Douglas Laycock, 2018 Joseph Smith Lecture

Q&A Transcript

Q: As a graduate student in Vienna I earnestly advocated the view that the United States had no established religion. [47:26] [They] countered with "Ah, but you do. The Old Order Amish are for you an established religion." Could you speak to the proposition that the state arguably has no entitlement to deprive a child of a uniformly mandated education because of parental objections to the child's education?

A: Well, I think *Wisconsin v. Yoder* and the Amish going to high school is a hard case. It's a close issue on compelling government interests and, to the people in this room, it is unimaginable that you would end your formal education at eighth grade. It is equally unimaginable you would end your formal education at tenth grade. And that was what the argument was about. Wisconsin didn't want much. They said you had to go to school until you were sixteen which typically falls in the middle of tenth grade and is about an extra year or year-and-a-half, at the most two years, beyond what the Amish were willing to do and Wisconsin had no coherent theory of why that extra year-and-a-half mattered. Age sixteen was picked as a matter of labor regulation and never had any basis in education policy. And so the Supreme Court said there is no compelling interest in that extra year-and-a-half. It was also in the court's … [48:52] case that the Amish children got no education after eighth grade. Rather, that they would get vocational education on the farm. I think *Yoder* is clearly right in saying that the government should have to have a compelling interest before it puts a serious burden on a small religious minority. I think it's a close case on compelling interest, but given what Wisconsin was demanding I think the court probably got it right.

Let me say just a word about your debates in Vienna. Government does not establish a religion by leaving it alone. Exemptions for religious minorities do not establish those minorities, they protect them from government regulation imposed by a larger majority that outvotes them. But that argument is out there. There are plenty of people that are willing to argue that religious exemptions establish a church. I think that's just silly and there's absolutely no basis for it in the original understanding of the establishment clause. Exemptions emerged very early in our history as a matter of free exercise they were never thought to be part of the establishment.

Q: So, I'm associated with Christian colleges and universities and one of the things that Masterpiece said was that the court was going to balance religious liberty views with LGBT views. And actually, in some of the cases it said "can't the legislature do something about actually laying out exemptions and handling LGBT civil rights" like they did with the Utah Compromise and we saw the opposite in the Trinity Western case where it went all the way up to the Supreme Court. It was not allowed to open a law school and then people said, "Well we should go to the legislature." So, what is the advantage of legislature drafting in order to make this more predictable on exemptions and civil rights?

A: Did people hear that question?

So, can the legislature solve this? There was a reference to *Trinity Western*. Before you all panic, it was a Canadian case. *Trinity Western* is an evangelical law school and the bar authorities have been for years trying to deny it accreditation because it has a chastity policy for students and faculty and the bar authorities just won in the Supreme Court of Canada.

So, yeah, in many ways it would be much better if the legislators would solve this. Every state that includes gay rights in its employment discrimination laws has a religious exemption. Usually just for religious organizations, not for for-profit businesses. But in the early years this could be solved legislatively. It can't be solved that way anymore, in part because we are too polarized, in part because the gay rights side is making the classic Puritan mistake, right? When they were oppressed, and undoubtedly they were, we treated them very badly. When they were oppressed, all they asked for was equality and liberty. But now that they are winning they no longer want any religious exemptions. And so, we have not quite half the states with gay rights' laws. Many of them with some kind of religious exemption. All the states that enacted same sex marriage legislatively included religious exemptions. And we have a little more than half the states with no gay rights laws and no prospect of enacting any because they are not willing to include religious exemptions. Utah is the shining example here, which enacted a state-wide gay rights' law for employment and for housing, not for public accommodations. They didn't solve the whole problem. But for employment and for housing the gay rights' law in Utah with strong religious exemptions. And it was immediately denounced by both sides and said not to be a model anywhere. The bottom line in most legislatures is the Republicans don't want the gay rights' law and the Democrats don't want religious exemption and neither side will give and they'd rather have no bill at all than a bill that includes provisions they oppose. And *Alliance Defending Freedom,* which has done a lot of good work and represented Jack Phillips in *Masterpiece Cakeshop*, is going around the country aggressively opposing any kind of compromise bill. And there are people on the gay rights' side aggressively opposing any kind of compromise bill. So, right now we're at gridlock. You've heard that before on many issues so they are very hard to enact.

The advantage of a legislative solution, if it could be negotiated, is that both sides could know what they are getting, right? They could draft in fairly specific terms who is exempt, who is not: at what point, if you have ten employees do you lose your exemption, if you have twenty do you lose your exemption. That's a number that can be negotiated. And neither side would have to worry about judges interpreting general language in a way that turned out to be deeply hostile to them. But it's very hard to get from here to there and probably the events of this week are making it even harder.

I've got a couple of written questions:

Q: Please comment on Justice Thomas's concurrence. What is the core of his argument?

A: I don't know. Did Thomas write a separate concurrence? I'm sorry it's just gone from my head. I apologize. Whoever wrote that question if you email me . . . I'll actually look at Justice Thomas's concurrence and give you an answer.

Q: In your preface you gave your views on same sex marriage and said a policy view only. Was Obergefell rightly decided? Explain.

A: It started out as a policy view, became a constitutional view. I think what happened in *Obergefell* is (and the court's always been more implicit about this than explicit), but the court's view is (and I think it's right) if the only reason for prohibiting something is religious disapproval that's not a reason the state can act on. It has to have some reason in addition to that. And the state in *Obergefell* struggled mightily to come up with some reason that made sense, and they weren't having any luck, right? I mean the court's opinion says—it's got a whole string of adjectives, the states' argument is implausible and ridiculous and attenuated and so forth. At the end of the day the states' argument came down to the reason states recognize and regulate marriage has nothing to do with love and mutual commitment. That is irrelevant to us. The only reason we recognize and regulate marriage is that so when the love and commitment wears out, but in the meantime there's been children, you'll be more likely to stay together. Because marriage is only about reproduction.

Well, that's not how I've experienced my marriage of forty-seven years. I love my kids, but, there's a lot more to our marriage than that. So, yeah, I do think *Obergefell* was rightly decided, but if you are an Originalist, you say "what did the framer's think about." They obviously never imagined this in their wildest dreams, right? And so you can see why it was five/four and why in this sense were in passion.

Q: Will church sponsored colleges and universities that forbid students and faculty to enter into same-sex relationships be able to retain their tax-exempt status?

A: I think so. In 1983 there is this decision, *Bob Jones University v. United States*. Bob Jones is in South Carolina, founded by a segregationist. By the 80s' it was admitting African-American students but still had a rule: no inter-racial dating. And any inter-racial couple or any student who dated someone out of a different race outside the student body could be expelled. And the Supreme Court took their tax exemption away, and they said an organization acting in defiance of fundamental public policy is not a charitable organization. And so, the fear is, will that precedent be extended to single sex colleges, to colleges that take a traditional position on same-sex relationships, to Baylor and Brigham Young, to Pepperdine and Notre Dame? Are they all in danger? The important thing to note is *Bob Jones* has not been extended to anybody or anything, it is a one-train only about race. This is a very controversial proposition, but I think that makes sense, I think race is constitutionally unique in our history. No other victimized group ever required a civil war, 750,000 deaths, three constitutional amendments, and 150 years of struggle trying to enforce those amendments to address their problems. The Supreme Court has not said that, but has confined *Bob Jones* to race. There may be a time in fifty years if resistance to same-sex marriage becomes as disreputable as racial segregation is today, maybe, but I don't think tax-exemptions are in danger. Now, the solicitor general of the United States, who should have known better, got that question in oral argument, and said "gee judge, I'd have to think about it, but that'll certainly be an issue." Which understandably panicked a lot of people. I don't think any government's going to move on that front anytime soon. That's my prediction.

Q: I recently got an email urging the Virginia General Assembly to pass the ERA amendment. Do you have any comments on that?

A: Well the Equal Rights Amendment was proposed in 1972, I think. It quickly got the nearly thirty-eight ratifications then it stalled. There was a time limit on it. The time limit ran out thirty or more years ago. Some state just ratified it and there's an argument being made that the time limit is unconstitutional, and no state is permitted to reverse its ratification. It's a ratchet. I don't think that argument's going anywhere. And the short answer is if they ratify the Equal Rights Amendment the time limit will be part of the Constitution which makes it very hard for it to be unconstitutional. That's my short answer. Who else?

Q: Hey Doug, it's Caroline Homer at CAIR. So, I work for the Council on American Islamic Relations, and our overwhelming sentiment after Masterpiece was that if government explicit hostility to religion is a constitutional harm than the Muslim Ban decision is unacceptable. And I'm just kind of curious as to your reaction on that argument.

A: Well, see you're assuming, and maybe I was assuming in my talk tonight, that the Supreme Court acts on principle. And, as I tell my students, I tell them in Constitutional Law, don't get too cynical. All you really have to believe is some of the judges, some of the time, to some extent, act in good faith and on principle. Principally but not exclusively.

When *Masterpiece* came out, you guys said, law professors all over the country said if they mean this it's toast for the travel ban. But no one expected them to really mean it and of course they didn't and what's most embarrassing is both the liberals and conservatives flipped sides, right? The conservatives [liberals? 100:01] who weren't worried about hostility to Jack Phillips were very worried about Trump being hostile to anybody, and the conservatives who put together the majority to protect Jack Phillips were quite happy to let President Trump express hostility and exclude people from Muslim countries.

It was immigration which is where there is a tradition of extreme deference to the executive branch, the national security argument is, there's deference there. There are reasons to understand why they did it, but yeah, it was inconsistent. It clearly was.

Q: So, your litigation strategy after Smith, right, is to expand the definition of laws that aren't generally applicable by finding any kind of exemption from those laws. And I'm wondering if you can speak to the issue that that creates an incentive, right, for a legislature that wants to pass a challenge-proof law to not give any exemptions, right, and so to the extent that you think it's kind of unhealthy for us to be resolving all these big, all these highly-cultural sensitive issues, in front of the Supreme Court instead of hammering them out through a series of sort of ad-hoc legislative compromises, seems that your strategy is creating an incentive to not do that which would be more politically healthy.

A: There's force to that. So, why not just ask the Supreme Court to overrule *Smith*? Well, they've been asked. It is much easier for them to undermine a precedent than it is for them to flat out overrule it, and you see that all the time. For the people who are worried about *Roe v. Wade*,

they're not going to overrule it, they're going to find that nothing is ever a substantial burden on the right to choose.

The second problem is you only get 15,000 words. That's sounds like a lot but it goes in a hurry. You don't have the words to make a full argument about why, even with *Smith*, you should win, because this law is generally applicable, and also to make a full argument about why *Smith* was wrong and why it should be overruled. You've got to choose. And, so far, every litigator whose gotten up there with a case has decided the choice was [distinguish? – 104:04] *Smith,* that's a stronger bet, a better bet, then asking them to overrule it. That does to some extent have the political effect you worried about, that it pushes legislators towards all-or-nothing solutions. It's probably not as bad as your comments suggested, and here's why: If legislature enacts a religious exemption that's only—let me give you a real example instead of a hypothetical. The early version of the contraception rules under Obamacare said only the church itself and orders of nuns basically are exempt. All the other religious non-profits have to provide contraception. Well, that was bad policy, and it violated the *Religious Freedom Restoration Act* because it burdens religious non-profits without having a compelling reason. But it didn't fail the test of general applicability because it wasn't a secular exception. It was a rule that said OK, we are going to compromise here by exempting the most, the core of religion, the most intensely religious organizations and not more marginal religious organizations. There were people arguing that even that was unconstitutional, and I think that was a suicidal argument. That really would have made it impossible for any legislature to ever enact any kind of religious exemption, because the threat would have been if you enact even a little-bitty one, it's going to be expanded to cover the universe. And the court didn't buy that argument. And clearly, they said a little bit about it at the opinion but clearly at the oral argument they were all deeply suspicious and hostile to that argument. So, I think it's still possible to do exemptions legislatively that compromise in some way. What the legislature can't do is provide secular exceptions not religious or provide religious exceptions that discriminate, right? It can't say OK, Catholics are exempt but Protestants aren't, or vice versa. You know there are restrictions on what the legislature can do, but it still has room to compromise here. So you point to a risk, but I don't think it's an insoluble risk.