Religious Liberty in a Pluralistic Society

Part 2 of 2: Religious Liberty and Discrimination
with
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Darrell Bock: And now here's the interesting thing about the Indiana Law that I think most people don't get and that is as originally written and even I think as amended and that is that really all the Indiana Law does is establish the right of a person to make a religious liberty defense isn't that correct.

Jeff Mateer: Yeah. The thing that I think has really gotten sort of blown out of proportion is this idea and the other side has done I think an unfair job of mischaracterizing. It doesn't mean you win when you assert every time. It is a defense and I take this and it's real. Let's say we converted and we became Mayan. We're now Mayan and we're going to practice the Mayan religion or the Aztec religion. Any religion that does human sacrifice. Pick your religion. So we decide we think we're going to convert. We're going to be and what we say in America, Freedom of Religion. Now does that give us a right to engage in human sacrifice? That would be our sincere because that's our sincerely held religious belief. I mean that's the test. The test is, is this sincere? Well my religion and actually it's been established, this is what we believe. Does that give us a belief to do that? No. This, the law, and just like the founders envisioned, the way the law was for over 100 years in America. It's a test. There's a balancing test.

Darrell Bock: It's a standard that's applied that has to be met.

Jeff Mateer: It's a standard. And so the first thing, if you look at this law just like the federal law that was passed in 1993. The law in Indiana, the law in Texas, the law in 20 states says, the first thing that courts look at when someone feels their religious liberty is being somehow infringed. The first thing the court looks at it says, "Is this substantially burdening a sincerely held religious belief? Substantial burden." That's the first thing. And so the person who is arguing that my rights are being somehow violated has to demonstrate that it's a substantial burden.
And even when they do that doesn't mean they win. Then the government comes forward and says and in the case of human sacrifice we would use that but in the case of any public safety sort of situation, would say, "All right does the government have a compelling interest?" Now again that's a legal term that has been in the legal vernacular for over 100 years. What it really means is does the government have a really good reason? It's not made up reason. It's a good reason. There are some tests in the law that are called rational basis. That just means that the government has a reason. They don't have to be really good. Just a reason and then that's good enough. Here it's a little more than that.

**Darrell Bock**

It's a higher standard.

**Jeff Mateer**

Yeah. It's a higher standard, it has to be a really good reason. And with that really good reason is it using the only way it can in order to accomplish that. Now that standard should be really familiar for a lot of people especially if you've done a show on Hobby Lobby because that's the standard that the court looked at in the Hobby Lobby case.

**Darrell Bock**

That's right. Yeah.

**Jeff Mateer**

That's all Indiana at its core, when you look at the core parts, that's all the Indiana Law does.

**Darrell Bock**

It says to the person who feels that their rights are violated, you get the right to assert that your rights are violated and then we go through this standard practice of determining whether the states compelling interest has been sacrificed in forcing you to go there. And that's a judicial judgement that's made. Is that right?

**Jeff Mateer**

That's right. And we've got because we've since '93 the federal law but before that we had a body of law that talks about ☐ so you were able to look at different situations. So vaccinations for instance. Oh my word we're going to ☐ and now ☐ well no you have to take that balancing test and actually the Hobby Lobby case that was the argument. I said, "Well look if you rule in favor of Hobby Lobby then you're opening Pandora's box." No, judges have routinely ☐ I mean we're taught in law school. You routinely ☐ they have to apply the test. It's a fact; case by case analysis.
So we're going to look at vaccinations and I tell people, "Look I don't know how the court would handle that case but I know what the analysis would be. First it would be, do you have a sincerely held religious belief that's being substantially burdened?" So it can't be just I wake up one morning and I don't like vaccinations. You have to be part of a religious belief system that and there are and I recognize that but you just couldn't be just willy-nilly. And then from that does the government have a compelling interest to substantially burden that? Well I could see a lot of judges and ultimately the Supreme Court saying that they do have a compelling interest and there's no other way.

**Darrell Bock**  
Because of the public health threat?

**Jeff Mateer**  
Because of the public health threat. And you know the court gets to make that determination.

**Darrell Bock**  
Let me give you another one that you mentioned to me when we were off the air that I think is interesting and it's the Amish right to use the public thoroughfares because the human sacrifice one is kind of out there.

**Jeff Mateer**  
Yeah. That's a little out there. I haven't met too many Mayan or Aztecs lately. [Laughs]

**Darrell Bock**  
That's right. Okay. But the Amish one if you live in Pennsylvania, that's a real one. You're going to run into that.

**Jeff Mateer**  
Yeah. I was just there.

**Darrell Bock**  
So what does that one look like?
Jeff Mateer: Yeah. No and that's the thing. There's a case called Yoder vs. Sherbert, but it has to do with the Amish. So, take the case of the Amish being in there buggies. They want to use public highways. And originally the Amish said, "Well, we don't want to put reflectors on ours. We don't want to do that." So they argued that and the government said, "No. We have a compelling interest for safety. Now we're going to let you on the roads but you're going to have to do certain things to be on the roads. You're going to have to put reflectors on there. You're going put the lights. You're not going to drive at night. There are going to be certain restrictions." And courts have said that that's fine. It's not just you can't use religious liberty as a trump card.

Darrell Bock: It's not automatic.

Jeff Mateer: No. Not at all. And they don't win every case nor should it win every case. And that's what great with the founders they understood that. And that was the law and a colleague of mine says, "You want to blame all this well you blame it on Justice Scalia." Because it goes back to a decision this was the law. We wouldn't need these statutes in the states or in the federal government had not the Supreme Court decided a case in 1990 called Employment Division vs. Smith and in that case Justice Scalia writes the majority opinion and what he holds is if it's a law of general applicability then it's fine and we don't get into the issue of religious. We don't even have to balance. Now I would I submit to you that case was wrongly decided and I love Justice Scalia but he was wrong on that.

And I honestly believe that if he had that case again today knowing what would have happened he wouldn't have ruled the way he did. But actually in that case it was the conservatives who ruled against the religious person and said, "No it was a law of general applicability." Means it's a law that applies to everybody. We don't want to hear about your religion. And so if it's a general neutral law then we don't get into this religious analysis. Now us again, submit to you that was inconsistent with how we understood free exercise in our country what the founders understood free exercise to be. It's inconsistent with cases from the '40s and the '50s interpreting religious liberty. And so what congress did then after that decision they passed the Religious Freedom Restoration Act. Which reinstated the test that had been there before.
Darrell Bock  
So they went back because of the decision to get back to where they were?

Jeff Mateer  
Exactly and that's exactly what they did in 1993 and the thing that's neat about 1993 was this was a huge bi-partisan.

Darrell Bock  
Oh yeah it was something like 93 to something.

Jeff Mateer  
97 to 3 in the senate. Signed by President Clinton. Supported by Senator Kennedy. Drafted by then representative Schumer, Chucky Schumer. And you had a broad support. You had the ACLU supporting it. You had conservative groups supporting it. I mean just broad support. No one in 1993 would have come out except the extreme on both sides coming out saying, "We're against religious liberty and religious freedom." And because it was a federal law they could only say against the federal government. It did not apply to the states. So what you then had from 1993 on you had states adopting their own versions, Texas being one of them. Texas has adopted one. And in Texas it passed in the late '90s. We've had at Liberty Institute actually Kelly Shackelford was involved in the first case at the Texas supreme court. It involved a city trying to restrict a prison ministry at a halfway house from its city limits. Supreme Court took that case and said, "No by banning them from the city you're infringing on the religious liberty." But it wasn't simply, "Oh we have religious…" No the court did the balancing test.

Darrell Bock  
So this law that we're talking about in 1993 is entitled and I'm trying to remember is it the religious - what is it?

Jeff Mateer  

Darrell Bock  
So RFRA basically?

Jeff Mateer  
We call it RFRA.

Darrell Bock  
RFRA okay.

Jeff Mateer  
We call it RFRA, Religious Freedom Restoration Act.
Okay. And that's what everybody's talking about when they say these laws are mirroring or at least attempting to mirror with the changes that have come in place. Okay. Now let's get down to the brass tacks. We've got 20 minutes left and really what it seems to me we're down to now is a tension. The tension between the rights that an individual has to be a citizen and exercise the rights and choices that the law gives them. And of course with the law shifting in the area of same-sex marriage we have people now in certain states that have the right to get married to marry someone of the same gender. With the choice that they have about what services they procure for that and then the option, the service provider has for whether or not in giving that service they are violating their conscious or not.

So I'm going to lay this out as neutrally as I know how to describe it. From the same-sex perspective, the idea is, “I have a right to get married, the state recognizes that right to get married, I ought to be able to get the cake and the flowers and the pictures that I want for my marriage; it's a completely legal act and any refusal to do that is discriminatory against me.” From the provider’s standpoint, the idea is, “But the moment you ask me to do that, you're asking me in effect to endorse something that I find morally objectionable on religious grounds and that's discriminatory against me.” So when I've got dual discrimination going on, what do I do?

Well it's Constitution interpretation and it's a clash although I think it's important to first off you go back to what the law so how would it come up in the context? And if in the version originally passed by Indiana the version passed by Arkansas and take Texas for instance, you have someone who goes into an establishment and they're told I’m not going to service you.

And we've had this with florists and we've had this with photographers and I think we've had this with cake bakeries.

Right. We've had wedding venues in other states and things. Right now all the cases relate to some sort of participation in the marriage ceremony.

Where the person providing the service actually in some senses actively engaged in contributing to the service.
Jeff Mateer: And somehow expressing artistic ability adding to it. And I think that's important because this is not an ability to refuse service because of someone's sexual orientation. It is a basis to say, "Government you cannot compel me to participate in an activity that violates my religious beliefs."

Darrell Bock: And my religious conscious.

Jeff Mateer: And this is something that when we think about it we've seen this before and this came up in a different context in the '60s and '70s when the government was drafting people and they were saying, "You're going to go into the army." And people said, "No I have a conscious objection."

Darrell Bock: So this is the pacifism objection.

Jeff Mateer: "And I do not want to participate in something I believe is illegal; something that I believe is immoral; something that violates my beliefs." And through that process we then established in this country and idea that we were going to give people the right to have consciousness objection to not force them to violate their beliefs. And so when I look at this issue and I think of the florist and I think of the baker and the photographer. What we really have is the government coming in and saying, "Can the government compel someone that they in order to be in business, they have to participate in an activity that they have a sincerely held religious belief against." And I think that then that's how you kind of have to look at it because it's a consciousness objection.
That's something that the First Amendment as a core principal again as we talked about earlier. Not just freedom to believe, it's freedom to act on those beliefs also. And so when you ask the florist, you ask the baker to actually participate in an activity that they disagree with. And again Kelly Shackelford and I were at the Hobby Lobby argument actually sitting on the front row. And we both gave a double take at one point during the argument and it's when the Solicitor General of the United States argued that because Hobby Lobby had entered into business that somehow lose their religious liberty rights. Well that's really the same argument that we're hearing now today. That if you want to be I mean the latest being and this one to me one of the most outrageous casualties of the recent Indiana debate is this pizzeria who doesn't even cater weddings. But some journalist says, "Well would you? Would you cater?" "Well that's never happened." And a journalist being a journalist presses the issue, "Well but would you?" "No we wouldn't do that. That violates our beliefs."

Result is because of threats they've been forced out of business. Now they weren't saying they would refuse a gay person from buying a slice of pizza. That they would even know that the person was gay unless they told them right. It's not like race, where you can look at someone and you can determine it has nothing to do with that. They somehow but they just answered a question and they're a causality of this. So I think the whole issue is government compulsion. In order to be in business you have to violate your religious beliefs.

**Darrell Bock**

And this compelling standard idea is another interesting part of the argument it seems to me because I do think that another reply can be it isn't like this couple can't find a baker, a florist or a photographer to take pictures at their wedding. They don't have to go into one where they know the person objects.
Jeff Mateer

And that's the thing about the florist in her situation. What we know is one, she had served this person before, the gay individual and what she had said is, "I can't participate in your wedding. Here are some florists who will." So she said other people, she had served them before, she thought I mean actually said it had sort of a friendship. And she's just saying I can't participate in something that violates my deeply held religious beliefs. And again it isn't a license. You have to go through and go through the analysis. You first have to demonstrate not everyone will get this ability, you assert it as a defense, again by the government compelling you. And then what you determine is if the law had been passed as written, the law like it is for the federal government, it would be something you've got to show again, substantial burden, sincerely held religious belief and then the government can come forward with its part of the cases.

Darrell Bock

And so it seems to me I'm going to go back to kind of where we started which is if you design a government that supposed to honor diversity and it also is supposed to create a society in which there's a recognition that there are diverse views. And there certainly is I don't think anyone walking into a court of law today would have difficulty making the argument. And the issue of same-sex marriage is socially controversial. I don't think you would have to work very hard to establish that. It is an area that there are diverse views that exist and there is a history of religious discussion around it as well.

So in trying to balance the right of the gay person to have access to all the services they want when they have a wedding, which is certainly something they would still have versus compelling the person who has religious objection to participate in that we seem to me that if you apply these standards to make a pretty good case that you can get all the services you want. The discrimination that you're talking about, if it exists, is extremely selective but the compulsion of asking someone to participate in an act that they view would be an affirmation of something they actually view as immoral is a violation of conscious. It is a violation of core amendment rights. It seems to me that that is how you would balance this out.
No, that's exactly how you'd do it. Take it out of the gay issue and let's talk about a different example because if the government can compel you to violate your religious beliefs then what are some areas. Let's think about the kosher deli. I'll take New York, I'm sure there's some great kosher delis in New York.

Yeah. There are tons of them.

And so, could if in their wisdom the city of New York decided, "You know we don't want kosher. We want deli's to offer everything. So we want all deli's to offer everything including kosher and non-kosher." Now could they compel a kosher deli to carry non-kosher items?

That's a good argument.

And you know of course not. And it goes back again, you started talking about the Hobby Lobby case. The Hobby Lobby case is important because these same issues that came up, "Can the government force you to eat broccoli." And if you don't are you going to pay a tax or fine depending on what Chief Justice Roberts decides but can it compel? No. You cannot force people to violate their religious beliefs. And I like the idea because in the law, in the employment context, we have something called accommodation. And there was a case this last term argued involving Abercrombie & Fitch. A young lady applied for a job, Abercrombie & Fitch has a policy that you're not an employment policy we won't let our they call all their employees models. I don't know if I've ever been to an Abercrombie & Fitch by the way. I feel like I should since I know about this case.

My wife won't go there partially for this reason but go ahead.
Jeff Mateer

Yeah. I think they got some. But they call their employees models, I do know that, and so a young woman interviewed for a job, she had on her hijab during it. She scores really high but I often tell when I was in the corporate people, "When you're corporate people do not put these type of things in emails." But apparently their email correspondence back and forth was saying, "Well yeah but she was wearing this thing on her head. We can't have that because we have a policy." So the issue that the Supreme Court is presented with and she didn't get the job. She scored the highest and then the downgraded her because she had a hijab and because of her Muslim faith she needs to where that and otherwise would have gotten it. So the question is can they accommodate that belief? And the courts going to let us know.

Now based upon the oral argument, I think the young lady is going to win because the justice is looking at that well who has to ask, lots of different issues but in the employment context we've often said that if your employer asking you to violate your religious beliefs. First off, the employer has to know that they're violating it. Then it goes back. Just because they are doesn't mean you win. Then is goes back sort of like this balancing test again, it goes back for the employer to demonstrate, "Well look, I have to have people work on Sunday. I only have three employees. We take turns. They have to work. And so if they can't do that then they can't work here." Even though that they believe that they shouldn't work on Sunday. But for a large employer maybe you can accommodate. And I really think when you think of the florist and the baker. I mean they can be accommodated. I mean this isn't a case that these people were not going to get they weren't going to get their wedding, they weren't going to have their cake.

Darrell Bock

They weren't going to have their cake and eat it too. [Laughs]

Jeff Mateer

Not at all. I almost said it but I'll let you say it. But that wasn't case, that you could accommodate those. I mean I think we're going to see this in other areas, we're going to see it with county clerks. There are certainly, if the supreme court goes the way many of us belief and they find that in the Fourteenth Amendment that there is a right to same-sex marriage then county clerks are going to be asked to issue licenses and they're going to be faced with, do I resign or do I follow the law or perhaps in some places there will be enough clerks that there are some clerks who don't -

Darrell Bock

Will sign and others won't.
Jeff Mateer: Again, it goes back to you're going to have to demonstrate this is your sincerely held religious beliefs. And again, this is about on these issues, we're talking about marriage. This is something that the majority of Americans believe in traditional marriage. And something that for thousands of years the three main faith traditions all believe in marriage between one man and one woman.

Darrell Bock: That's why I started, that's why I said, "I don't think you're going to have difficulty saying this is a controversial area." That is you know -

Jeff Mateer: But we're seeing - I know in cases right now on my docket. I've got men and women who've lost their jobs in the private sector because of their beliefs concerning traditional marriage.

Darrell Bock: Well, the famous case in that regards is what, the Atlanta Police?

Jeff Mateer: The Atlanta Police Chief and we've got four others. I mean Craig James, which people in the Dallas area will know.

Darrell Bock: On ESPN.

Jeff Mateer: Well, fired Fox Sports.

Darrell Bock: Yeah. Fox Sports that's right.

Jeff Mateer: Fox Sports because his views. I've got a PhD, MD Doctor of Public Health, Eric Walsh, fired from the state of Georgia because they went - believe this - don't go to the secular workplace because they'll review your sermons. Did you know that? That's what they did with Dr. Walsh. Dr. Walsh is a lay minister. And low and behold he had preached about traditional marriage. That makes him unqualified to work for the state of Georgia apparently. And so these issues are coming up. And what we've been talking about at Liberty Institute, we see the clash; it's a clash of absolutes. You've got religious freedom, which for over 200 years we believe in this country, we've respected as a core foundational freedom versus this new sexual orthodoxy.
And unfortunately on the other side they seem to be taking a winner take all approach and you can't go if you read the New York Times for instance. I mean the idea is religious liberty can't win. The disturbing thing is on the national level the person who is now in charge of the Equal Opportunity Employment Commission, the EEOC is a former professor named Chai Feldblum and she was asked, recognizing this clash, she was saying, "When there's a clash between religious liberty and sexual orthodoxy, this new sexual orthodoxy. Can you imagine a time ever where religious freedom would win." And she answered honestly and she said, "No I can't imagine a situation."

**Darrell Bock**

Yeah. I even think the language is poor because the issues not an issue of one side winning or the other. This is not we're back to the principle of we're talking about a diverse society in which there are differences of views and we're trying to figure out how can we live together. Now I like the legal language, how can we accommodate one another to a certain degree? Then it's not going to be a matter of me getting everything I want and you getting everything you want. It's going to be a matter of trying sort out how we can co-exist with one another despite the differences in world view that we have and trying to figure out what that is that impinges on everybody the least, if I can say it that way, might be a better path to seek then for each side to seek absolute victory.

**Jeff Mateer**

Well I think that's right. Again religious liberty doesn't win in every case nor should it. And before 1990 and before the Employment Division vs. Smith case, that's the balancing test we had. That's what these laws at its core, that's what these laws are trying to do is reinstate that balancing test. And it's not to put a thumb down on one side or the other. Unfortunately I think that now the knee jerk reaction has been to out that thumb.

**Darrell Bock**

Yeah. The cultural way this has been framed really gets us off this is why I wanted to spend so much time on the legal side of this because to me if you understand legally what has been attempted and what the history of this conversation has been it isn't as all or nothing as the public debate has been. And this is one of the ways in which our public debate sometimes doesn't service very well. In fact it's almost disturbing how unaware the public discussion is of these kinds of standards and the way they are applied and really to some degree what motivated their establishment to begin with so that we do develop some mutual sensitivity to one another.
Jeff Mateer

Well, I think that's important and what I've been telling people and

certainly when I've been talking about these issues publicly is I tell

them about the stories of the people that these laws have protected.

We represented in Mississippi a small African American church, so

Mississippi, small African American church who had found a
downtown location to expand into and the city there believe it or
not, had a law that said, "In order for a church to occupy the
downtown area of it's town -" and it specifically said, "church". "In
order for a church to occupy the downtown it had to gain 60
percent support of the adjoining land owners in the downtown area
and then the mayor had to approve it." Well guess what, that

violates the law. And that is a substantial burden.

I mean they couldn't even find someone of the things. So you can

have a pool hall in downtown Holly Springs, Mississippi, you can

have a liquor store in downtown Holly Springs, Mississippi but you
couldn't have a church. And so the small African American church,
they were done. But fortunately we were able to go there and we
obviously thought, "Well the city when we show them this violates
the law, it will fix it." But no we ended up going all the way to the
fifth circuit court of appeal. So that's the court right below the
Supreme Court that covers our area in Mississippi and getting a
landmark precedent. But it was one of these laws, and it was the
sister to RFRA called RLUIPA, that applies to land use and
protects churches and synagogues and other places of worship in
land use decisions. But it's the same standard and the same test.
And so these laws [that church today exists because we were able
to use that to protect them but whether it's a Jewish synagogue or
an African American church. I mean these laws protect real people,
who are involved in real disputes and who for whatever reason you
have governmental entities trying to take advantage of or
discriminate against.

Darrell Bock

Well Jeff I really appreciate you taking the time to be with us. Tell

us a little bit about how people can find out about the Liberty

Institute.

Jeff Mateer

The best way to go find out about Liberty Institute is at

www.LibertyInstitute.org and you hear about all our cases that
we're working on and the battles to protect religious liberty.

Darrell Bock

Are there resources available there to help people get located in

these kinds of conversations?
Jeff Mateer: Yeah. If you're a school, if you're a church, if you're involved in these issues we've got lots of downloads and they can see that LibertyInstitute.org.

Darrell Bock: Great. Well I really appreciate you coming in to help us walk through this. Obviously this is an ongoing discussion and I think this is a case where there's a credit to the law. I mean I think the law has really tried to make an effort to balance out the tensions of living in this kind of diverse society in which we are a part of and if we would respect the way the law has been crafted because of the way these conversations have taken place over a long period of time, if we respect that we might actually be able to figure out a way to deal with all of this.

Jeff Mateer: I hope so. I hope so. And I guess it's going to play out over the next few months and years.

Darrell Bock: Yeah. Well thank you again for being a part of this and thank you for being a part of the table where we discuss issues of God and culture and we look forward to seeing you again soon.