



THE FIRST AMENDMENT vs THE RFRA

Part II: Becoming "A Law Unto Oneself"

The Supreme Court of the United States (SCOTUS) decided in June in the Hobby Lobby case that companies having a religious objection are exempt from the legal mandate to purchase medical insurance for their employees that covers reproductive health care services. But SCOTUS didn't rely on the First Amendment. Like religious tax exemptions, Hobby Lobby was the result of legislation, in this case a federal law known as the Religious Freedom Restoration Act (RFRA). The RFRA "restored" a standard that SCOTUS itself had applied in the 1963 case of Sherbert, which required that the government have "a compelling interest" furthered in a way that is "least restrictive" to religion. SCOTUS later found that standard unworkable, with Justice Antonin Scalia, regarded by many as an enemy of state-church separation, writing in the 1990 case of Smith, that:

"To make an individual's obligation to obey ... [generally applicable] law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' – permitting him, by virtue of his beliefs, 'to become a law unto himself,' [citing Reynolds, an 1879 case in which SCOTUS ruled that Mormons could not claim exemption from laws banning polygamy] – contradicts both constitutional tradition and common sense ... what it would produce here – a private right to ignore generally applicable laws – is a constitutional anomaly."

Congress thought better and overwhelmingly enacted the RFRA in 1993 to create just such a private right, as long as it can be justified on "religious" grounds. It passed by a voice vote in the House of Representatives and by a vote of 97 to 3 in the US Senate. Voting in support were such well-known "liberal" Democratic Senators as Diane Feinstein, Harry Reid, Barbara Boxer, Joseph Biden, Carol Mosely Braun, Paul Wellstone, Ted Kennedy, John Kerry and Patrick Leahy. Only three Senators, now all deceased, voted against the RFRA: Robert Byrd (D), Harlan Mathews (D) and the notorious conservative Jesse Helms (R) from North Carolina. President Clinton signed RFRA into law that same year.

RFRA is Congress limiting itself, saying, in essence, to the courts: "here is how any and every law that we enact is to be construed if and when some-

one asserts that their religious practice is substantially burdened." So it is a rather peculiar law.

The RFRA is probably unconstitutional, because, among other things, it privileges religion by creating special rights for any who can plausibly claim to be "burdened" – on religious grounds – by generally applicable laws. This was pointed out by Justice Stevens in Boerne (see below) who wrote bluntly that RFRA "is a 'law respecting an establishment of religion' that ... is forbidden by the First Amendment." But Justice Ginsburg, in Cutter, blithely allowed that the principle is "compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise." Of course, if someone can't plausibly claim "religion" then they must bear whatever the burden is.

Justice Ginsburg was widely quoted in the media for her dissent in Hobby Lobby for saying: "The Court, I fear, has ventured into a minefield." But she was not thinking of the obvious minefield that she previously and continues to ignore. Rather, she chided the majority for "its immoderate reading of RFRA. I would confine religious exemptions under that Act to organizations formed 'for a religious purpose,' engage[d] primarily in carrying out that religious purpose, and not 'engaged. ... substantially in the exchange of goods or services for money beyond nominal amounts.'" That is to say, she only objected to Hobby Lobby and other companies getting the same religious exemption that the Catholic Bishops and others enjoy because Hobby Lobby and others are not "religious" enough!

It did not take long for a case to arise where non-federal law was claimed to "burden" religion. That was Boerne, in 1997, in which the Catholic Church sought relief through the RFRA from municipal zoning laws. SCOTUS correctly ruled then that RFRA cannot, like the First Amendment, be applied to state and local laws.

This led to the passage by Congress – by unanimous consent in both houses – of the Religious Land Use and Institutionalized Persons Act (RLUIPA) in 2000. This further extended the Sherbert test, though it is not yet settled how far this federal law can effectively restrict municipalities' zoning and eminent domain powers. But the other thing that

happened was that some states passed their own versions of RFRA. One of those states was Texas, which did so in 1999.

Interestingly, Texas' version of the RFRA opens up the possibility, at the state level, of what happened in Hobby Lobby. Anyone – including atheists and other hated religious minorities – could object to and claim exemption from a law seen to “substantially burden” their religious belief or practice. This might most easily be done with religiously-motivated laws such as the many restrictions and mandates concerning abortion.

For example, if a woman has a sincere religious belief about her ownership of her own body and perhaps the non-personhood of an embryo or early fetus, then wouldn't it be a “substantial burden” for her to be subject to government restrictions reflecting contradictory religious beliefs including invasive vaginal ultrasound procedures?

Of course, it would not be enough to simply assert this. Indeed, the Texas version of the RFRA (available online at: <http://www.statutes.legis.state.tx.us/Docs/CP/htm/CP.110.htm>) requires and specifies that notice must be given to the government agency imposing the burden at least 60 days before litigation may begin.

The point is that “what is sauce for the goose is sauce for the gander.” Anyone with “sincerely-held religious beliefs” who feels “burdened” by generally-applicable laws may object and gain exemption from them. Or anyone who feels “burdened” by a law may think of a “religious” reason or style any reason as “religious” to effectively object and gain exemption.

Government policies always come with economic, cultural, and other distortions. This is deliberately exploited in our taxation system, but the effect is general. What incentive do objectors to reproductive health care services have now, for example, to become more reasonable and change their views? None. In fact, they have a disincentive to do so. Everyone in American society now has an incentive to exploit “sincere religious belief,” even if it is counterfactual and irrational, as a way to become “a law unto themselves.” RFRA may allow the return of Mormon polygamy, public animal sacrifice and other possibilities. For what is the “compelling” interest of the government in prohibiting such things beyond popular sensibilities?

It is ironic that those most loudly cheering the Hobby Lobby decision are the ones who most strenuously insist that their own religious doctrines and practices must be imposed on society at large. In addition, when it comes to medical care, allowing anyone to opt out of what remains at least a nominally “private” system of insurance seems likely only to speed the coming of a mandatory “single-payer” government-run solution that conservatives say they most strongly oppose.

All NTCOF events can be found through our website calendar , or our meetup page, from which you can RSVP, at:

- www.meetup.com/church-of-freethought - JOIN THE NTCOF MEETUP GROUP !!!

Social Luncheon: Today, immediately after our Service, join us for lunch and discussion. Today we meet at the Jason's Deli on MacArthur Blvd just south of 635, at 7707 N MacArthur Blvd, phone (972) 432-0555.

Freethought Salon: Get together to discuss today's service topic or other conundrums of interest for Freethinkers. It happens most non-1st Sundays, over breakfast, at the Hilton DFW Lakes Hotel restaurant in Grapevine beginning 10:30 AM; see the meetup site!

Game Night: The regular game night crew meets nearly every Friday night at the IHOP on 2310 Stemmons Trail (I-35), near Northwest Highway (Loop 12). Plan to arrive at about 7:30 PM, and stay late playing Risk, Rummikub, and other fun games!

Have Another Idea? Email or call us about it!

PLANNED FOR NEXT MONTH:

“MOTIVATION”

Why DO We Do Things?

**>>> Sunday, September 7th, 2014 <<<
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Presenters:	Tim Gorski
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