lose their existing healthcare benefits.

HHS's main argument against the existence of a substantial burden on free exercise, also echoed by the dissent, was that

the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo) is simply *too attenuated*. (emphasis added)

Without a doubt, the attenuation argument is the crux of the entire dispute. And, what does it really mean? "Too attenuated," stripped of obfuscation, suggests that the position maintained by the religious objectors in this case is too extreme to be respected by the legislators who framed the ACA and the Mandate, and the medical and scientific professionals who determined that there is nothing objectionable with any of the FDA-approved contraceptive methods. "Attenuation" is a legal talisman by which the dissenters

would render ineffectual the obstructionist religious beliefs held by the Hahns and the Greens, without overtly questioning their “centrality” or “validity.” The dissent asserts, in effect, that because this talisman was effective in at least two pre-*Smith* cases, it should also be effective here.

But in *Hobby Lobby*, the dissent is outvoted. And thus, the Court does not “presume to determine . . . the plausibility of a religious claim.” And, in turning aside attenuation, comments that “it is not for us to say that the line [drawn] was an unreasonable one.”

Although the Tenth Circuit found that HHS had not demonstrated a compelling governmental interest in enforcing the Mandate, the Court chose to assume a compelling governmental interest “in guaranteeing cost-free access to the four challenged contraceptive methods” and proceeded to the least restrictive means analysis.

Nearly every challenged government action that makes it to the least restrictive means question—the final step of a strict scrutiny analysis—will perish there. It is the Moscow winter of strict scrutiny.

And no wonder. To survive this step, the “application of the burden *to the person*” (emphasis added) must be such that there is no other means for achieving the desired goal. Rare will be the case where an exception made for the objecting person would subvert the entire governmental purpose. And here, the Court has a simple initial proposal: Let the Government pay for the four contraceptives at issue if women are unable to obtain them under their health insurance policies due to their employers’ religious objections.

Can the answer be that simple? Well, why not? Although HHS contended that “RFRA cannot be used to require creation of entirely new programs,” the Court found nothing in RFRA to support that argument. According to the Court, “RFRA . . . may in some circumstances require the Government to expend additional funds to accommodate citizens’ religious beliefs.”

The dissent astutely asks, “where is the stopping point to the ‘let the government pay’ alternative?” Good question. But not essentially different from the fundamental question: What should be the role of government in American society in general? And as commentators such as SCOTUSblog contributor John Eastman point out, “There being no such thing as a free lunch (or, in this case, après-lunch contraceptive protection), someone has to pay for [the healthcare benefits mandated by the ACA].” Eastman’s acerbic observations on the economics of the decision bear fuller quotation:

In an earlier time in our nation’s history, that principle [of no free lunch] was much better understood. In the landmark decision of *Calder v. Bull* two centuries ago, for example, the Supreme Court cited “a law that takes property from A and gives it to B” as an example of “An ACT of the Legislature (for I cannot call it a law)” that “cannot be considered a rightful exercise of legislative authority” because it is “contrary to the great first principles of the social compact.” . . . Happily, . . . it

has not yet disappeared from the citizenry. My favorite: “My Jerk Boss Won’t Pay for My Groceries! I’m Going to Starve!” over at EagleRising.com, although a tweet from someone named Sean Davis is certainly a contender: “Get your politics out of my bedroom!” “Not a problem. I’m just going to grab my wallet before I leave.” “The wallet stays, bigot.” (Eastman, 2014)

However, the Court also offered another option for a less restrictive means: to give the for-profit corporations the same out that HHS regulations already give to nonprofit organizations with religious objections. Such an organization can self-certify that it opposes providing coverage for particular contraceptive services. The organization’s insurance issuer must then exclude contraceptive coverage from the plan, and provide payments for the contraceptive services without cost to the organization. (It being the conclusion of HHS that the costs of providing the contraceptives will be offset by savings from lower pregnancy-related costs and from improvements in women’s health.)

And so the Court upheld the free exercise claims of the Hahn and Green families against the requirements of the Mandate, and triggered heated commentary.

Conclusion

Respect for the free exercise of religion requires the development and articulation of a rule of law that defines the degree to which religious belief authorizes departure from otherwise binding legal rules. Too much deference to religious belief undermines basic lawfulness and could in theory lead toward the “human sacrifice” horrors set forth in the *Reynolds* opinion. Limiting the deference to opinion only adds nothing to ordinary due process guarantees, and in effect, writes free exercise out of the Constitution. The solution reached in the United States, as reflected in the Supreme Court’s *Sherbert* decision and the RFRA, is to invoke strict scrutiny of any government action that creates a substantial burden on sincere religious practice. This rule, which emerged from the Supreme Court and was revived by Congress after the Court abandoned it, is a reasonable and workable interpretation of free exercise of religion.

Should RFRA protection extend to cases such as *Hobby Lobby* where adherents to religion disagree with Congress and the FDA as to what is an abortifacient, and do not want to facilitate, in however attenuated a manner, conduct that they believe to be morally wrong? As a matter of law, it is hard to dispute the Court’s analysis. To be sure, Senator Orrin Hatch says this is exactly the sort of case that he and Senator Kennedy had in mind. But as a matter of policy, the answer really depends on how much one values freedom of religion vis-à-vis other rights. Those who regard gay rights and women’s reproductive rights, for now at least, as more important than religious freedom will tend to view *Hobby Lobby*, as “deeply disturbing,” as does Hillary Clinton. Those who consider religious freedom more important will tend to view it as

a much-needed corrective, and may contend, with Steve Deace, that the Greens and the Hahns are today's Rosa Parks.

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