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978-1-107-08744-6 - God vs. the Gavel: The Perils of Extreme Religious Liberty:
Revised Second Edition

Marci A. Hamilton, Paul R. Verkuil Chair and Benjamin N. Cardozo

Excerpt

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INTRODUCTION: THE WAGES OF RFRA

It has taken more than twenty years, but the American public is finally getting a true taste of the perils of extreme religious liberty. Finally, the Religious Freedom Restoration Act, or RFRA, and its progeny have emerged for what they are: a license for believers to assert rights to discriminate against homosexuals, abuse or neglect children, constrain a woman's right to choose, and force huge projects on residential neighborhoods and families. But RFRA is only a part of the extreme religious liberty problem, because lawmakers too often grant religious lobbyists and claimants privileges that let them harm others. Judges also blindly grant religious preferences on the basis of their own religious beliefs or on trial records that are misleading.

RFRA is evidence of an agenda of one-way accommodation, where the religious believer is the center of the universe and the rest of us are supposed to make way. Each one of us is, on this theory, a self-enclosed universe where our only obligations are to ourselves. It is a recipe for intolerance; self-centered practices; harm to children, women, and the vulnerable; and, ultimately, if permitted to fester, religious war. Do you know why we haven't had a religious civil war yet, like the rest of the world? Because we did not countenance extreme religious liberty until now.

To put it plainly, we are in the grip of a push for Me-Me-Me religious liberty, or, just plain narcissism. To be clear from the beginning: this is no indictment of the Supreme Court, whose First Amendment doctrine has established the most successful religious liberty regime in the history

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of the world – for believers and potential victims of religious conduct. The new statutes like RFRA do not “restore” the First Amendment, but rather go well beyond it.

The RFRA formula, which directs the courts to tailor every law to each believer, promised disaster early on, but only a few of us saw it. And we have been called everything from “hysterical” to “overreacting.” What could be wrong with religious liberty, everyone, especially members of Congress, said? A lot when it is extreme.

It took huge for-profit companies with revenues in the billions like Hobby Lobby demanding a “right” not to be “complicit” in their female employees’ reproductive health decisions to get the country’s attention. The company hoisted RFRA to avoid including emergency contraception in its health care plans, because of its owners’ and board members’ beliefs. Dozens of businesses followed suit, with an array of objections to women’s reproductive health care. The move should violate Title VII, because it discriminates on the basis of gender and religion, but that did not deter Hobby Lobby, which took its claimed right to avoid “complicity” in women’s most personal and private decisions to the Supreme Court. In a decision I dreaded but expected, five Catholic, male Justices held that RFRA trumped any rights the women might have and ruled in favor of Hobby Lobby.¹

Civil rights groups were shocked, as were many women, at the sheer nerve of the claim and the decision. They woke up none too soon.

While Hobby Lobby was reminding women that evangelicals and the Catholic bishops do not respect their legal rights to privacy, the RFRA formula was working its magic in the states, where arch-conservative groups were pushing ever more extreme RFRA-on-steroids bills that would permit businesses to refuse to deal with homosexuals and same-sex couples. *Finally*, civil rights groups, the press, and the public took notice of this insidious law and cried foul. Arizona’s Governor Jan Brewer vetoed the Arizona version, and similar bills across the country were withdrawn as Republican sponsors were accused (rightly in my view) of taking us back to the Jim Crow era. Except Mississippi, whose new, “ordinary” RFRA invites businesses to discriminate as part of their extreme free exercise rights, due to the definition of “person” under state law.

Some of the 2014 state bills “just” permitted discrimination on the basis of sexual orientation. Arizona’s went further, as it was written so

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that businesses could invoke religious reasons to discriminate against *anyone*. Businesses, including the National Football League and Major League Baseball, balked, and it was vetoed. If future lawmakers were to pass such a bill, expect the empowerment of Biblical and neo-pagan white supremacists like Frazier Glenn Cross, who recently killed three people in Kansas City for his beliefs.

RFRA introduced an era of extreme religious liberty in the United States that would have been rejected by the Framers, who understood the difference between ordered liberty and licentiousness. We need to return to that distinction, or risk the end of our largely peaceful religiously diverse country.

Who is empowered under this new regime? Employers and believers who sexually abuse, abandon, or medically neglect children, engage in animal cruelty, oppose all family planning, and engage in invidious discrimination based on disability, race, gender, and sexual orientation. Not to mention the religious land developers who find inexpensive parcels in residential zones and then use extreme religious liberty statutes to force their large projects on families and neighborhoods. When neighbors complain about the intensity of the use, and the land use application is appropriately denied, the religious applicant calls everyone anti—their religion and races to federal court, where it can force the city to do its bidding and taxpayers to foot its attorneys' fees, even in weak cases. It is not that believers *win* every case under these new rules. It is bad enough they can burden judges, courts, taxpayers, and everyone else with such claims. The claims alone, which would not have been raised under prior doctrine, increase religious rancor as well.

This pro-believer wave also subverts justice. It has persuaded vote-hungry legislators not only to pass ill-considered statutes, but also to defer to religious demands to block access to justice for child sex abuse victims, to fail to prosecute child predators, and to cooperate in the cover-up of abuse.

Who loses? Employees, children, child sex abuse victims and their families and friends, women, homosexuals, minorities, homeowners, cities, counties, taxpayers, and society itself. What is being demanded is licentiousness, not liberty. It is time to reverse the tide and return to common sense religious liberty.

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A brief history of how we got here

I will detail this history further in Chapters 1 and 8, but it is worth providing an overview for the reader first. Before RFRA was adopted, there were three constitutional principles. Belief is absolutely protected. Religiously motivated conduct can be regulated. Religious persecution is forbidden.

Except in rare cases, religious claimants have not had a right to trump the laws that govern everyone else simply because they were religious. Thus, the First Amendment did not grant the Amish a right to avoid Social Security taxes.² In an iconic statement that captures where we were and where we should be, the *Lee* court explained how the Hobby Lobby case should be decided:

... 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. Granting an exemption from Social Security taxes to an employer operates to impose the employer's religious faith on the employees.³

Likewise, Jimmy Swaggart Ministries lost its bid to avoid sales taxes,⁴ Native American believers had no right to direct how the federal government develops federal land,⁵ Jewish merchants could not force the weekly day of no retail sales to coincide with their Sabbath,⁶ and a Native American family could not refuse to obtain a Social Security number for their 2-year-old daughter as a precondition to getting federal welfare.⁷ Here is the Court nicely explaining these principles:

Certain aspects of religious exercise cannot in any way be restricted or burdened by either federal or state legislation. Compulsion by law of the acceptance of any creed or the practice of any form of worship is strictly forbidden. The freedom to hold religious beliefs and opinions is absolute...

However, the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions... [L]egislative power over mere opinion is forbidden, but it may reach people's actions when they are found to be in violation of

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important social duties or subversive of good order, even when the actions are demanded by one's religion.⁸

The Court then held that the laws that impose indirect burdens on conduct do not violate the First Amendment.

Believers also have a strong right against discrimination, targeting, and persecution. In fact, there have been very few laws that fit this description in the United States, but the Santerians in Hialeah, Florida, who ritually sacrifice animals during worship services, won when the Court held that they could not be driven out of town by an ordinance that outlawed the "sacrifice" of animals, but let stand similar practices by others.⁹ Nor can the government favor secular reasons over religious reasons when crafting exceptions to a law. Adell Sherbert, a textile mill operator and Seventh-day Adventist, whose Sabbath was on Saturday, was fired after missing Saturday work to attend church. The Court reasoned that she could not be denied unemployment compensation when an employee who had missed work for a doctor's appointment could receive it.¹⁰

Religious actors also have the right and power to petition lawmakers for exemptions, like the exemption for the use of Communion wine for Catholics during Prohibition and the many others discussed in this book. If you add up all of this history, Americans enjoy absolute protection of belief, obligations to obey the laws over conduct balanced by generous legislative accommodations for many practices, and a strong rule against persecution.

The one outlier case in this history was *Wisconsin v. Yoder*, where the Court turned on its prior cases to grant a right to the Amish to remove their children from school at age 14, and thereby trump Wisconsin's compulsory education law, which required students to attend school until age 16. The Court focused on the Amish's belief "that salvation requires life in a church community separate and apart from the world and worldly influence." The Amish reject higher education, because of its "influences that alienate man from God." The Court was unwilling to let Wisconsin educate the Amish children fully, because it recognized a right to avoid the "destruction of the old Order Amish church community as it exists in the United States today." As I discuss later, this decision was not well-reasoned, but rather a love letter to the Amish, who, according to the Court had "an excellent record as law-abiding and generally

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self-sufficient members of society. . . . had never been known to commit crimes, . . . to receive public assistance [or to be] unemployed.”¹¹

Having sung the religious entity’s praises, the Court then discounted the government’s and society’s interest in an adequately educated citizenry, assumed that no child would ever want to leave the faith, ignored the potential for this decision to deprive children in other faiths, and failed to take into account the needs of children to be educated at least through high school. No group of humans is as perfect as the Court assumed in *Yoder*, and this decision shows just how far Americans will go to assume religious actors are intrinsically good people. Unfortunately, they are all too human.

There is no other decision with the same level of hero worship, but also no other decision where the Court permits a religious entity to overcome a neutral, generally applicable law. There is a lesson in this opinion, and that is the Framers’ deeply held conviction that every one of us is fallible, even those who appear to be godly. Since *Yoder*, we have learned that there are indeed problems in the Amish community, like those that range across humankind. There is violence; alcoholic and drug addiction, incest, particularly sibling incest; and it is a religious organization that will support the rapist, while shunning the victim. Moreover, when it shuns the victim, that girl is sent out into the real world unprepared, with an inadequate education, because the Supreme Court discounted the states’ interest in requiring a high school education on a one-sided record. (Imagine a world where all religious groups can simply freeze their beliefs and not have to interact with the culture.)

With these cases behind it, in 1990 the Supreme Court took up the case of two drug counselors who used illegal drugs and were fired. Their theory was that they had a right to use drugs, even if they were drug counselors, because the use was religious. They lost, which should have surprised no one, but religious lobbyists made the case a cause célèbre, and RFRA was the unfortunate result.

The Supreme Court’s 1990 decision, *Employment Div. v. Smith*, held that the drug counselors could be denied unemployment compensation if they were fired for using peyote.¹² The Court employed the reasoning from the vast majority of its cases, except *Yoder*, which they distinguished in a way that marginalized it. I was clerking for Justice Sandra Day O’Connor that year. None of us thought this was much of a case. In actuality, it triggered the most political fallout of any case that Term.

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The majority, with Justice Scalia writing, relied principally on all of the Court's free exercise cases, starting with its first, *Reynolds v. United States*, in which the Court declared that belief is absolutely protected, but conduct is not. Quoting Thomas Jefferson's Letter to the Danbury Baptists, the Court stated that the First Amendment requires "that the legislative powers of the government reach actions only, and not opinions." Thus, "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."¹³ This belief/conduct distinction would become the framework of ordered liberty.

Religious groups and legal academics had persuaded themselves that *Yoder* should govern every case, because of a misguided, naïve, and ridiculous view that more liberty is always good liberty. (I was one of those scholars at one point.) The Framers had a name for extreme religious liberty: licentiousness.

When *Yoder* did not control *Smith*, they stormed Congress demanding its members reverse the Supreme Court's interpretation of the First Amendment. To their discredit, House members, Senators, and President Clinton could not resist the temptation to pander to this united front of religious and civil rights groups, and so they agreed to take over the Court's free exercise doctrine and to make it even stronger. Voila! RFRA was born.

There is plenty of blame to go around. RFRA was supported initially by a coalition that included religious groups and the American Civil Liberties Union (ACLU), People for the American Way, and Americans United for Separation of Church and State (Americans United). The latter three groups normally fight for the separation of church and state, but like the members of Congress, they fell for the call to "restore" supposedly true religious liberty.

During three years of hearings, religious lobbyists told members of Congress the Court had "abandoned" religious liberty again and again. The solution: supposedly "restore" the Court's doctrine it had purportedly left behind. It was all so simple; here was the problem, and there was the solution. The answer offered, though, was not the Court's prior doctrine, but rather a new extreme religious liberty formula.

Under the RFRA of 1993, a religious believer could ignore every law in the country unless it served a "compelling interest," which is a state interest of surpassing importance, *and* the law served that end in the

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“least restrictive” way for this one religious believer. In layman’s terms, believers could build a moat around their particular religious beliefs that would deny access to the law.

What was missing? Well, how about members of Congress asking why the religious groups were in need of such extreme rights. Which laws did believers need to break? They should have demanded answers before endorsing RFRA. Instead, they treated it like a no-brainer when it should have engaged them. The House didn’t even do a roll call vote, which would have recorded each member’s vote. It was passed by “unanimous consent,” the reprehensible procedure by which leadership puts up a bill for a vote with no one there and no record of where each member stands. Today, supporters of RFRA routinely claim it was passed “unanimously,” but that is just not true.

Or, better yet, the ACLU, People for the American Way, and Americans United should have considered that they were sitting at a table with their natural political enemies. How could the ACLU not have understood that fair housing laws were at risk? Or women’s reproductive health? What was Americans United thinking?

The problems we now face

Almost a decade has passed since the first edition of *God vs. the Gavel*. As veteran New York Times Supreme Court reporter, Linda Greenhouse, recently said to me, I “saw around the corner” on RFRA before anyone else did, but not because I wanted to. I had to.

The irony is that this book is grounded in my sincerely held religious belief in the inherent fallibility of all humans – whether clergy, legislator, or judge. I am writing this new edition, *God vs. the Gavel: The Perils of Extreme Religious Liberty*, because the U.S. is on the precipice of a permanent shift that threatens to transform the country from a thriving, diverse community of religious believers who share a marketplace and a public square into a collection of separate mini-theocracies, where we are more concerned about the religion of the person sitting next to us than the fact that he or she is a fellow American, where an employee needs to know the religion of a Fortune 500 company’s owners to know what the health coverage will be, and where goods are tagged with religious identity. RFRA and its state counterparts and its other spawn, the Religious Land

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Use and Institutionalized Persons Act (RLUIPA),¹⁴ have sewn religious discord we don't need.

I must also admit that I am frightened by the sheer narcissism of the recent demands made by male-dominated, religious organizations who wish to have a say in women's reproductive health decisions. I am appalled at the Hollywood representations of polygamy in one reality show after another, which downplay women's inequality and children's suffering for ratings. I will never forget my shock and disgust when I learned Catholic bishops across the country were paying their lobbyists millions to keep victims of child sex abuse from having access to justice. Nor will I accept lightly that officials in New York City have done so little to protect babies from getting potentially life-threatening herpes from ultra-Orthodox Jewish circumcisions or that the Brooklyn District Attorney was cooperating with ultra-Orthodox Jews to cover up child sex abuse or that American Muslim fathers have subjected their daughters to "honor" killings, and parents have shipped daughters overseas for female genital mutilation. Of course, no American can forget that the World Trade Center and Boston Marathon bombings were fomented by religion. It's ugly religion, but it is religion nonetheless.

At some point, I simply came to expect that religious leaders are capable of betraying not only society's values, but their own. Most recently, I was not surprised to learn that the leader of the evangelical Christian movement for the "submissiveness" of women to men and children to adults, and home-schooling, Bill Gothard, was credibly accused by many women and teenage girls of sexual harassment and abuse.¹⁵ Is it any wonder that respect for religious leaders is at an all-time low?¹⁶

Now is the time for Americans to understand exactly what religious entities are demanding and doing to our beloved country.

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