

# *The Evolution of Religious Rights under the Law: Implications for Zubik v. Burwell*

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# First Amendment: Hierarchy of Religious Rights

“The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods, or no god.”

“the legitimate powers of government reach actions only, & not opinions”

---Thomas Jefferson

- The Right to Believe = Absolute  
(harms no one)
- The Right to Religious Speech = Highly Protected  
(harm unlikely)
- The Right to Religious Conduct = The Law Governs Actions  
(harm more likely)

# Religious Liberty: Pre-RFRA

## Ordered Liberty Under the Constitution, First Amendment, Free Exercise Clause (1878 – Present)

- *Employment Division v. Smith*, 494 U.S. 872 (1990) and *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993)
- Believer must prove law imposes a substantial burden
- A neutral, generally applicable law is constitutional unless irrational
- If law is not neutral or not generally applicable, ordinary strict scrutiny applies: the government must prove a compelling interest and that the law is narrowly tailored
- The right is only good against the government (state action)

## Singular Departure from Ordered Liberty Cases (1972)

- *Wisconsin v. Yoder*, 406 U.S. 205 (1972)
- Believer must prove a substantial burden
- Only Supreme Court case where a neutral, generally applicable law is subjected to strict scrutiny
- Government must prove a compelling interest and that the law is narrowly tailored

# RFRA and Beyond

## **Religious Freedom Restoration Act of 1993**

- Believer must prove a “substantial burden”
- Government must prove a neutral, generally applicable law serves a “compelling interest”
- Narrow tailoring is replaced by the more extreme “least restrictive means”
- Relief permitted only “against a government”

## **Amendments to the Religious Freedom Restoration Act (2000)**

- Expands definition of “religious exercise” to: “any exercise of religion, whether or not compelled by, or central to, a system of religious belief”

# RFRA and *Hobby Lobby*

- Interpretation of RFRA expanded to include for-profit corporations
- Broadened lens from individual protections to include employer protections
- “Substantial burden” is narrowly defined
- Reaches holding without explanation on when a burden on a third party (employee) could deter a RFRA claim by the employer

# *Zubik v. Burwell*: How could SCOTUS ruling further stretch RFRA's reach

- Could set a precedent to allow religious objectors (employers) to limit independent third-party actions, regardless of the faith of those affected
- Could create disincentive to legislative accommodation and public safety by forcing accommodation of already existing accommodation