EXTRICATING THE RELIGIOUS EXEMPTION DEBATE FROM THE CULTURE WARS

WILLIAM P. MARSHALL*

As Professor Laycock noted in his opening remarks, the debate over religious exemptions has unfortunately devolved to polemics with insults and mischaracterizations being freely levelled by both sides.[1] It was not always this way. Although the question of whether religious believers should be exempt from neutral laws of general applicability has long sparked serious debate, that issue was not historically situated in the epicenter of the culture wars until relatively recently. *Sherbert v. Verner*,[2] the 1963 decision in which a constitutional right to a free exercise exemption was initially recognized, involved the issue of whether a Seventh Day Adventist should be exempt from the availability for work requirements of an unemployment compensation statute.[3] *Employment Division v. Smith*,[4] the 1990 case that held there was no such right, dealt with the claims of Native Americans seeking religious exemptions from laws prohibiting the ingestion of peyote.[5] In neither case was the underlying religious claim socially divisive.

Things have changed. In the current political environment, the question of whether religious believers should be exempt from neutral laws of general applicability is most prominently debated and understood with an eye towards the deeply polarizing issues that underlie the legal claims. Should religious believers be exempt from laws such as the Affordable Care Act that would otherwise require them to offer certain types of con-

---

* Kenan Professor of Law, University of North Carolina. An expansion of some of the arguments made in this Article can be found in William P. Marshall, *Bad Statutes Make Bad Law:* Burwell v. Hobby Lobby, 2014 SUP. CT. REV. 71. I am deeply grateful to Josh Roquemore for his research assistance.

1. *See* Douglas Laycock, *The Wedding-Vendor Cases*, 41 HARV. J.L. & PUB. POL'Y 49, 58 (2018).

2. 374 U.S. 398 (1963).

3. *Id.* at 403.

4. 494 U.S. 872 (1990).

5. *Id.* at 878.

traceptive coverage for their employees, as in *Burwell v. Hobby Lobby Stores, Inc.*?[6] Should small businesses, such as bakeries, have to provide wedding cakes to gay couples, when to do so would offend their religious principles, as in *Craig v. Masterpiece Cakeshop*?[7]

Viewing the religious exemption question against a cultural war background, however, tends to distort the underlying legal issues involved. After all, it was Justice Brennan, one of the most prominent liberals in Supreme Court history, who wrote the *Sherbert* opinion allowing for religious exemptions. And, it was Justice Scalia, one of the leading conservative jurists in Supreme Court history, who wrote the *Smith* decision, effectively ending the *Sherbert* regime. Now, however, some liberals vociferously question the granting of religious exemptions, while some conservatives are often the loudest voices in favor of religious exemption claims. Apparently then, to some on both sides of the political spectrum, the position on the advisability of religious exemptions is secondary to their views on the hot-button reproductive and civil rights issues that dominate our public discourse.

It is therefore appropriate to re-examine the religious exemption issue removed from its current highly politicized context in order to return the focus to the religion issues involved. For me, the starting point for that inquiry is Justice Scalia's opinion in *Smith*.[8]

Let us quickly set up the discussion. Pre-*Smith*, a claimant seeking a constitutionally compelled religious exemption under the Free Exercise Clause had to satisfy three threshold elements. First, she needed to show religiosity; that is, that her claim was religious, as deeply held moral or philosophical beliefs were not held to be sufficient to maintain a free exercise challenge.[9] Second, she needed to establish that her claim was

---

6. 134 S. Ct. 2751 (2014).

7. 370 P.3d 272 (Colo. App. 2015), *cert. denied*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), *cert. granted sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290 (2017).

8. *See* William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991).

9. *See* Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 713 (1981).

sincere.[10] Third, she needed to demonstrate that her beliefs were burdened by the challenged state provision.[11] If these elements were established, the burden switched to the state, which then had to demonstrate a government interest sufficiently compelling to override the free exercise challenge.

Justice Scalia's opinion in *Smith* rejected this "compelling interest test" regime. First, and most broadly, he argued that potentially allowing every person's religious belief to be superior to the law would effectively make each person a "law unto himself."[12] As such, he argued, the test would introduce a new element into the criminal law.[13]

Second, Justice Scalia was concerned about the potential breadth of the free exercise assertion. Religious beliefs, after all, can be about anything. They can concern how a person dresses,[14] the days she chooses to works,[15] to whom she rents,[16] and the wages she chooses to pay to her employees.[17] They can even be implicated, as recent Affordable Care Act litigation shows, by requiring a religious believer to file paperwork as a pre-condition for being granted a religious exemption.[18] There is no limit. Consider, for example, one pre-*Smith* decision in which the belief being advanced was the ostensible religious obligation for the individual to dress like a chicken when going to court.[19]

Further, as Justice Scalia explained, because there is no limit on the types of actions that can be ascribed to religious compulsion, this is also no limit on the types of regulation against which a religious exemption claim can be brought. As he stated:

---

10. United States v. Ballard, 322 U.S. 78, 88 (1944).

11. *See* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 934 (1989).

12. Emp't Div. v. Smith, 494 U.S. 872, 879 (1990) (citing Reynolds v. United States, 98 U.S. 145, 167 (1878)).

13. *Id.*

14. *See* Goldman v. Weinberger, 475 U.S. 503, 504 (1986).

15. *See* Sherbert v. Verner, 374 U.S. 398, 410 (1963).

16. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 276 (Alaska 1994).

17. Tony and Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 291–92 (1985).

18. *See* Zubik v. Burwell, 136 S. Ct. 1557 (2016).

19. State v. Hodges, 695 S.W.2d 171, 171–72 (Tenn. 1985).

> [B]ecause 'we are a cosmopolitan nation made up of people of almost every conceivable religious preference,' and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The [compelling interest test] would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind . . . .[20]

Third, Justice Scalia contended that because free exercise challenges were potentially limitless, courts would inevitably water down the strength of the compelling interest test.[21] On this point, moreover, he had ample empirical support, as there was little doubt that this is exactly what had happened in the pre-*Smith* line of cases.[22] As virtually every commentator acknowledged, the compelling interest test was not applied in the pre-*Smith* free exercise cases with any of the rigor with which it was applied in other contexts.[23]

Fourth, Justice Scalia was concerned with the thorny issues surrounding the evaluation of the bona fides of the religious claims that the compelling interest test required.[24] How should a court adjudicate the sincerity of religious belief?[25] How should it determine whether a particular belief is burdened?[26] How does a court even define what "religion" is—given that doing so can itself give rise to First Amendment concerns?[27]

Further, there were other reasons to be skeptical of an exemption regime beyond the reasons advanced by Justice Scalia. First, the potential availability of exemptions invited challenges to laws where exclusion from coverage could provide economic advantage to the claimant, such as tax laws or wage and

---

20. Emp't Div. v. Smith, 494 U.S. 872, 888 (1990) (citations omitted).

21. *Id.*

22. *See* James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1412 (1992).

23. *See, e.g.*, Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 756 (1992); Michael W. McConnell, *Free Exercise Revisionism,* 57 U. CHI. L. REV. 1109, 1127 (1991).

24. *Smith*, 494 U.S. at 887.

25. *See* United States v. Ballard, 322 U.S. 78, 88 (1944).

26. *See* Lupu, *supra* note 11, at 934–35.

27. United States v. Lee, 455 U.S. 252, 263 (1996) (Stevens, J., concurring).

hour requirements.[28] It therefore encouraged strategic behavior by those seeking economic benefit, a problem exacerbated by the difficulty in determining the bona fides of religious claims.[29]

Second, the test allowed for the mischaracterization of beliefs as religious even when conscious strategic behavior was not at issue. Consider *Thomas v. Review Board of Indiana Employment Security Division*.[30] In that case, the Court held that the claimant had a free exercise right to an exemption from having to work in an armaments factory—even though it was not clear whether the claimant actually knew whether his belief was religiously-based (in which case he would be entitled to an exemption) or morally-based (in which case he would not).[31] Indeed, there may be significant question as to whether it is ever possible for a believer to definitively know the derivation of his specific belief—particularly when, as in the *Thomas* case itself, the belief in question was not based on any formal church tenet or doctrine.[32] Nevertheless, the obvious incentive created in a pre-*Smith* regime is to self-characterize (consciously or unconsciously) the belief as religious even when that might not actually be the case.

Third, the need to distinguish between religious and moral or philosophical beliefs reflected in the *Thomas* opinion raises the question as to whether such a distinction is justifiable. As some writers have contended, the distinction impermissibly privileges religious conscience over non-religious conscience.[33] Is there a sound reason as to why a person should be exempt from working in an armaments factory if his belief is religious-

---

28. *E.g.*, Tony and Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 293 (1985) (free exercise challenge to minimum wage requirements).

29. *See id.* at 298–99.

30. 450 U.S. 707 (1981).

31. *Id*. at 713.

32. To demonstrate this point, I would invite the reader to consider his or her own beliefs. Presumably, most of us believe that stealing is wrong. But can we definitively state whether this belief is based on moral conviction rather than religious tenet, or vice versa? Perhaps some of us can. But, for many, I would suggest, the answer is highly ambiguous.

33. *See* Micah J. Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1353 (2012); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1248 (1994).

ly based but not if it is based upon a deeply held moral or philosophical conviction?

Fourth, religious exemptions are also troublesome in that they provide special advantage to religious beliefs in the marketplace of ideas.[34] Religious beliefs, like secular beliefs, compete for hearts and minds. Speech clause jurisprudence accordingly requires that all speech be treated equally.[35] Exempting religious beliefs in circumstances where non-religious beliefs are not exempted, however, violates this central principle.

Despite the many arguments in its favor, however, Justice Scalia's opinion in *Smith* did not persuade the Congress. Rather, the decision triggered a reaction that has not since been replicated in the nation's capital. It brought people and groups from the left and the right together to pass the Religious Freedom Restoration Act (RFRA) and reinstall the compelling interest test[36]—an event that some might have considered a true ecumenical moment. But all was not as it seemed. Rather, as subsequent events unfolded, it became apparent that support for RFRA was based on two different strands of thought that, although complementary at times, were also ripe for conflict.

The first of these strands saw the free exercise claim as primarily a civil rights issue.[37] Under this view, religious exemptions were necessary to protect minorities from majoritarian actions that unfairly disadvantaged them. The second viewed free exercise as primarily designed to protect the substance of religion itself.[38] Religious exemptions were therefore a way to keep religion inviolate.

---

34. *See* Marshall, *supra* note 8, at 312–13.

35. *See, e.g.*, Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218 (2015); Widmar v. Vincent, 454 U.S. 263 (1981); Police Dep't of the City of Chi. v. Mosley, 408 U.S. 92 (1972).

36. Some Catholic groups did not join this coalition because of concerns that a new law might allow religious exemptions from anti-abortion restrictions if *Roe v. Wade*, 410 U.S. 113 (1973), were overturned. *See* Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883, 896 (1994).

37. *See, e.g.*, Editorial, *Congress Defends Religious Freedom*, N.Y. TIMES (Oct. 29, 1993), http://www.nytimes.com/1993/10/25/opinion/congress-defends-religious-freedom.html [https://perma.cc/FD4G-LUQ9].

38. *See, e.g.*, Garrett Epps, *Elegy for a Hero of Religious Freedom*, ATLANTIC (Dec. 9, 2014), https://www.theatlantic.com/politics/archive/2014/12/elegy-for-an-american-hero-al-smith-smith-employment-division-supreme-court/383582/ [https://perma.cc/VZ75-PQT8].

To repeat, these two lines of thought were not, and are not, mutually exclusive; and some in the RFRA coalition were undoubtedly motivated by both of these concerns.[39] Many others, however, strongly favored one rationale over the other, a matter that would later become clear after the Supreme Court struck down the application of RFRA to the states in *City of Boerne v. Flores*.[40] At that point, the coalition once again convened in an effort to resurrect the compelling interest test. By then, however, unity was lost, as those who saw free exercise as primarily a civil rights matter had become concerned that religious exercise protections could be forged to exempt religious believers from civil rights requirements, while those who saw free exercise as primarily concerned with protecting religious belief saw no such concern. Consequently, the only matters the coalition could ultimately agree upon were those dealing with land use restrictions and prisoners' rights. The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) was therefore passed addressing only those issues.[41]

The tension between the two strands of thought regarding the advisability of religious exemptions, however, did not go away. *Boerne*, it may be remembered, had invalidated RFRA only with respect to the states, meaning the statute continued to apply to the federal government.[42] A religious claimant, therefore, could still bring an action under RFRA if she could show that a federal law burdened her religious exercise.[43] Accordingly, even after the Congress's failure to enact a new RFRA applicable to the states, there remained the possibility that the conflict could manifest itself in subsequent RFRA litigation.

---

39. *See, e.g.*, Ross Douthat, *Questions for Indiana's Critics*, N.Y. TIMES: EVALUATIONS (Mar. 30, 2015, 4:20 PM), https://douthat.blogs.nytimes.com/2015/03/30/questions-for-indianas-critics/ [https://perma.cc/RRF7-P3WC].

40. 521 U.S. 507 (1997).

41. Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 804 (2000) (substantially codified at 42 U.S.C. §§ 2000cc–2000cc-5 (2012)).

42. *Boerne*, 521 U.S. at 512.

43. Some states, to be sure, passed their own state RFRAs. *See* Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466, 467 (2010).

The first case to reach the Court, *Gonzales v. O Centro Espirita Benificente Uniao do Vegetal*, [44] however, did not present this conflict. *Gonzales* involved a RFRA challenge, brought by a small Christian sect against a federal restriction on the importation and use of a hallucinogenic substance (DMT) on grounds that the sect required the use of this ingredient in one of its religious practices.[45] The case thus fit comfortably within both lines of support for RFRA. It involved a small and politically powerless minority religion, and it sought to protect a sacrament that no one disputed was deeply religious. Not surprisingly, the Court ruled unanimously in favor of the RFRA claimant.[46]

Enter *Burwell v. Hobby Lobby*. *Hobby Lobby* involved a RFRA claim brought by two for-profit corporations seeking religious exemptions from portions of the so-called "contraceptive mandate" or "contraceptive coverage requirement" regulations promulgated under the Affordable Care Act on grounds that having to provide coverage for certain types of contraceptives violated their religious belief that life begins at birth.[47]

Unlike *Gonzales*, *Hobby Lobby* brought the RFRA divide to the surface in both the courts and in the populace. On one side were those who saw the ACA requirements as vital provisions designed and necessary to protect women's rights. On the other were those who viewed the case as presenting basic issues of religious liberty. Reflecting this broader divide, the Court split 5-4 along conservative-liberal lines. The five conservatives, led by Justice Alito, voted to grant the religious exemption. The four liberals, led by Justice Ginsburg, strenuously dissented.

There has been much discussion in the literature as to whether *Hobby Lobby* was correctly decided, and it is not my intent to go over well-trod ground here. Nevertheless, it is worth noting that Justice Alito's opinion, whether correct or not, largely ignored the problems in the compelling interest test

---

44. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

45. *Id*. at 425–26.

46. *Id*. at 422, 439 (Justice Alito did not participate). That the Court ruled unanimously is also not surprising given that *Smith*, the case that RFRA purported to overrule, had very similar facts. As the *Gonzales* Court stated, "the very reason Congress enacted RFRA was to respond to a decision denying a claimed right to sacramental use of a controlled substance." *Id*. at 436–37.

47. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762–64 (2014).

identified by Justice Scalia in his *Smith* opinion and actually exacerbated those concerns in two important respects. First, Justice Alito's opinion made the burden inquiry self-referential; that is, Justice Alito held that the question of whether a person's belief is sufficiently burdened to trigger RFRA's protections is a matter to be deferred to the claimant herself.[48] Second, Justice Alito ruled that whether the state has a compelling interest is to be adjudged only with respect to the religious claimants seeking exemption.[49] Thus, for example, the question in a case like *Tony and Susan Alamo Foundation v. Secretary of Labor*[50] is not whether the government has a compelling interest in wages and hours regulations generally but whether it has a compelling interest in applying those regulations to only those presenting the specific religious objection.

On one level, both of these assertions are defensible. After all, who knows better than the claimant whether her religious beliefs are, or are not, burdened? If a religious group believes, for example, that its belief is burdened by having to file paperwork in order to receive a religious exemption from having to provide contraceptive coverage, as in the *Zubik v. Burwell*[51] case, who is fit to tell them otherwise? Similarly, the notion that the state's interest must be compelling in relation to only the believers seeking exemption is not an unreasonable reading of the RFRA text, and in any event, was foreshadowed in *Gonzales*.[52]

Nevertheless, the inclusion of these factors, along with the already heavy weighting of the compelling interest test in favor of the religious objector, means that the state would likely win very few cases going forward. The effect of presuming burden based solely the claimant's assertion essentially means that there will be no threshold inquiry before a challenged law is presumed to be unconstitutional as applied to a religious objec-

48. *Id.* at 2778–79.

49. *Id.* at 2779–80.

50. 471 U.S. 290 (1985).

51. 136 S. Ct. 1557 (2016).

52. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430–31 (2006).

tor.[53] The effect of requiring that the state show a compelling interest in applying a particular regulation to only religious objectors, in turn, will impose an almost insurmountable barrier on the state because almost any state interest will be less compelling when applied to only a few religious adherents than when applied to the general population.

Whether, of course, the courts will apply the test this vigorously is the big question. After all, the courts pre-*Smith* had difficulty applying even a less stringent version of the test because of the havoc that would result if religious believers were able to win exemptions from virtually every type of regulation.[54]

But assume for the moment that the courts do take the compelling interest test seriously. If so, we may see a new reign of religious exemption cases coming (and then prevailing) from the other side of the culture wars. Churches and religious believers may claim that they have a right to provide sanctuary and shield illegal immigrants. Religiously owned businesses may claim a religious right to discriminate against those with religious beliefs they perceive to be intolerant. As Justice Scalia foresaw, the list of potential challenges is endless.

Even more likely, we may see, and have already seen, other cases that will test whether the courts are prepared to apply the compelling interest test in the manner *Hobby Lobb*y prescribes and whether the exemptions that result are normatively warranted. Consider, for example, *Iglesia Pentecostal Casa De Dios Para Las Naciones, Inc. v. Johnson*,[55] in which a foreign national sought an exemption from the "ability to pay" requirement for work visa status on grounds that his religious belief and that of his church was that he should "live by faith."[56] Or *United States*

---

53. The Court's decision in *Thomas* has already made clear that courts should defer to a claimant's assertion that his belief was religious. *See* Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 714 (1981). To be sure, after *Hobby Lobby*, a RFRA claimant will still have to show sincerity, but that element is almost always stipulated, in part because of the difficulty in demonstrating that a religious claim is being fraudulently asserted. *See* United States v. Ballard, 322 U.S. 78, 93 (1944).

54. *See generally* James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407 (1992).

55. No. 15-CV-2612-DDC-GEB, 2016 BL 234814 (D. Kan. July 21, 2016).

56. *Id.* at *4.

v. Jeffs,[57] in which members of the Fundamentalist Church of Jesus Christ of Latter-day Saints sought exemption against a restriction prohibiting transferring food stamps outside the household unit on grounds that the church's religious beliefs required all members to donate their resources to the Church.[58] As it turns out, the RFRA claimants lost both of these cases.[59] But if the *Johnson* and *Jeffs* courts had seriously applied the compelling interest test in the manner prescribed by *Hobby Lobby*, it is certainly questionable that they should have.

There is a lesson in all this. Before too profusely celebrating (or condemning) the reinvigoration of a jurisprudence of religious exemptions, it might be worthwhile for those on all sides of the culture wars to consider that Justice Scalia may have been right.

57. No. 2:16-CR-82 TS, 2016 BL 379750 (D. Utah Nov. 15, 2016).
58. *Id.* at *3.
59. *Id.*; *Johnson*, 2016 BL 234814, at *1.