Religious Liberty, Hobby Lobby and Wheaton College

Part 1 of 2: Religious Liberty and the Hobby Lobby Decision
with
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Welcome to the table where we discuss issues of God and culture. I’m Darrell Bock, Executive Director for Cultural Engagement at the Hendricks Center at Dallas Theological Seminary in Dallas Texas and today our subject is religious liberty. We’re returning to this topic. A few months ago we had our first guest Kelly Shackelford who’s sitting in studio with me. President and CEO of the Liberty Institute, which is the largest organization focused on religious liberty in the country with us. And he introduced the topic of religious liberty to us in anticipation of the Hobby Lobby decision which has come down but not only has the Hobby Lobby decision come down but we’ve also had an injunction related to another very closely related case involving Wheaton College and as a matter of disclosure I should say I serve on the board of Wheaton College so I’m very, very aware of what this case involves and have a little bit of a vested interest in the process and then via Skype we have retired Federal Judge Roland Van Brookhoven who is a reformer federal judge and I’ve got these two legal experts to help us parse what happens in the courts with regard to this issue because for us average, everyday folk sometimes it’s hard for us to understand the how’s and the why’s of what’s going on and what the rules of the game are. And so my job is to keep them communicating at a level that we all will understand. So you’re going to be sitting off the back of my ignorant shoulders so that I can help parse and make sure we’re all talking the same language.
So Kelly and Roland thank you for coming in and being a part of this with us. Kelly we really appreciated you being with us last time and look forward to what you’re going to offer to us in help today. And Roland it’s great to have you with us as well. Roland if you remember did an earlier table podcast as well when the initial same sex marriage decision was issued, what a little over a year and a half ago, about a year and a half ago and he walked us through those Supreme Court decisions and what was going on culturally. So I have got two very qualified people to speak with us. Well gentlemen let me dive in. We got the Hobby Lobby decision and I’m going to let the judge explain what happened and make whatever preliminary remarks he wants to make about how and why it happened and then that will set the table for the rest of our discussion. For those of you who don’t remember the Hobby Lobby case was a case of a corporation run by Christians that had a religious liberty objection to the mandate that required them to supply birth control and other kinds of contraceptive elements among other things to their employees. And so they challenged their lack of status if I can say it that way in the courts and the decision came down over the summer. Judge, the floor is yours. What did the Supreme Court decide and how should we think about it.

Judge Roland Van Brookhoven

Well first of all I might just add that the statement has been made recently that the current administration has done a great deal in terms of unifying the country in terms of left, center and right against many of its policies and the Supreme Court is no different. What is rather interesting is that the unanimous decisions of the Supreme Court are significantly larger than those of divided decisions. We tend to focus on the divided decisions. And it is certainly in the case of the Windsor case a little over a year ago with the same sex marriage issue and then Hobby Lobby. These tend to suck the wind out of all of us. It strikes me that there are basically three things going on in the criticism of the court that don’t get to the substance of what is being decided. The first one is a pro-business claim. A lot of people claim that the Roberts Court has a pro-business bias and it decides in favor of business. The Hobby Lobby case fits generally within that argument.
The second argument is that there’s a proclivity to take cautious steps. Part of the Justice Roberts interest is unifying the court and protecting its reputation and so here although in the briefs both the first amendment and the freedom of religious restoration act were dealt with the court only dealt with the statutory issue under the restoration act itself. And so we get into questions of statutory interpretation rather than the larger issues that are raised constitutionally. And the third thing is the hysteria, which seems to greet these decisions particularly on the left. Justice Ginsburg decent in Hobby Lobby is way off the chart. This is really over the top so it takes a great deal of credibility away from perhaps some of the arguments she might have otherwise made. In the case of the Wheaton College injunction, there’s a rather simple injunction issued by the Supreme Court against Wheaton having to follow the mandate and yet Justice Sotomayor wrote a 17 page decent to that injunction and this is completely unheard of it seems to me. And so you have this whipping up of the various sides and the hysteria that accompanies those. So that kind of sets a bit of the background it seems to me how we might look at Hobby Lobby.

**Darrell Bock**

Okay. So let’s take a look at – you’ve tempted me and I’m revisiting temptation to dive into more detail on some of what you’re saying here. Let me do this much before we actually look at the decision and that is what you’re saying is that all three of these reactions are not appropriate ways to think about what we’re getting ready to discuss. Am I hearing you right?

**Judge Roland Van Brookhoven**

Yeah. I think that’s exactly what I’m saying but that’s the way most people hear it when we read the newspapers.

**Darrell Bock**

Okay.

**Judge Roland Van Brookhoven**

These are the basic criticisms to a certain extent against the legitimacy of the court and so I think that’s important to carry that idea.

**Darrell Bock**

So the corollary with that is that there really are important legal questions that need to be resolved here as opposed to viewing this through kind of a sociological lense or a lense that says well there’s a strategy for how this is being done and how the court is going about it. Am I reading that right as well in your remarks?
Judge Roland Van Brookhoven
Yeah. I think the interesting thing in the Hobby Lobby case are the amicus curiae briefs and you get a lot out of the amicus curiae briefs that you don’t necessarily get in the decision or the basic briefs by the Green family or the two main parties.

Darrell Bock
Now I’m going to have to ask you to translate the technical language for folks because the amicus curiae is going to mean absolutely schmatz to a lot of people. So can you help us with that?

Judge Roland Van Brookhoven
Right. Well we’re talking about friend of courts.

Darrell Bock
Okay.

Judge Roland Van Brookhoven
The briefs that are submitted on behalf of multiple parties that might be effected by an adverse decision or they wanted to shape the direction of the decision.

Darrell Bock
Okay. So these are briefs that come alongside the major briefs that basically give support to the particular case one side or the other that’s being argued.

Judge Roland Van Brookhoven
I think that’s right.

Darrell Bock
Okay. All right let’s turn our attention directly to the decision. Well let me ask it this way since you said there’s a real issue wrapped up in this. In your view what is the issue that the court was trying to decide in relationship to Hobby Lobby and maybe that’s the wrong way to ask it. What issues, could be more than one, is the court trying to balance as they dealt with the Hobby Lobby case and the claim that Hobby/Lobby says that they should receive some kind of exemption for this mandate? Roland?

Judge Roland Van Brookhoven
Yeah. Okay. I guess there’s several issues. When I first picked up Hobby Lobby this summer I was struck by the fact that it seemed that the court had forgotten 200 year’s worth of legal history or juris prudence. The big issue immediately became is Hobby Lobby a person. And that was decided by the trustees of Dartmouth case in 1819.

Darrell Bock
Which we all certainly remember.
Judge Roland Van Brookhoven

-Well obviously the court didn’t remember. Although Justice Ginsburg did talk a little bit about that but the fact that corporations have been regarded as persons is nothing new and it wasn’t decided in the Hobby Lobby case. Now the question is even though they’re an artificial person what rights can they assert. And to a large extent the courts have held over the years going back to the late 19th century that they can for example assert rights under the equal protection clause of the 14th amendment. So the fact that the court is allowing a corporation to act as a person asserting rights that individuals can assert is nothing particularly new. And yet it seemed like both the majority and the decent labored over that question probably more than was necessary.

Kelly Shackelford

And let me point out I was in the front of the Supreme Court during the argument. A friend of mine argued the case and it’s shocking to listen to what the Solicitor General of the United States was arguing. I mean this is not an exaggeration, his argument was that once you decide to go into a for profit business and incorporate you are making the decision to waive your religious freedoms and “You’re now playing by the governments rules.” That’s what he said. And you know it’s just think about what that would mean. I mean anybody who wants to feed their family and incorporate to make money and have a business. The place where they spend most of their waking hours those rights are gone. As the judge said it would be an extreme departure from many, many years of law but that’s what was being argued and you know what’s scary is I don’t know how many justices away, evidently one, from that becoming a law. So that was a very good first step that that was rejected but to me even that that’s being argued I think that’s very disturbing.

Darrell Bock

Now as we work our way through what this decision is we’re going to have to come to grips for people who are just lay people with certain phrases that are a part of the conversation in the discussion. One of those phrases is a closely held business. What is a closely held business and there seems to be a distinction that’s being made between business. Those that are closely held and I don’t know what the alternative expression is, if it’s not closely held what is it just a business? I don’t know what the alternative is but what’s the point of making that kind of distinction because it seems like this decision applies to certain kinds of businesses but not to other kinds of businesses.
**Kelly Shackelford**

I think they’re just being careful to say in this case we’ve got a closely held corporation. The corporation is more akin to the individuals who run it and own it. It’s not like a public corporation but in reality I don’t think the argument should change. I mean I know of publicly traded corporations that—Christians, it’s a Christian company and a majority own the stock. I mean I would think that it would apply there. I just think the court was being very careful not to talk about things that weren’t before it. And if you’re closely held that’s what this case is, this clearly applies. They didn’t say that it didn’t apply to others they just said that we’re not there yet and that’s not the case before us. I think they’re being careful.

**Darrell Bock**

Okay. So the point here is, is that you have owners who are Christian of this corporation and the case that they’re making is we have the right to apply our religious values to how our corporation is run. That was the basic position. Is that right Kelly?

**Kelly Shackelford**

Absolutely yeah.

**Darrell Bock**

Okay. So the decision came down and let’s talk about -

**Judge Roland Van Brookhoven**

Let me if I might just bi-complement support what Kelly said. The Supreme Court or any court for that matter are to decide only the issues that are before that court and so when we get all wrapped up in this question of closed corporation versus a public corporation versus individuals we’re really not addressing a principal of litigation. That you’re only litigating the basic question that has been presented in the lower courts and that is worked up through the process. I think it would have been horrible for Justice Aledo to expand beyond which is basically what Justice Ginsburg tried to do in every instance, expand beyond the basic issues that had been litigated before it had come to the court.

**Darrell Bock**

Well this is precisely why we have you all here so that you can help us explain the rules of the game and what’s being asked and required of people are we think through this. And I feel like we’re slowly working are way towards the discussion of the actual decision but basically what was decided here was and Kelly this is for you that, the Greens were given the right to exercise their religious freedom in the context of how their corporation was being run. Is that the fundamental decision?
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Kelly Shackelford  Yes. That was step one, which the judge said shouldn’t had to be a step but it was forced because they made this argument that corporations don’t have religious freedom. Once they got by that they got to really the guts issue of the case, which is under the Religious Freedoms Restoration Act and again he mentioned that earlier too, the court didn’t – this was not a constitutional decision. This was not a – what the free exercise of religion says. There’s a statue that’s passed called the Religious Freedoms Restorations Act. They simply applied that and asked the questions. The way that statute works is a test that you would normally apply when fundamental constitutional rights are at stake, which is called the compelling interest test. And what they do in that test is they ask the first question, “Was a person’s or this case a corporation’s sincerely held religious beliefs burdened?” And that’s just a matter of – really the only people that can answer that question are the individual before the court. They said yes. I don’t think anybody doubts that they had a religious objection to 4 of the 20 drugs.

Darrell Bock  And the decisions actually alluded to the fact that they recognized and acknowledged this burden.

Kelly Shackelford  Right. So that’s step one. So once you trigger that and you show that the government is now burdening someone’s religion then the burden of proof shifts to the government to prove that it has a compelling governmental interest that is requiring this infringement and that what the government is doing to accomplish the compelling governmental interest is the least restrictive way to do it on the offended party. And that’s something that they couldn’t meet. In this case in particular what the court said is look there are other accommodations. You look at what the non-profits have been offered. They’ve been offered a specific accommodation. That wasn’t offered to the for-profits so that alone shows this was not the least restrictive way therefore this is unconstitutional. So they went to that least restrictive means and said you don’t meet the burden under the test, you can’t prove that this is the least restrictive way to burden Hobby Lobby in similar groups so under the Religious Freedoms Restoration Act you violate that act therefore we’re going to enjoin you from these heavy penalties. Which they would have punished Hobby Lobby with Hobby Lobby said they would have gone out of business.

Darrell Bock  Yeah. I mean these penalties are so large that they’re millions of dollars because so many people are involved. Okay.
I think one thing that I might add to what Kelly just said, is the court assumed that mandating all of these contraceptive methods was a compelling interest of the government. I’m not ready to buy that assumption and I’m not sure why they made that assumption as the brief from West Minster Theological Seminary said, really pregnancy is not a disease and providing all of these do not promote the health of women and whether the statistics were there to support the idea that women were prevented from engaging in the workplace is simply were not articulated in this case. But it does strike me that Aledo for whatever reason simply assumed the compelling interest and I see nothing in the record either in the decision or any of the briefs that would suggest that providing all 21 of these contraceptives would promote a compelling interest of the government.

That’s an interesting observation and you’re again working with something that I’ll take a moment to explain to the lay folks. And that is that when a case is in front of someone it’s the burden of the lawyers on each side to present the facts of the case to the court through their briefs and it’s on the basis of those briefs and what’s gets presented to the court in relationship to the law that the case gets decided. I know this is basic legal 101 but I think for some people who don’t understand how courts work it isn’t that I can think of any argument that I want it’s got to be formally presented to the court, is that right Kelly?

Yeah, absolutely.

Actually formerly presented to the lower courts.

The lower courts.

To lower courts, okay.

The juror for the trial or the appellate court it doesn’t even get to the Supreme Court.

Okay. Fair enough.

And let me lay out something because I think this is an important issue for people to understand sort of before we go into Wheaton and everything else.
We talked about accommodation. The reality is that if the government really, really thinks it’s important to provide these particular four drugs that many believers find are abortion causing drugs.

If the government really though that that was something crucial or compelling it could simply provide it to people.

And instead what it is doing and it’s going out of its way to do this is instead of that easy solution. If that was the issue they really cared about that would be solved in not time. They’d just say, “We’ll provide these.” Instead what they’re doing is, they’re trying to enforce all religious entities to be the ones -

Who trigger this.

And so ultimately what is really going on here is the government is trying to get a precedent that they can force religious entities to violate their conscious. And it’s totally unnecessary.

Here’s another question that I have and thinking about this as a lay person looking at what’s going on and that is when you sign on to an accommodation you actually are acknowledging the governments right to make you sign on to that accommodation. That means that’s something they can potentially take back down the road. Doesn’t it mean we’re showing you grace and we’re being kind by giving you this accommodation. If you sign on, you’re buying in to your recognition that you are compelled to respond to us on this issue. It seems to me that’s another element of this conversation. Am I right about that?

Well I think so.
Kelly Shackelford: I think there’s a lot of different – you know one of the things about accommodations as with any sincerely held religious belief it’s really not up to the government or judges to decide what they think is a rational religious objection. Their job is simply to decide, is it sincere? So if I’m a prisoner and all of a sudden I feel like I become a member of the church of the filet mignon, you know that’s not going to go.

Darrell Bock: [Laughs]. Right.

Kelly Shackelford: But they really shouldn’t be in the business of saying well I don’t think you’re objection to this makes a lot of sense to me. That’s really not an inquiry that judges should be involved in and so really if people and churches and entities come forward and say, “This violates our faith and our consciousness.” That really should be all that matters when it comes whether the accommodation really actually avoids violating their religious beliefs and their rights.

Darrell Bock: Okay. I’m kind of ticking off the issues that we’re working through here that are involved in this singular case. This is one case but it’s got lots of elements to it. We’ve already ticked off the idea that corporations can operate and have rights like persons. We’ve already ticked off the idea that accommodation in one way or another is a way of acknowledging or it could be read as acknowledging the governments right to have authority in this kind of an area. That’s a certain kind of infringement. We’ve already ticked off the fact that the way that this is being done is forcing the business and eventually we’re going to be talking about schools to trigger the process and it’s their insurer who ends up covering what’s being asked for. So that’s another way being involved. And it seems to me that the fourth issue is the question, the actual formal narrow legal question, if I can say it that way, of figuring out the least restrictive way to make all this work. And now my question is, having ticked off those four, am I missing anything?
Kelly Shackelford
No I think those are the big issues and I think the last one you said there’s an obvious answer and to me that’s what sort of hangs over all of this. Is there a least restrictive means? Yes. The government provides them. If it’s so important to the government they can provide them. It’s not a problem and so that’s going to be the problem with all of these legal actions in the future, the court didn’t say in Hobby Lobby that it’s this one type of accommodation. They just said look that’s just an example that there are accommodations. But I think they ultimate accommodation is, do you have to force religious groups to be put to this Hobson’s choice of my faith or government penalties. You don’t even have to have them in that situation. You don’t need to go through the religious groups. You the government can just provide them yourself but that’s not what they’re trying to do and so they’re going to all, I mean until that is switched there will be religious rejections and religious groups are going to be fighting this until the very end.

Darrell Bock
And they’re fighting it for a variety of reasons. They’re fighting it at the level of the protection of the individual rights that are involved both at the individual and corporate levels particularly the more corporate levels involving schools and businesses. They’re fighting it because they’re being asked to trigger something that they’re actually underwriting by there being their own insurance organization that’s doing it and by signing on to the accommodation they feel like their signing on or at least the potential of giving away a right that the constitution recognizes that they possess and I think that's it’s important that those things be clear because in the way this has been covered my sense is that almost none of those issues are raised to any public awareness at all as to why it is peoples concern. Let me raise one more issue before we press on here and it’s this, sometimes in listening to the response to this you get the feeling that what is being said about the people who are trying to defend and stand up for religious liberty is well you just don’t want people to have access to these drugs. You know deep down what you’re really saying is that you disagree with abortion, you disagree with maybe birth control depending where you are on the religious spectrum and so you just don’t want this to happen and so you’re putting up every possible obstacle in the world to keep that from happening and to distance your involvement from it. I think the distancing involvement part is probably true but I think it’s unfair to suggest I think the position the people who are defending religious liberty in this case are arguing we don’t want people to have access to this type of care if they choose they want to exercise it. No one that I’m aware of is saying that. Am I -
Kelly Shackelford: No that’s right. I think the access argument is a false argument. It’s a media term for people who don’t think or understand the case. And again nothing about Hobby Lobby is saying we don’t want to provide this is saying they can’t have access to it anywhere they want.

Darrell Bock: Right.

Kelly Shackelford: It’s like saying if you don’t provide it there’s no access. I mean they can get it all kinds of places.

Darrell Bock: And it could be set up to be provided for, in all kinds of places.

Kelly Shackelford: Exactly, the government can provide that easily. There’s a lot of places and clinics that provide that anyway but the idea that somehow women don’t have access to birth control if their employer doesn’t give it to them is a farce.

Darrell Bock: And that’s part of the reason judge why I take it you said earlier that some of the reaction to this presents a form of hysteria, which is a very vivid description of it because it is an overreaction to what’s actually being decided in the case is that fair? Roland?

Judge Roland Van Brookhoven: That is fair. Yeah I think it’s fair.

Darrell Bock: Okay.