Vanderbilt Law Review

Volume 67
Issue 7 *En Banc*

Article 15

2014

Why Wynne Should Win

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HOBBY LOBBY IN CONSTITUTIONAL WATERS: TWO LIFE RINGS AND AN ANCHOR

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I. INTRODUCTION

Sebelius v. Hobby Lobby Stores, Inc.[1] represents a belated Supreme Court coming-out party for the Religious Freedom Restoration Act ("RFRA"). The Supreme Court in the 1990 case of *Employment Division v. Smith*[2] announced that the First Amendment's Free Exercise Clause provided meaningful protection only against deliberate government abridgements of religious freedom. That decision effectively knocked out the Free Exercise Clause as a legal basis for religious believers to bring claims for relief, known as religious accommodations or exemptions, from legal burdens on their religious exercise. In 1993 Congress responded with RFRA. The Act revitalized religious accommodation claims by requiring courts to review any law's "substantial burden" on religious exercise under strict scrutiny.[3] While declaring that Congress's effort to apply RFRA to the states violated

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1. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1147 (10th Cir.) (5-3 en banc decision), *cert. granted*, 134 S. Ct. 678 (Nov. 26, 2013).

2. Emp't Div. v. Smith, 494 U.S. 872 (1990).

3. 42 U.S.C. §§ 2000bb to 2000bb4 (1994).

federalism limits on the Fourteenth Amendment,[4] the Court has acknowledged that RFRA properly applies to federal law.[5]

Hobby Lobby's challenge to the contraception-coverage provision of the Patient Protection and Affordable Care Act is the first Supreme Court case to test an application of RFRA to a federal law. For an introductory case, *Hobby Lobby* pushes RFRA's conceptual envelope. Never before, under any constitutional or statutory provision, has the Court exempted a private, for-profit business from the obligation to obey a generally applicable law. Most successful religious accommodation claims, whether constitutional or statutory, have involved individual religious believers or groups of similarly situated believers. Religious institutions have occasionally but less frequently brought successful accommodation claims. Whatever the Court decides in *Hobby Lobby* will affect the contours of religious accommodation law for years to come.

Hobby Lobby is a statutory interpretation case, but RFRA is a special statute. It seeks not merely to expand or enforce a constitutional rights regime, like a typical law enacted under Congress's Fourteenth Amendment power, but to reconstruct and empower a regime of religious liberty whose constitutional bases the Court has rejected. Given RFRA's constitutional form and purpose, precedents from the Court's constitutional jurisprudence can help to inform our expectations, hopes, and concerns about what a RFRA accommodation for Hobby Lobby might mean. In this Essay, I discuss three constitutional decisions that might, in different ways, serve as models for such an outcome. The first two precedents toss life rings to Hobby Lobby's claim. They provide favorable parallels, suggesting how RFRA accommodations of for-profit businesses could fit coherently and constructively into the law. Each of them, however, ends up failing as a model because of problems with the original decision or imperfections in the parallel. The final decision throws Hobby Lobby an anchor. It provides a more apt, less flattering model, revealing serious problems with exempting Hobby Lobby from the contraception mandate.

II. *SHERBERT*: HERALDING A BROAD REGIME OF RELIGIOUS ACCOMMODATION

The most natural constitutional model for a RFRA accommodation of Hobby Lobby is *Sherbert v. Verner*.[6] Justice Brennan's opinion in that case announced the Warren Court's

4. *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

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

6. Sherbert v. Verner, 374 U.S. 398 (1963).

commitment to a strong regime of religious accommodations under the Free Exercise Clause, the regime Congress sought to restore in RFRA. *Sherbert* instructed courts to evaluate religious accommodation claims under strict scrutiny. Federal courts have used *Sherbert*-era case law to aid them in interpreting RFRA. If the Court follows the *Sherbert* directive and applies conventional strict scrutiny in *Hobby Lobby,* it may well conclude that for-profit businesses should enjoy exemptions from legal requirements that countermand their religious commitments. In this scenario, *Hobby Lobby* would usher in a broad, generous regime of religious accommodations. Though grounded in a statute and limited in its controlling effect to federal law, *Hobby Lobby* would finally fulfill the promise of *Sherbert.*

For several reasons, however, *Sherbert* fails as a model for a Hobby Lobby accommodation. First, *Sherbert* on its own terms provides a shaky base for grand aspirations. As a matter of legal doctrine, *Smith* overturned the *Sherbert* standard by telling courts to apply mere rational basis review in free exercise accommodation cases. As a practical matter, however, *Smith* did not sweep away a well-established legal regime that generously granted constitutional accommodations.[7] Rather, the *Smith* Court's nullification of constitutional accommodations largely validated the status quo. *Sherbert* declaimed loudly about strict scrutiny, but in Free Exercise Clause accommodation cases between *Sherbert* and *Smith* the Court mostly mumbled excuses for denying relief. The Court granted accommodations only in two contexts: cases that directly tracked the facts of *Sherbert*[8] or *Wisconsin v. Yoder*,[9] a decision that let Amish parents educate their children privately, which had obvious parallels in substantive due process.[10] In all the other Free Exercise Clause accommodation cases of the *Sherbert* era, the Court found burdens on religious exercise too insubstantial to trigger *Sherbert* review,[11] held that the institutional settings in which claims arose rendered the claims ineligible for strict scrutiny,[12] or held for the government despite applying strict scrutiny.[13] The *Sherbert*-era

7. *Smith*, 494 U.S. 872 (1990).

8. *See, e.g.,* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987).

9. Wisconsin v. Yoder, 406 U.S. 205 (1972).

10. *Cf.* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (invoking the Due Process Clause to ground a right of parents to educate their children in religious schools).

11. *See, e.g.,* Tony & Susan Alamo Found. v. Sec. of Labor, 471 U.S. 290 (1985) (denying a religious foundation's Free Exercise Clause claim for exemption from federal labor laws).

12. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (rejecting Muslim prisoners' claim of a Free Exercise Clause right to attend worship services).

13. *See, e.g.,* United States v. Lee, 455 U.S. 252 (1982) (rejecting an Amish employer's Free Exercise Clause claim for exemption from social security taxes). For a discussion of the *Sherbert*-era accommodation cases, see Gregory P. Magarian, *The Jurisprudence of Colliding First*

Court found a true strict scrutiny accommodation regime impossible to administer.

A more specific problem with *Sherbert* as a template for accommodating Hobby Lobby is that the Court has always disfavored religious accommodations for institutional claimants, even during the *Sherbert* years.[14] Not until 2012 in *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*[15] did the Court grant a constitutional accommodation to a religious institution. *Hosanna-Tabor,* in which a unanimous Court narrowly exempted churches' hiring of ministers from employment discrimination laws, has no apparent salience for *Hobby Lobby*. The *Sherbert*-era Court's aversion to accommodating institutions under the Free Exercise Clause comes as no surprise, given the general weakness of *Sherbert* as a charter for constitutional accommodations. But during that period, the Court hesitated to validate even discretionary legislative accommodations in cases involving institutional claimants. Only once, in a case that considered a similar employment dispute to the one in *Hosanna-Tabor*, did the Court uphold an institutional legislative accommodation against a legal challenge.[16] The Court's aversion to institutional accommodations carried over to its only major post-*Smith* discretionary accommodation case, which struck down a state's creation of a special school district for an insular religious sect.[17] Even worse for Hobby Lobby, the *Sherbert*-era Court never contemplated granting a constitutional accommodation or validating a legislative accommodation for a for-profit business.

A final reason that *Sherbert* fails as a model for accommodating Hobby Lobby stems from the Establishment Clause's prohibition on favoring religious believers over others. Religious accommodation comes into natural tension with nonestablishment principles. That does not mean the Establishment Clause should bar religious accommodation. It does, however, counsel caution about the nature and scope of religious accommodations. The *Sherbert*-era Court never directly confronted the tension between the Establishment Clause and accommodations under the Free Exercise Clause, but that tension looms over the Court's refusal to apply *Sherbert* vigorously. The Establishment Clause has formed the explicit basis for the Court's

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Amendment Interests: From the Dead End of Neutrality to the Open Road of Participation-Enhancing Review, 83 NOTRE DAME L. REV. 185, 215–18 (2007).

14. *See* Gregory P. Magarian, *The New Religious Institutionalism Meets the Old Establishment Clause* (work in progress, on file with author) [hereinafter Magarian, *Establishment Clause*].

15. Hosanna-Tabor Evangelical Lutheran Church and Sch. v. Equal Emp't Opportunity Comm'n, 565 U.S. ___, 132 S. Ct. 694 (2012).

16. *See* Corp. of the Presiding Bishop v. Amos, 483 U.S. 327 (1987).

17. *See* Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 688 (1994).

numerous rejections of legislative religious accommodations, including its nearly universal rejection of institutional accommodations. For the Court in *Hobby Lobby* to permit certain for-profit businesses to ignore laws the rest of us must obey, while imposing onerous direct costs on a discrete set of employees, would raise the Establishment Clause stakes dramatically.[18]

III. *CITIZENS UNITED*: EXTENDING CORPORATE RIGHTS

Commentators and supporters of Hobby Lobby's cause frequently raise *Citizens United v. FEC*[19] as a model for exempting Hobby Lobby from the contraceptive mandate.[20] The reasoning is straightforward. *Citizens United* notoriously states that corporations (and unions) are "persons" entitled to free speech rights.[21] In the view of the *Citizens United* majority, restrictions on corporate independent expenditures in election campaigns violated corporations' First Amendment free-speech rights. The greatest sticking point in *Hobby Lobby,* of course, is the idea of extending RFRA's simulated free exercise rights, rights we ordinarily associate with individual religious believers, to for-profit businesses. *Citizens United* arguably should put that concern to rest. The Supreme Court has made clear that corporations have First Amendment rights. Therefore, exempting Hobby Lobby from the contraceptive mandate would simply extend an established principle of constitutional law through the quasi-constitutional device of RFRA.

The trouble with this argument is that it misreads and misapplies *Citizens United.* Let's set aside the question whether *Citizens United* is a wise decision likely to stand the test of time (for the record, I believe it isn't and it won't). The idea that corporations are legal persons entitled to certain constitutional rights, contrary to widespread public misperception, did not originate with *Citizens United.* That idea has resided in U.S. law at least since *Santa Clara County v. Southern Pacific Railroad*[22] in 1886, and it has resided in First Amendment campaign finance law at least since *First National Bank v. Bellotti*[23] in 1978. The Court, in other words, had the corporate-rights doctrine available during all the decades when the Justices never gave a thought to granting corporations free exercise rights. The Court

18. I develop these points in Magarian, *Establishment Clause, supra* note 14.

19. Citizens United v. FEC, 130 S. Ct. 876 (2010).

20. *See, e.g.,* Ronald J. Colombo, *The Naked Private Square,* 51 HOUS. L. REV. 1, 69–70 (2013).

21. *See Citizens United,* 130 S. Ct. at 899–900.

22. Santa Clara Cnty. v. S. Pac. R.R., 118 U.S. 394 (1886).

23. First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978).

has never held that corporations enjoy every right the Constitution guarantees. The hard questions in *Citizens United* and other cases about corporate rights are which rights corporations should enjoy and why.

Citizens United offers a specific explanation for granting corporations the right to spend money in election campaigns. The First Amendment gives corporations that right because they play a distinctive, crucial role in the electoral process. Corporations are "the voices that best represent the most significant segments of the economy."[24] They provide "information, knowledge and opinion vital to [the electorate's] function," particularly "advi[ce] on which persons or entities are hostile to [voters'] interests."[25] Corporations, according to the *Citizens United* Court, focus and stabilize the electoral process by giving voice to economic power. They enjoy the right to electoral speech not primarily for the sake of their own interests but for our collective sake as a political community.[26] This functional justification for the right to electoral speech does not translate to RFRA's simulation of free exercise rights. Even if we emphasize the social dimension of religion, conceiving of religious exercise as transcending individual (or particular corporate) believers, the *Citizens United* rationale still fails. Prayer meetings are not elections.

If we read *Citizens United* as a case about corporate free-speech rights more generally, it still makes an ill-fitting model for a Hobby Lobby accommodation. Corporations speak all the time through their representatives. They express policy views, report on profits or losses, provide information about products or services, and so forth. These instances of speech do not express conscientious commitments because corporations, as collective entities, cannot manifest conscience. Speech need not express conscientious commitments to claim protection under the Free Speech Clause. In contrast, conscience is integral to the free exercise right codified in RFRA. Exercising religion necessarily manifests some conscientious commitment. The absence of any precedent for recognizing corporate free exercise rights reflects corporations' incapacity to manifest conscience. Not even a closely held, pervasively religious corporation can exercise religion, as a corporation, in the sense that corporations can speak. Free speech and free exercise rights have sharply divergent contours, and that divergence disqualifies *Citizens United* as a model for accommodating Hobby Lobby.

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24. *Citizens United*, 130 S. Ct. at 907 (citations and internal quotation marks omitted).

25. *Id.*

26. I elaborate on this analysis of *Citizens United* in GREGORY P. MAGARIAN, MANAGED SPEECH: THE ROBERTS COURT'S FIRST AMENDMENT (work in progress).

IV. *LOCHNER*: SHIELDING ECONOMIC ACTORS FROM STATE REGULATION

My colleague Liz Sepper has argued[27] that any strong regime of religious accommodations, including accommodation of for-profit businesses in *Hobby Lobby,* would repeat the familiar mistake of *Lochner v. New York.*[28] Adapting her insight to my terms, *Lochner* offers another constitutional model for a Hobby Lobby accommodation. Where the *Sherbert* and *Citizens United* models sought to toss life rings to for-profit religious objectors to the contraceptive mandate, the *Lochner* model heaves them an anchor. *Lochner* notoriously invoked constitutional rights to run roughshod over proper legislative policy discretion. Professor Sepper argues, in essence, that courts would replicate that mistake if they enforced a robust regime of religious accommodation. Much about the argument strikes me as sound. However, I part company with Professor Sepper in two respects that matter for present purposes, and for me a different aspect of the *Lochner* mistake raises the greatest concern about a Hobby Lobby accommodation.

First, a generalized *Lochner* critique of religious accommodations somewhat overstates the danger and understates the societal benefits of a robust but carefully drawn accommodation regime. The right to free exercise of religion differs substantially from the due process right the Court concocted in *Lochner*. The *Lochner* Court's account of the right to contract stretched the Fourteenth Amendment's broad guarantee of "due process" beyond any conceivable breaking point. In contrast, the free exercise principle, while complex and open to divergent interpretations, can be rendered in relatively narrow and specific ways. In an ideal accommodation regime, whether constitutional or statutory, courts would understand "religious exercise" broadly to include practices dictated by both deeply held theistic and nontheistic conscientious commitments. Judges would subject accommodation claims to something like intermediate scrutiny with bite, taking both accommodation claims and their social costs seriously.[29] This approach would show special favor to the interests of minority and idiosyncratic religious practices. It would also naturally

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27. *See* Elizabeth Sepper, *Free Exercise Lochnerism* (draft on file with author). Eugene Volokh has also noted the *Lochner* concern with accommodations under the Free Exercise Clause. *See* Eugene Volokh, *The Priority of Law: A Response to Michael Stokes Paulsen,* 39 PEPP. L. REV. 1223, 1226 (2013) (arguing that "a constitutional religious exemption regime of the *Sherbert/Yoder* variety would make much the same mistake as what is often called the *Lochner* regime did in its day—though likely even to a greater degree") (footnotes omitted).

28. Lochner v. New York, 98 U.S. 45 (1905).

29. *Cf.* Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (holding, based on rational basis review, that a mental disability classification violated the Equal Protection Clause; commonly described as applying "rational basis with bite").

favor claims from individual believers and small groups, rather than larger institutions.[30]

I also attach somewhat more importance than Professor Sepper to the fact that *Hobby Lobby* does not directly implicate the Constitution but rather arises under RFRA. Whatever the merits of a *Lochner* critique of free exercise accommodations, the statutory context appears to sap the critique of its most familiar and obviously potent element. Most people understand "Lochnerism" to mean excessive judicial invocation of constitutional norms to interfere with legislative authority. RFRA is not the Constitution; it is Congress's own creation. One therefore cannot simply assert that a win for Hobby Lobby would directly replicate the *Lochner* problem. To extend my water-rescue metaphor, the anchor is more cumbersome to throw than the life rings. Professor Sepper acknowledges the constitutional-statutory distinction between *Lochner* and *Hobby Lobby* but argues that the importance and reach of a statutory Hobby Lobby accommodation would make it tantamount to the constitutional overreach of *Lochner*.[31]

A version of the *Lochner* separation-of-powers problem carries over to *Hobby Lobby* for reasons grounded in the practice of statutory interpretation. RFRA speaks in very general terms. For the Court to extend the law to for-profit businesses, however, would wildly exceed any legislative or statutory accommodation the Court had considered at the time RFRA was enacted.[32] Whatever regime of robust religious accommodation Congress thought it was restoring with RFRA, no one would have imagined that regime to include exempting for-profit businesses from generally applicable commercial regulations. If the Court reads RFRA to provide such accommodations, then it will be making law, inflating a federal right, and usurping legislative power as surely as it did in *Lochner*. Of course, Congress would retain theoretical power to abrogate a Hobby Lobby accommodation. But legislating against "religious liberty" would scare politicians in the best of times and seems laughably inconceivable given Congress's present dysfunction. For the Supreme Court to find a Hobby Lobby accommodation in RFRA would amount to *Lochner* without fingerprints.

The separation-of-powers concern, however, is not the most important sense in which a victory for Hobby Lobby would implicate *Lochner*. The Court's repudiation of *Lochner* in the 1930s wasn't just an

30. For a full account of my approach to accommodations, see Gregory P. Magarian, *How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution*, 99 MICH. L. REV. 1903, 1978–97 (2001); Magarian, *Establishment Clause*, *supra* note 14.

31. *See* Sepper, *supra* note 27.

32. *See* Magarian, *Establishment Clause*, *supra* note 14.

apology for judicial activism. It was also a validation, under the Great Depression's shadow, of progressive regulation in the public interest.[33] The Court declared in *Nebbia v. New York*:[34]

> [N]either property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest.[35]

The repentant Court didn't just hold that Congress enjoyed discretion to regulate in the public interest. Rather, the Court recognized that government has "not only the right, but the bounden and solemn duty . . . to advance the safety, happiness and prosperity of [the] people, and to provide for [the] general welfare."[36] Likewise, *West Coast Hotel v. Parish*[37] described constitutionally protected liberty as "liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people."[38] I'm not suggesting that the Affordable Care Act, or any particular social policy regulation, is constitutionally mandatory. I am claiming that the Court, in repudiating *Lochner,* understood economic regulation in the public interest to play a normatively valuable role in the constitutional scheme. This aspect of the *Lochner* story suggests that, despite Congress's ownership of RFRA, the Court would do the public a profound disservice by letting for-profit corporations' asserted religious interests trump a crucial economic regulation.

The *Lochner* critique of a Hobby Lobby accommodation under RFRA warrants one more caution. When we talk about "Lochnerism," that usually implies a sweeping judicial action with broad societal consequences. Whether extending religious accommodations to for-profit companies would have major impact is an open empirical question. Perhaps Hobby Lobby is making a genuinely unusual claim, based on a perfect collision between ordinarily latent religious commitments and an uncommonly intrusive statute. Moreover, RFRA only applies to the federal government. In my view, however, the *Lochner* concerns about accommodating Hobby Lobby remain clear and present. First, an improper encroachment-of-rights doctrine of social

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33. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 584–85 (2d ed. 1988) (discussing the possibility that the Court's repudiation of *Lochner* entailed positive approval of economic regulations).

34. Nebbia v. New York, 291 U.S. 502 (1934).

35. *Id.* at 523.

36. *Id.* (internal quotation marks and citation omitted).

37. West Coast Hotel v. Parish, 300 U.S. 379 (1937).

38. *Id.* at 391; *see also id.* at 399–400 (emphasizing the conditions of the Depression as justifying regulation of "unconscionable employers").

policymaking need not be broad to be wrong. Impeding the access of Hobby Lobby's employees to birth control does harm enough to fuel a *Lochner* critique. Second, while I can't immediately predict obvious extensions of a *Hobby Lobby* victory, I don't get paid to think of the next lawsuit. Plenty of smart religious liberty activists and litigators do. In any event, the myriad for-profit businesses that routinely complain about regulations would have every incentive to figure out how to wriggle into a *Hobby Lobby* allowance for accommodation. We can't assume that our business-friendly courts would rigorously deploy conceptual filters like sincerity and centrality of religious beliefs to beat back dubious claims. Third, the existence of numerous state RFRAs and the likelihood that state courts would treat a Supreme Court ruling for Hobby Lobby as persuasive authority in interpreting their own statutes corrode RFRA's limitation to federal law.

V. CONCLUSION

A decision in *Hobby Lobby* that interpreted the Religious Freedom Restoration Act as extending religious exemptions to for-profit corporations would immediately make RFRA the most potent source of religious exemptions our legal system has ever seen. It would expand the class of viable exemption claimants to include any and all entities, however large or powerful, that can construct viable claims of religious duties to ignore the law, under a premise that any and all entities can have meaningful religious commitments. Constitutional models can help us envision the legal and societal consequences of accommodating Hobby Lobby. In this Essay, I first threw two life rings at the Hobby Lobby accommodation. *Sherbert v. Verner* and *Citizens United v. FEC* offer superficially apt parallels to *Hobby Lobby* that could help to justify and fortify a for-profit accommodation regime. Unfortunately, neither of those life rings provides real help. *Sherbert* drifts away on a current of its own failings, while *Citizens United* misses the mark due to decisive differences between its theoretical underpinnings and those in *Hobby Lobby*. I then heaved an anchor at the Hobby Lobby accommodation. *Lochner v. New York* doesn't offer an exact parallel to *Hobby Lobby*, but it carries warnings about judicial overreach and, more importantly, interference with constructive social policy regulations that apply fully to the idea of accommodating for-profit businesses under RFRA. Based on these constitutional models, Hobby Lobby's challenge deserves to sink.