Addleton Academic Publishers

Contemporary Readings in Law and Social Justice 9(2), 2017
pp. 191–197, ISSN 1948-9137, eISSN 2162-2752

COMPETING FREEDOMS: FREEDOM OF RELIGION AND FREEDOM OF SEXUAL AND REPRODUCTIVE LIBERTY IN PLURALISTIC SOCIETIES[1]

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ABSTRACT. Recent events in several states, along with the United States Supreme Court's recent decision in Obergefell v. Hodges, have resulted in a national debate often pitting religious freedom against the civil rights and civil liberties of the LGBT community. This controversy follows closely on the heels of the Supreme Court's decision in Burwell v. Hobby Lobby, which set off a firestorm over the balance between reproductive rights and religious freedom. Both conservatives and progressives have raised the level of hysteria. The media has been happy to oblige. Television and radio news programs, newspapers, magazines and the blogosphere are filled daily with reports of discrimination by one or both sides. We have entered a new, and heretofore unparalleled, battle in the culture wars. Of course, the framing of this controversy ignores one central fact: religious freedom and strong civil rights for all can coexist when properly understood. This paper, which is an edited excerpt from my recent book, *Freedom's Edge: Religious Freedom, Sexual Freedom, and the Future of America* (Cambridge University Press, 2016), addresses elements of the debate and suggests some possible bases for co-existence.

Keywords: LGBT rights; religion; constitutional law; same-sex marriage

1. Introduction

Recent events in Arizona, Arkansas, Georgia, Indiana, Michigan, Missouri, and New Mexico, along with the Supreme Court's recent decision in *Obergefell v. Hodges*[2], have resulted in a national debate often pitting religious freedom against the civil rights and civil liberties of the LGBT community. This controversy follows closely on the heels of the Supreme Court's decision in *Burwell v. Hobby Lobby*[3], which set off a firestorm over the balance between reproductive rights and religious freedom. Both conservatives and progressives have raised the level of hysteria. The media has been happy to oblige. Television and radio news programs, newspapers, magazines and the blogosphere are filled daily with reports of

discrimination by one or both sides. We have entered a new, and heretofore unparalleled, battle in the culture wars. Of course, the framing of this controversy ignores one central fact: religious freedom and strong civil rights for all can coexist when properly understood.

The stakes are high. For one side fundamental civil and human rights are involved. For the other fundamental civil liberties are involved. This conflict, however, can be resolved. In fact, in most situations the conflict has been manufactured by partisans on both sides of the culture wars. Coexistence is possible, and it is necessary for the survival of the United States as a nation of freedom for all.

2. Freedom of Religion and Freedom of Sexual and Reproductive Liberty in Pluralistic Societies

The main allegations made by progressives against religious freedom claims in recent years arise from attempts by conservatives, courts, and legislatures to accommodate claims brought by for-profit entities and entities that serve the general public (including government entities). The Supreme Court's recent decisions in *Obergefell v. Hodges* and *Burwell v. Hobby Lobby*, and recent state legislation, have brought this to a head. Yet, protection of for-profit entities and those that serve the general public leads to many of the claims that religious freedom acts support discrimination against the LGBT community and reproductive freedom. The answer for government employees is more nuanced because it may be possible to accommodate them if doing so would cause no delay in services or inconvenience for members of the public they serve.

Yet, arguing that for-profit entities and some government officials should not be protected by religious freedom principles is deeply troubling to many people of faith. After all, for many people of faith, life is not separable into segments, some with faith and some without. Religion is at the core of their being and influences everything, including the businesses they build and run. Religion is not left at church on Sunday, Synagogue on Shabbat, or Mosque on Friday.

Ironically, this is something that progressives should be able to identify with. Progressives don't leave their values at rallies and speeches. They take them everywhere and those values are part of their being. There is an irony in the way that progressives often write off faith based commitments as base discrimination rather than understanding the trauma that occurs when law and society reject those faith commitments and require behavior that is in conflict with them.

The side asserting that religious freedom claims and Religious Freedom Acts lead to discrimination has vastly oversimplified these issues, and created a straw-man that is easy to take down without a deeper understanding of religious freedom. Similarly, some religious freedom advocates have used religious freedom claims as a way to oppose LGBT rights in public accommodations and reproductive rights in employer benefit plans, without considering the impact and nature of such claims

in their historical context. As a result, we have a battle against straw-men on both sides; a battle from which little good can come.

The recent media firestorm over Religious Freedom Acts has mostly ignored the history and meaning of religious freedom. This is important because much of that history has been focused on protecting religious minorities from being substantially burdened by laws that never took them into account. In some cases, unpopular religious minorities were the victims of outright discrimination. Until recently, religious freedom claims were not used to discriminate against others.

In recent years religious freedom has been used by some to justify discrimination against tenants and clients based on sexual orientation. Ironically, the pain the victims of this sort of discrimination have suffered is similar to the pain the religious minorities suffered when denied religious freedom. This helps point the way toward building common ground between religious freedom claims and LGBT rights. Traditional notions of religious freedom are not the culprit here, but rather a certain kind of conscience claim that has become popular as LGBT rights have increased; a kind of conscience claim we have not seen popularized since the days of Jim Crow.

Still, one error those opposed to religious freedom claims and religious freedom legislation make is to automatically assume that objections to LGBT rights based on religion, even when those objections would not be protected by law, are somehow based in the same sort of discriminatory sentiment as race discrimination. While this is true in some cases, in most cases the religious basis here has a deep and long history and is not just the product of an era in U.S. and European history. This does not mean that those asserting these claims should win under religious freedom acts, but it does mean that the recent attacks in the media and by LGBT and reproductive rights advocates have often failed to understand the deep power and centrality to one's being experienced by those with deep faith commitments. It is not as if these individuals can simply bifurcate their lives into a religious part and a non-religious part. A line, albeit an imperfect line can be drawn between traditional religious freedom claims that harm no third parties and the sorts of religious freedom claims that discriminate against or deny benefits to third parties. This will help draw the line between religious freedom claims that should prevail at law and those that should not, without demeaning the importance of religious freedom.

Many advocates of religious freedom have argued that those advocating for LGBT and reproductive rights are engaged in an assault on "traditional values." Yet, for those advocating LGBT and reproductive rights, the issues is not about attacking anyone else's values. Rather, it is about protecting fundamental and civil rights which have been denied unfairly. Just as LGBT and reproductive rights advocates and the media have often misunderstood religion and the motives of many of those making religious freedom claims, those advocating against LGBT and reproductive rights often belittle those rights and misunderstand the importance of those rights in a free and pluralistic society.

When the Federal Religious Freedom Restoration Act (RFRA) was passed in 1993 and signed by President Clinton it enjoyed wide bipartisan and public support, and was viewed as necessary to support the civil liberties and civil rights of people of faith, especially religious minorities who were denied those liberties and rights by the Supreme Court's 1990 decision in *Employment Division v. Smith*.[4] When the Supreme Court limited application of the federal Act to the federal government in 1997,[5] many states passed their own Religious Freedom Restoration Acts or interpreted their state constitutions in a manner that rejected the U.S. Supreme Court's 1990 decision in Smith. Until recently, none of this was terribly controversial outside of some limited academic and political lobbying circles.

Over the last few years, however, Religious Freedom Acts have been re-characterized by many as licenses to discriminate and deny benefits. Several things have happened to lead to this situation. First, shortly after the Federal and some state Religious Freedom Restoration Acts were passed, a few medical providers began bringing claims under the acts to avoid having to perform abortions, even when the mother's life was in danger, and some pharmacists brought claims that they did not have to provide contraception. Most lost these claims, but a few won where there were alternative ways for patients to receive the necessary care and where patients were properly informed. These were often termed "religious conscience" claims, because they were based on an objection to facilitating what the objectors viewed as evil or sinful. Over time, however, these claims became more pervasive and created a rift in the broad based support for RFRA; albeit a narrow one.

Second, landlords and others began asserting these sorts of conscience claims against renting to gay couples or even unmarried straight couples. Again, they mostly lost, but the claims got a lot of media attention. Finally, just as society was making great strides in protecting LGBT rights and gay marriage, some for-profit entities that serve the general public like shops and restaurants, some government entities, and some for-profit corporations, began seeking similar sorts of conscience protection in order to deny service to gay couples or to deny some kinds of contraceptive coverage to female employees. This led to widespread opposition to religious freedom laws, even when they mimicked the Federal and earlier state RFRA's, under which most claimants lost most such claims. This claimed protection for for-profit entities whose exercise of religious freedom could harm third parties culminated in *Hobby Lobby* decision upholding the rights of for-profit entities to exercise religion.

I have written that *Hobby Lobby* is a pyrrhic victory for religious freedom, if it is a victory at all.[6] Many advocates for religious freedom view Hobby Lobby as a win, but the backlash against the decision has been astounding. Hobby Lobby crystalized the opposition to religious freedom laws by protecting for-profit entities and understating the impact the religious accommodation in that case – allowing the companies to deny certain contraception coverage under the Affordable Care

Act – will have. The national media accepted this meme, and the Federal and state Religious Freedom Acts became labeled as licenses to discriminate. After Hobby Lobby that label seemed to fit. Before Hobby Lobby, however, there was no indication for-profit entities would be afforded religious freedom, and certainly no basis to believe that religious accommodations that burdened others would be allowed under the Religious Freedom Restoration Act. *Hobby Lobby* was a critical moment in the balance between religious freedom and civil rights, and while at first glance it may appear a victory for religious freedom, in the long run it may have killed any chance at achieving longstanding religious freedom protection.

Moreover, even under the Federal RFRA that the Hobby Lobby Court was interpreting something called the "more is less" doctrine is likely to take hold and further limit RFRA protections. That doctrine suggests that the broader civil rights and civil liberties protections are applied the more shallow the protection under them is over time. This suggests that by protecting for-profit entities the ultimate victims may be traditional religious entities and religious individuals who will enjoy less protection under RFRA as courts narrow protection over time. In short, contrary to public opinion, *Hobby Lobby* is a disaster for religious freedom.

The Supreme Court's decision in *Hobby Lobby* followed a heated battle in Arizona over a "religious freedom act" that would have specifically protected for-profit entities and allowed negative impacts on third parties. The Arizona act was part of a movement aimed at passing such legislation in the states as a response to LGBT rights and gay marriage. Governor Jan Brewer wisely vetoed the law, which was opposed by the civil rights community, women's rights community, many religious groups opposed to discrimination against the LGBT community, and a significant number of business interests. A similar Act was vetoed in Kentucky after the Hobby Lobby decision, but the fallout from Hobby Lobby affected a number of state religious freedom acts that were promoted by many individuals and groups who also oppose discrimination against the LGBT community.

Acts in Michigan, Ohio, Georgia, Maine, New Mexico and beyond either failed to pass or stalled in the legislative process. These state religious freedom acts would have likely passed before Hobby Lobby, but once proposed they immediately came under assault as promoting discrimination against the LGBT community. Many were called "licenses to discriminate." That label was likely accurate for the Arizona and Kentucky laws, but it was not true of many of the other state acts. These other laws did not explicitly protect for-profit entities and did not specifically allow discrimination against third parties as a result of religious accommodations.

More recently, both Indiana and Arkansas passed acts that were especially problematic because they were generally designed to protect religious freedom, but were amended to also codify *Hobby Lobby*. Neither state has enacted civil rights protections for the LGBT community and negative response to the Indiana Act becoming law was overwhelming, with businesses threatening to leave and boycotts underway. This has kept the Arkansas Act from being signed by the

governor so far. Either way, if there was any doubt that the conflict between religious freedom and civil rights has become front and center on the national stage in the United States, recent events in Indiana erase that doubt.

As things stand today, it might seem impossible to find common ground. Common ground exists, however, when we look at the real purpose of most religious freedom acts. That purpose is protecting the fundamental rights of religious minorities, including Christian religious minorities, from substantial burdens on their religion imposed by general laws and protection against discrimination based on religion. Similarly, the purpose of civil rights protections for the LGBT community is protection of the fundamental right to marry and protection against discrimination. The common ground, ironically, is freedom. It is the freedom to be who you are without government interference and without discrimination.

Perhaps of greatest interest is the common ground the LGBT community and religious entities who recognize gay marriage share. While many of the claims brought by private entities have been attempts to discriminate against the LGBT community, claims may also be brought by religious entities who seek to sanctify gay marriages. We have seen significant backlash against gay marriage by some state officials, especially in Alabama, Florida, Mississippi and Oklahoma, and it is possible that a state legislature or someone like Alabama Supreme Court Chief Justice Roy Moore, could attempt (in violation of the U.S. Constitution) to limit gay marriage or religious recognition of gay marriage even though the U.S. Supreme Court has upheld the fundamental right to gay marriage. Of course, such attempts would be unconstitutional, but they would take time to sort out. Ironically, religious entities and religious individuals that support gay marriage could use religious freedom acts in these states to assert a right to marry and to have the state recognize the marriage. The claim would be based on the assertion that marriage between loving adults regardless of sexual orientation is central to the tenets of a given faith.

Obviously, the question of for-profit entities and entities that serve the general public would need to be addressed. There is little common ground on these issues, but the social trend demonstrates that most people disagree with *Hobby Lobby*, and the legal trend is likely to follow, at least in the states. Moreover, passage of civil rights laws protecting the LGBT community would provide a compelling interest under religious freedom acts that would allow lawsuits to proceed against for-profit entities who try to justify discrimination based on religion. Also, as Justice Kennedy's concurring opinion and Justice Ginsburg's dissent in *Hobby Lobby* suggest, there is already a compelling interest to prevent for-profit employers from denying broad contraceptive coverage.[7] Common ground is possible, and with common ground bridges can be built and straw-men disassembled. This is necessary to move forward in a productive way that minimizes conflict and misunderstanding and maximizes freedom.

3. Conclusion

Individual freedoms on both sides would be drawn narrowly by elected officials to avoid controversy. Courts might further narrow these freedoms, or may grant victories to one side or the other. Each victory, whether in a legal case or through legislative action, would create immense backlash and raise money for each side. This, in turn, would take us further into the tailspin toward an unbridgeable cultural gap. Geography and demographics will play a major role in where victories occur for one side or the other, but the nation as a whole would be involved. The nation would be entrenched in a full-fledged culture war beyond anything we have seen so far. It is likely that over time religious conservatives would lose more battles than they would win, and this would spur further anger within that community.

Yet, the nation can move forward in a more informed manner, enabling both religious freedom and civil rights to thrive in our pluralistic society. There is hope for the future if the public understands that both sides of the debate share common ground, even if some on each side are determined to ignore that fact. Each side will win some battles and lose some battles, but if the possibility of common ground is taken to heart we can proceed in a principled way that maximizes protections for both sides and freedom for all.

NOTES AND REFERENCES

1. This paper is based in part on Frank S. Ravitch, *Freedom's Edge: Religious Freedom, Reproductive Freedom and the Future of America*, and Frank S. Ravitch, "Be Careful What you Wish For: Why Hobby Lobby Hurts Religious Freedom," 2015 *BYU L. Rev.* (forthcoming 2015).
2. 576 U.S. ___, Slip Opinion (June 2015).
3. 573 U.S. ___, 134 S. Ct. 2751 (2014).
4. 494 U.S. 872 (1990).
5. City of Boerne v. Flores, 521 U.S. 502 (1997).
6. Frank S. Ravitch, "Be Careful What You Wish For: Why Hobby Lobby Hurts Religious Freedom," 2015 *BYU L. Rev.* (forthcoming 2015).
7. 134 S.Ct. at 2785 (Kennedy, J., concurring); Id. at 2787 (Ginsburg, J., dissenting).