OBERGEFELL'S PRESCRIPTION: WHY THE FOURTEENTH AMENDMENT TRUMPS STATE EMPLOYEES' FREE EXERCISE CLAIMS

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Following the Supreme Court's recent decision finding a fundamental right to same-sex marriage in *Obergefell v. Hodges*,[1] some politicians and public employees have asserted an ostensible First Amendment right to refuse to issue marriage licenses to same-sex couples. For example, Texas Attorney General Ken Paxton declared in an official opinion letter that Texas state employees retain the right to rely on their "religious freedoms" and "religious objections" and refuse to issue same-sex marriage licenses.[2] However, neither the Attorney General's opinion, nor any current or future concocted state law, nor the First Amendment will allow such religiously based refusals to comply with the *Obergefell* decision—the court's own Free Exercise jurisprudence has seen to that.

In *Sherbert v. Verner*, the Supreme Court announced that the Free Exercise Clause of the First Amendment required the government to meet a strict scrutiny standard if a law substantially burdened citizens' rights to the free exercise of religion.[3] In that case, a religious adherent was fired from her job after refusing to work on the day of her Sabbath. She filed for, and was denied, unemployment compensation because the

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1. Obergefell v. Hodges, 135 S.Ct. 2584 (2015).

2. Letter Op. No. KP-0025 from Honorable Ken Paxton, Tex. Att'y Gen., to Honorable Dan Patrick, Lt. Gov. at 1 (June 28, 2015), *available at* https://www.texasattorneygeneral.gov/oagnews/release.php?id=5144.

3. Sherbert v. Verner, 374 U.S. 398, 403 (1963).

state found her religious justification for refusing to work unacceptable.[4] The Supreme Court applied strict scrutiny and found that denying Ms. Sherbert unemployment benefits violated the Free Exercise Clause of the First Amendment.[5] The court reasoned that the state's eligibility restrictions for unemployment compensation imposed a significant burden on Sherbert's ability to freely exercise her faith. Furthermore, there was no compelling state interest which justified such a substantial burden on this basic First Amendment right.

Nearly thirty years later, the Supreme Court decided *Employment Division v. Smith*,[6] which sharply limited the potential application of strict scrutiny in favor of a rational basis test. In that case, two Native Americans, Alfred Smith and Galen Black, were fired from their jobs for ingesting peyote—a powerful hallucinogen—as part of a sacrament of their church.[7] The two filed for unemployment compensation but were denied because the state in which they resided, Oregon, prohibited the possession and use of peyote.[8] The state refused to award them benefits because of their use of this illegal drug despite their religious purpose.[9] Smith and Black claimed that the refusal to award unemployment compensation was a violation of the First Amendment's Free Exercise Clause.[10] They argued that Oregon's denial of unemployment compensation did not meet the strict scrutiny standard as required by court precedent.[11] Thus, under strict scrutiny, Oregon's law substantially burdened their free exercise of religion, Oregon lacked a compelling governmental interest, and the law was not narrowly tailored to accomplish this governmental interest.[12] The court disagreed with their argument and held that if a law is one of general application, not intentionally targeted at religion,[13] then the constitutionality of the law is tested under the rational basis test. To the likely chagrin of some state employees who object to *Obergefell*, the religious adherents in *Employment Division* were faced with a court that wanted to return to a

4. *Id.* at 399-401.
5. *Id.* at 403, 408-09.
6. Employment Div. v. Smith, 494 U.S. 872 (1990).
7. *Id.* at 874.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 882-83.
12. *See generally*, Sherbert, 374 U.S. at 406-07.
13. *See generally*, Employment Div., 494 U.S. at 881 (The court noted that at times strict scrutiny will be appropriate when an individual claims that a law regulates religiously motivated action in conjunction with another constitutionally protected liberty such as speech or press).

rational basis standard, or a pre-*Sherbert* interpretation[14] of the Free Exercise Clause.

The court in *Employment Division* determined that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and [religious-]neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[15] The court reasoned that because Oregon's law proscribed the use of peyote without being animated by its religious significance, Smith and Black's religious motivation for failing to comply with the law was immaterial.[16] Indeed, the Court held "a stance of conscientious opposition [never] relieves an objector from any colliding duty fixed by a democratic government."[17] If the individual is free to disregard laws that fail to coincide with his own religious beliefs, then the individual will "become a law unto himself."[18] These are the principles that animate (or undergird) the Free Exercise Clause rights invoked by some who intend to ignore *Obergefell* and the dictates of the Fourteenth Amendment.

In *Obergefell*, the court held that the Fourteenth Amendment compels states to issue same-sex couples marriage licenses where they also issue opposite-sex couples marriage licenses.[19] In other words, the citizens of the United States, through the democratically enacted Fourteenth Amendment, require the states to offer marriage licenses to same-sex couples.[20] Indeed, the Constitution, either in the text or as interpreted by the court, is full of proscriptions and prescriptions. For example, the Constitution proscribes an individual from being President of the United States if he or she is under the age of 35.[21] Moreover, the Free Speech Clause of the First Amendment would prescribe the issuance of a permit to someone wishing to hold a demonstration if he otherwise met the threshold articulated by a parade permitting law.[22] Finally, the Fourteenth Amendment prescribes the right to same-sex marriage. Yet states, like corporations, can only act through human

14. *See e.g.*, Reynolds v. United States, 98 U.S. 145 (1878); Davis v. Beason, 133 U.S. 333 (1890).

15. Employment Div., 494 U.S. at 879 (internal quotation marks omitted).

16. *Id.* at 884.

17. *Id.* at 882 (quoting Gillette v. United States, 401 U. S. 437, 461(1971); internal quotation marks omitted).

18. *Id.* at 879 (quoting Reynolds v. United States, 98 U.S. 145, 166-67 (1879); internal quotation marks omitted).

19. Obergefell v. Hodges, No. 14-556, 2015 U.S. LEXIS 4250, *42 (U.S. June 26, 2015).

20. *Id.*

21. U.S. CONST. art. II, § 1.

22. *See* Shuttlesworth v. Birmingham, 394 U.S. 147, 150-51 (U.S. 1969).

beings in the form of elected officials and employees. The question then arises: who is compelled, in a practical sense, to effectuate the prescriptions found in the Constitution and empower the fundamental right to same-sex marriage found in the Fourteenth Amendment?

Certainly same-sex couples cannot issue marriage licenses to themselves. Issuing marriage licenses is a function of the state and an act that must be performed by the state. Therefore, the Fourteenth Amendment fundamental right to same sex-marriage is only realized with a concomitant prescription to issue marriage licenses to same-sex couples. That prescription falls upon the state and, ultimately, the employee whose duties include issuing marriage licenses. Therefore, a state employee who refuses to issue a marriage license to a same-sex couple because they are the same sex is acting on behalf of the state. Upon a state employee's refusal to issue such a marriage license, the state, in that moment, violates the couple's Fourteenth Amendment rights.[23]

Concededly, these state employees have free exercise rights under the First Amendment. Indeed, state laws[24] and administrative opinions[25] seem to attempt to reassert or bolster state employees' free exercise rights while at the same time positioning those rights as an affirmative defense to a same-sex couple's Fourteenth Amendment claim. Thus a conflict emerges: a state employee that is constitutionally duty bound to issue same-sex marriage licenses may have a free exercise interest and state law "right" to opt-out of issuing same-sex marriage licenses. This Fourteenth Amendment prescription tips the justice scale in favor of one position, while the First Amendment and state law balance out the other side of the scale.

It goes without saying that the Fourteenth Amendment, and any prescriptions found therein, is superior to state law or administrative opinions. If the Fourteenth Amendment prescribes an act by the state, and by extension a state employee, the state is utterly powerless to authorize the employee to opt-out of the prescription. Accordingly, the Fourteenth Amendment certainly trumps state law. However, as discussed above, state law is not the only law on which the employee might rely. The employee may believe, from a religious perspective,

23. Whether a state employee can, in keeping with the Constitution, refuse to issue a marriage license for reasons not specifically addressed by the Supreme Court's Fourteenth Amendment jurisprudence is beyond the scope of this piece.

24. NC S.B. 2 (2015).

25. Rights Of Government Officials Involved With Issuing Same-Sex Marriage Licenses And Conducting Same-Sex Wedding Ceremonies, TX Att'y Gen. Op. No. KP-0025 (2015).

that same-sex marriage is an abomination. To be sure, the Free Exercise Clause protects "first and foremost, the right to believe and profess whatever religious doctrine one desires."[26] The employee may then feel compelled by his or her truly held religious beliefs to deny the same-sex couple a license. It is then a conflict between the Free Exercise Clause and the Fourteenth Amendment that must be resolved.

As discussed in *Employment Division*, government inevitably places prescriptions on its citizens through the democratic process.[27] Most often those prescriptions come in the form of state or federal legislation requiring an act by a citizen. Those prescriptions are, of course, subordinate to the Constitution and must comply with its protections—including the Free Exercise Clause.[28] In the conflict described above, however, the prescription derives not from middling legislation but rather the democratically enacted Fourteenth Amendment itself. Therefore, if an employee relies on the First Amendment to refuse to issue same-sex marriage licenses, the Fourteenth Amendment's prescription must be held up against the Supreme Court's interpretation of the Free Exercise Clause. One amendment need not be subservient to the other; instead they must be read in conjunction in light of the jurisprudence that has brought them to life. In such a situation, the Free Exercise Clause provides no safe-harbor.

Ultimately, the Constitution, while peerless and revered, is merely a set of democratically enacted laws. The Fourteenth Amendment, which encompasses the Substantive Due Process and Equal Protection rights therein, and any prescriptions that flow from these rights, are part of those laws. There is no credible argument that the Fourteenth Amendment is anything but a valid, religion-neutral, generally applicable law. The text of the amendment does not refer to religion or seek to prescribe or proscribe actions simply because of their religious nature.[29] Moreover, the Substantive Due Process rights found in the amendment are equally religion-neutral and generally applicable.[30] They are simply secular rights that exist irrespective of religion.

To be sure, it is possible that all of the rights and concomitant

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26. Employment Div., 494 U.S. at 877.

27. *Id.* at 882.

28. *See generally*, Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993).

29. U.S. CONST. amend. XIV, § 1.

30. "In addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights to marry, . . . to have children, . . . to direct the education and upbringing of one's children, . . . to marital privacy, . . . to use contraception, . . . to bodily integrity, . . . and to abortion . . . ." Wash. v. Glucksberg, 521 U.S. 702, 720 (1997) (citations omitted).

prescriptions (or proscriptions) found in the Fourteenth Amendment impose upon one religious belief or another, but that alone does not undermine them pursuant to the Free Exercise Clause. The legal dictates of the Fourteenth Amendment would only give way to the Free Exercise Clause if they were motivated by religious animosity.[31] A public employee's constitutional obligation to issue a same-sex marriage license certainly may impose upon the employee's truly held religious belief. However, "[t]he mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities."[32]

The court in *Obergefell* was clear that its decision does not compel religious institutions to recognize or even condone same-sex marriage.[33] Of course that is true because the Fourteenth Amendment only applies to the states and federal government. However, that application to the states compels them to issue marriage licenses to same-sex couples.[34] Every refusal to do so is a violation of the Fourteenth Amendment. That violation occurs whether the state acts as a sovereign entity through legislative or executive action or through a single employee's refusal to issue such a license. Neither state law nor the Free Exercise Clause can function as an opt-out or defense for the failure to comply with the dictates of the Fourteenth Amendment. As the court in *Employment Division* held, the First Amendment "does not relieve an individual of the obligation to comply" with the Fourteenth Amendment.[35] If it did, the Free Exercise Clause would permit state employees to flout the democratic will of the people as expressed in the Fourteenth Amendment and "become a law unto [themselves]."[36]

31. Church of the Lukumi Babalu Aye, Inc., 508 U.S. at 532.

32. Employment Div., 494 U.S. at 877 (internal quotation marks omitted).

33. Obergefell v. Hodges, No. 14-556, 2015 U.S. LEXIS at 48-49.

34. *Id.* at 42.

35. Employment Div., 494 U.S. at 879.

36. *Id.* at 879 (quoting Reynolds v. United States, 98 U.S. 145, 166-67 (1879); internal quotation marks omitted).