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Revisiting Religious Freedom in Dordt v. Burwell

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Abstract
Posting about a recent opinion handed down from the United States Court of Appeals regarding the "contraceptive mandate", part of the Affordable Care Act (ACA), from *In All Things* - an online hub committed to the claim that the life, death, and resurrection of Jesus Christ has implications for the entire world.

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On September 17, 2015, the United States Court of Appeals for the 8th Circuit handed down an opinion in favor of Dordt College and Cornerstone University and their objection to the so-called "contraceptive mandate" in the Affordable Care Act (ACA). The process, which began over three years ago, seems to be at some resolution as far as the schools are concerned, but unless you've followed the issue closely, it might not be clear exactly what all the fuss was about or why exactly the court found in Dordt and Cornerstone's favor.

Since this decision is all about the interaction of the ACA and the federal Religious Freedom Restoration Act (RFRA), and since I've written about RFRA for iAt on several different occasions, I thought it worthwhile to focus in on the key issues from this particular case in a simple, hopefully plain English fashion. By doing so, we'll see that this case raises key issues about how courts analyze religious freedom cases, and, given disagreement between different Courts of Appeal on this, it's likely we will have to wait on the Supreme Court for an ultimate resolution.

RFRA and the ACA Mandate in a Nutshell

RFRA was passed in 1993 as a legislative response to the Supreme Court's decision in *Employment Division v. Smith* (which I summarized here), and it requires all government actions to pass a test protecting the free exercise of religion. The test states that only actions which are the *least restrictive means* of pursuing a *compelling governmental interest* will be permissible when those means *substantially burden* the free exercise of religion.

For the purposes of this issue, all parties agree that the government's interest in providing healthcare (including contraceptives) on a broad, low-cost basis is compelling, the real dispute is over the way to interpret the test requirements for least restrictive means and substantial burdens. I will discuss the specific dispute over these two parts of the test below, but the general process of analysis is a two-step inquiry. First, the party challenging the government bears the responsibility to provide evidence to prove a substantial burden on their religious belief; then the burden of proof shifts to the government to prove that it used the least restrictive means in pursuing its compelling interest.

The "contraception mandate" provision of the ACA is part of a broader requirement that all employers provide a minimum level of coverage to their employees. This minimum coverage is defined to include free (to the employee) coverage of a variety of medical services that Congress considered to be "preventive care."[1] Among the list of things considered to be preventive in nature by the ACA are a variety of contraceptive products, including several which some Christians believe to be abortificants.[2] This means that, in order to avoid tax penalties, employers are required to provide insurance plans which cover the listed contraceptives.

The ACA provides for an exemption for religious employers who object to covering these contraceptives; however, the U.S. Department of Health and Human Services (HHS) decided to interpret "religious employers" in a narrow fashion which only includes organizations which engage in exclusively religious activity. HHS did create an "eligible employer" accommodation for nonprofit institutions like Dordt, but the accommodation does not allow for non-coverage of challenged contraceptives; rather, it directs eligible

employers to certify their religious exemption with the Department of Labor, and it directs the company providing insurance to the institution to cover the contraceptive measures at no cost to the employer.[3] Dordt, along with nearly 140 other institutions, objected to this accommodation as inadequate, arguing that it still required the employer to trigger abortion coverage by its objection.

Courts Granting the Objection

If you read either the opinion or Dordt's press release on the topic, you notice Dordt won its case in the 8th Circuit based on that court's decision in an earlier case called *Sharpe Holdings*. This earlier decision interpreted the substantial burden test as being met whenever the government "coerces private individuals into violating their beliefs or penalizes them for those beliefs." Using this analysis, the court emphasized the idea that the court doesn't really weigh the merit of a religious belief, only whether or not it is sincerely held. By this analysis, then, an institution acting in accordance with its beliefs would not follow the HHS accommodation procedure and would suffer significant federal tax penalties for failing to provide minimum coverage to its employees. The court considered this to be a substantial burden.

Going further, the court concluded that the government also failed the least restrictive means test because of a variety of alternative arrangements, such as the total exemption for religious employers and the less burdensome certification process which was authorized by the Supreme Court on appeals from other groups, such as Wheaton College.

Courts Denying the Objection

While three other circuits agree with the 8th Circuit and its reasoning, there are currently seven who disagree.[4] These other courts have followed a different line of interpretation and analysis of, most commonly, the substantial burden test, such as in the 3rd Circuit's ruling against Geneva College.

In that case, the 3rd Circuit questioned whether, despite Geneva's belief to the contrary, the requirement that the college certify its objection with HHS *actually* burdened the free exercise of the college. The court said, "[w]ithout testing [Geneva's] religious beliefs, we must nonetheless objectively assess whether [Geneva's] compliance with the self-certification procedure does, in fact, trigger, facilitate or make them complicit in the provision of contraceptive coverage." The court went on to conclude that, because the coverage mandate fell on insurers, and since that mandate came about by the operation of federal law, rather than any action by the college, it was not possible that the certification process placed any substantial burden on the college's beliefs. Geneva, along with many organizations who've lost in the other six circuits, has appealed to the Supreme Court.[5]

What This All Means

If you've been following along this far, you hopefully see that this whole issue turns on what counts as a substantial burden on the free exercise of religion. I'm probably not surprising anyone by saying that I agree with the 8th Circuit's reasoning. It seems to me that the best way to test for a substantial burden is to look at what the government's reaction would be to a person/organization acting in accordance with its conscience, which in this case is a significant financial penalty. While the majority of the Courts of Appeals take a different approach, I believe that their approach, while claiming to respect the sincerity of a religious group's belief, nonetheless tests whether the court agrees with that belief or not, and this puts the court on a dangerous path of beginning to judge the relative merit of religious beliefs.

At the same time, my beliefs on when life begins differ somewhat from many Christians (I tend to favor implantation, rather than fertilization), and questions about what the objectionable contraceptives actually do make me question whether all the fuss is justified. That said, I also think HHS was completely wrong-

headed in the way it defined “religious employer” and that the issue of this accommodation should never have come up in the first place.

Footnotes

1. Preventive care traditionally includes things like annual physicals and routine health screenings, which are believed to save significant future healthcare costs through early detection of disease. ↩

2. Typically, this means that rather than just interfering with the fertilization of an egg, these drugs would do some harm to an already-fertilized egg, particularly one which has already attached to the wall of a woman’s uterus. Since many Christians believe life begins as fertilization, that would mean drugs like Plan B, Ella, and certain IUDs would be aborting children. It is worth noting that these perceptions as to the effect of these drugs are disputed. ↩

3. This includes a special annual notification to the employees of the objecting company that these contraceptive measures are fully covered. ↩

4. There are 13 total courts of appeal in the federal system. See the breakdown of decisions here. ↩

5. If we’re being really persnickety, it might be misleading to call this an appeal. Geneva has filed what’s called a petition for a Writ of Certiorari, which is a court order by which the Supreme Court agrees to hear an appeal. Unlike the Courts of Appeal, the Supreme Court does not have to agree to consider every appeal made to it. ↩