Religious Liberty in a Pluralistic Society

Part 1 of 2: Religious Liberty and the Law
with
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Darrell Bock

Welcome to the table where we discuss issues of God and culture and our topic today is one that has been literally been buzzing through the television and our culture and social media it's religious liberty and issues of discrimination and my guest today is Jeff Mateer who's General Counsel for the Liberty Institute. They specialize in cases related to religious liberty among other things. He's a former corporate litigator. A graduate of SMU law school and I'm Darrell Bock, Executive Director for Cultural Engagement at the Hendricks Center here at Dallas Seminary. And this topic has been rolling and going but before we get into it Jeff why don't you tell people a little bit about your own background and how you came to work with the Liberty Institute and then we'll dive into the topic.

Jeff Mateer

Sure thanks Professor Bock. Well I was trained as a corporate lawyer, graduated from SMU and like most students who do well, was recruited by corporate America and that's what I did for 19 years. And represented people like the NCA and ConAgra Foods and Ford Motor Company. And what I didn't know is that God sort of had something else in mind for me. He was giving me that corporate training. I thought I wanted to be a judge. Meet with my friend Kelly Shackelford who I'd volunteered on some religious liberty cases and Kelly, the lord using him of course, convinced me that my calling was bigger than being a judge. It was to come help him and eventually come and work at Liberty Institute where I've been the last five years overseeing the legal team there. And it's been an incredible ride the last five years. I joined him five years ago. Today, right now, I've got a 110 cases on our docket in 20 states where we're defending people of faith and faith based organizations who in some way their religious liberty rights are being infringed.

Darrell Bock

Now that's interesting and why don't you tell us do you remember the first religious liberty case you ever worked on?

Jeff Mateer

I do because it was for me it was one of those life-changing things and it really gave me the idea that I could do this full-time. Kelly had called me about a group of senior citizens in Balch Springs. And of course you and I know where Balch Springs because we are sitting in downtown Dallas. But Balch Springs is a little suburb near Mesquite Texas.

Darrell Bock

Now that will help about one-tenth of our audience [laughs]. It's just outside Dallas-Fort Worth.
Jeff Mateer: Yeah. About 20 miles from here, from downtown Dallas, east. And Balch Springs a group of senior citizens were meeting in a public building and they were doing radical things these senior citizens. They were having a devotional before their meal, they were praying over their meal and they were singing gospel music. And someone somewhere at the city thought that was wrong. And so they issues and edict, thou shall not do these things anymore because this is a public building. And Kelly got me involved in that case and we were able to actually end up having a court hearing on it and eventually prevailing and restoring those senior citizens' rights but I did that I guess now probably 15 years ago or so and the result was now I'm general counsel at Liberty Institute and got these cases all over the country but that got me hooked.

Darrell Bock: I see. So you have got to be careful what you say yes to, huh?

Jeff Mateer: Absolutely.

Darrell Bock: That's great. Well let's dive in. We've had Kelly of course on before to talk in particular about the Hobby Lobby case and this is not completely unrelated because of some of the issues that come up but it certainly has created a storm. And I thought what we would do is kind of do a kind of legal 101 to start off with for people who one don't have a legal background and two don't know really the language that you use when these cases get discussed and particularly with all the buzz that you hear in the public square over news media et cetera. Getting some sense an anchor about how the law actually looks at these cases can be pretty important. So I'm going to go through some general categories and let you talk about them as a lawyer and if you can translate legalese into every day English for us that will help us. So let's start off with civil rights because everyone sees these cases or at least it gets framed as a civil rights or a human rights issue. And it certainly belongs in that category. So when we talk about, when the law talks about civil rights what exactly is it addressing?
Jeff Mateer: Well civil rights obviously our foundation in this country is the constitution and the founders when they adopted the Constitution, at first we didn't have a Bill of Rights but in their wisdom a few years later they decided we're going to articulate, originally in ten amendments, what are the particular protections. And really out of those amendments come our civil rights and from the federal perspective. And of course the founders would say, &quot;All we are doing ▸ we are not granting the rights. We are recognizing rights that God had already granted." And so they write them down. So there are certain things that the Constitution provides and gives us the right to. The First Amendment talks about some of those, which include Freedom or Religion, include Freedom of the Press, Freedom of the Association, core fundamental rights.

Darrell Bock: Freedom of Speech is in that group.

Jeff Mateer: Freedom of Speech. And then later, of course we had a Civil War and out of the Civil War came the Thirteenth, Fourteenth, Fifteenth Amendments abolishing slavery and giving rights that you cannot discriminate on the basis of, originally race and since out of that we've expanded to include, sex and all those are sort of a group of rights that we would refer to as Civil Rights. So it's the right to speak, the right to believe, the right to be free from discrimination, because of your race, because of your sex. All those would be considered Civil Rights.

Darrell Bock: And of course it's important just for historical context to say that when these amendments were originally passed that there were times when certain races were excluded, certain genders were excluded and didn't have certain rights. Women having the right to vote is in our history actually relatively recent more recent then the length of our total existence that kind of thing. And so it was these kind of affirmations that were coming and what impart is happening here in our society is that if I can say it this way, new categories are being attached to these rights. Is that part of what is going on?
Jeff Mateer

Well I think what had happened is that as time has passed and groups in our country have gained more and more power and more and more the ability to let their views be known there's been pressure put on to expand the group of rights. And so you even have people today arguing that there's a right to housing. That obviously out of the abortion situation in 1973 the Supreme Court found that there was a right to abortion. And that now came into the code of rights. Now the founders of course never envisioned a right to abortion. They didn't envision a right to housing.

When they wrote down the ten amendments to the Constitution those rights were not imagined and I would think that the framers of the Fourteenth Amendment right after the Civil War, they were dealing with race, nothing more and that's what they envisioned. However there's been pressure put on because of these special interest groups and those rights have expanded or the arguments have expanded and largely the rights have been created by court to the extent that the rights have been extended it's because of activist judges who have extended more and more. So you have some court decisions talking about housing. There have been arguments about the right to travel. And so what is a core common right, civil right, it is an ever-expanding list. Sometimes further from what the framers intended as opposed to like a judicial activist would have.

Darrell Bock

So how much - I'm going to try and stay out of getting into a philosophical fog here but I do think in this case the questions important and that is how much obviously culture and worldview are impacting what’s going on here? That we aren't merely - I mean we could talk about strict framing or activism and that kind of thing but really what we've got is an issue in which the question is being raised, what core human rights should people have and what should not be a disqualifier? If I can say it that way. Is that what we wrestle with when the courts move to expand these categories? I think they're attempting to ask at least at one level some core legal and philosophical questions simultaneously, is that true?
Jeff Mateer: Yeah. Everything is about worldview. I think everything that comes out is what is your worldview determines how you answer that question and certainly on the court today there are three or four judges that kind of have that conservative approach that come from a world view a more conservative worldview. That they come from a worldview that they look at it as God granted the rights and so they're looking at really God and nature to see what are those rights. That's the same view that the founders would have taken. And then I think on the other side of the court there are four maybe five depending on the issue who look at the issues and say, "No well we can look at today and based upon what society needs, the way societies changed those rights have expanded and just because there wasn't a right 30 years ago doesn't mean that there can't be a right today based upon societal changes." That's all dependent on worldview.

Darrell Bock: And really the other part of the worldview issue that plays in here is that everyone recognizes that our society is structured to be diverse in one way or another. I like to post the question this way, when our founding documents were being written you had someone like a John Adams who certainly would have been viewed as a very orthodox Christian but you also had someone like a Thomas Jefferson, who wouldn't be defined in that category at all but they were able to sit down at a table and try and design a government in which they felt like they both could work side by side with one another and function as a society together. And so there is an element of our core documents attempting to establish a society that is recognizably diverse on the one hand and yet is able to function on the other. And that's one of the core societal tensions we always deal with because everybody doesn't think the same about these issues. So how do you coexist in a society when you've got that level of difference?

Jeff Mateer: No I think that's exactly right. I think what makes America great has been the idea that our country was formed and people came here with diverse views on religion, diverse views on politics and they were able to work together and sit down. Today in the environment we're in that's becoming harder and harder because if you don't hold the politically correct view then you're called lots of really bad names.
Darrell Bock
Yeah. And I have - I'll get your read on this but my read is that to some degree both sides are a little bit guilty in that conversation in terms of not being willing to engage in the kind of dialogue or discussion that's necessary to kind of hammer out all right how do we actually can make this work as opposed to simply digging in terms of where they are. Is it that our worldviews have become that so diverse that we're now locked in this mode or have we lost something that we used to have or is it a little of both.

Jeff Mateer
I think it's a little of both and I certainly believe that some of the things that we believed as core American and core American in principals are changing. I mean one of the ones we're going to talk about is the view of religious freedom and the importance of religious freedom and what that means. What we're seeing today and really the last few weeks but really over the last year is a lessening of we used to think that religious freedom was an important value, it was important to promote, it was important to have. And what would happen for conservative Christians the idea of the argument back against us always was well you're trying to impose some sort of Christian theocracy. And there may have been people on the conservative right who were trying to do that. In my job I rarely run into people advocating that.

Darrell Bock
Yeah. It's not the bulk of people and what they're concerned about.

Jeff Mateer
No. Not at all but today if you have those conservative, whether it be Christian, let's just say Judeo Christian beliefs then you're being ostracized and that those beliefs are - not only they're being belittled and you're severely criticized if you hold them and that environment we didn't have that five years ago. And I know we're going to talk about Religious Freedom Restoration Acts but if you look back 25-30 years ago, religious freedom was a bi-partisan issue. It wasn't a partisan issue and I’m not talking Democrat-Republican I'm just talking in America on the political spectrum but today that's no longer the case and we're no longer valuing. I often when I get to speak to pastors and do pastors conferences, I talk about we used to live in an America that respected churches that respected pastors, respected leaders of religious institutions. Well you look at George Barna's surveys today. I mean pastors are right there with us lawyers. That's not a good place to be by the way at all.
I mean I was just with a rabbi who is in our city of Dallas who is in litigation with the city of Dallas to exist. We would never have those cases. To have churches being told they can't move to a certain area of town because they are a church we don't want a church there anymore because we'll lose the tax benefit. We didn't have those cases. I think our culture, we just we don't think religion is important unfortunately and we've lost, and boy we could go down a big rabbit trail there about the role of churches and the role of religious institutions in our society and the importance to communities and why it's becoming less and less. That we're somehow letting there to be churches is an inconvenience and maybe we'll let them but boy they're not important. That's a new thought. That's not something we had.

Darrell Bock: Well we've only gotten through one of these so let me take on the second one. Let's talk about discrimination. Legally what is considered to be discrimination? Has that been changing in terms of the way it's been defined or is that a pretty relatively straight forward category or at least until recently?

Jeff Mateer: Well I guess the question - the word discrimination itself that's not changing it's who and who is protected and so in the law and this really comes primarily out of race in 1964 the congress and then eventually signed by, originally thought up by President Kennedy but it was signed by President Johnson after President Kennedy's assassination was the idea that we were going to outlaw discrimination and so the question becomes discrimination against who and in what areas. And in 1964 they had a vision of what that was and again it was primarily race was the reason that got expanded to sex and now the push is to expand it even more so.

And of course we all know that there are letters now, we want to expand it, and the easy one is LGBT but if we were here with some of my lawyers at Liberty Institute they would remind me that it's a lot longer than LGBT these days but it's expanding who can be free from discrimination. Race, sex, religion, those were the original thoughts. Now it's expanding to sexual orientation in some places, it's expanding to gender identity in some places and who knows what tomorrow -

Darrell Bock: Will bring.
Jeff Mateer - that will bring. Now the other part of discrimination in what areas and again it's discriminate - the federal government that's one entity, can the federal government discriminate on the basis of religion, can the federal government discriminate on the basis of race, those things were taken care of through amendments to the Constitution.

Darrell Bock So that's your Fourteenth -

Jeff Mateer That's the Fourteenth amendment incorporating the First amendment and other parts of the Constitution so we have that. So that's when the government, whether it be federal government, state government, local governments, there's a prohibition against discrimination: religion, race, sex. And then beyond that, what in 1964 did is because the First Amendment does not apply between private citizens. If I tell you you can't speak. And I, "You can't speak." And you say, "No you're violating my First amendment rights." No we're private citizens. It only applies against the government. So in certain areas in 1964 when congress passed what's known as title seven expanded that for areas of employment for instance.

So if an employer fires someone in the private context, they didn't have a claim that you're violating race, or you're violating religion until the federal government passed a law that said, "Thou shall not in the private context." So you got employment, you have housing. And the push now is to expand that into more and more areas. And so who is being discriminated against that's being expanded. Again sometimes by congress, other times by activist judges, sometimes by local governments. And so we've seen that conflict recently. And then also you have what is the category? What are the categories that the government can be involved in to say, "You can't discriminate."

Darrell Bock That's a violation.
Jeff Mateer: Public accommodations for instance. If you have a place - a business that's open to the public you cannot discriminate. And I think we have a consensus in our country that race is one of those things that we're not going to allow discrimination, private or public based upon race. We're not going to allow discrimination based upon religion, public or private. The push is to now expand that into lots of more and more categories. Unfortunately it's not congress who's acting a lot of times it's through judicial cases or what we've seen in the last few months is the president is issuing executive orders expanding who can bring claims of discrimination but in also what areas.

Darrell Bock: And in process trying to set precedents that then can become understood as the law.

Jeff Mateer: Absolutely.

Darrell Bock: Now so we've got you've mentioned a couple of entities here just to be clear for people so we've got governments on the one hand. We've got individual citizens on the other and in another category that's come into the discussion as kind of a quasi-personal entity if I can say it that way or corporations and how they're viewed. That's part of the Hobby Lobby discussion is can a corporation be used as having rights as a person at least when it's owners are predominately individuals whose views then can reflect its values. That's part of the Hobby Lobby case. So we've got various entities that we're dealing with here as to who might or might or not be participating in discrimination. The government can't do it. Individuals now theoretically aren't supposed to be able to do it and depending on how laws are written and corporations are where in this mess?

Jeff Mateer: Now well corporations, the Hobby Lobby case tells us corporations are persons. That's the dictionary act which is a federal law that defines the words so generally corporations are considered they are persons and so they are covered just like an individual is right now.
Okay. So that kind of lays the ground now let's talk about religious liberty a second. We've talked about where it comes from. I think we've pretty much taken care of equal protection in what we've said in terms of the Fourteenth Amendment and that kind of thing. Let's talk about religious liberty. People would say this is one of the foundational rights. This goes back to the Bill of Rights in the very beginning. What is religious liberty and what isn't religious liberty and the reason I'm asking that question is that some people think there's a difference in the language of freedom of religion versus freedom from religion. So how do we work through that language?

No it's good. And I go back and it is not necessarily my view. I think I'm articulating the view of the founders and the founders believed that religious freedom was a foundational freedom. And when those men met in Philadelphia and the push was we need a Bill of Rights to protect us from this federal government that just a couple years past, they had formed. We want to protect ourselves from this federal government. The first thing when they wrote the First Amendment, the first phrase of the First Amendment is to protect religious freedom and prohibit the federal government from establishing the establishment of religion. Prohibit the federal government from prohibiting the free exercise thereof and that became the foundational freedom.

So what is that? Now they could have used a lot of different words and the founders were extremely intelligent men who debated these issues, understood these issues. They could have said, freedom of worship. Some countries that's what they have in their constitutions. They talk about protecting freedom of worship. The founders deliberately and really you go back to the Virginia - the debate over the Virginia freedom, religious freedom law that is a predecessor to our first amendment and really Jefferson and Madison involved in that. Of course Jefferson was not involved in the debate over the First Amendment, he was in France, but Madison was there and so they understood what they had done in Virginia. They didn't freedom of worship. They wanted something so much more. And I think that's important because freedom of worship really talks about what we do on Sunday mornings and the view of what happens inside our church, inside the synagogue, inside the place of worship. And it's that believing there and speaking there not going outside that. The founders rejected that notion. Now they certainly wanted to protect freedom of worship but they chose words that were beyond that.
Darrell Bock: So you're saying a bigger concept?

Jeff Mateer: A lot bigger concept and the concept they used is free exercise. And free exercise is not just simply believing something it's acting on those beliefs and that's at it's a core, that's religious liberty. Religious liberty is being able to believe and then to act on those beliefs. It's not just believing it's being able to act on those beliefs which includes speech and a lot of our cases we handle you'll see it's religious speeches involved which is another part of the First amendment and we have protection there but religious freedom it implicates speech, it implicates association, other things that the founders also put down in the First Amendment but it's that right to believe it's that right to act on those beliefs. That is at its core what religious liberty is.

Darrell Bock: And there's an - I'm going to put a synonym in here it may or may not work but when we think if you were to secularize this concept at all you'd be talking about the state doesn’t have a right to ask someone to violate their conscious in some ways. Is that a good synonym?

Jeff Mateer: Yeah. And the founders would have been comfortable with that because they interchangeable would use religion and conscious because it came from the same thing. And that's exactly it is freedom of consciousness and it's to act on that. And to be able to not just believe it. I mean think of conscious and think of the best - when I think of conscious the first thing that comes to mind is consciousness objectors right. The people who didn't want to go to Vietnam. Well think if the government said, "Jeff you don't have to go. You can believe you don't have to go to Vietnam but -"

Darrell Bock: But you're going [Laughs]

Jeff Mateer: - "but you're going anyways. But we're not invading your right to believe."

Darrell Bock: That's right.

Jeff Mateer: "You can believe whatever you want."

Darrell Bock: That's not what it means.
Jeff Mateer: And that's not what it means and that's never what it meant.

Darrell Bock: Yeah. And I think that's important. I think getting this concept down clearly on the table is going to help us when we come to these particular laws. So now let's transition and take a look specifically at these laws that we're dealing with. What is the controversy that's been attached - I do want to deal with one perhaps misunderstanding that I think is important to clarify at the start and that is that sometimes these laws have been said to mirror exactly the laws that were passed under Clinton in 1993. And at least technically speaking that's probably not true. That the scope of what these laws were at least as originally written and the more recent laws not only deals with how the government handles these areas but also deals with and gives rights to corporations, some of these other entities that we're talking about because we had government, we had individuals, and then we had corporations. So some of the push back that came from the Indiana Law in particular was that it expanded the 1993 law. In fact I even have a Facebook tweet from Schumer who wrote the 1993 law saying, "No this was an expansion. The idea that this was a mirror isn't exactly correct." So is that true or not?

Jeff Mateer: Technically correct however what I would ask them, is what I'd ask the people who are now saying, "Well these are different." Well first off it's technically correct. At their core they're not different. And at their core they are to protect the same thing. And I would say at Liberty Institute what we've been working on and telling states who don't have these protections is adopt the federal language verbatim. Because that is the first thing which takes care of probably 90 percent of the issues and it is technically correct in Indiana and Arkansas and Arkansas originally did not verbatim adopt the RFRA. Although to defend the folks in Indiana I will tell you what they were doing is since 1993 new attacks have come up and they were being a little more specific in their language to combat those attacks.

Darrell Bock: They actually were incorporating things that were already implied in the Hobby Lobby decision for example. So if we're going to expand judicial judgement and then apply it one area then we ought to be able to do it in the others. Should we think of it that way?
Jeff Mateer  You're exactly right. What they did is they said some things that the court found in Hobby Lobby that they were trying to put into their law so that judges couldn't change that view later. And certainly Indiana State court in the case of Indiana, Indiana State Court judges applying Indiana law would then follow the Hobby Lobby decision, which they wouldn't be bound to do because Hobby Lobby comes out of the federal system interpreting a federal law. They wanted to make sure their Indiana law so they went ahead and spelled it out.