Background:

The Religious Freedom Restoration Act and *Burwell v. Hobby Lobby*

Professor Marci A. Hamilton
Paul R. Verkuil Chair in Public Law
Benjamin N. Cardozo School of Law
Yeshiva University

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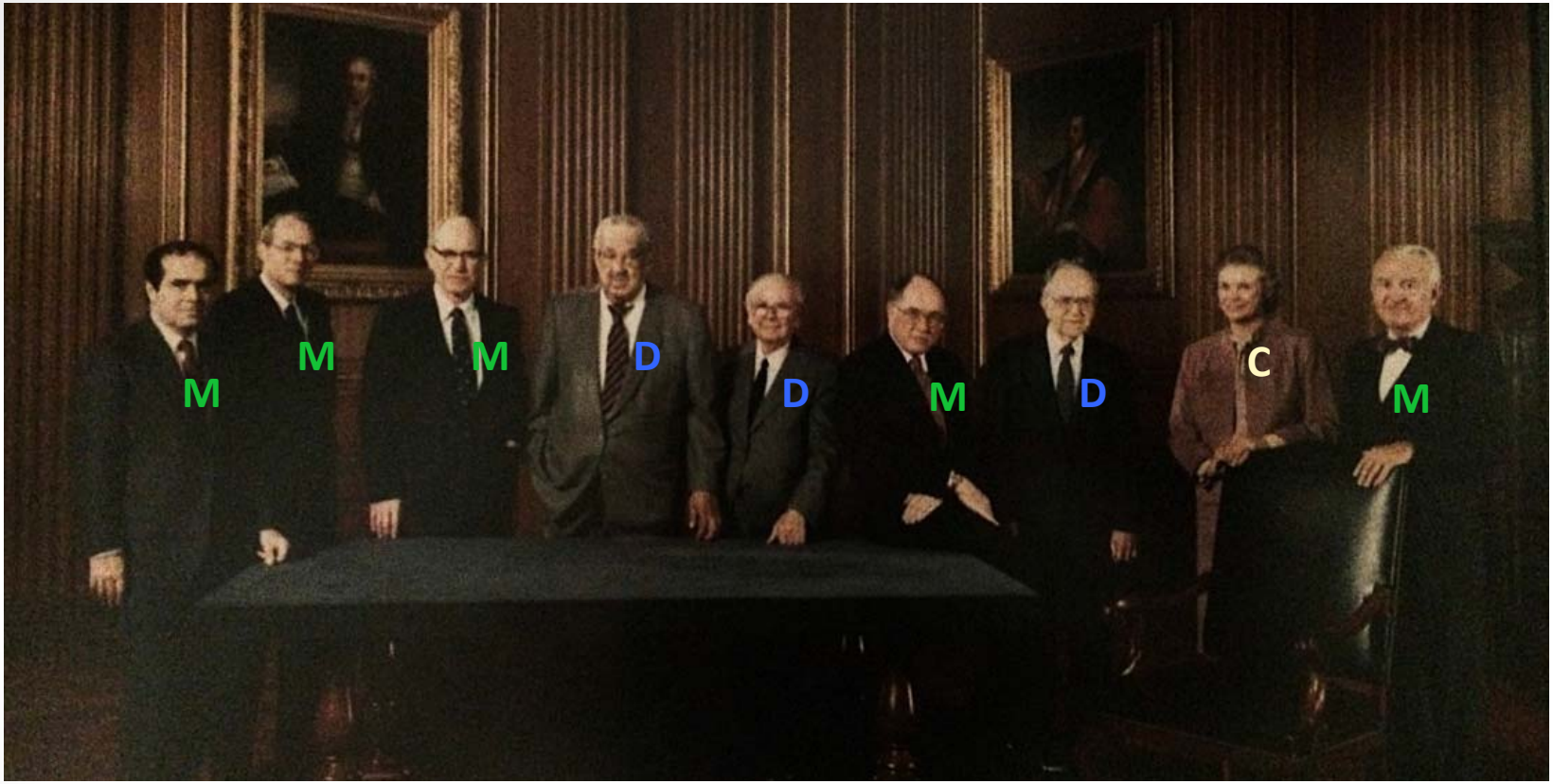
Employment Division v. Smith:

The Native American Church and Peyote

Contains mescaline = hallucinogen



US Supreme Court
1989 Term

Majority: Justice Scalia, Chief Justice Rehnquist, Justice White, Justice Stevens, Justice Kennedy

Concurring in the Judgment: Justice O'Connor

Dissent: Justice Brennan, Justice Marshall, Justice Blackman

Employment Division v. Smith

Supreme Court confirms its longstanding free exercise test

1. A law that is neutral and generally applicable is subject to rationality review

2. A law that is not neutral or generally applicable is subject to strict scrutiny

Church of Lukumi Babalau Aye v. City of Hialeah

Santerians and Animal Sacrifice

Church of Lukumi Babalu Aye v. City of Hialeah

Decided June 11, 1993

- Church's *proposed* standard for laws that are not neutral or not generally applicable:
  1. Believer proves substantial burden
  2. Burden shifts to government to prove compelling interest and the **least restrictive means**

- The standard the Court followed:
  1. Believer proves substantial burden
  2. Burden shifts to government to prove compelling interest and the **law is narrowly tailored**

The Religious Freedom Restoration Act

The Trojan Horse

Passage of RFRA
October 27, 1993

- HOUSE: passed by "*unanimous consent*"
  - Voice vote with no quorum required and no individual votes recorded
  - **Translation: RFRA was not passed unanimously**
- SENATE: 97 YEA, 3 NAY

The Religious Freedom Restoration Act of 1993

(b) Purposes

The purposes of this chapter are–

(1) to restore the compelling interest test as set forth in **Sherbert v. Verner**, 374 U.S. 398 (1963) and **Wisconsin v. Yoder**, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) . . . .

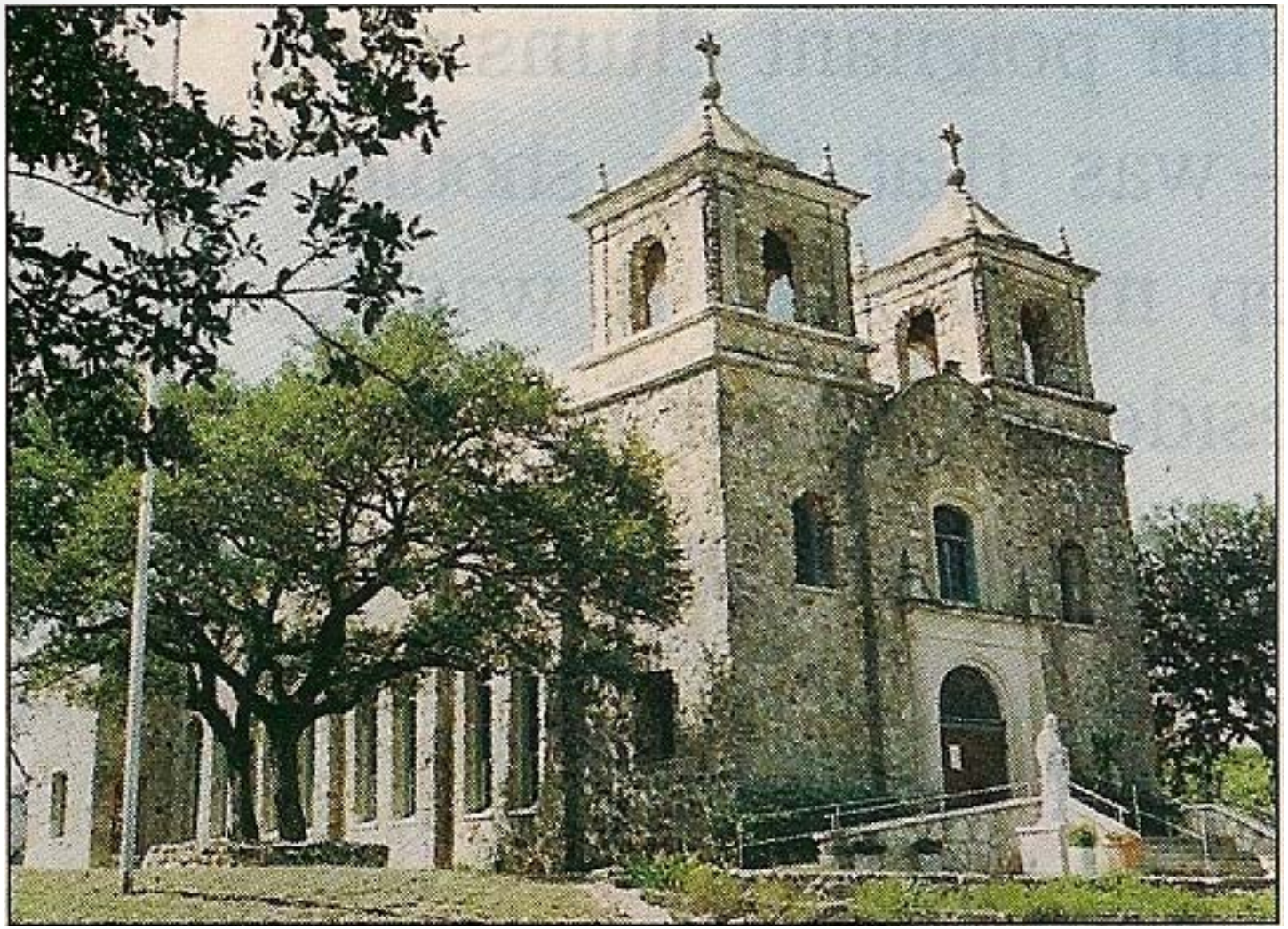
(b) Exception – Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person –

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

November 16, 1993

(five months after *Church of Lukumi Babalau Aye* is decided)



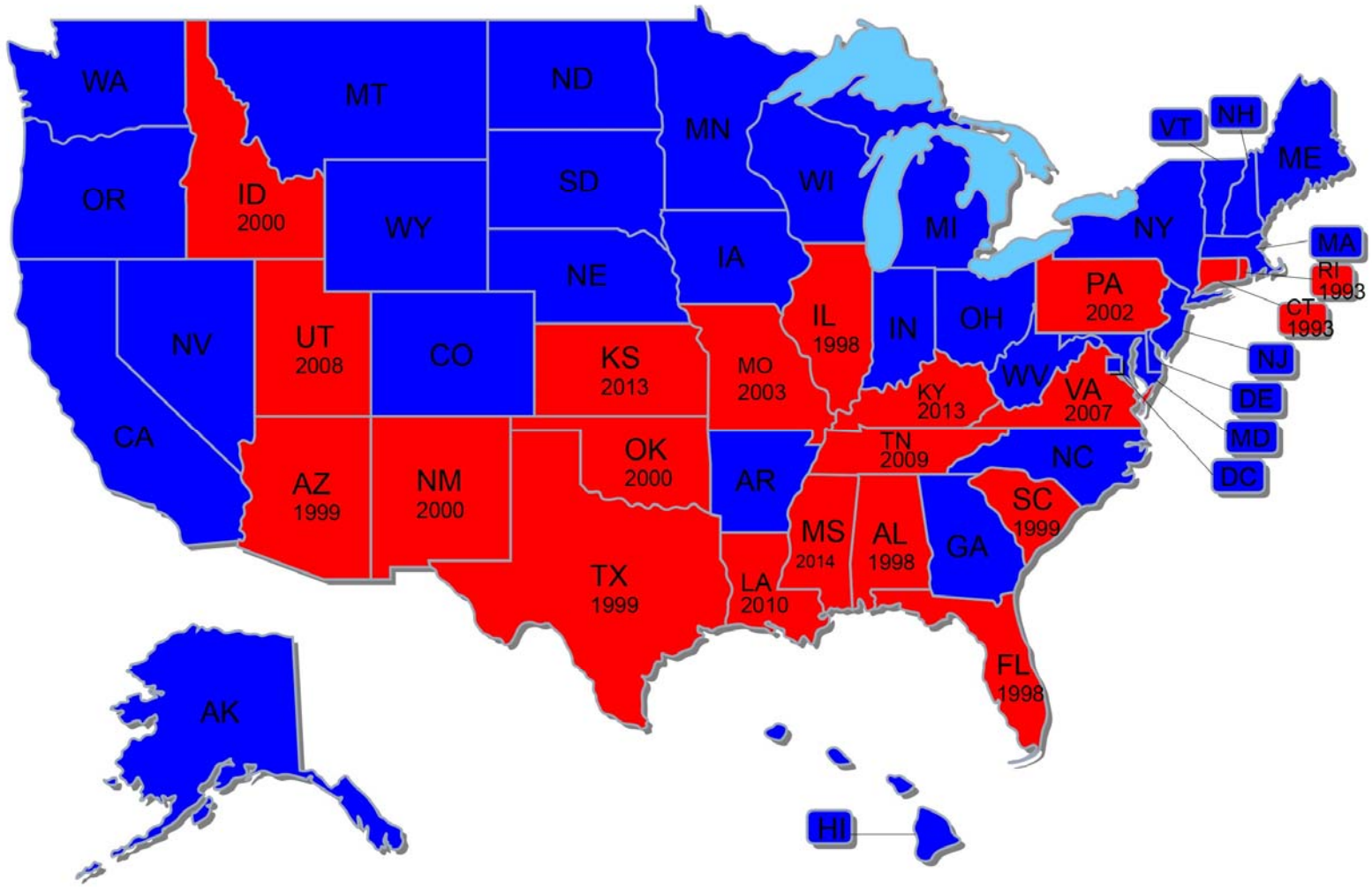
St. Peter the Apostle Catholic Church
Boerne, TX
Boerne v. Flores (1997)

Boerne v. Flores

June 25, 1997

- RFRA is unconstitutional

1. Beyond the power of Congress
2. Violation of federalism
3. Violation of separation of powers
4. Violation of the constitutional amendment procedures in Amendment V



States with RFRAs

as of October 2014 2014

Source: RFRAperils.com

State RFRA Developments That Undermine Neutral, Generally Applicable Laws as of Fall 2014

Source	Capabilities/Power/Interpreted to
AZ, FL, IL, LA, SC, TX	***standard state RFRA***
AL, CT	***would have deleted or deletes "substantial" from "substantial burden"***
RI, NM, MO	***removed "substantial burden" and replaced with "restrict"***
ID, KS, KY, OK, PA, TN, VA	***adds to government's burden: "clear and convincing evidence"***
MS	***expands to include suits between private parties***
MS	***applies to businesses***
MS	***works against homosexuals or same-sex couples***

PASSAGE OF THE RFRA OF 2000: NOT UNANIMOUS

After *Boerne*, Congress Considers the Religious Liberty Protection Act

July 15, 1999

- HOUSE
  - YEA: 306
  - NAY: 118
- SENATE
  - Bill is killed because of threat to civil rights

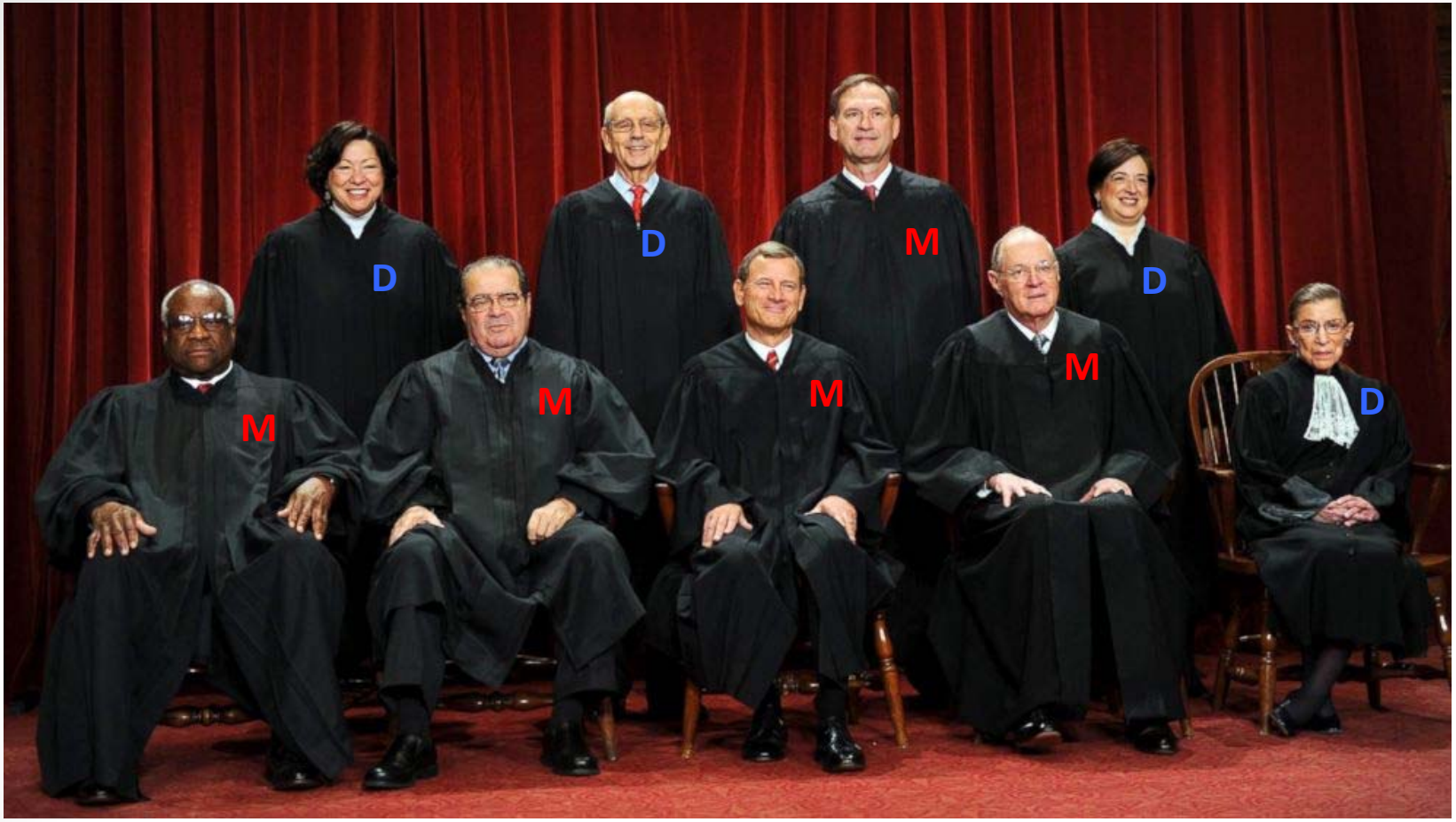
Reenactment of RFRA only to be applied to federal law and Religious Land Use and Institutionalized Persons Act (RLUIPA)

July 27, 2000

(vote occurs after summer recess is called)

- **HOUSE:**
  - **"Unanimous" consent: no quorum, no roll call**
- **SENATE:**
  - **"Unanimous" consent: no quorum, no roll call**

Burwell v. Hobby Lobby

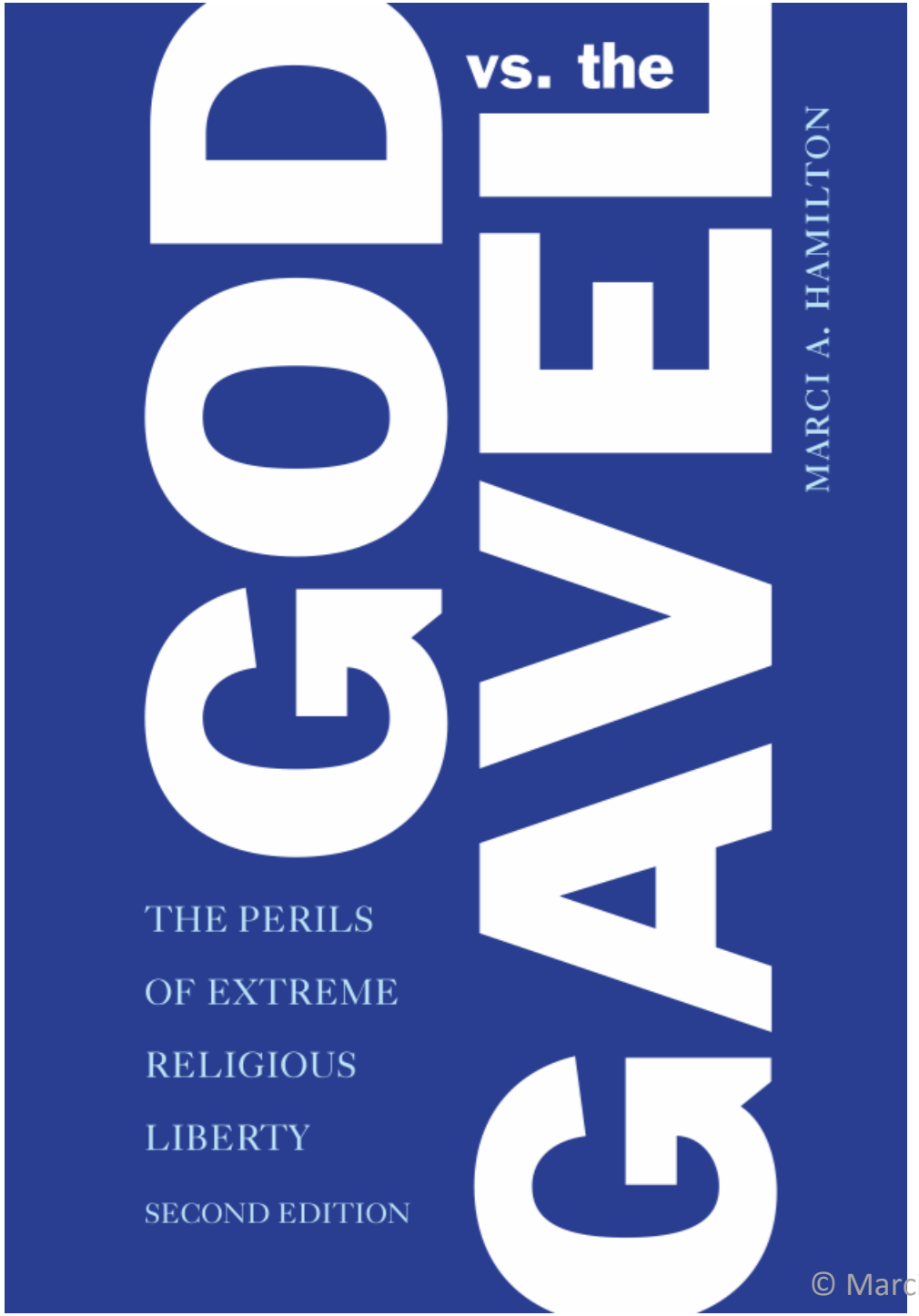


US Supreme Court
2013 Term

Majority: Justice Alito, Chief Justice Roberts, Justice Scalia, Justice Kennedy, Justice Thomas

Dissent: Justice Ginsburg, Justice Breyer, Justice Sotomayor, Justice Kagan

Consequence of RFRA: *Legal Swiss Cheese*



EPSTEIN
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The *Hobby Lobby* Decision: Its Impact on the Workplace

Thursday, October 30, 2014

Presented by

Stuart M. Gerson

Epstein Becker & Green, PC
1227 25th Street, NW
Washington, DC 20037
(202) 861-4180
sgerson@ebglaw.com

EPSTEIN BECKER GREEN

The Issue Presented

Whether the Religious Freedom Restoration Act of 1993 (RFRA), permits the United States Department of Health and Human Services (HHS) to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners.

The Holding of *Hobby Lobby*

The regulations that impose this obligation violate RFRA, which prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest.

Majority Rationale Enunciated by Justice Alito

RFRA's plain terms make it perfectly clear that Congress did not discriminate against persons who wish to run their businesses as for-profit corporations in the manner required by their religious beliefs. Under RFRA, Court must decide whether the challenged regulations substantially burden the exercise of religion, and Court holds that they do.

The Government's Burden Unsustained

Under RFRA, a Government action that imposes a substantial burden on religious exercise must serve a compelling government interest, and Court assumes that regs do so. But for the HHS mandate to be sustained, it must also be the ***least restrictive means*** of serving that interest, and the mandate was held to have failed that test.

A Less Restrictive Means to the End

HHS already has a system that seeks to respect the religious liberty of *religious nonprofit corporations* under which their employees have access to insurance coverage without cost sharing for all FDA-approved contraceptives. According to HHS, this system imposes no net economic burden on insurance companies that provide or secure coverage.

The Majority Counters the Dissent

"We do not hold, as the principal dissent alleges, that for-profit corporations and other commercial enterprises can "opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs."
Nor does Majority claim RFRA demands accommodation of a for-profit corporation's religious beliefs no matter their impact.

Business Owners' Claim Under RFRA

According to owners' religious beliefs the four contraceptive methods at issue are abortifacients. If they comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will fines that could total millions per day and hundreds of millions per year. The majority finds this to be a substantial burden.

Majority Claims Alternative Has No Impact

The effect of the HHS-created accommodation on the women employed by companies involved in these cases would be precisely zero. These women would still be entitled to all FDA-approved contraceptives without cost sharing.

Justice Ruth Bader Ginsburg's Dissent

Justice Ginsburg (joined by Sotomayor, J.) and by Justices Breyer and Kagan as to all but "whether a corporation qualifies as a 'person' capable of exercising religion."

Ginsburg believes that the Court has empowered corporations to "opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs. ..."

The Kennedy Concurrence

Justice Anthony Kennedy responded to the "respectful and powerful dissent", by emphasizing the limited nature of the ruling and acknowledging governmental interest in providing insurance coverage that is necessary to protect the health of female employees," citing the alternative already available to non-profit corporations with religious convictions.

The Kennedy Limitation

Justice Kennedy goes on to note that this alternative, designed precisely for this problem, might well suffice to distinguish the instant cases from many others in which it is more difficult and expensive to accommodate a governmental program to countless religious claims based on an alleged statutory right of free exercise.

Intersection of Free Exercise/RFRA with Title VII

Paul W. Mollica
Outten & Golden LLP
161 N. LaSalle St., Suite 4700
Chicago, IL 60601

Title VII Religious Exemptions

Congress added exemptions for religious employers in Title VII, **42 U.S.C. § 2000e-1(a)** ("religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities"), **and § 2000e–2(e)(2)** (religious teachers)

Title VII Religious Exemptions

Establishment Clause challenge to religious exemptions rejected in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987), even as applied to a secular job (building engineer for church-run gymnasium)

Title VII Religious Discrimination

Section 703 prohibitions (**42 U.S.C. § 2000e-2**)

but

Bona fide occupational qualification defense
(**subsection (e)(1)**)

Title VII Religious Accommodation

Title VII does not require religious accommodations that impose more than "de minimis" costs on an employer (**42 U.S.C. § 2000e(j)**) – enough to offer accommodation

Employer must *"demonstrate[] that [it] is unable to reasonably accommodate ... an employee's ... religious observance or practice without undue hardship on the conduct of the employer's business"*

Title VII Religious Accommodation

Title VII does not require religious accommodations that impose more than "de minimis" costs on an employer (**42 U.S.C. § 2000e(j)**) – enough to offer accommodation

Trans World Airlines v. Hardison, 432 U.S. 63 (1977) (Sabbatarian)

Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986) (relig holidays)

Title VII Religious Accommodation

Employer must be aware that employee is seeking accommodation for religious, versus personal reasons

Adeyeye v. Heartland Sweeteners, LLC, 721 F.3d 444 (7th Cir. 2013)

EEOC v. Abercrombie & Fitch, 731 F.3d 1106 (10th Cir. 2013)

Title VII "Ministerial Exception"

Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 132 S. Ct. 694 (2012)

- Court recognizes "ministerial exception" to employment discrimination law (9-0); teacher who was elected by congregation, called a minister and engaged in religious training was "minister"

- "[J]ob duties reflected a role in conveying the Church's message and carrying out its mission"

Title VII "Ministerial Exception"

Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 132 S. Ct. 694 (2012)

- "By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments"

- Distinguishes *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872 (1990), a/k/a the peyote case, outward acts vs. "interference with an internal church decision that affects the faith and mission of the church itself"

- Extends to religious institutions, not (presently) to religious-affiliated entities

Anti-Discrimination as a "Compelling Interest"

Courts regularly hold that the anti-discrimination provisions of Title VII constitutes a "compelling interest"

Werft v. Desert Southwest Annual Conference of United Methodist Church, 377 F.3d 1099, 1102 (9th Cir. 2004) (nevertheless finding ministerial exception prevailed in hiring of minister); *Redhead v. Conference of Seventh-Day Adventists*, 440 F. Supp. 2d 211, 221-22 (E.D.N.Y. 2006); *Robinson v. Jacksonville Shipyards, Inc*., 760 F. Supp. 1486 (M.D. Fla. 1991) (First Amendment did not protect company against injunction barring sex harassment under Title VII)

Anti-Discrimination as a "Compelling Interest"

Roberts v. United States Jaycees, 468 U.S. 609 (1984) (First Am.)

Noting State's "*compelling interest in eradicating discrimination against its female citizens*" overruled Jaycees' right-of-association to exclude women from membership, where it would not materially interfere with the ideas that the organization sought to express (9-0). *Accord New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1 (1988); *Board of Directors of Rotary Intern. v. Rotary Club of Duarte*, 481 U.S. 537 (1987)

Contra Boy Scouts of America v. Dale, 530 U.S. 640 (2000) (5-4)

RFRA and Employment Law

RFRA created no additional religious-discrimination rights for federal workers (Title VII exclusive remedy)

Harrell v. Donahue, 638 F.3d 975 (8th Cir. 2011); *Francis v. Mineta,* 505 F.3d 266, 271 (3d Cir. 2007). *But see Tagore v. United States,* 735 F.3d 324 (5th Cir. 2013) (wearing of *kirpan* in violation of federal agency's enforcement of statute banning weapons with blades exceeding 2.5 inches; case remanded for reconsideration under standards of RFRA)

RFRA and Employment Law

Searched for cases where RFRA was invoked successfully in an employment-discrimination case between private parties

Prevailing view is "no": *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir.2006) ("RFRA is applicable only to suits to which the government is a party"); *General Conference Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402 (6th Cir. 2010) (same)

RFRA and Employment Law

Searched for cases where RFRA was invoked successfully in an employment-discrimination case between private parties

One exception: *Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006) (RFRA overrules implied "ministerial exception" of ADEA), *doubt expressed by Rweyemamu v. Cote*, 520 F.3d 198 (2d Cir. 2008) (because RFRA is phrased concerning government's burden, "we do not understand how it can apply to a suit between private parties, regardless of whether the government is capable of enforcing the statute at issue")

The Hobby Lobby Decision: Impact on LGBT Community

Relevant text from the decision:

Justice Alito:

In any event, **our decision in these cases is concerned solely with the contraceptive mandate**. Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer's religious beliefs. Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means of providing them.

The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.

Justice Ginsberg (dissent):

Hobby Lobby and Conestoga surely do not stand alone as commercial enterprises seeking exemptions from generally applicable laws on the basis of their religious beliefs

See, e.g., **In re Minnesota ex rel. McClure, 370 N.W.2d 844, 847 (Minn.1985)** (born-again Christians who owned closely held, for-profit health clubs believed that the Bible proscribed hiring or retaining an "individua[l] living with but not married to a person of the opposite sex," "a young, single woman working without her father's consent or a married woman working without her husband's consent," and any person "antagonistic to the Bible," including "fornicators and homosexuals" (internal quotation marks omitted)), appeal dismissed, 478 U.S. 1015, 106 S.Ct. 3315, 92 L.Ed.2d 730 (1986); **Elane Photography, LLC v. Willock, 2013–NMSC–040, —— N.M. ——, 309 P.3d 53 (for-profit photography business owned by a husband and wife refused to photograph a lesbian couple's commitment ceremony based on the religious beliefs of the company's owners), cert. denied, 572 U.S. ——, 134 S.Ct. 1787, 188 L.Ed.2d 757 (2014).**

Would RFRA require exemptions in cases of this ilk? And if not, how does the Court divine which religious beliefs are worthy of accommodation, and which are not? Isn't the Court disarmed from making such a judgment given its recognition that "courts must not presume to determine ... the plausibility of a religious claim"?

Areas of Potential Impact:

- Discrimination in hiring, discharge, hostile environment sexual harassment

- Employee Benefits – Spousal Benefits Coverage, Family & Medical Leave Act, Coverage of Particular Medications or Medical Procedures