Religious Liberty, Hobby Lobby and Wheaton College

Part 2 of 2: Religious Liberty and the Wheaton College Case
with
Release Date: February 2015
Darrell Bock  

Well that kind of takes us through the Hobby Lobby decision and where that sits now it already would have been a significant week if that had all that had been done but that isn’t what happened. I think that within 48 hours, it may have been less than that a granding of an injunction - I think that’s the right term. I may have it wrong – was given to Wheaton which was a different situation. It’s important for people to realize that in relationship to the health care provision and religious liberty, there were three categories of entities that were dealt with. Churches, which got an automatic exemption on the basis of religious liberty. The government didn’t challenge that right. They recognized that it says in the constitution you can do it you automatically are exempt you don’t have to cover. But then there were two other groups that were handled differently originally. The institutions like schools were put in a category in which they were asked originally and this took various forms over the period of all of the development of the lawsuits et cetera, various kinds of accommodations that signed on to objection and that triggered their insurance to cover things that the institution itself didn’t want to cover. The claim was that this was being provided for, for free but non the less the point was is that they had to sign on to an accommodation saying we object before they receive any kind of – well they didn’t receive an exemption they simply were not responsible for baring the burden at least the claim was of baring the burden of the care. And then the third category this is what produced the Hobby Lobby case was is that in the case of corporations there wasn’t even room for an accommodation; they had to obey the health care act. So those are the three levels that we’re dealing with. Hobby Lobby was a check mark that said no corporations have the same rights and access to the same right as others do and then the question was how is the government going to handle the fact that they lost the case. Well the way they’ve handled it was to lump it in if I can say it that way and I don’t think that I’m over simplifying here, lump it in with what they’re asking the schools to do which is to sign on to an accommodation that says you object. And so now what’s happened with Wheaton is – Wheaton challenged the need to sign an accommodation. Hobby Lobby was just trying to get in the game if I can say it that way. And I’m sitting here going I feel like a law professor, which is a really dangerous feeling. Anyway and so what happened with the injunction was is that the court came back and said the way in which you’ve asked for the accommodation from Wheaton doesn’t meet the least restrictive way of burden and therefore there’s no penalty and they don’t have to sign on to that accommodation of government. You have to come up with another way to do this.
Kelly Shackelford: Yeah. And let me try and be real simple with it. Hobby Lobby was a for-profit corporation. And a lot of people think well therefore we’ve solved the issue. No. All the non-profit religious organizations are not covered by Hobby Lobby it specifically does not apply to them because there’s this accommodation offer. And so a lot of people don’t understand this. They think, “Well churches were exempt.” Well yeah, but not the church school. Not every other Christian ministry that you can think of. For instance one of our clients is Chuck Swindoll’s Insight for Living. So your church is exempt but not Chuck Swindoll’s Insight for Living.

Darrell Bock: So Stonebriar is exempt but Insight for Living is not?

Kelly Shackelford: ~Yes. So think of everything you listen to on the radio, every ministry. I mean we’re talking about huge numbers, they’re not exempt and so Hobby Lobby does not decide the case for them. So they are literally over 100 and it’s going to increase because they’re all having to file law suits because they’re saying I’m a Christian college but I can’t do this. I know you gave Hobby Lobby protection but I don’t have it. You’re forcing me to be complacent in this. So that’s what we’re now dealing with. Now let me throw something else out, I don’t want to over complicate things but we have a number of the for-profits who are our clients before Hobby Lobby came down and we’re still winding down those cases. Guess what the government is basically told us about to do.

Darrell Bock: Huh?

Kelly Shackelford: They say, “Ha Ha. Well since Hobby Lobby the decision didn’t apply if we offered some sort of accommodation we’re going to take the same accommodation we offered the non-profits and we’re going to create one of those for the for-profits and then try to force them.”

Darrell Bock: Everybody’s now in the same bucket basically.

Kelly Shackelford: That’s I think what they’re going to try to do. They’re going to ride around the decision and force everybody into the same ethical lane.
Darrell Bock

And expand the claim that the government is making in the process. It’s an interesting situation. So, Wheaton along with everybody else is deciding what to do with this new accommodation and those decisions haven’t been made yet and are in the process of being analyzed but I think if you look through the four fold structure of what it is that we said was going on here. The recognition of the person – I’m going to have to remember all these – the recognition of the person on the one hand, what the signing on an accommodation means, the fact that it’s your insurer that’s providing the service and is this the least restrictive way. You can see if you run those filters through the discussion you’re not ticking all the boxes if you will as you go through that list. There still is involvement. And this is what I think people don’t get; there still is involvement of the institution in the process that leads to the provision of what is being objected to.

Kelly Shackelford

“Absolutely. I mean the ways I’ve seen it described by different ministries, “I want cooperation with evil, complacent in evil.” I mean all those types of terms. They’re having to participate which again I say isn’t necessary but that’s what this provision requires and I’ll point out, look at, there’s been over 100 of these lawsuits. 90 percent of all the decisions are wins for religious freedom. I mean that’s a pretty heavy – and that’s not just the Supreme Court. That’s all the lower courts up to the court of appeals. So this is really something that I think most judges and courts recognize as a sort of direct attack on religious freedom and one that’s unnecessary. And so they’re getting injunctions, whatever the ministry is they’re getting injunctions again I think because it doesn’t tick off all the boxes as you mentioned.

Darrell Bock

Now it’s important again for people to understand what’s at stake here and why it isn’t just religious liberty that’s at stake although that’s certainly important for why this is being done but the sanctions against these entities if they fail to accommodate are significant. There are fines, they are significant fines because they’re figured daily and individually so the larger the group the more fines you’re paying, et cetera. So there literally are cases where if this were decided against certain entities certain entities couldn’t pay the fines if they weren’t given relief in that regard. Roland is that correct?
Judge Roland Van Brookhaven: Yeah. What’s rather interesting is Westminster Theological Seminary in its brief said, “How can you balance the fines that would result in the death of Westminster Theological seminary against the rights of a woman to get from Westminster the prescription drugs that we’re talking about in this case.” You know what they say in that brief is that it’s not just simply the right to get these drugs basically what happens is the government by providing these drugs or these lists of drugs is saying that we’re protecting your promiscuous activities from any consequences for what you do. And so then when you balance these heavy fines that effect the entire country if you will because so many of these organizations are major entities. I mean we’re just not talking about a couple evangelical seminaries or schools. What is interesting is I’m on the LinkedIn chat room for the Wheaton College issue and most of the arguments in that chat room are people that are arguing in favor of the mandate and against Wheaton College. And these are alumni of the college. So it does strike me, number one I can’t understand how this case came up because the government lost the case of Hosanna-Tabor Evangelical Lutheran Church and School versus EEOC when it tried to determine whether this was a legitimate religious involvement in the assignment of ministerial to teach mathematics in that school. And that should have been the end of it. And it seems to me from what I hear around Washington is how can this continue to percolate when we’ve got such a decisive decision in the Hosanna-Tabor case that the government is still pushing this mandate. And you know we talk about the fines but all of these organizations are having to pay lawyers’ fees or lawyers such as Kelly’s organization are still having to cover the cost through the donations. The cost of litigating this thing is incredible and it’s totally unnecessary.

Darrell Bock: Well that’s interesting. We’ve talked about the Wheaton case and we’ve talked about the Hobby Lobby case. I want to close our time by talking about the importance of religious liberty. I think that’s an important theme to wrap around. I mean we’ve talked about the kind of blood and gory details of these particular cases and these details are really fine points but I think it’s important to work through them so that people get what’s at stake and why I can see some little old lady and she’s listening to us and saying just sign the accommodation. It’s so simple. A little signature, a date, it’s all over. But there actually are really important issues at stake here and Kelly, since you represent an organization that talks about this all the time, why is religious liberty such an important right. For some people it’s actually one of the primary rights our constitution gives to people.
Kelly Shackelford: Yeah. You give that example of that little old lady that says why don’t you just sign it. Immediately what comes to my mind is Thomas Moore. Why didn’t he just—you know that’s the reason, you’re asking people to violate their faith. The reason people and there’s a lot of reasons, we can talk about a lot. Let me just do a few. One of the reasons why you have religious freedom our founders understood was because if you actually ask people to choose between following their God or their government many people will choose God and what that results in is anarchy and chaos. And so you don’t want the government in a position of trying to force people to violate their faith because you’re going to create all kinds of problems. I can’t think of a bigger example then that. I can’t think of any other issue where the government has been so belligerent as to cause literally hundreds of lawsuits over this one thing and the result being a 90 percent win rate. I mean that’s just—so that’s one. And I think this is a big one because maybe somebody’s listening to this and they’re not religious and they go well why is religious liberty important to me or is it. And the answer is yes. The founders wrote a lot on religious freedom. They called it our first freedom. And the reason they called it our first freedom is that they understood that if you lose religious freedom you will lose all of your freedom, your political freedom and everything else. I mean once the government has the right to get between you and your conscious or you and your God -

Darrell Bock: Gets in your head

Kelly Shackelford: - you’ve really lost things. And think about it the one thing that totalitarianism can never allow our citizens who hold an allegiance to one higher than the government. So when totalitarianism comes in you will always see as one of the first flash points, an attack on religious freedom because they’ve got citizens who are holding an allegiance to God. And so the founders understood it to be, I mean it’s right in the first part of the first amendment, the first two clauses and so it is why America is America and you take it away and you really will destroy America. So it’s very important and that’s why it’s so frustrating when people look at Hobby Lobby and they say it’s about contraceptives or it’s about—you can’t ever let the issue over blind you essentially the principal of religious freedom. You might disagree with that religious person or what their beliefs are on a particular issue.

Darrell Bock: Where they draw the line as to what they may or may not use.
―Yeah but don’t ever give the government the power to violate to force them to firmly violate their own faith because once the government has that power they have power to tell you anything they want to and you will have lost it at that point.

Roland why do you see religious freedom as being important?

One of my favorite quotations is on the Jefferson memorial’s here in Washington where Jefferson said, “God who gave us life, gave us liberty. Can the liberties of a nation be secure when we have removed the conviction that those liberties are a gift of God. Indeed I trelle for my country when I reflect that God is just and that his justice cannot sleep forever.” And so as I listen to Kelly and now as I’ve read these decisions and having just come back from China where these issues are being debated at the highest levels of government. I keep thinking of the statement from Thomas Jefferson. There’s one other thing that strikes me that why a lot of this is important. You know Sayyid Qutb the leading Muslim radical and one of Osama Bin Laden’s favorite writers came to the states in the 1940’s and studied in Colorado and he wrote on leaving that the church was a grotesque schizophrenia and about 20 years later, somebody wrote that churches in America are privately engaging but publicly irrelevant. And it seems to me that part of our fight aside from religious freedom as Westminster put it is to live out our lives, all of our lives, which are worshiped to God to do honorably what we do in our work as unto the Lord. And so these ideas of religious freedom aren’t simply to worship as we want to which they are surely that but they go at the very heart of what it means to be a believer to live not only out in the church but to live actually and engage in the culture. And I just think that the more these fights happen, the more Christians are going to be aware that we’ve got to put our stake as Martin Luther did and say I stand on this point you know. I think it’s vital for the church and vital for us in the church to be able to do that. And we’ll lose some I’m sure. You know as Kelly said 90 percent of these cases are wins, which means 10 percent have lost and you wonder how in the world that has happened and you look at what’s happening in the case of same sex marriage. Why has the church basically abandoned the fight and it’s important that we do as Wheaton did and Hobby Lobby and other organizations do to fight this kind of encroachment and the idea that the government is the ultimate giver of all good things.
Yeah. And I think that the important thing in the midst of what you’re saying is that not only is the church protected by what religious liberty represents but as Kelly has also pointed out but really it is a protection for everybody. I think that sometimes in the context of these kinds of events are getting sucked into the vortex of what we call the culture wars that are going on around us and no one denies that there is a huge ideological debate going on in our country about its direction and that kind of thing but I think the danger sometimes that in the midst of discussing these issues people think, “Well you’re just defending your side and you’re just defending your interests.” But in fact when Thomas Jefferson says this if I can say it this was as a Unitarian, you know makes these kinds of statements part of the point that he is making is he’s talking about some fundamental religious rights that come to people because we’re all made in the image of God, we all have a transcendent beyond the human structures that exist in our world to which we are to be responsible to and to be accountable to. And I think that is a very, very important dimension of this conversation. The church is not merely defending her right to religious liberty. She’s defending the right to religious liberty to a Jewish person or to someone who’s Muslim or to someone who has no faith at all to be able to live out in the context of their conscious and to do so in a way that also allows them to live with and next to neighbors who think differently than they do without having everybody be dictated to about what it is that they’re supposed to do. Fair enough?

Kelly Shackelford  

Yeah. And I think we’ve talked about religious freedom but I want to make sure that we think about the differences in some types. I mean I’ve been doing religious freedom cases for a quarter century and the most common case you have citizen A is doing something and the government says, “Hey you can’t do that.” And Citizen A says, “Well I’m doing this because of my faith.” And they say, “Well we don’t really care. We’re not going to allow you to do that.” And then you have a lawsuit over how you balance that and whether they are protected in living out their faith in that way. That’s I think most religious freedom cases. What we’re talking about here is I think the very extreme level of violations of religious freedom.

Darrell Bock  

So it’s on the other end of the spectrum is what you’re saying?
Kelly Shackelford — It is, it’s we the government want to force you to affirmatively engage in acts that violate your faith and consciousness. You see how much more – I mean because that’s never necessary. If the government or somebody doesn’t want to pull the switch on the electrocution chair the government doesn’t really have to order citizens to take their turns doing that. And so that’s what we’re talking about. This is like really the ultimate intolerance by the government for religious freedom is when they began number one punishing you for what you believe or forcing you to affirmatively engage in acts that you consider sin or that violate your faith and that’s why this is such an important case because in this case it’s these particular statutes but really it’s an issue can the government order you to engage in acts that violate your faith and once you say yes wit this one just fill in the next one and the next one and the next one because the precedent is now there for them to do that.

Darrell Bock — Yeah if the law were written in the reverse direction and it were forcing people that they ought to have access to these drugs and care and said you absolutely can’t do that and we’re going to ask you to pay for the privilege in preventing you to do that, they’d be up in arms.

Kelly Shackelford — Well sure.

Darrell Bock — If the shoe were reversed and I think one of the ironies is and this is why the discussion of access to me is so important is again because no one is saying that a person who chooses to want to exercise this care within the way we can structure this shouldn’t be denied that access. No one is saying that. They’re simply saying please don’t ask me to participate in that choice. Protect me from being complicit or a part to or a trigger for that taking place and I really – my hope would be that when someone listens to this no matter what side they’re on and what they think this case should be and how it should be decided that they would appreciate really the concern that exists for everybody when thinking about this case and what is involved in it: the protection of religious liberty. Another way to say it perhaps more neutrally if there is such a term is what we’re talking about is protecting people’s consciousness and their right to be who they are and believe what they do without forcing them to engage in acts that they see as a violation of their own moral positions and moral standards, fair enough?
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**Judge Roland Van Brookhaven**  What is rather interesting and I’m a part of the Religious Freedom Project at the Berkley Center at Georgetown University and Georgetown is partnering with Baylor University in this project and the day before the argument in these cases the Berkeley Center sponsored a seminar a whole day seminar on this subject and the Green family were there as were all of the lawyers that were representing them. Were you there, Kelly?

**Kelly Shackelford**  I wasn’t. I got there right after but I know they also had the debate between Judge Star and Alan Dershowitz at this [crosstalk]

**Judge Roland Van Brookhaven**  That’s what I was going to mention. What was really interesting is both Ken Starr and Alan Dershowitz agreed on virtually everything. And what was funny was that Alan said he had been thinking about this for 65 years. Since his father was arrested for opening a store on Sunday. In Jewish theology justice is always to be perused never achieved but what he said was his father closed the store on Sabbath Saturday and opened it on Sunday and he’s arrested and tried and he took his boy Alan out of school as 10-year-old to sit in on the trial there in New York in which he was ultimately acquitted on the religious freedom issue. And this was a Jewish man asserting his rights not to be closed on Sunday since he was closed on the Sabbath. And Alan said that since he’s been thinking about this for 65 years this is what has motivated him so strongly in the area of religious freedom. So both Ken and Alan were together in discussing what was coming before the Supreme Court and ironically both of them agreed with the outcome that we saw several months later.

**Darrell Bock**  So what is probably happening is, I’m going to ask you to be legal prophets now, what is probably happening is that we’re headed to another round of law suits and I take it that the legal question that we’re still going to be perusing, not the list of four but the key legal question is, Is this the least restrictive means of providing for the situation in which we find ourselves in. Is that likely where we’re headed?

**Kelly Shackelford**  I think so. I think that was the basis of the decision in Hobby Lobby and yet they left the decision open with regard to all the non-profits and there are many of these law suits going on already. In addition to Wheaton there’s the Little Sisters of the Poor.

**Darrell Bock**  That’s right.
Kelly Shackelford: Which is one of the most incredible. The idea that the government is trying to force nuns to provide abortifications to their fellow nuns or to be complicit in that is just—you know most people when they hear that one they go, “What? They’re doing what?” I think it shows the extremity of this whole thing is unnecessary and you really have to put yourself in an extreme position to do it in the way that they are doing it but we’re filing almost another law suit a week on behalf of numerous clients whether they’re Christian colleges, whether they’re as I mentioned, Chuck Swindoll Insight for Living, ministries you see all the time. They’re all coming up against this where they’re now having to make the decision on either I’m going to be paying for these abortion causing drugs by this insurance being provided to my people here or I’m going to have to do something illegally because they’re not applying Hobby Lobby to me. They’re saying no we’re not going to give you that we want you to participate and so they’re all making that decision and we’re just seeing numerous numbers of these having to file every week now and this is going to work its way up to the Supreme Court I think and we’ll have another decision.

Judge Roland Van Brookhaven: I think also the Beckett fund is also [crosstalk]

Darrell Bock: That’s right. They’re also handling the Wheaton case.
Judge Roland Van Brookhaven

I’m wired in with a number of Catholic circles who work with the Beckett fund you are fighting the same issue. It seems to me that although you articulate the most restrictive means of providing these I think there’s got to be some attack on whether there is a compelling public interest or government interest in providing these. And I thought that the court just kind of fluffed over that and it does seem to me that that is another area of attack that’s got to go at it. I think what Justice Aleto did was he simply was willing to assume for the purposes of the argument or the decision that that was a compelling interest but I didn’t see that in any of the amicus briefs that I read whether it was from the American Center for Law and Justice Jay Sekulow and his group or from the folks that were representing Westminster or even ECFA and that host of schools and ministries that were represented in that case. All of them talked about the lack of a compelling interest in this and the importance of being able to live out your life according to your convictions. And the problem we have in America it seems to me is we’re able to separate and this is a part of postmodernity it seems to separate the idea that it’s okay to believe privately what you believe, but the question of practice is a different thing and one of the things that I thought Justice Aleto did in his decision was he tied the two together and he talked about how important the practice was in addition to the belief.

Darrell Bock

And judge just to be clear when you make the case about whether the government has a compelling interest or not does that impact the access question at all or is that a separate question?

Judge Roland Van Brookhaven

I think it’s preliminary to the access question. My sense is that this compelling interest test or this strict scrutiny test that the Supreme Court requires is based on the idea that there is a compelling public good or need for this. And I just do not think that that was set up in the case of the descending opinion but certainly in the case of Aleto’s decision. Aleto didn’t decide that. He merely said that for the purposes we’re assuming that that should be the case and yet as all these amicus briefs took him on, that was not an issue that was decided by the court and I think it’s something that needs to be made. I certainly would urge in the folks representing Wheaton to also put that in front. Not simply assume that that’s the case and move in to the access question.

Darrell Bock

Okay. So I’m going to wrap up here because we’re running out of time but I want to – let me wrap up this way. If you were the government – okay – what would you do?
Kelly Shackelford: Well if you were the government and your being rational and not have other purposes you would simply say I see there’s this handful of drugs that are causing all these religious entities and companies all over the country to not be able to give those, we will provide them. We the government will provide for those and we will take that problem away. Obviously the government has a different purpose. Whether the purpose is a political purpose to create a war on women type political issue, a false one, or whether that they want to see if they can get this power over religious organizations. It’s not a rational purpose. It’s not a we want to fix the problem purpose because instead they’ve now passed nine different iterations of this accommodation when they could do it very easily by just saying we’re going provide for these. We’re just going to take these off the list. This wasn’t something passed by congress anyway.

Judge Roland Van Brookhaven: Exactly.

Kelly Shackelford: This is something that one of our people came up with the list, we’ll just take care of this. But they want to fight and that’s why we’re going to continue to have one I think.

Darrell Bock: And just to be clear it’s not a war on women because the issue of access is not on the table. It might be an issue of the government encroachment on civil rights because of what the accommodation represents.

Kelly Shackelford: And if access was the issue, the government could provide the access. It’s very easy. They don’t have to go to Wheaton.

Darrell Bock: Or Wheaton’s insurer.

Kelly Shackelford: Yeah. And so that’s not necessary so that’s why if access was their real goal, that’s easily solved but that’s not their goal. They obviously have a different goal.

Darrell Bock: Judge do you have anything you want to wrap up with on this?
I agree with him completely. It strikes me. An important fact that has been brought out is that congress did not enact these requirements and did not indicate what the compelling public interest was but neither did the Department of Health and Human Services this was basically secunded to a bunch of experts who came up with a list and then one of the departments within the Department of the Health and Human Services put it in the regs and so essentially what you have is a group of people that have no connection to determining the public good either through legislation or even through the administration dictating it and they probably are dictating it because this is the idea that they get from the Department of Health and Human Services. But it just strikes me that we basically have subcontracted much of government to a bunch of contractors so the bureaucrats aren’t even handling it anymore.

[Laughter] It’s deep in there somewhere.

Yeah. Well I want to thank you all for taking the time to walk us through this. I know it’s been a lot of detail for people but I think the detail is important for people to get so that they can get a really all the elements that are in play much of which you don’t hear about in the public discussion of what’s going on with this issue. And I do think it’s an important discussion and I really do appreciate you all taking the time to be with us and helping us discuss it and we also thank you for being part of the table where we discuss issues of God and culture and we hope you’ll join us on the next table time.