Article

Conscience in the public square: The pivoting positions of the USCCB and ACLU around the Religious Freedom Restoration Act

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The debate on the meaning of the Religious Freedom Restoration Act (RFRA) is rapidly developing. Taking three snapshots in the bill's history (in 1993 at its origin, in 2014 during Burwell v. Hobby Lobby, and in 2015 after Obergefell v. Hodges), this essay evaluates the stances taken on the RFRA by the American Civil Liberties Union (ACLU) and the US Conference of Catholic Bishops (USCCB). Although the ACLU initially supported the bill, it now campaigns against it. In contrast the USCCB, once hesitant to endorse the RFRA, fervently defends it today. Evaluating these pivoting positions, this essay suggests that at the heart of the debate on RFRA lies a difference in understanding the right to follow one's conscience in the public square.

Lay Summary: This essay evaluates how the ACLU and the USCCB differ in their understanding of conscience. Next, the essay demonstrates that this difference leads to opposing viewpoints on the Religious Freedom Restoration Act today. Although both initially supported the Religious Freedom Restoration Act at its signing in 1993, the ACLU has now disavowed the bill after it had been used to permit following religious-based conscience in the public square.

Keywords: Conscience, Religious Freedom Restoration Act, ACLU, Burwell v. Hobby Lobby, USCCB, Obergefell v. Hodges, Secularism

INTRODUCTION

Since being passed in 1993, the Religious Freedom Restoration Act (RFRA) has played a critical role in determining the boundaries of conscience in the public square. The RFRA is designed to give a person of faith the procedure to assert that the federal government has burdened his or her religious beliefs. The RFRA was signed into law with broad public support, and although the law has not changed, moral standards have pluralized since it was enacted. In response, religious persons

have become increasingly aggressive in using the RFRA to protect their religious exercise. This essay focuses on three events in the RFRA's timeline—its origin, its role in *Burwell v. Hobby Lobby* (the Supreme Court ruling on mandated insurance coverage for contraception), and its possible applications after *Obergefell v. Hodges* (the Supreme Court ruling on the right to same-sex marriage). These three events will be considered from the positions taken by the US Conference of Catholic Bishops (USCCB) and the American Civil Liberties Union (ACLU).

Using these two organizations, it will be clear that the heart of the RFRA debate is the prerogative to externalize one's conscience in a pluralistic society.

A BRIEF HISTORY OF THE DEBATE OVER THE RFRA

A brief history will assist in understanding the current debate. The foundation of the RFRA begins with the First Amendment, specifically the Free Exercise Clause, italicized here: "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof*." The breadth of this constitutional liberty has been defined by several Supreme Court interpretations, notably *Sherbert v. Verner* (1963) and *Wisconsin v. Yoder* (1972). In these two cases, a test known as "strict scrutiny" was applied to determine whether or not the government had violated a right to religious liberty. Strict scrutiny required the government to prove that if any action were to compromise religious beliefs or duties, it must be of compelling public interest and applied by the least-restrictive, most-accommodating means. Thus, under strict scrutiny, religious liberty was prioritized but not unlimited (Morgan 2014, 176–77). Religious liberty enjoyed this protection until 1990, when *Employment Division v. Smith* (494 U.S. [1990]) was brought to the Supreme Court. In this case, two members of the Native American Church were denied state unemployment benefits after testing positive for peyote, an illegal drug used during their religious ritual. In a 6–3 decision supporting the state, the Court ruled that the Free Exercise Clause does not exempt the "free exercise of religion from a neutral law of general applicability" (Morgan 2014, 177). Thus, strict scrutiny no longer applied to neutral laws, removing a critical protection of religious exercise.

The ruling set off a firestorm of controversy, leading to the introduction of the RFRA. In contrast to the Court's ruling in *Smith*, the RFRA proposed that government could "not substantially burden a person's exercise of religion," even if the burden results from a general rule (*Religious Freedom Restoration Act 1993*). The public consensus, recognizing that personal religious convictions should be among the highest protected civil liberties, ensured support for the bill from both parties and diverse faith traditions, including the United States Catholic Conference (USCC), which later merged with the National Conference of Catholic Bishops to form the USCCB (Gaffney 1994, 6). The bill passed by unanimous voice-vote in the House, passed 97–3 in the Senate, and was penned into law by President Bill Clinton in 1993.

The American Civil Liberties Union unequivocally supported the bill. At a congressional hearing, the ACLU president, Nadine Strossen, called it, "a great privilege to be here testifying on behalf of this critically important statute." She went on to say:

I think it is all in the name: the Religious Freedom Restoration Act. That is an accurate description of what this legislation would do, no more and no less ... The ACLU strongly supports [the RFRA] because it restores religious liberty to its rightful place as a preferred value and a fundamental right within the American constitutional system. The First Amendment's guarantee of the "free exercise of religion" has proven to be the boldest and most successful experiment in religious freedom the world has known. (US House 1993, 63)

The USCC took a more cautious view. General Consul Mark Chopko, in the same hearing, spoke on behalf of the USCC:

[The bishops] are concerned about the frightening government power with too great a handle to interfere into religious activities ... They do believe that the government may not impair religious practices without compelling justification, and therefore they join the search for a solution to the *Smith* case. (US House 1993, 48)

While the USCC agreed with the need to protect religious freedom, they were initially uncertain whether the RFRA was the appropriate answer. At the hearing, Mr. Chopko went on to say, “religious freedom and how best to protect it are complex issues that do not lend themselves readily to simple solutions. A major problem is that [the RFRA] seems to adopt a single test to be applied to a multitude of situations” (US House 1993, 37). As we will soon see, the USCC had a more expansive understanding of religious liberty, and considered the RFRA too naive to address its nature. However, within a year, the USCC conferred their support to the RFRA, which played a significant role in the lopsided vote to pass the measure.

Thus, in 1993, both the ACLU and USCC supported the RFRA. With such unusual allies, one legal scholar commented, “the RFRA was warmly received and intensely celebrated by a remarkably diverse group of supporters—from secular liberals in the ACLU to religious conservatives” (Idleman 1994, 248–49). Neither constituency anticipated how the RFRA would evolve in practice. While many rallied to support the sentence that “government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” (Religious Freedom Restoration Act 1993), the phrase “exercise of religion” was vaguely defined under the First Amendment. Therefore, both the ACLU and the USCC understood the RFRA

according to their own definition of religious exercise.

LIBERTY *FROM* AND LIBERTY *TO*

To understand how the RFRA would later be interpreted, let us consider the exercise of religion as it relates to the exercise of conscience. Bishop De Smedt, of Belgium, explains it this way:

What, therefore, is meant by “religious freedom”? Positively, religious freedom is the right of the human person to the free exercise of religion according to the dictates of his conscience. Negatively, it is immunity from all external force in his personal relations with God. (quoted in Lori 2015).

Religious freedom can be understood as a spectrum containing internal and external liberties. On one end of the spectrum lies negative liberty, *liberty from* government interference in religious expression (i.e., to gather to profess a creed, to have a sacred ceremony and rites, to elect ministers of the faith without government encroachment, etc.) This is an internal expression, exercised *within* the home or a religious community. On the other end of the spectrum lies positive liberty, the *liberty to* live one’s conscience throughout the day (i.e., to invoke God’s blessings in a public speech, to collect canned goods for refugees at one’s workplace, to refrain from participating in an elective abortion, etc.). An external expression, such liberties are exercised *outside* the home or religious community, such as in hospitals or schools.

For the USCCB, the full exercise of conscience requires both internal and external expression. This is laid out in *Dignitatis humanae*, the first magisterial document on religious liberty, which provided the ground rules for the Church to

relate to secular states. Written in 1965 during the Second Vatican Council, the Declaration on Religious Freedom *Dignitatis humanae* is designed to bring the Church into closer contact with a global culture:

This Vatican Council declares that the human person has a right to religious freedom. This freedom means that all men are to be immune from coercion on the part of individuals or of social groups and of any human power, in such wise that no one is to be forced to act in a manner contrary to his own beliefs, whether privately or publicly, whether alone or in association with others, within due limits. (Vatican Council II 1965, n. 2)

Guided by *Dignitatis humanae*, the USCCB supports the freedom from governmental interference. For the USCCB, however, this is a minimum. Archbishop William Lori, chair of the USCCB's Ad Hoc Committee on Religious Liberty, would call this liberty-from a necessary building block, but nonetheless incomplete (Lori 2015). For *Dignitatis humane* goes on to state:

The council further declares that the right to religious freedom has its foundation in the very dignity of the human person as this dignity is known through the revealed word of God and by reason itself... On his part, man perceives and acknowledges the imperatives of the divine law through the mediation of conscience. In all his activity, a man is bound to follow his conscience in order that he may come to God, the end and purpose of life. It follows that he is not to be forced to act in a manner contrary to his conscience. Nor, on the other hand, is he to be restrained from acting in accordance with his conscience, especially in matters religious... Injury therefore is done to the human person and to the very order established by God for human life, if the

free exercise of religion is denied in society, provided just public order is observed. (Vatican Council II 1965, n. 2)

The RFRA at least grants the negative liberty to conscience, protecting the freedom from coercion by government. The ACLU and USCCB rallied behind this interpretation. However, for the ACLU, protecting the internal expression of conscience is sufficient. Thus, from 1993 to 2014, the ACLU considered the RFRA to be a comprehensive protection of conscience, whereas the USCCB would consider it partial in that the law only protected the internal life of the Church, but did not protect the person of faith in a pluralistic or secular public square.

SHIFTING AROUND THE RFRA WITH *BURWELL V. HOBBY LOBBY*

The political alignment of the ACLU and the USCCB around the RFRA shifted with the 2014 landmark Supreme Court decision, *Burwell v. Hobby Lobby* (573 U.S. [2014]). The Supreme Court had been asked to rule whether closely held businesses (i.e., private, for-profit businesses that are owned by persons of faith) are considered persons under the law, and may likewise seek protection under the RFRA from a federal mandate to include contraception in their employees' health insurance policies. The owners of Hobby Lobby conscientiously objected specifically to the mechanism of action of FDA-approved intrauterine devices (Jost 2013, 4). The question at hand was whether the owners of Hobby Lobby have the liberty to externalize their conscience in the workplace, even if to do so limited access to contraception for their employees. Given that the petitioners were seeking to use the RFRA to protect a positive expression of conscience, the ACLU swapped sides on the bill.

Instead of debating the legal application of the RFRA, the ALCU proposed that the externalization of conscience is dangerous if it undermines another's sexual liberty. "We submit this brief to highlight an important lesson of history: as our society has moved towards greater equality for racial minorities and women, it has been less willing to accept religion as a justification for discrimination" (ACLU et al. 2014, 6). Their argument is as follows: like most Americans, but unlike the owners of Hobby Lobby, the ACLU does not morally object to contraception. It considers contraception "a tool, like education, essential to women's equality" (ACLU et al. 2014, 9). Therefore, denying full access to contraception (for any reason) is likened to denying full women's equality. Thus, the employer's conscientious objection of contraceptives they consider to be abortifacients is considered discriminatory to the female employees. The ACLU bluntly states that conscience must be restrained to one's private life only: "Although the business owners are certainly entitled to their religious beliefs, the companies are not permitted to invoke those beliefs to discriminate against their female employees" (ACLU et al. 2014, 33). The ACLU acknowledges the validity of the employer's conscientious objection, but the moment their conscience spills into the public square, it becomes unlicensed and even discriminatory. Thus, when applying a neutral law—the Department of Health and Human Services (HHS) mandate, in this case—a conscientious objection should be internalized. No accommodation should be made for the external expression of their conscience.

The amicus brief of the USCCB posits a broader understanding of conscience to support the owners of Hobby Lobby. The brief reflected the complementary understanding of conscience (liberty-from and

liberty-to) discussed in *Dignitatis humanae*. In addressing the suggestion that internal conscience should be separated from its external pursuit, the USCCB states:

Religion is not something that can or should be divorced from the commercial sphere. Indeed, it is religion that often serves to direct that sphere toward the common good... Moreover, the notion that religious believers or the companies they own cannot or do not exercise religion rests on an unduly cramped definition of religious liberty and runs contrary to the manner in which Christians have understood their faith for centuries. Religion is not confined to the four walls of a church or to the private life of a believer. (USCCB 2014, 7)

Although the general public may consider the HHS mandate neutral and even insignificant, for a business owner who holds tenable that life begins at conception, it is undue and unconscionable. Thus, without an accommodation, the business owners are posed with the mutually exclusive solutions of violating their beliefs or complying with the mandate to provide contraception.

In a 5–4 ruling, the Supreme Court ruled that employers possessed conscience prerogatives, and the federal government did not offer a compelling interest and least-restrictive means in which to violate them as required by the RFRA. Therefore the conscientious objections of the employers must be accommodated. Although the court majority opinion made clear that the scope of the analysis is directed solely to the contraception mandate, it was a ruling that provided a means for religious liberty to become more prominent in the marketplace, supporting an external exercise of conscience long sought-after and regarded by religious communities as necessary.

Unsettled by the RFRA's exemption of an employer's conscience, the ACLU formally disavowed the bill in an op-ed in the *Washington Post* titled, "Why we can no longer support the religious freedom law." In the article, the ACLU's deputy legal director stated:

[The ACLU] can no longer support [the RFRA] in its current form. For more than 15 years, we have been concerned how the RFRA could be used to discriminate against others ... while the RFRA may serve as a shield, it is now often used as a sword to discriminate against women, gay and transgender people ... Yes, religious freedom needs protection. But religious liberty doesn't mean the right to discriminate or impose one's views on others. (Melling 2015)

The harsh language criticizing the RFRA is a stark departure from their support at the bill's hearing 23 years prior. What changed? Not the RFRA. The current form of the bill as it applies to federal laws was not amended. Instead, the RFRA is being applied and interpreted in a shifting cultural context (Norris and Inglehardt 2007, 31–32). The ACLU decision to wash their hands clean of the bill represents an interpretation that the Free Exercise Clause protects a person's conscience only in private matters, where it can safely be exercised without potential friction. In this view, the external expression of one's conscience is hastily mistranslated as paternalistic. Its exercise outside the religious community, should it affect another individual's autonomous expression, is cheaply equivalent to the proselytizing of one's theocratic pretensions. In this secularized worldview, churches, synagogues, and mosques are able to grow and shrink with the ebb and flow of the population that fills them, but not contribute to the public conscience. Outside the religious institution, the

public sphere should be sterilized of any religious expression.

The ACLU would argue that the internal expression of conscience is the only appropriate method to achieve tolerance in a pluralistic society. It would suggest that religious tolerance, like internal conscience, gives the opportunity to pray the Rosary, recite the Shema Yisrael, or face the Kaaba without interference. However, as one enters and exits the public sphere, for the sake of the common good, religious conscience must checked in and out like a salesclerk clocking his or her hours. However, many religious leaders contend that this a false notion of religious liberty built on a narrow understanding of the common good. Returning to our spectrum of liberty-to and liberty-from discussed above, we can better understand the relationship of religious tolerance to religious liberty. Religious tolerance is the freedom from government coercion, and a building block to express the freedom to exercise religious liberty. While religious tolerance and religious liberty are connected, they are not equivalent for the same reason that one's internal and external expressions are related, but not interchangeable. In a letter, the Union of Orthodox Jewish Congregations of America draws this distinction, "a religious entity is not insular, but engaged with broader society ... Many faiths firmly believe in being open to and engaged with broader society and fellow citizens of other faiths" (Diamant 2012). Pope Francis shares this sentiment too, saying in his first encyclical *Evangelii gaudium*, "religion [cannot be] relegated to the inner sanctum of personal life, without influence on societal and national life" (Francis 2013, n. 183). Consequently, the drive to internalize conscience has deleterious effects on the practice of religion. In a lecture to seminarians, Archbishop William Lori discusses this challenge:

Clearly our institutions of education and service have entered a more challenging environment for bearing witness to Christ and his teaching. This environment has deteriorated due to factors *within* the Church, including: lessened church attendance, scandals and divisions within the Church, and diminished knowledge and acceptance of church teachings, especially moral teachings. But that environment has also been made difficult by factors *external* to the Church, including: the societal loss of consensus on moral values, the view that religion as a cultural force is spent, and laws, rules, and court decisions that reflect those changed attitudes. (emphasis added; [Lori 2014](#))

Religious leaders are growing dependent on the RFRA to claim that their conscience is being trampled upon by a religiously unconscionable federal stature. The ACLU, in contrast, now considers the RFRA as a necessary abandonment in order to preserve what they consider to be a completely tolerant society.

POSITIONS ENTRENCHED

If *Burwell v. Hobby Lobby* pitted the ACLU against the USCCB on opposite sides of the RFRA, their positions have calcified after *Obergefell v. Hodges* (576 US [2015]). In this case, a 5-4 Supreme Court ruled that, under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment, the fundamental right to marry is guaranteed to same-sex couples. This requires all states and territories in the United States to issue marriage licenses to same-sex couples. The RFRA was not used explicitly during the proceedings, but the undertones of religious freedom were present throughout the case (USCCB 2015). With the liberty to same-sex marriage imminently protected under the Fourteenth Amendment,

and the right to religious liberty protected under the First, a tangle of liberties results (Green 2015). In his dissenting opinion, Supreme Court Justice Clarence Thomas elaborates on the inevitability of this conflict:

The Court's decision [that same-sex marriage is a fundamental right] will have unavoidable and wide-ranging implications for religious liberty. In our society, marriage is not simply a governmental institution; it is a religious institution as well. Today's decision might change the former, but it cannot change the latter. It appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to participate and endorse civil marriages between same-sex couples. (*Obergefell v. Hodges* 2015, 15)

Justice Thomas claims that the court's majority opinion grossly misunderstands religious liberty, which has damaging consequences for conscience. He points out that without a legislative accommodation, the ruling effectively limits the exercise of one's religious-based conscience:

[The majority opinion of the court] makes only a weak gesture toward religious liberty in a single paragraph. And even that gesture indicates a misunderstanding of religious liberty in our nation's tradition. Religious liberty is about more than just the protection for "religious organizations and persons as they seek to teach the principles that are so fulfilling and so central to their lives and faiths" [as claimed in the majority's opinion]. Religious liberty is about freedom of action in matters of religion generally, and the scope of that liberty is directly correlated to the civil restraints placed upon religious practice ... [violating this] has potentially ruinous consequences for religious liberty. (*Obergefell v. Hodges* 2015, 16)

Obergefell v. Hodges was decided on June 26, 2015. The ACLU ran its op-ed abandoning the RFRA on June 25. This is hardly a coincidence. In anticipation of the Supreme Court's ruling that same-sex marriage is a fundamental right, religious-based conscience was soon to be on the wrong-side of the law, with a Pandora's box of discrimination claims about to be opened. Will religious adoption agencies be required to violate their beliefs and place children in same-sex households, or will same-sex couples sue the adoption agencies on grounds that they were discriminated against? Will religious colleges lose access to federal funding because of their policies on same-sex marriage, or will same-sex couples sue a religious college for not being granted housing designated for married couples? Without an accommodation, claims to religious freedom and claims of discrimination are negatively correlated. As one legal journalist put it, "the Supreme Court's ruling in favor of same-sex marriage ... has set up the country for two new waves of discrimination claims: those made by same-sex couples and those made by religious Americans who oppose same-sex marriage" (Green 2015). A post-*Obergefell* legal landscape is ambiguous, and at this point still largely speculative. However, energized after *Obergefell* and on a mission to eliminate any hint of inequity, the ACLU began to swiftly and fiercely lobby against the RFRA legislation, considering it a bastion of externalized religious conscience. This position completed its 180° pivot around the legislation: from supporting the RFRA at its birth, to opposing it during the *Hobby Lobby* proceedings, the ACLU is now prepared to see its demise. The vector charted by the USCCB has taken quite the opposite course: from cautiously approving the RFRA at its origin, to fervently defending it today.

THE ESSENCE OF THE RFRA

More than two decades after the RFRA was signed into law, both the ACLU and the USCCB would admit that the bill is not perfectly applied in every case. The RFRA finds itself at the heart of the battle of understanding the substance of the First Amendment. The German philosopher Jürgen Habermas considers this to be a uniquely American challenge:

The secularization of state powers [in America] did not serve primarily the negative purpose of protecting citizens against the compulsion to adopt a faith against their own will. It was instead designed to guarantee the settlers who had turned their backs on Old Europe the positive liberty to continue to exercise their respective religion without hindrance. For this reason, in the present American debate on the political role of religion, all sides have been able to claim their loyalty to the constitution. (Habermas 2006, 3)

Conflicts over deeply held beliefs and public policy will remain a characteristic of democracy.

By entering into the conversation of conscience, the RFRA was bound to lose its early support as the law was applied. Recognizing religious liberty means standing up for unpopular religious expression within constitutionally appropriate bounds. This is the fabric of true coexistence and pluralism. To the secularist, the bill potentially invites a cacophony of accommodations for "odd" religious expressions: a Muslim woman will refrain from serving alcohol on an airplane, a Catholic nurse will avoid an elective termination, a Jewish man will don out-of-uniform sidelocks in military attire. These are the inevitable challenges of a pluralistic society. These challenges, however, do not discredit the RFRA. Rather, they affirm its integrity. Religious

conscience in its various expressions contributes to the common good and to constructive public discourse. The ACLU position on the RFRA today, to throw out the baby with the bathwater, would put religious-based conscience at serious risk. Without adequate protection, a pluralistic society will lose the voices that contribute to its plurality. The words of President Bill Clinton, at the RFRA's signing, continue to ring true:

We are a people of faith. We have been so secure in that faith that we have enshrined in our Constitution protection for people who profess no faith. And good for us for doing so. That is what the first amendment is all about. But let us never believe that the freedom of religion imposes on any of us some responsibility to run from our convictions. Let us instead respect one another's faiths, fight to the death to preserve the rights of every American to practice whatever convictions he or she has, but bring our values back to the table of American discourse to heal our troubled land. (Clinton 1993, 2000–2001)

Modeled after the federal version signed in 1993, state legislatures have brought similar bills to vote. However, as seen in Indiana and Mississippi, the individual bills are met with strong criticism from business and entertainment leaders. The state bills are cast as discriminatory exclusively in the context of same-sex marriage, although the text does not specifically address the issue and remains virtually identical to that signed into law by President Clinton. If the national conversation continues to consider conscience and discrimination as grossly synonymous, the RFRA is not likely to survive. This puts the sincerely held intellectual and moral traditions of religious communities—and the fabric of plurality—at risk. The RFRA is worthy of our defense, because *strict*

scrutiny promotes a consistent, reality driven analysis of conscience in the public square. It is not a trump card, and does not guarantee one's conscientious expression. However, it provides the means for legal evaluation of beliefs as applied in America today. The Catholic response, therefore, should be firm yet careful. First, as members of a pluralistic society, we must work to defend the conscientious expression of other religions, within constitutional and morally appropriate bounds. Second, using the democratic process, we must emphatically support political leaders that understand the timeless importance of the First Amendment. Finally, conscience is best understood as a well-developed capacity for moral judgment, therefore we must continually seek to develop it internally. Our conscience should be neither a shield nor a sword, but an opportunity to share the freshness and fragrance of the Gospels.

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BIOGRAPHICAL NOTE

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