SEBELIUS v. HOBBY LOBBY STORES

**Facts of the Case**

The Green family owns and operates Hobby Lobby Stores, Inc., a national arts and crafts chain with over 500 stores and over 13,000 employees. The Green family has organized the business around the principles of the Christian faith and has explicitly expressed the desire to run the company according to Biblical precepts, one of which is the belief that the use of contraception is immoral. Under the Patient Protection and Affordable Care Act (ACA), employment-based group health care plans must provide certain types of preventative care, such as FDA-approved contraceptive methods. While there are exemptions available for religious employers and non-profit religious institutions, there are no exemptions available for for-profit institutions such as Hobby Lobby Stores, Inc.

On September 12, 2012, the Greens, as representatives of Hobby Lobby Stores, Inc., sued Kathleen Sebelius, the Secretary of the Department of Health and Human Services, and challenged the contraception requirement. The plaintiffs argued that the requirement that the employment-based group health care plan cover contraception violated the Free Exercise Clause of the First Amendment. The plaintiffs sought a preliminary injunction to prevent the enforcement of tax penalties, which the district court denied and a two-judge panel of the U.S. Court of Appeals for the Tenth Circuit affirmed. The Supreme Court also denied relief, and the plaintiffs filed for an en banc hearing of the Court of Appeals. The en banc panel of the Court of Appeals reversed and held that corporations were “persons” for the purposes of RFRA and had protected rights under the Free Exercise Clause of the First Amendment.

**Question**

Does the First Amendment allow a for-profit company to deny its employees health coverage of contraception to which the employees would otherwise be entitled based on the religious objections of the company’s owners?

**Here’s what you need to know about the Hobby Lobby case**

BY JAIME FULLER

March 24 at 6:30 am

On Tuesday March 25, the Supreme Court will hear oral arguments on Sebelius v. Hobby Lobby Stores, Inc. and Conestoga Wood Specialties Corp. v. Sebelius, two highly anticipated cases that deal with the Affordable Care Act, religious freedom and women's access to contraception. The case won't be decided Tuesday, but we could get a clear indication of which way the justices are leaning. Here's what you need to know — and who to read — before tomorrow.

Hobby Lobby President Steve Green and his mother Barbara Green stand outside the federal courthouse in Oklahoma City on Friday, July 19, 2013. The Hobby Lobby Inc. was given a temporary exemption Friday from a requirement in the new federal health care law that businesses must offer insurance coverage for the morning-after pill and similar emergency birth control methods or face steep fines. (AP Photo/The Oklahoman, Brianna Bailey)

**What are these cases about?**

It all starts with the Affordable Care Act. The law stipulates that employers need to provide health care for their employees that covers all forms of contraception at no cost. However, some for-profit corporations have insisted they should not have to pay for all of these services — especially those that conflict with their beliefs.

The owners of Hobby Lobby and Conestoga Wood Specialties don't have a problem with offering insurance that covers most forms of birth control, but they aren't willing to cover emergency contraceptives — like Plan B or ella -- or IUDs. Hobby Lobby contends its "religious beliefs prohibit them from providing health coverage for contraceptive drugs and devices that end human life after conception." The question these cases are seeking to solve is whether for-profit companies have a right to exercise religious freedom under the Religious Freedom Restoration Act, a federal law passed in 1993 that states the “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability." If they do, does the government have a compelling interest to override it in this instance?

There is a separate set of cases dealing with whether religiously affiliated businesses are exempt from the Affordable Care Act's contraception mandate.

How did this case make it to the Supreme Court? As CNN noted, "Three federal appeals courts around the country have struck down the contraception coverage rule, while two other appeals courts have upheld it. That 'circuit split' made the upcoming Supreme Court review almost certain." There are at least 47 cases that have been filed concerning for-profit companies and the contraception mandate.

**Who are the people to know in this case?**

Hobby Lobby is a chain of 640 arts and crafts stores owned by the Green family, and based in Oklahoma City. An article in the Wall Street Journal last week explained how they came to file the suit against the Health and Human Services department:

Hobby Lobby officials say religious participation is optional for its 28,000 employees. "If they don't believe in God, we love them where they are," says Dianna Bradley, the company's director of chaplain services.

In 2012, a lawyer for the Becket Fund for Religious Liberty, a nonprofit Washington law firm, called Hobby Lobby's general counsel to inform him of the health law's contraception requirement and to ask whether the company wanted to file a suit.

Mr. Green says he was shocked to discover Hobby Lobby was in fact offering in its insurance plan some of the emergency contraceptives at issue. He called for the insurer to revoke that coverage and signed onto the lawsuit.

The Greens are devoted Southern Baptists, and their family foundation is building a Bible museum five blocks south of the U.S. Capitol, set to open by 2017. The family foundation focuses more broadly on "gospel outreach efforts in the U.S. and abroad, contributing to the building of a dome for the Oklahoma State Capitol, and supporting social services such as the City Rescue Mission," according to the Religious News Service.

Conestoga Wood Specialties — a company that manufactures kitchen cabinets — was founded by Norman Hahn, a conservative Mennonite in Pennsylvania. His company's lawyer in this case, Randall Wenger, told Lancaster Newspapers last week, "As Mennonites, they're not thrilled about going to court. They're probably the most reluctant clients I've ever encountered."

The article also noted,

Norman and his wife, Elizabeth, for example, oversee a family foundation that contributed more than $1.1 million to 20 nonprofits between 2010 and 2012. The Pennsylvania Relief Sale, benefiting Mennonite Central Committee, was the top recipient, receiving $150,000 over those three years. Three organizations received $125,000 during those years: Christian Aid Ministries of Berlin, Ohio, Clinic for Special Children of Strasburg, and Wycliffe Bible Translators of Locust Grove. ... Separately, the Hahns have financially supported the political campaigns of a handful of Republicans. Norman, for example, contributed $10,000 to Lynn Swann's race for governor in 2006, $2,500 to Rick Santorum's race for the presidency in 2011, and $1,000 to Gordon Denlinger's race for state House in 2006.

Lyle Denniston at SCOTUSblog has a concise summary of these two companies' reasons for heading to court:

The Green family members signed a formal commitment to run the two chains according to Christian religious principles — closing on Sunday, advertising their religious orientation, and playing religious music in the stores. The owners and their stores do not object to every part of the contraceptive mandate, but they do object to the use of any drugs or intrauterine devices that — in the words of their lawyers — “end human life after conception.”

They have estimated that, if they follow their faith and violate the mandate, they face fines of about $1.3 million a day, or almost $475 million a year. They believe that canceling their health plan to avoid obeying the mandate would put them at a competitive disadvantage with other employers. They do not believe that the government can force them to make such choices.

The other company is Conestoga Wood Specialties Corp., a company based in East Earl, Pennsylvania, that also has operations in other states, making wooden cabinets and wood specialty products. It has about 950 employees.

The company is owned by members of the Hahn family, who are Mennonite Christians. Their faith teaches them that it is wrong to take a human life and to prevent its creation through drugs and intrauterine devices. If the company or its owners were to violate the mandate to adhere to their beliefs, they estimate that they would face financial penalties of about $35 million a year.

Paul Clement will be arguing for the challengers in Tuesday's oral arguments — which have been extended to 90 minutes from the usual hour. Neal Katyal, who once served as acting solicitor general under Obama, told New York Magazine in 2012 that, “Paul truly is the best lawyer of his generation." In the past few years, he has argued against the Affordable Care Act's legality in front of the Supreme Court and he has defended Arizona's controversial immigration law. He has argued for the constitutionality of the Defense of Marriage Act, and he has argued against the White House's block of South Carolina's voter-ID law. When it comes to the most important conservative causes being argued at the legal level these days, Clement is usually involved.

Solicitor General Donald Verrilli will be arguing for HHS secretary Kathleen Sebelius. Lincoln Caplan said of him in the New York Times last year,

It’s conventional wisdom in some circles that Mr. Verrilli is a fumbling lawyer who can’t hold his own at the Supreme Court. He received bad marks from professional colleagues after defending the Affordable Care Act last year, and obviously disappointed at least one prominent observer in Shelby County v. Holder — the voting rights case — a few weeks ago.

This reputation is undeserved. Mr. Verrilli isn’t showy, but he is a deeply experienced and capable advocate who finds ways to make technical legal arguments that persuade a majority of justices. While he’s not inspiring, he’s often effective.

**What are the arguments on either side of the case?**

Hobby Lobby and Conestoga Wood Specialties' argument for not providing emergency contraception and IUD coverage to their employees can be boiled down to this: Because of the religious nature of our companies, we are entitled to religious freedom exemption from the Affordable Care Act's mandate because of the Religious Freedom Restoration Act — the same exemption that has been afforded to nonprofits with a religious nature. SCOTUSblog's Lyle Denniston has a good look at the nuanced details of this argument.

At the level of their greatest potential, the two cases raise the profound cultural question of whether a private, profit-making business organized as a corporation can “exercise” religion and, if it can, how far that is protected from government interference. The question can arise — and does, in these cases — under either the First Amendment’s Free Exercise Clause or under a federal law, the Religious Freedom Restoration Act, passed by Congress in 1993.

In a manner of speaking, these issues pose the question — a topic of energetic debate in current American political and social discourse — of whether corporations are “people.” The First Amendment protects the rights “of the people,” and the 1993 law protects the religious rights of “persons.” Do profit-making companies qualify as either?

Aside from whether corporations do have any religious rights, as such, the cases also raise the question whether the religious rights of their owners — real people, who undeniably can act according to their faith — are violated by the requirement that their companies obey the contraceptive mandate. Ordinarily, in business law, corporations are separate from their owners, but the owners in these cases resist that notion, at least so far as the owners’ religious views actually shape the business of their companies.

No one doubts that the owners of the two companies have sincere religious objections to some forms of birth control or that their beliefs do counsel them to avoid any role in providing those services to their employees. The companies and their owners do not have to convince the Court that that is what they believe — only whether that belief controls enforcement, or not, of the mandate.

The Obama administration's argument also focuses on how they believe the Religious Freedom Restoration Act should be applied to this case. Verrilli will argue that the federal government has never afforded for-profit corporations the religious protections Hobby Lobby says are being violated by the contraception mandate. Additionally, they focus on how employees would be affected by an exemption, and say these women are also entitled to protection for their freedom to choose their own health coverage. As Hobby Lobby argues that providing contraception coverage would be a burden for them, the federal government will argue that not covering these forms of contraception would be a burden on employees who don't necessarily share these companies' beliefs.

Speaking of those burdens, the Obama administration has a backup argument if the Court decides that for-profit corporations qualify for religious freedom exemptions. Pew Research has a good explanation for this prong of the government's argument:

Even if RFRA does apply, the government contends, the contraception mandate does not rise to the level of being a “substantial religious burden” (which is required if the law is to apply) because the companies are significantly removed from an employee’s decision to use contraception. After all, they point out, Hobby Lobby and Conestoga do not directly provide contraception services to their workers. Instead, they offer their employees health insurance that covers a huge array of medical services, including birth control. In addition, any decision to use birth control rests with the employees, not the insurance providers or the companies.

Finally, the government argues, the mandate advances a compelling government interest because it is part of a comprehensive reform of the nation’s health care system, and granting the companies an exemption would deprive some Americans of important benefits provided by that reform. In this case, many women would not receive free contraceptive services, thwarting an important public health goal for the government – that all women have adequate access to effective birth control. As for RFRA’s requirement that the mandate be enforced in the least restrictive way possible, the government argues that any alternative to the insurance mandate would mean upending the ACA’s health care model (which revolves around employment-based health insurance) and replacing it with something different, a highly impractical option, according to the government.

Many of the groups supporting the government's interpretation of this case also bring up what a decision in favor of Hobby Lobby would mean in the future. What other religious protections will corporations argue for?

The evolution of the Religious Freedom Restoration Act to become the foremost tool in the conservative legal toolkit — it has also featured prominently in cases around the country dealing with businesses' right to deny service to LGBT customers for same-sex weddings — has been a surprise to many of the legislators who crafted the law early during the Clinton administration, as MSNBC reported yesterday:

‘It was never intended as a sword as opposed to a shield,” said Rep. Jerry Nadler, one of the architects of RFRA in the House. “Once you went into the commercial sector, you couldn’t claim a religious liberty to discriminate against somebody. That never came up. It was completely obvious we weren’t talking about that.”

The vaunted left-right alliance on RFRA has fallen apart over such claims. “If anyone had ever come up with a scenario like what’s been proposed by Hobby Lobby, that coalition would have exploded like someone hitting a watermelon with a shotgun,” said Barry Lynn of Americans United for Separation of Church and State. “There would have never been a Religious Freedom Restoration Act.”

Eight-four amicus briefs have been filed for this case — which is a lot, and a testament to the importance of the impending decision and controversy surrounding this issue. These briefs, also known as friend-of-the-court briefs, are filed by individuals and organizations not affiliated with the case, but who have a vested interest in the case's outcome.

ABC News has a good roundup of each side's arguments for each of the big legal questions that need to be answered in the Hobby Lobby case.

**How could the case be decided?**

Here are the four things you should read to understand how this could all end.

Sam Baker at National Journal lays out all the possible and probable ways each side could lose. Because the lower federal courts were so schizophrenic on this case, things feel particularly up in the air. It all depends on 1) what the court thinks and 2. how big a decision they want to make.

Pew Research focuses a bit more on what the significance of any decision would be. Depending on how the justices decide, the shape of future religious freedom cases could change dramatically.

Lyle Denniston says one thing is for sure: "Whatever the Court decides, it will not decide the fate of the Affordable Care Act."

"The nation’s politics, and many of its legislatures (including Congress), are absorbed with debates over whether to keep the law, to amend it, to render it unenforceable, or to repeal it altogether. None of that depends upon the outcome of this case. The Court has not been asked to strike down any part of the law, and it almost certainly won’t volunteer to do so. All that is at issue is who must obey the contraceptive mandate."

**Are You There God? It's Me, Hobby Lobby**

Everything you need to know about the high-stakes religious-freedom case that could redefine corporate personhood.

—By Stephanie Mencimer | Fri Mar. 21, 2014 3:00 AM PDT

On Tuesday, the US Supreme Court will hear arguments in Sebelius v. Hobby Lobby Inc., the most closely watched case of the year. The stakes are high. Thanks to novel legal arguments and bad science, a ruling in favor of the company threatens any number of significant and revolutionary outcomes, from upending a century's worth of settled corporate law to opening the floodgates to religious challenges to every possible federal statute to gutting the contraceptive mandate of the Affordable Care Act.

Hobby Lobby is a privately held, for-profit corporation with 13,000 employees. It's owned by a trust managed by the Green family, devout Christians who run the company based on biblical principles. They close their stores on Sundays, start staff meetings with Bible readings, pay above minimum wage, and use a Christian-based mediation practice to resolve employee disputes. The Greens are even attempting to build a Museum of the Bible in Washington, DC.

The Greens contend that the ACA's requirement that health insurance plans cover contraception will force them to choose between violating their religious beliefs or suffer huge financial penalties for violating the law. They don't object to covering all contraception, only the emergency contraceptive pills Plan B and Ella and intrauterine devices (IUDs), which they (erroneously) believe are abortifacients. But the Greens aren't the ones who'd be providing the health insurance with contraceptive coverage. Their corporation, Hobby Lobby, would be.

So in September 2012, Hobby Lobby sued the US Department of Health and Human Services, challenging the contraceptive mandate on the grounds that it unconstitutionally and substantially burdens the company's religious beliefs. The company is asking the court to find that it has the same religious-freedom rights as a church or an individual, a finding no American court has ever made.

"By being required to make a choice between sacrificing our faith or paying millions of dollars in fines, we essentially must choose which poison pill to swallow,” David Green, Hobby Lobby's founder and CEO, said in a press release when the case was filed. "We simply cannot abandon our religious beliefs to comply with this mandate."

On many levels, the Hobby Lobby case is a mess of bad facts, political opportunism, and questionable legal theories that might be laughable had some federal courts not taken them seriously. Take for instance Hobby Lobby's argument that providing coverage for Plan B and Ella substantially limits its religious freedom. The company admits in its complaint that until it considered filing the suit in 2012, its generous health insurance plan actually covered Plan B and Ella (though not IUDs). The burden of this coverage was apparently so insignificant that God, and Hobby Lobby executives, never noticed it until the mandate became a political issue.

The most well-publicized and controversial element of the case is Hobby Lobby's assertion that a for-profit corporation can have the constitutionally protected right to the free exercise of religion. It's a strange notion, but the court opened the door to this argument when it ruled in Citizens United that a corporation has First Amendment rights. So now the justices will have to consider whether corporations can pray, believe in an afterlife, and thus, be absolved of ACA's contraception mandate. But that's hardly the only thorny issue the court has to grapple with.

For Hobby Lobby to prevail, the company has to, among other things, meet what's known as the Sherbert test. It requires plaintiffs in religious-freedom cases to first show that their religious beliefs are sincere, and then prove that a government regulation or law poses a substantial burden on those beliefs. Given those criteria, a skeptic might wonder how burdensome the mandate really is for Hobby Lobby when, until just recently, it was mostly in compliance with the law.

The fact that Hobby Lobby once covered the drugs it now objects to is "evidence that these cases are part of a broader effort to undermine the Affordable Care Act, and push new legal theories that could result in businesses being allowed to break the law and harm others under the guise of religious freedom," says Gretchen Borchelt, senior counsel and director of state reproductive health policy at the National Women's Law Center.

Motives aside, theoretically the court in Hobby Lobby is being asked to make an entirely subjective judgment as to the sincerity of a plaintiff's religious beliefs and whether a government regulation poses a "substantial burden" on them. Such things aren't easily measured, and doing so puts the courts at risk of passing judgment on the religious beliefs themselves, a big constitutional no-no. That's why back in 1990 the court abandoned the Sherbert test for something more straightforward: Is the law generally applicable or does it single out a specific religious belief for punishment?

In Employment Division v. Smith, the court said it was okay for the state of Oregon to deny unemployment benefits to a couple of counselors at a drug rehab program who'd been fired for using peyote, which was illegal at the time. As members of a Native American church, they argued that denying them benefits violated their right to practice their religion by using peyote. Justice Antonin Scalia, who wrote the majority opinion, wasn't buying it. He wrote that the Oregon law was constitutional because it didn't single out any particular religious practice. It applied to everyone. He wrote:

The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service to the payment of taxes to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws; to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races.

If Scalia had had the last word on this subject, the court might not even be considering Hobby Lobby. For this case and many of its potentially wide-ranging ramifications we have Congress and Bill Clinton to thank.

The Supreme Court ruling in Smith outraged members of Congress, who in 1993 passed the Religious Freedom and Restoration Act (RFRA), which Clinton signed into law. That act forced the court to once again look at things like religious sincerity and to try to measure how much a government mandate burdens any one religious belief—something courts generally don't like to do. "Courts are wary of scrutinizing sincerity of claims," says Caroline Mala Corbin, a professor at the University of Miami law school. "They're worried that it will bleed into judgment of the religious belief itself. And if there's one thing courts don't want to do and aren't allowed to do under the Establishment Clause is to pass judgment about people's religious beliefs."

That's why Corbin thinks the court will steer clear of the sincerity question. Even the government hasn't touched it. As Lori Windham, a senior counsel for the Becket Fund, which is representing Hobby Lobby, says, "Neither the government nor the courts have disputed the sincerity of the Green's objections to these drugs and devices."

But in the Hobby Lobby case, there might be a good reason for the court to take a closer look at whether this legal challenge is politically, rather than religiously, motivated. Not only had the company never objected to covering the kinds of birth control that are now central to its lawsuit, but the reason Hobby Lobby now balks at covering these forms of contraception is based on a false premise—one the court will have to accept as true in order to find in Hobby Lobby's favor.

The company argues that emergency contraception pills, such as Ella and Plan B, destroy fertilized eggs by interfering with implantation in the uterus. Hobby Lobby's owners consider this abortion. But the pills don't work that way. When Plan B first came on the market in 1999, its mechanism for preventing unplanned pregnancies wasn't entirely clear. That's why the FDA-approved labeling reflected some uncertainty and said that the pills "theoretically" prevent pregnancy by interfering with implantation. Since then, though, there has been a lot of research on how these pills work, and the findings are definitive: They prevent pregnancy by blocking ovulation. In fact, they don't work once ovulation has occurred. As Corbin recently wrote in a law review article, "Every reputable scientific study to examine Plan B's mechanism has concluded that these pills prevent fertilization from occurring in the first place…In short, Plan B is contraception."

Labels on these products have been updated in Europe to reflect the science, and the Catholic Church in Germany dropped its opposition to local Catholic hospitals providing emergency contraception to rape victims after reviewing the evidence. The science is so clear, in fact, that even Dennis Miller, an abortion foe and director of the bioethics center at the Christian Cedarville University, concluded that emergency contraception drugs don't cause abortions. Last year, he told Christianity Today. "[O]ur claims of conscience should be based on scientific fact, and we should be willing to change our claims if the facts change." (IUDs generally work like spermicide, preventing conception.)

Yet the Becket Fund's Windham insists that the question of the science is not before the court. So basically, the Hobby Lobby case requires the court to decide whether a corporation has sincere religious beliefs that would be compromised by having its health plan cover the contraception that it once covered because it believes that contraception causes abortions, even when it doesn't. Got that?

Of course, the case isn't just about Hobby Lobby. The Supreme Court is using it to address dozens of similar lawsuits by other companies that, unlike Hobby Lobby, object to all forms of contraception. But the inconvenient set of facts here are just one reason why the case hasn't garnered a lot of support outside the evangelical community. Many religious people are uneasy with the idea of corporations being equated with a spiritual institution. At a recent forum on the case sponsored by the American Constitution Society, the Mormon legal scholar Frederick Gedicks, from Brigham Young University, said he was offended by the notion that selling glue and crepe paper was equivalent to his religious practice. "I'm a religious person, and I think my tradition is a little different from an arts and craft store," he said.

Women's groups fear a ruling that would gut the ACA's contraceptive mandate. The business community, meanwhile, doesn't want to see the court rule that a corporation is no different from its owners because it would open up CEOs and board members to lawsuits that corporate law now protects them from, upending a century's worth of established legal precedent.

No one seems to really have a sense of how the court might rule. On one side, court watchers have speculated that with five six Catholics on the bench, Hobby Lobby has a decent shot of prevailing. But then again, one of those Catholics, Chief Justice John Roberts, is also sensitive to the interests of corporate America. He seems unlikely to do anything that might disrupt the orderly conduct of business in this country and make the US Chamber of Commerce unhappy, as a victory for Hobby Lobby could. Scalia is an ardent abortion foe, but his view of Native American peyote users might incline him to find for the government.

Finding a reasonable way out of this case won't be easy. The litany of bad outcomes has some legal scholars rooting for what might be called "the Lederman solution"—a punt. Georgetown law professor Martin Lederman has suggested that the lower courts have misread the contraceptive-mandate cases by assuming firms such as Hobby Lobby have only two choices: provide birth control coverage or pay huge fines to avoid violating their religious beliefs. He argues that while the ACA requires individuals to purchase health insurance, it doesn't require employers to provide it. If companies choose to do so then the insurance companies must cover contraception without co-pays. Hobby Lobby and the other companies currently suing the Obama administration can resolve their problems by simply jettisoning their health insurance plans and letting their employees purchase coverage through the exchanges.

An employer that drops its health plan would have to pay a tax to help subsidize its employees' coverage obtained through the exchange or Medicaid, but this option is actually far cheaper than providing health insurance. And if a company doesn't even have to provide insurance, much less a plan that covers contraception, Hobby Lobby doesn't have much of a case that the ACA burdens its free exercise of religion.

Lederman's analysis gives the court an easy out in Sebelius v. Hobby Lobby, allowing it to avoid the dicey questions of whether corporations have religious-freedom rights, whether scientific ignorance is a religious belief—or even whether the plaintiff is sincerely religious or simply part of a larger Republican-led political effort to kill off Obamacare.

**Religious exemptions — a guide for the confused**

###### **BY**[EUGENE VOLOKH](http://www.law.ucla.edu/volokh)

###### **March 24 at 7:32 am**

The [Hobby Lobby case](http://www.washingtonpost.com/politics/high-court-with-vocally-devout-justices-set-to-hear-religious-objections-to-health-care-law/2014/03/23/ff54147a-af97-11e3-9627-c65021d6d572_story.html?hpid=z4) is about to be [argued this week](http://www.washingtonpost.com/blogs/the-fix/wp/2014/03/24/heres-what-you-need-to-know-about-the-hobby-lobby-case/), so talk of religious exemptions is in the air. But what exactly is the law here, even beyond the particular details of Hobby Lobby? When can religious objectors go to court to get exemptions from generally applicable laws (whether drug laws, employment regulations, driver’s license photograph requirements, or whatever else)?Glad you asked! There’s no simple answer, but here are a few commonly asked specific questions, with answers that can help you navigate the complexity.

1. **What’s with religious people getting exemptions? I thought the Supreme Court said that wasn’t required.** For most of American history, courts generally didn’t see the Free Exercise Clause as requiring exemptions for religious objectors. But in *[Sherbert v. Verner](http://scholar.google.com/scholar_case?case=17526177081953259048)*[(1963)](http://scholar.google.com/scholar_case?case=17526177081953259048), the Supreme Court said that such exemptions were presumptively required, unless the government could show that denying the exemption was necessary to serve a compelling government interest.

Then, in [*Employment Division v. Smith* (1990)](http://scholar.google.com/scholar_case?case=10098593029363815472), the Supreme Court changed its mind, by a 5-to-4 vote. The Free Exercise Clause, the court held, basically just banned intentional discrimination against a particular religion or religious people generally. With a few exceptions (such as for churches’ decisions about choosing their clergy), religious objectors had to follow the same laws as everyone else, at least unless the legislature specifically created a religious exemption.

The lineup in that ruling, by the way, was interesting: conservative Justice Antonin Scalia joined by conservative Justice William Rehnquist, moderate conservative Justice Anthony Kennedy, moderate Justice Byron White, and moderate liberal Justice John Paul Stevens voted for the nondiscrimination rule. Moderate conservative Justice Sandra Day O’Connor — joined by liberal Justices William Brennan, Thurgood Marshall and Harry Blackmun —  disagreed, and wanted to preserve the Sherbert constitutional exemption regime.

But wait. Congress didn’t agree with *Smith*, and so it enacted — by a nearly unanimous vote — the Religious Freedom Restoration Act of 1993, which gave religious objectors a statutory right to exemptions (again, unless the government could show that denying the exemption was necessary to serve a compelling government interest). In [*City of Boerne v. Flores* (1997)](http://scholar.google.com/scholar_case?case=8746804851760570747), the court said this exceeded  congressional power over the states, but RFRA — pronounced “*riff*ra” — remains in effect for the federal government.

Moreover, since 1990, 17 states enacted similar “state RFRAs” that government state and local governments. One state (Alabama) enacted a constitutional amendment that did the same. Eleven states’ courts interpreted their *state* constitutions’ religious freedom clauses as following the 1963-1990 Sherbert model. And one state’s high court (in New York) interpreted the state constitution as applying a less protective religious exemption regime, somewhere between the old Sherbert approach and the Smith approach. Here’s a map of how the law works in the states today:



Quite the crazy quilt, but that’s life in our federal republic.

2. Now for a question from the other side: **Well, duh. Of course religious objectors are entitled to exemptions. What part of “the free exercise [of religion]” don’t you understand?** “The” and maybe “free exercise.” The First Amendment doesn’t say that religious objectors are entitled to exemptions; it refers to “the free exercise [of religion],” which seems to suggest a preexisting legal concept of “free exercise” that the Framers understood as being secured. What “the free exercise” meant at the time is a hotly debated issue — see Scalia’s and O’Connor’s dueling opinions in [*Flores*](http://scholar.google.com/scholar_case?case=8746804851760570747).

And beyond this, “the free exercise [of religion]” can’t mean freedom to do whatever your religion commands. What if it commands murder of blasphemers? Theft? Statutory rape? Complete exemption from all taxes paid to a government that supports, for instance, abortion or war or blasphemy? That’s why even those justices who support constitutional exemptions don’t really read the Free Exercise Clause as protecting all worship. They carve out an exemption for “compelling government interests” — an exception that isn’t in the constitutional text.

3. **I get that — indeed, I’m against religious exemptions, because they discriminate in favor of religion. Isn’t such discrimination forbidden?** That’s a perfectly sensible argument, especially given the court’s Establishment Clause cases, which sometimes say that the government may not favor the religious over the nonreligious. And some statutes — such as the conscientious objector exemption from the draft, and Title VII’s requirement of religious accommodation by employers (including private employers) — have been read as protecting secular conscientious objectors as well as religious objectors.

But in [*Cutter v. Wilkinson* (2005)](http://scholar.google.com/scholar_case?case=18159772008817235086), the court seemed to unanimously accept the notion that, when it comes to exemptions from generally applicable laws, the government may often create such exemptions only for religious objectors. And such religious objector exemptions have been a longstanding tradition throughout American history. So while any exemptions have to be available to all denominations that have a particular belief — a sacramental wine exemption from an alcohol ban, for instance, can’t apply only to Catholics and not Jews — they can probably be given just to religious objectors and not to those who have nonreligious reasons.

4. **But this way lies anarchy! What’s to stop people from using RFRAs to claim religious exemptions from human sacrifice laws? From bans on race discrimination in employment? From all taxes? From all drug laws?** Remember, RFRAs don’t mean that religious objectors always prevail — the government may still deny exemptions when necessary to serve a compelling government interest.

Moreover, in practice that “compelling interest” test has been read in a pretty government-friendly way in religious exemption cases. (The same language in other cases, such as those involving content-based speech restrictions or race discrimination, has been read in a much more demanding way.) Basically, courts grant exemptions if it looks like the exemptions won’t be too burdensome on the government or on others, and deny exemptions if it looks like the exemptions will be too burdensome.

Here’s how Chief Justice John Roberts put it in [Gonzales v. O Centro Espírita Beneficente União do Vegetal (2006)](http://scholar.google.com/scholar_case?case=7036734975431570669), a case in which the court unanimously held in favor of a religious exemption from a ban on a particular hallucinogen called hoasca:

We have no cause to pretend that the task assigned by Congress to the courts under RFRA is an easy one. Indeed, the very sort of difficulties highlighted by the Government here were cited by this Court in deciding that the approach later mandated by Congress under RFRA was not required as a matter of constitutional law under the Free Exercise Clause.

But Congress has determined that courts should strike sensible balances, pursuant to a compelling interest test that requires the Government to address the particular practice at issue. Applying that test, we conclude that the courts below did not err in determining that the Government failed to demonstrate, at the preliminary injunction stage, a compelling interest in barring the UDV’s sacramental use of hoasca.

5. **So judges get to choose which laws religious objectors have to follow and which they don’t. That can’t be right.** Again, a perfectly sensible argument. Indeed, many states haven’t enacted RFRAs, maybe partly for this very reason.

But the legislatures that have enacted RFRAs disagreed, and required judges to make such decisions. That’s the law in those states (and, as to federal statutes, too, since Congress has enacted a federal RFRA).

And remember that Anglo American judges have long in effect made law, using similarly subjective policy choices. The law of contracts, torts, property, civil procedure, evidence, family relations, and even criminal law have historically been created by judges (that’s what “common-law” decisionmaking generally means).

To be sure, starting in the 1800s, legislatures started enacting more and more statutes. Indeed, some areas of the law are now largely controlled by legislatures, and judges only make narrow decisions along the borders. But a lot of law (such as contract law and tort law) continues to be made by judges — subject to modification by the legislature, if the legislators disagree with courts.

RFRAs essentially tell judges to similarly develop the law of religious exemptions. And, as with common law, these exemptions are subject to legislative revision.

For instance, say that a court uses a state RFRA to says that landlords are free not to rent to unmarried couples, or same-sex couples, if the landlords have religious objections to such behavior. Denying the exemption, the court concludes, isn’t necessary to serve what the court sees as a compelling government interest. If the legislature disagrees — maybe thinking that there is indeed an inherently compelling interest in equal treatment in housing without regard to marital status or sexual orientation — the legislators can come back and amend the RFRA to exclude the exemption. Courts have the first word on whether to grant exemptions under RFRAs, but not the last.

6. **But a lot of the religious exemption claims I hear about don’t have any real support in the Bible, or any other religious work. Even many of the objector’s coreligionists don’t agree with him. And the claim doesn’t even make logical sense; the objector says one thing is a mortal sin, but something else that’s just like it is just fine. That’s just people making stuff up.**

The American law of religious exemptions is individualistic. The right to a religious exemption belongs to a particular religious believer because of his sincere religious beliefs, whatever they might be.

Small denominations are protected, to the same degree as large denominations. The same is true for dissenting groups within denominations. It’s even true for idiosyncratic religious believers. One doesn’t need a note from one’s priest to prevail in a religious exemption case.

Moreover, American courts are constitutionally forbidden from determining what the Bible — or any other religious work — really means. Courts are forbidden from determining whether a belief is reasonable. (Many religious beliefs are seen as unreasonable by members of other religions, and are often not founded in “reason” even from the perspective of those who hold them.) Courts are forbidden from determining whether a belief is internally consistent, or whether the lines that a religious believer draws make sense. Thus, consider the Supreme Court’s opinion in [*Thomas v. Review Bd.* (1981)](http://scholar.google.com/scholar_case?case=4040736983898309892), where a Jehovah’s Witness’s exemption claim was based on his objection to working in war production (some paragraph breaks changed):

The [lower] court also appears to have given significant weight to the fact that another Jehovah’s Witness had no scruples about working on tank turrets …. Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences …. [Protection] is not limited to beliefs which are shared by all of the members of a religious sect….

[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation….

[A religious-exemption case is also] not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others …. The [lower] court found [claimant’s willingness to help produce steel, even when it is a raw product to be used in arms, but not tank turrets] inconsistent with Thomas’ stated opposition to participation in the production of armaments. But … Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one.

Of course, an objector can win only if his religious beliefs are sincerely held. But if the objector’s religious beliefs are sincere, it doesn’t matter whether courts think they are unreasonable, unusual, or unconnected with Scripture. Court should treat minority and dissenting beliefs on par with standard mainstream Muslim, Jewish, Baptist, Methodist, etc. beliefs.

Of course, the claimant could lose even if his religious belief is sincere. The religious exemption I discuss don’t provide absolute protection; see item 4 above. An objector’s claim may be defeated by a showing that it would unavoidably undermine compelling government interests. But the claim shouldn’t be defeated by a showing that many of the claimant’s ostensible coreligionists don’t share the claimant’s beliefs.

7. **Does that mean that religious objectors can just stop any government program they think is religiously wrong, at least if the program isn’t “necessary to serve a compelling government interest”?** No, because the objectors must also show that the program “substantially burdens” their beliefs, which basically means that

* + the program requires people to do something that “is forbidden by [their] faith,”
	+ the program requires people not to do something that is required by their faith,
	+ the program requires that people violate their religious beliefs in order to get important benefits (such as unemployment compensation).

What’s not a substantial burden? A few examples:

* + - “[T]o the extent that imposition of a generally applicable tax merely decreases the amount of money appellant has to spend on its religious activities, any such burden is not constitutionally significant.” Requiring someone to pay a tax that he thinks it sinful to pay is thus a substantial burden, though one that the Court has said is permissible because denying the exemption is necessary to serve a compelling government interest. But in the absence of such a religious belief in the impropriety of paying the tax, there is no substantial burden.
		- The interference with religious practices caused by the government’s diminishing the privacy offered to American Indian religious sites on government land doesn’t count as a substantial burden.
		- The interference caused by the government’s referring to a person using a social security number, which the person or her parents believe will “‘rob the spirit’ of [the person] and prevent her from attaining greater spiritual power.”

So, at a rough cut, if the law is requiring you — or pressuring you, on pain of lost rights or benefits — to violate your felt religious beliefs, that’s a “substantial burden” on you. It doesn’t mean you’ll win under a RFRA, because the government can still show that denying the exemption is necessary to serve a compelling interest. But it does mean the government has to make such a showing.

**Things that are outside the scope of this discussion**, though they are very interesting: (1) We’ve only discussed when people can go to court to get exemptions from generally applicable laws. People can also go to the legislature to get such exemptions, and legislatures have granted many such exemptions — consider the conscientious objector exemption from the draft (though it’s applicable to nonreligious conscientious objectors, too), the clergy-penitent privilege not to testify, various exemptions from tax law (though these are generally applicable to nonreligious nonprofits, too), and more.