

HOBBY LOBBY AND THE DUBIOUS ENTERPRISE OF RELIGIOUS EXEMPTIONS

IRA C. LUPU*

The experience of the past fifty years, culminating in *Burwell v. Hobby Lobby*, provides grounds for deep skepticism of any sweeping regime of religious exemptions. Part I of this Article views the problem in the current legal and cultural moment, which includes religious objections to employer-provided insurance that covers contraceptive care for women and religion-based refusals by wedding vendors and others to facilitate the celebration of same-sex marriages. Part II broadens the time frame to analyze the regimes of religious exemption—federal and state, constitutional and statutory—in which such disputes have played out. Such regimes will tend to be strong in rhetoric and weak in practice, with an occasional outburst of religion-protecting vigor. The decision in *Burwell v. Hobby Lobby*, analyzed in Part III, demonstrates yet again that application of vague, general standards for adjudicating religious exemption claims cannot satisfy values associated with the rule of law. The key terms in the Federal Religious Freedom Restoration Act¹ (hereafter “Federal RFRA” or “RFRA”), and the similar state laws modeled on the Federal RFRA, are perpetually contested and subject to massive, result-oriented manipulability. Part IV addresses issues likely to arise in the wake of *Burwell v. Hobby Lobby*, including questions of LGBT equality. In light of past experience, Part IV argues that *Burwell v. Hobby Lobby* will suffer the same fate as earlier, apparently strenuous embraces of religious exemption regimes. Ultimately, it will wither on a malnourished vine.

* F. Elwood & Eleanor Davis Professor of Law Emeritus, George Washington University. My thanks to the organizers of the Symposium on Religious Accommodation in the Age of Civil Rights; to Bob Tuttle for a series of illuminating conversations about the topic and for his comments on successive drafts; to Fred Gedicks, Andy Koppelman, Marty Lederman, Doug NeJaime, Jim Oleske, Naomi Schoenbaum, Micah Schwartzman, and Nelson Tebbe for very helpful comments on earlier drafts of the piece; and to Christina Hobbs, a member of the class of 2016 at George Washington University Law School, whose research assistance contributed significantly. The errors are mine.

¹ 42 U.S.C. §§ 2000bb–2000bb-4 (2012).

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INTRODUCTION

Students of religious liberty typically have intuitions about exempting religious objectors from legal duties with which others must comply. A common assumption is that American law can be truly and adequately respectful of religious freedom only if the law offers avenues to accommodate deeply held, conscientious religious commitments. Moreover, most students of the subject think that legislatures or administrators cannot be fully trusted to produce an optimum mix of well-deserved, practice-specific accommodations—that is, to do justice over time in the mix of grants and denials of such accommodations. Power advantage, manipulation and control of agenda-setting, and religious prejudice are likely to be all too prominent in the legislative process, and frequently in administrative processes as well.

With this set of intuitions, the choice to involve an impartial judiciary in the enterprise of religious accommodation seems salutary. Courts, unlike other branches, are obliged to hear all justiciable claims. Case-by-case adjudication, under general standards, guided by reliance on precedent and analogical reasoning, appears to offer hope for a just process of determining when religiously motivated practices should be shielded from negative legal consequences.

This set of intuitions extends to substance as well as to process. When confronted with examples, most people can identify religious claims that

appear highly exemption-worthy, because denying them appears to greatly intrude on faith while producing little or no public benefit. Consider the example of a school that forbids the wearing of hats, and its consequent refusal to accommodate a child whose faith requires him or her to wear a head covering. Conversely, many people can identify claims that seem obviously unworthy of exemption, even if the relevant practice is central to a particular faith, because granting them appears to produce a risk of significant harm to others. Consider the example of an airline passenger who asserts that her faith requires her to carry a deadly weapon at all times.

Having constructed categories of easy cases, defined primarily (though not exclusively) by risk of harm, most students of the subject will eventually arrive at close or difficult cases with respect to granting accommodations or exemptions. Perhaps the significance of certain practices within a particular faith is unclear; perhaps the risk of harm they create is in a non-trivial mid-range. Consider the example of a soldier who asserts that she can never work the evening shift on a military base on account of her religious duties at home during the evening hours. Her religious duties may be difficult for outsiders to her faith to understand, and accommodating her faith commitments inevitably will impose extra evening work on others.

In these kinds of cases, judges applying standards of an exemption regime typically will want to know more about the religious practice, its significance to its adherents, and the harms to others that may follow from accommodating the practice. As information about particular claims accumulates, and variations among the claims proliferate, judges soon will be forced to confront a set of conflicting intuitions, not only about the cases in the middle ground, but also about which cases fall into each of three categories—yes, no, and maybe. They will be uncertain about so many of the relevant variables—the faith, the role of the practice within it, the religious significance of accommodation or non-accommodation, and the costs that accommodation may inflict on government interests or private third parties.

At a level deeper, judges may also be concerned about the sincerity of exemption claimants, the incentives that a pro-exemption ruling may create for insincere claims, and the intrusiveness of the process for weeding out insincere claims. Alas, judges will find no satisfactory template in existing or past law for rigorous and principled evaluation of these multiple variables. Eventually, as cases accumulate, their pattern of results will not be easily defended as a whole.

Adjudication of religious exemptions, under any scheme that applies to all government action and operates under highly general criteria, repeatedly reveals this dilemma. We can opt for a judicially administered, generalized exemption regime that will in particular cases result in what some observers will see as “good outcomes,” all things considered. Over time, however, that regime is highly likely to be unprincipled, ad hoc, inconsistent, subject to manipulation, and predominantly statist. Such a regime will pretend to be sensitive to religious practice, while nearly always deferring to needs of gov-

ernment. Moreover, to the extent the regime permits judges to determine the religious weight and significance of certain practices, the regime unconstitutionally entrusts the state with questions that it is constitutionally incompetent to answer.²

In order to avoid those problems, which involve serious concerns of justice and constitutional limitation, we can opt to eliminate any such regime of adjudication. That would limit religion-specific exemptions to those produced by legislation and administration in regard to particular practices.³ Courts must operate on consistent principles, applicable to all; other branches have more obvious leeway in balancing costs and benefits. For this reason, the judiciary presents a complex and highly problematic forum in which to unpack questions of religious exemptions. An institutional arrangement that favors practice-specific accommodations by legislatures and administrators, when joined with other modes of protection of religious liberty,⁴ richly protects the interests of religious people without doing violence to the rule of law.

My approach to this set of issues is Holmesian, grounded in experience rather than abstract logic.⁵ As the article will demonstrate, that experience has been repeated at various intervals over the past fifty years. Judges, and at times legislators as well, have acknowledged the normative gravity of claims for religious exemption. These acknowledgments have led to the promulgation of seemingly religion-protective standards for measuring these claims

² See IRA C. LUPU & ROBERT W. TUTTLE, SECULAR GOVERNMENT, RELIGIOUS PEOPLE 226–32 (2014) [hereinafter LUPU & TUTTLE, SECULAR GOVERNMENT] (arguing that the Establishment Clause of the First Amendment precludes determination of the religious significance of particular beliefs or practices and offering examples of breach of this prohibition in cases arising in prisons); Ira C. Lupu & Robert W. Tuttle, *The Forms and Limits of Accommodation: The Case of RLUIPA*, 32 CARDOZO L. REV. 1907, 1913–19, 1926–36 (2011) [hereinafter Lupu & Tuttle, *The Case of RLUIPA*] (echoing a similar argument and application of the idea in cases involving religious land use and prisons).

³ These exemptions are subject to Establishment Clause constraints, which tend to be under-noticed and highly significant. For an excellent elaboration of the relevant Establishment Clause norms, see Frederick Mark Gedicks & Rebecca G. Van Tassel, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 356–71 (2014); see also LUPU & TUTTLE, SECULAR GOVERNMENT, *supra* note 2, at 216–25.

⁴ These modes are spelled out in chapters 6–7 of LUPU & TUTTLE, SECULAR GOVERNMENT, *supra* note 2, and summarized succinctly in the conclusion to this paper, see *infra* Concluding Note on Religious Liberty.

⁵ See OLIVER WENDELL HOLMES, JR., THE COMMON LAW 3 (1881) (“The life of the law has not been logic; it has been experience. . . . In order to know what it is, we must know what it has been, and what it tends to become.”). To be sure, there have been powerful voices behind the view that a regime of free exercise exemptions is normatively indefensible. See, e.g., CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 78–120 (2010); Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555 (1998); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991). For a very different approach leading to a similar conclusion, see generally WINNIFRED FALLERS SULLIVAN, THE IMPOSSIBILITY OF RELIGIOUS FREEDOM (2007).

against the government's competing concerns. Free exercise law and then statutory law (federal and state) have at various times embodied such standards.

On rare occasions, application of these standards has produced important victories for religious freedom. Far more frequently, however, judges have displayed pseudo-sensitivity to religious freedom. Judges have flinched at such claims, either by weakening the standards or working around them. As I hope the article demonstrates, the best explanation for this pattern is not bias against religion or against particular faiths. Rather, the culprit is statism, heavily colored by anxiety about maintaining a toehold on the slippery slope of choosing among seemingly analogous claims.

Part I locates the piece in the moment—that is, in our current situation of conflict over religious accommodations with respect to (1) the Affordable Care Act's requirement of contraceptive coverage in health insurance and (2) legal duties to refrain from discrimination on the basis of sexual orientation. Part II turns to the historical evidence that a generalized exemption regime will be rhetorically strong, experientially weak, and relentlessly ad hoc in its results. Part II.A addresses the experience from 1963–1990 under a constitutional regime of free exercise exemptions. Part II.B discusses *Employment Division, Department of Human Resources of Oregon v. Smith*⁶ and the uneasy path from *Smith* to the Federal RFRA. Part II.C analyzes the record of adjudication under the Federal RFRA, both before and after *City of Boerne v. Archbishop Flores of San Antonio*,⁷ which invalidated RFRA as applied to the states. Part II.D brings in the experience under state RFRAs in the same twenty-plus year period. Part II.E draws lessons from our collective experience with religious exemption regimes since 1963.

Part III then analyzes *Burwell v. Hobby Lobby Stores, Inc.*⁸ in light of the general regime concerns that this history illuminates, and shows how the various opinions perfectly illustrate the general dilemma of adjudicating religious exemptions under a set of general standards. Part IV offers an assessment, drawn from this half century of experience, of the implications of *Hobby Lobby* for future conflicts, especially those between religious freedom and LGBT equality.

I. GENDER EQUALITY AND RELIGIOUS ACCOMMODATIONS ON THE EVE OF *HOBBY LOBBY*

Through the late winter and spring of 2014, lawyers and scholars focused on religious liberty watched with mounting engagement and anxiety as a number of parallel battles played out. The most prominent one, which

⁶ 494 U.S. 872 (1990).

⁷ 521 U.S. 507 (1997).

⁸ 134 S. Ct. 2751 (2014) (decided together with No. 13-356, *Conestoga Wood Specialties Corp. v. Burwell*).

had roiled American law and politics over the prior few years, involved the Affordable Care Act's requirement that employer-provided health insurance include all forms of female contraception. The Supreme Court's decision in *Hobby Lobby* has now resolved several aspects of those disputes. As discussed in Part III, however, the decision leaves open a number of crucial questions, including most urgently the question of the legal validity of the existing accommodation for religiously affiliated nonprofit institutions.⁹

The most important legal authority in the cases concerning the contraceptive mandate has never been the Free Exercise Clause of the First Amendment.¹⁰ No court has ever found that the mandate violates the Free Exercise Clause. Instead, the Federal RFRA¹¹—far less familiar to the general public—has been the center of legal gravity for this body of litigation. The dominance of RFRA, however, has meant all along that the Supreme Court's interpretation, in an earlier era, of the Free Exercise Clause would play a crucial role. As discussed in detail later in this paper, Congress intended RFRA to “restore” by statute some version of those prior interpretations.¹² Moreover, state RFRAs are modeled on the Federal RFRA, so prior free exercise decisions are similarly influential in the interpretation of state law.

Here is the brief, operative provision of the Federal RFRA:¹³

(a) In general

⁹ Compare *Univ. of Notre Dame v. Burwell*, 743 F.3d 547, 554 (7th Cir. 2014) (rejecting RFRA claim by the university against the accommodation), with *Little Sisters of the Poor Home for the Aged v. Sebelius*, 134 S. Ct. 1022, 1022 (2014) (granting a stay against enforcement of the accommodation against a religious nonprofit); see also *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2807 (2014); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-5638, (D.C. Cir. Nov. 14, 2014), archived at <http://perma.cc/339T-3PFH> (holding that the accommodation, in its current form, does not impose a substantial burden on an objecting non-profit entity). There also remains the question of the application of the *Hobby Lobby* decision to for-profit firms that object to covering all female contraceptives, versus only those considered by the employer to be abortifacients. The objections in *Hobby Lobby* and *Conestoga Woods* were limited to the latter. See Lyle Denniston, *Wider Impact of Hobby Lobby Ruling?*, SCOTUSBLOG (Jul. 1, 2014, 12:05 PM), <http://www.scotusblog.com/2014/07/wider-impact-of-hobby-lobby-ruling>, archived at <http://perma.cc/Z336-8LH5> (summarizing and linking to the Supreme Court's orders to the circuit courts to reconsider cases involving RFRA challenges to coverage of all pregnancy prevention services). It is difficult to imagine those decisions being resolved against the objecting firms.

¹⁰ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”). Claimants in cases challenging the mandate have always included Free Exercise Clause claims, but courts that have ruled for the claimants have always done so on the basis of the Federal RFRA, without reaching the free exercise arguments, see *Hobby Lobby*, 134 S. Ct. at 2785, and courts that have ruled against the claimants' RFRA arguments have all rejected the free exercise arguments, see *Conestoga Woods Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 379, 388 (3rd Cir. 2013), *rev'd sub nom. Hobby Lobby*, 134 S. Ct. 2751.

¹¹ 42 U.S.C. §§ 2000bb–2000bb-4 (2012).

¹² As discussed in Part III, Justices Alito and Ginsburg duelled over the scope of this restoration of case law in their majority and dissenting opinions, respectively, in *Hobby Lobby*.

¹³ 42 U.S.C. § 2000bb-1 (2012).

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

RFRA's general prohibition on the government burdening religious exercise appears to be a strict command ("shall not"); RFRA's exception looks familiar to constitutional lawyers, well-acquainted with the language of compelling interests and least restrictive means, both of which ordinarily signal a strong presumption against the government. As elaborated below, however, the narrative of RFRA's enactment and subsequent interpretation maps erratically at best onto the use of these concepts elsewhere in constitutional law. For lawyers and academics who have tracked the entire mass of contraceptive mandate litigation over the past few years, the many RFRA questions raised in these cases have defied any easy path to resolution. In considerable part, the resistance to clear answers has not simply been the product of the cognitive dissonance produced by the conflicts between conservative religious values and women's reproductive freedom. For even the most careful and open-minded of lawyers, these cases presented a set of difficult and interrelated questions. Here is a list, inevitably incomplete:¹⁴

1. **Corporate Religious Exercise:** Is a corporation a "person" within the meaning of RFRA's operative provision? How can an artificial person exercise religion? Are business corporations a different sort of artificial person than religiously affiliated nonprofit entities, such as universities, hospitals,

¹⁴ For an impressively comprehensive identification and analysis of the issues raised in *Hobby Lobby*, see Marty Lederman, *Compendium of Posts on Hobby Lobby and Related Cases*, BALKINIZATION (Jul. 19, 2014, 3:16 AM), <http://balkin.blogspot.com/2014/02/compendium-of-posts-on-hobby-lobby-and.html>, archived at <http://perma.cc/8DU6-FD67>; Eugene Volokh, *Hobby Lobby, the Employer Mandate, and Religious Exemptions*, THE VOLOKH CONSPIRACY (Dec. 2, 2013, 12:40 AM), <http://www.volokh.com/2013/12/02/hobby-lobby-employer-mandate-religious-exemptions>, archived at <http://perma.cc/ZL2F-Z74Q>. The Establishment Clause issues in the litigation are thoroughly analyzed in Gedicks & Van Tassel, *supra* note 3, at 372–83; Micah Schwartzman, Richard Schragger & Nelson Tebbe, *The Establishment Clause and the Contraceptive Mandate*, BALKINIZATION (Nov. 27, 2013, 2:05PM), <http://balkin.blogspot.com/2013/11/the-establishment-clause-and.html>, archived at <http://perma.cc/A9YN-XZRW>; Nelson Tebbe, Richard Schragger & Micah Schwartzman, *Hobby Lobby and the Establishment Clause, Part II: What Counts as a Burden on Employees?*, BALKINIZATION (Dec. 4, 2013, 6:04PM), <http://balkin.blogspot.com/2013/12/hobby-lobby-and-establishment-clause.html>, archived at <http://perma.cc/8NA-N92T>; Micah Schwartzman, Richard Schragger & Nelson Tebbe, *Hobby Lobby and the Establishment Clause, Part III: Reconciling Amos and Cutter*, BALKINIZATION (Dec. 9, 2013, 11:15AM), http://balkin.blogspot.com/2013/12/hobby-lobby-and-establishment-clause_9.html, archived at <http://perma.cc/RDY9-K3U7>.

and charities? How can these entities be “persons” if business entities are not?

2. **“Substantially Burden”:** What counts as a “burden” under RFRA, and what makes a burden “substantial”? May courts look at the religious weight and significance (that is, the religious cost of compliance with the law) of the asserted burden, or are they limited to examining the secular costs of non-compliance? Does the availability of an employer option to drop health coverage and pay a tax make the secular burden of the mandate insubstantial? Does legal pressure that may lead an employer to facilitate the “sins” of others, who make independent behavioral choices, constitute a substantial religious burden on the employer?

3. **“Compelling Governmental Interest”:** What governmental interests are compelling enough to justify imposition of such burdens? Are these interests to be measured in general terms, such as “women’s health” or “gender equality,” or only as implicated by particular exemption claims—that is, by the marginal cost to the government or affected third parties of recognizing exemptions? If an employer refuses to cover certain goods in a health insurance policy, is the harm any greater than the cost to employees of self-insuring for those goods? Why should the government be so strenuously interested in avoiding that kind of cost shifting?

4. **“Least Restrictive Means”:** When, if ever, are less restrictive means unavailable to achieve this kind of government interest? In particular, when the interest is in providing some good (contraceptive goods and services, for example) rather than avoiding some privately inflicted harm (an act of violence, for example), can’t the government always provide the good itself rather than imposing a duty on private parties to provide that good?

What was striking about the conversation that flowed across these discrete issues was the near-total lack of a common frame of reference for discussing them. On every question, advocates talked past each other. When Hobby Lobby’s supporters asked why the Green family should be made to leave their religious values at home when they went into business, the government’s supporters replied by asking why the Greens should be permitted to impose their religious values on employees and their families.¹⁵

These dueling sound bites were not merely an artifact of rhetorical strategy and legal or political positioning. Rather, as Part II below explains, this was a thoroughly predictable feature of the conversation about the content and application of the standards that supposedly guide religious exemp-

¹⁵ Professor Tuttle and I played our own parts in this game, though our first joint post on the case straddled the sides to some extent. See Ira Lupu & Robert Tuttle, *Symposium: Religious Questions and Saving Constructions*, SCOTUSBLOG (Feb. 18, 2014, 11:12 AM), <http://www.scotusblog.com/2014/02/symposium-religious-questions-and-saving-constructions>, archived at <http://perma.cc/JLM5-ZLNF> [hereinafter Lupu & Tuttle, *Symposium: Religious Questions and Saving Constructions*] (agreeing with *Hobby Lobby* on the question of substantial burden, but arguing that the government should prevail because an exemption would harm workers and their dependents).

tions. The endless plasticity of those standards invites widely disparate lines of argument for advocates and equally disparate modes of resolution for judges.

As the many challenges to the Affordable Care Act's contraceptive mandate made their way through the federal courts,¹⁶ a related cultural conflict exploded. Across the heartland of America, proponents of civil equality for same-sex couples dueled legally and politically with religious objectors to that equality. One manifestation of the conflict involved attempts in Kansas, Arizona, Mississippi, and other states to legislate about religious freedom. The proposed Kansas law, entitled "AN ACT concerning religious freedoms with respect to marriage,"¹⁷ would have very specifically precluded the imposition of any legal duty on an "individual or religious entity" to provide any services or goods related to any marriage or to the celebration of any marriage, or any legal duty to "treat any marriage . . . as valid."¹⁸ The proposed law defined "religious entity" to include privately held, for-profit businesses as well as nonprofit entities.¹⁹

No one had any doubt about the source of political energy that was driving the proposed Kansas law, which passed one house of the state legislature. In the weeks leading up to its consideration, federal district courts in Hawaii, Oklahoma, Virginia, Kentucky, and Utah had ruled that the Fourteenth Amendment required the State to allow same-sex couples the same rights to marry as opposite-sex couples.²⁰ The proposed Kansas law was an effort to pre-emptively bar the application of anti-discrimination norms, which at the time did not even exist in Kansas law, to businesses, public employees, and others who objected on religious grounds to same-sex un-

¹⁶ For a complete list, see *HHS Mandate Information Central*, THE BECKET FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/hhsinformationcentral/#tab1>, archived at <http://perma.cc/A3QP-58Y5>.

¹⁷ H.R. 2453, 85th Leg., Reg. Sess. (Kan. 2014), archived at <http://perma.cc/3FJT-DM42>.

¹⁸ *Id.* § 1(c).

¹⁹ *Id.* § 3(a).

²⁰ *Amsterdam v. Abercrombie*, No. 13-00649 SOM-KSC, 2014 WL 689764, at *1, *4 (D. Haw. Feb. 19, 2014); *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1296-97 (N.D. Okla. 2014), *aff'd sub nom.* *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014), *cert. denied*, 83 U.S.L.W. 3189 (U.S. Oct. 6, 2014) (No. 14-136); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 480-82 (E.D. Va. 2014), *aff'd sub nom.* *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), *stay granted sub nom.* *McQuigg v. Bostic*, 83 U.S.L.W. 3105 (U.S. Aug. 20, 2014) (No. 14A196), *cert. denied*, 83 U.S.L.W. 3189 (U.S. Oct. 6, 2014) (No. 14-153); *McGee v. Cole*, 993 F. Supp. 2d 639, 657-58 (S.D. W. Va. 2014); *Bourke v. Beshear*, 996 F. Supp. 2d 542, 544-46 (W.D. Ky. 2014), *stay continued sub nom.* *Love v. Beshear*, No. 3:13-CV-750-H, 2014 WL 1117271 (W.D. Ky. Mar. 19, 2014), *stay continued*, 989 F. Supp. 2d 536 (W.D. Ky. 2014); *Evans v. Utah*, No. 2:14CV55DAK, 2014 WL 2048343, at *21 (D. Utah May 19, 2014), *stay denied*, No. 14-4060, 2014 U.S. App. LEXIS 15972 (10th Cir. Jul. 11, 2014), *stay granted sub nom.* *Herbert v. Evans*, 83 U.S.L.W. 3073 (U.S. Jul. 18, 2014) (No. 14A65); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1188 (D. Utah 2013), *stay denied*, No. 2:13-cv-217, 2013 WL 6834634 (D. Utah Dec. 23, 2013), *stay granted*, 134 S. Ct. 893 (2014), *aff'd*, 755 F. 3d 1193 (10th Cir. 2014), *cert. denied*, 83 U.S.L.W. 3189 (U.S. Oct. 6, 2014) (No. 14-124).

ions. As such, the proposal triggered a firestorm of criticism, and the state Senate eventually balked and refused to enact the measure.²¹

The angry political conflict in Kansas quickly spilled over into a controversy about proposed amendments to Arizona's Free Exercise of Religion Act.²² Although neither the Act nor the proposed amendments said anything about weddings, marriages, sex, or gender, the proposal immediately drew fire as an attempt to achieve the same ends as the Kansas proposal. The amendments would have explicitly allowed for-profit business corporations to raise claims and defenses under the Act²³ and would have clarified that such defenses were available in private lawsuits as well as actions brought by the State of Arizona.²⁴ Critics of these amendments successfully painted them as being "licenses to discriminate" against those in same-sex relationships, and Governor Brewer—under great pressure from business interests and threatened with the loss of Arizona's winning bid to host the Super Bowl in Phoenix in February 2015 if the bill passed—vetoed the bill.²⁵

A few weeks before oral argument in *Hobby Lobby*, and a few weeks after the political explosion over religious freedom legislation proposed in Kansas and Arizona, a less well-noticed conflict played out in the State of Mississippi. The state's Republican leaders introduced and advocated for a Religious Freedom Restoration Act.²⁶ The proposed Act made no mention of marriage, same-sex or otherwise. Moreover, Mississippi (like many other states) neither recognizes same-sex marriage nor prohibits discrimination against LGBT people in the distribution of goods and services.²⁷ Nevertheless, the political conflict over the measure, which eventually became law²⁸ in a form weaker than originally proposed, centered precisely on the question of whether the proposal would license that kind of discrimination, in the context of wedding celebrations or otherwise.²⁹

²¹ Bryan Lowry, *Kansas Senate Leaders Kill Controversial Religious Freedom Bill*, WICHITA EAGLE (Feb. 18, 2014), <http://eprod.kansas.com/news/article1134753.html>, archived at <http://perma.cc/5UWU-HHLV>.

²² S.B. 1062, 51st Leg., 2d Reg. Sess. (Ariz. 2014).

²³ *Id.* § 41-1493(5).

²⁴ *Id.* § 41-1493.01(D).

²⁵ Alia Beard Rau, Yvonne Wingett Sanchez & Mary Jo Pitzl, *Arizona Gov. Jan Brewer Vetoes Senate Bill 1062*, ARIZ. REPUBLIC (Feb. 26, 2014), <http://www.azcentral.com/news/politics/articles/20140226arizona-jan-brewer-1062-statement.html>, archived at <http://perma.cc/GM9L-WNHE>.

²⁶ S.B. 2681, 2014 Leg., Reg. Sess. (Miss. 2014), archived at <http://perma.cc/ZJT5-X6J8>.

²⁷ See Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CAL. L. REV. 1169, 1190 n.66–67 (2012) (listing twenty-one states, not including Mississippi, and the District of Columbia as having laws prohibiting discrimination on the basis of sexual orientation).

²⁸ MISS. CODE ANN. § 11-61-1 (2014) (limiting the Act to claims against government and not including claims or defenses against private parties).

²⁹ See, e.g., Emily Wagster Pettus, *Miss. Governor Signs Religious Freedom Bill that Could Allow Anti-Gay Discrimination*, LGBTQ NATION (Apr. 3, 2014), <http://>

In the skirmishing over the Mississippi RFRA, two groups of legal scholars sent letters to the state's legislative leaders with respect to the law's merits and likely impact. The signatories on the first of those letters included a group that had been advocating for the rights of vendors to refuse on religious grounds to provide goods and services to same-sex wedding ceremonies.³⁰ This communication, under the letterhead of Professor Douglas Laycock, made absolutely no mention of weddings or discrimination. After describing the pattern of state RFRA's and the content of Mississippi constitutional law, the letter argued the following:

[T]he standard [the proposed Mississippi RFRA] creates now applies to the federal government and more than 30 of the states, and was the standard for the entire country from 1963 to 1990. In the places where this standard applies, it has not been interpreted in crazy ways that have caused problems for those jurisdictions; if anything, these laws have been enforced too cautiously.³¹

The second letter,³² to which I was a signatory, read in tone and content as if it were addressed to an entirely different legislative proposal. The letter emphasized the potential reliance on a state RFRA to discriminate against LGBT people and others, and it highlighted the strenuous recent enforcement of the Federal RFRA, upon which the Mississippi RFRA (and that of many other states) is modeled. In particular, the letter emphasized that the terms of RFRA

are tilted heavily in favor of religious freedom claims and against competing civil rights concerns Recent decisions by the Su-

www.lgbtqnation.com/2014/04/miss-governor-signs-religious-freedom-bill-that-could-allow-anti-gay-discrimination, archived at <http://perma.cc/BZJ7-EBNP>.

³⁰ Many of their communications to legislators on this subject are available. Thomas Berg, *Archive: Memos/Letters on Religious Liberty and Same-Sex Marriage*, MIRROR OF JUSTICE (Aug. 2, 2009), <http://mirrorofjustice.blogspot.com/mirrorofjustice/2009/08/memos-letters-on-religious-liberty-and-samesex-marriage.html>, archived at <http://perma.cc/XTR3-PCM9>.

³¹ Letter from Douglas Laycock, Professor of Law, Univ. of Va. Sch. of Law, et al. to Philip Gunn, Speaker, Miss. House of Representatives 2 (Feb. 11, 2014), <http://www.scribd.com/doc/210109360/Mississippi-RFRA>. The signatories included Professors Richard Garnett, Thomas Berg, and Christopher Lund, all of whom had urged the legislatures of other states to create wedding vendor exceptions to state law duties to serve without discrimination based on sexual orientation. See materials archived at MIRROR OF JUSTICE, *supra* note 30.

³² Letter from Ira C. Lupu, Professor of Law, George Washington Univ. Sch. of Law & Religious Liberty Scholars Opposing Miss. Bill 2681 to Phillip Gunn, Speaker, Miss. House of Representatives et al. 4-5 (Mar. 10, 2014) [hereinafter Letter Opposing Miss. Bill 2681], archived at <http://perma.cc/3U2M-L2LW>. The signatories included several scholars, myself included, who had earlier urged the Illinois legislature to defeat a legislative proposal (backed by the Laycock group) that would protect the freedom of vendors to refuse on religious grounds to serve same-sex weddings. See Letter from Ira C. Lupu, Professor of Law, George Washington Univ. Sch. of Law & Religious Liberty Scholars Opposing Illinois "Marriage Conscience Protection" Provisions (Oct. 23, 2013), archived at <http://perma.cc/5PXG-JG69>.

preme Court and the lower federal courts highlight [the Federal] RFRA's significant weighing in favor of religious interests, and against whatever government interests are on the other side.³³

The letter went on to emphasize the (recent) ease of satisfying the requirement of "substantial burden on the[] exercise of religion"³⁴ because "any sort of fine or legal sanction imposed for conduct that the actor asserts is motivated by his religious faith will be sufficient to show such a burden."³⁵

Moreover, as the letter argued:

Once a showing of substantial burden has been made, the requirement in [the Bill] that the government show that application of a law is "essential to further a compelling state interest" and the "least restrictive means" to do so is likely to be very difficult to satisfy. Federal RFRA imposes an identical standard on the federal government. In the most prominent Federal RFRA decision to date, *Gonzales v. O Centro [Beneficente Uniao do Vegetal]*, 546 U.S. 418 (2006), the Supreme Court unanimously ruled that the federal government had not sufficiently proven that it had a compelling interest in stopping importation of a hallucinogenic drug (*hoasca* tea), banned by the Federal Controlled Substances Act. . . .

Suppose [the proposed Mississippi RFRA] becomes law. If a person raises a RFRA defense to a charge under state or local anti-discrimination law (whether already enacted or enacted after [RFRA]), that person would likely include as part of his defense that other, non-objecting persons provide the same or similar goods and services. Such a person would assert that the existence of alternative providers renders application of the law not "essential" as to him. . . . [I]f state courts follow the model of [recent federal decisions], the state's RFRA might protect exactly that kind of discrimination.³⁶

Was one of these groups of scholars being deceptive or dishonest in its arguments to the Mississippi legislature? I make no such claim. The scholar-proponents of the Mississippi RFRA had a complex agenda, which included a general concern for religious freedom; this concern extended to empowering at least some religious objectors to same-sex marriage. And, as elaborated in Part II.D below, these proponents quite accurately asserted that a number of state RFRA's had been weakly enforced. The scholar-opponents

³³ Letter Opposing Miss. Bill 2681, *supra* note 32 (emphasis added).

³⁴ *Id.* at 5 (quoting S.B. 2681 § 1(5)(a), 2014 Leg., Reg. Sess. (Miss. 2014)).

³⁵ *Id.* ("So will any threat of lost government benefits, 'exclusion from government programs,' or lost 'access to governmental facilities' as a result of religious exercise.") (quoting S.B. 2681 § 1(4)(a), 2014 Leg., Reg. Sess. (Miss. 2014)).

³⁶ *Id.* at 5-6 (footnote omitted).

had a more focused agenda—flagging a RFRA as a potential threat to anti-discrimination laws in general,³⁷ and as a constraint on full marriage equality in particular. The opponents also accurately asserted that the Federal RFRA had become more potent over the past several years, especially in light of the litigation challenges to the contraceptive mandate. The proponents had no interest in flagging the recent surge in strength of the Federal RFRA; that development undercut their claim that a state RFRA was likely to do some good with little risk of harm.

What was striking to those who were simultaneously monitoring the contraceptive mandate litigation concerning the Affordable Care Act, and the Mississippi RFRA fight, was the conceptual overlap between the Federal RFRA questions in the former and the potential questions that the latter might eventually generate. Can a business corporation be a “person” who exercises religion? Is a requirement to provide (or not discriminate in the provision of) certain goods and services a “substantial burden” on the provider’s religious exercise, when the provider objects to use of the goods by others for certain purposes? Does the government have a compelling interest in disallowing all exemptions from such obligations, even if alternative methods of provision of these goods are likely to be available?

In the middle of this political debate in Mississippi, Professor Thomas Berg (one of the proponents of the state RFRA and a contributor to this Symposium) commented in a blog post that the atmosphere for proponents of RFRA had become “toxic.”³⁸ Indeed. As Professor Berg well knows, the moment’s toxicity was a function of the marriage equality battle. But the problem presented by RFRA, or any other mechanism for adjudication of religious exemptions under general standards, is not momentary,³⁹ and is not limited to the context of same-sex marriage or anti-discrimination law more generally. The problem is territorial and longstanding—such regimes invite

³⁷ Active proponents of the Mississippi RFRA were explicit in their defense of the law as supportive of the rights of wedding vendors to refuse service to same-sex couples. See, e.g., *FRC Commends Mississippi Legislature for Approving Religious Freedom Legislation*, FAMILY RESEARCH COUNCIL (Apr. 1, 2014), <http://www.frc.org/pressrelease/frc-commends-mississippi-legislature-for-approving-religious-freedom-legislation>, archived at <http://perma.cc/KF4T-G475>.

³⁸ Thomas Berg, *The Scholars’ Mississippi Letter: RFRA in General Are Now Bad*, MIRROR OF JUSTICE (Mar. 25, 2014), <http://mirrorofjustice.blogspot.com/mirrorofjustice/2014/03/the-scholars-mississippi-letter-rfras-in-general-are-now-bad.html>, archived at <http://perma.cc/LH2U-DRHK> (“[P]olitically this is an impossibly toxic time to propose a state RFRA.”). The time is anti-toxic for those Mississippi businesses whose owners oppose anti-gay discrimination, and are publicizing their opposition to what they believe the state RFRA represents. See Michael K. Lavers, *Business Owners Challenge Anti-Gay Miss. Law*, WASH. BLADE (July 11, 2014), <http://www.washingtonblade.com/2014/07/11/business-owners-challenge-anti-gay-miss-law>, archived at <http://perma.cc/FX5A-F9VM> (showing anti-discrimination seal that such business owners are putting on their shop doors).

³⁹ For an argument that the events outlined in this Part I do indeed represent a crucial “moment” in the historical narrative of religious liberty in the United States, see Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154 (forthcoming 2014).

sympathy for the plight of religious objectors, but they also invite indeterminacy, result-orientation, frequent (though undisclosed) pro-government bias, and the exercise of official power over questions that are wisely walled off from state resolution by the Constitution.

II. A BRIEF HISTORY OF RELIGIOUS EXEMPTION REGIMES

Like the subject of time, a narrative history of religious exemption regimes does not invite brevity.⁴⁰ My thesis, however, depends on explication of this history. Any useful version, however brief, must build the connection between now-abandoned constitutional law of religious exemptions and the developing statutory law (federal and state) that relates to the same set of concerns. Accordingly, Part II.A addresses the development of religious exemptions and the use of the compelling interest test in Free Exercise Clause decisions from 1963–1990. Part II.B focuses on *Employment Division v. Smith*,⁴¹ which ended that era, and the enactment in 1993 of RFRA, which originally applied to all law, federal and state, in the United States. Part II.C turns to litigation results under the Federal RFRA. Part II.C.1 identifies the litigation pattern under RFRA from 1993 until 1997, when the decision in *City of Boerne* invalidated RFRA as applied to state and local law.⁴² Part II.C.2 focuses on the period between 1997 and the Court’s 2006 decision in *Gonzales v. O Centro Espirita Benficiente Uniao do Vegetal*,⁴³ a decision that appeared to invigorate RFRA as applied to federal law. Part II.C.3 explores the surprising failure of *O Centro* to strengthen RFRA regime in practice, at least until the litigation about the contraceptive mandate produced the most significant surge in RFRA’s history. Part II.D examines the record under state RFRAs, which are frequently modeled on the federal version. Part II.E extracts lessons from this history, as it stood on the eve of *Hobby Lobby*.⁴⁴

A. *The Rise and Decline of Exemptions Under the Free Exercise Clause*

Prior to 1963, the Court had never ruled that the Free Exercise Clause, standing alone, supports an exemption from general laws. In 1878, the Court held in *Reynolds v. United States*, the Mormon polygamy case, that the Clause protects religious belief but does not exempt religiously motivated action from otherwise valid laws.⁴⁵ As the Court put it in *Reynolds*, “[t]o permit [religious excuse for violation of legal duty] would be to make the

⁴⁰ Cf. STEPHEN HAWKING, A BRIEF HISTORY OF TIME (1988).

⁴¹ 494 U.S. 872 (1990).

⁴² 521 U.S. 507 (1997).

⁴³ 546 U.S. 418 (2006).

⁴⁴ 134 S. Ct. 2751 (2014).

⁴⁵ 98 U.S. 145 (1878).

professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”⁴⁶

Constitutional law remained steadfastly true to that proposition for the next eighty-five years. Prior to 1963, all of the victories for religious claimants in the Supreme Court involved assertions of rights that protected secular and religious acts alike. Several of these decisions turned on the rights, under the Due Process Clause, of parents to direct the upbringing and education of their children;⁴⁷ others, most notably *West Virginia Board of Education v. Barnette*⁴⁸ and *Cantwell v. Connecticut*,⁴⁹ depended upon the presence of free speech interests. When the Court confronted claims resting on the Free Exercise Clause alone—that is, claims for religious exemptions from duties applicable to others—the claimant invariably lost.⁵⁰

In 1961, the Court first planted the seeds of doctrinal change in *Braunfeld v. Brown*,⁵¹ which rejected a claim for a free exercise exemption from Sunday Closing Laws, but nevertheless used the language of “burdens” and deployed the technique of exploring alternative means to the same end.⁵² Two years later, the Supreme Court’s decision in *Sherbert v. Verner*⁵³ brought those seeds to germination. *Sherbert* upheld a free exercise claim against the application of South Carolina’s unemployment compensation statute to a Saturday Sabbatarian, who asserted that she had good cause to refuse employment requiring Saturday work. *Sherbert* added the language of “compelling state interest,”⁵⁴ thus consolidating a standard that, thirty years later, became the centerpiece for the statutory embrace of religious freedom.

⁴⁶ *Id.* at 167.

⁴⁷ *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 399–402 (1923); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925).

⁴⁸ *See* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634–35 & n.15 (1943) (“Nor does the issue as we see it turn on one’s possession of particular religious views or the sincerity with which they are held. While religion supplies appellees’ motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual.”).

⁴⁹ 310 U.S. 296, 306–311 (1940). We trace the story of *Barnette* and *Cantwell* in more detail in LUPU & TUTTLE, *SECULAR GOVERNMENT*, *supra* note 2, at 183–90.

⁵⁰ *See, e.g.*, *Prince v. Massachusetts*, 321 U.S. 158, 164–70 (1944) (finding that rights conferred by the Free Exercise Clause may be limited in the interest of child welfare); *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 593–600 (1940) (finding that the First Amendment does not require States to excuse public school students, on religious ground, from saluting the American flag and reciting the Pledge of Allegiance); *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 262–64 (1934) (rejecting the assertion that the due process clause of the Fourteenth Amendment, as a safeguard of the rights guaranteed under the Free Exercise Clause, confers the right to students in a state university to opt-out of military training as a condition of attendance).

⁵¹ 366 U.S. 599 (1961). I examine the role of *Braunfeld* in the rise of a heightened standard of protection in free exercise cases in Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 939–42 (1989) [hereinafter Lupu, *Where Rights Begin*].

⁵² *Braunfeld*, 366 U.S. at 607.

⁵³ 374 U.S. 398 (1963).

⁵⁴ *Id.* at 406.

Sherbert was far more ambiguous than present-day restorers make it appear; the decision turned in part on the discrimination in South Carolina law in favor of Sunday Sabbatarians.⁵⁵ Moreover, *Sherbert* did not exempt the claimant from anything. The Court did not hold that Mrs. Sherbert could refuse work without good cause and still collect unemployment benefits; rather, it implicitly suggested that the state must treat her religious commitments as good cause in light of the state's constitutional duty to avoid burdening religious freedom.⁵⁶ *Sherbert* is a decision about a constitutionally mandatory extension of benefits, rather than an exemption from general norms.

Wisconsin v. Yoder,⁵⁷ decided in 1972, is the true and only lynchpin of a doctrine of free exercise exemptions. *Yoder* held that the Free Exercise Clause relieved adult members of the Old Order Amish from the obligation to send their children to school until the age of sixteen. *Yoder* is indeed an exemption case, and it is expressly limited to religiously motivated claims to such an exemption;⁵⁸ on its own terms, it rests on the Free Exercise Clause, and not on a religion-indifferent doctrine of parental rights. This is precisely what makes *Yoder* different from *Barnette*,⁵⁹ in which religion-indifferent freedom from compelled speech, rather than religion-dependent objection to the Salute, is driving the constitutional result.

Like *Sherbert*, *Yoder* also utilized the language of substantial burden and compelling interests, but a close examination of the opinion reveals it to be an exercise in even-handed balancing of interests, with close attention to the harms at the margin of each side's concerns.⁶⁰ The Court carefully analyzed, in light of facts in the record, the beliefs of the Old Order Amish concerning their obligations to maintain the continuity of their religious community, and the likely effects on that community if the Amish were not exempted from the obligation to send their fourteen- to fifteen-year olds to school.⁶¹ And the Court likewise examined the precise impact of an exemp-

⁵⁵ *Id.* (explaining that discriminatory treatment of Saturday Sabbatarians in state law compounds the constitutional problem).

⁵⁶ *Id.* at 403 (“[A]ppellant’s conscientious objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation.”).

⁵⁷ 406 U.S. 205 (1972).

⁵⁸ *Id.* at 215–17 (distinguishing claims based on secular philosophy from those based on religious belief). These themes are elaborated further in LUPU & TUTTLE, *SECULAR GOVERNMENT*, *supra* note 2, at 192–95.

⁵⁹ 319 U.S. at 634–35.

⁶⁰ Douglas’s solo dissent argued that the Court had ignored a crucial third-party interest—that of the Amish children whose formal education was being truncated at age fourteen. *See* 406 U.S. at 243–46 (arguing that the affected children should have a right to be heard on the harms of the requested exemption). Such a hearing would, of course, potentially put the children in open and public conflict with their parents’ religious desires.

⁶¹ *Id.* at 217–18. That inquiry—the effects of non-exemption on religious concerns—is deeply problematic, because it may force a reviewing court to consider questions of ecclesiastical depth and continuity over time. The government’s courts are constitutionally incompetent to address strictly ecclesiastical questions, such as fitness for religious ministry. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct.

tion on the state interests—having independent, self-reliant citizens with at least a minimum education—that Wisconsin claimed were at stake.⁶² Only after a detailed comparison of the effects on both sides of this equation did the Court resolve the case in favor of the Amish.

Between *Yoder* and *Employment Division v. Smith*, the path of free exercise decisions in the Supreme Court is an inconvenient embarrassment to restorers. The only victories for free exercise claimants in the Supreme Court involved explicit discrimination against religion⁶³ or denials of unemployment compensation; indeed, two of the three unemployment cases involved Sabbatarians,⁶⁴ similar to *Sherbert*. The third, *Thomas v. Review Board of Indiana*,⁶⁵ concerned conscientious objection by an employee to participation in the production of armaments.⁶⁶ Like *Sherbert*, these subsequent unemployment compensation decisions are also “false exemption” cases. Each of them requires extension of the concept of “good cause” to refuse proffered employment, rather than an exemption from the requirement of good cause. As a “true exemption” case, *Yoder* is the cheese—it stands alone.

The smattering of unemployment decisions to one side, the decade of the 1980s demonstrated that the Supreme Court was utterly unprepared to keep the promise that *Yoder* had apparently made. In case after case, the Court found ways to distinguish *Sherbert-Yoder* and rule against the free exercise claimant. These rulings fell into three basic categories. First, the Court held that the seemingly strict test of *Yoder* did not apply in government-controlled enclaves—the armed forces⁶⁷ and prisons.⁶⁸ The special needs for discipline in such contexts generically trumped religious liberty concerns.

694, 704–06 (2012) (stating that the First Amendment prohibits government involvement in the resolution of ecclesiastical controversies, and thus effectively commits their resolution to the appropriate religious authority). The *Yoder* opinion revealed little sign of awareness of this concern, but it came home to roost in the years that follow. See LUPU & TUTTLE, SECULAR GOVERNMENT, *supra* note 2, at 43–73, 226–32.

⁶² *Yoder*, 406 U.S. at 224–25.

⁶³ *McDaniel v. Paty*, 435 U.S. 618 (1978) (finding that a state may not bar clergy from elected office).

⁶⁴ *Hobbie v. Unemp’t. Appeals Comm’n*, 480 U.S. 136, 138 (1987); *Frazee v. Ill. Dep’t of Emp’t Sec.*, 489 U.S. 829 (1989).

⁶⁵ 450 U.S. 707 (1981).

⁶⁶ Significantly for the outcome in *Hobby Lobby*, *Thomas* appears to solve the dilemma of judicial incompetence to resolve ecclesiastical questions by making the claimant the judge of the religious substantiality of the burden he asserts. See *infra* Part III.B; see also *Thomas*, 450 U.S. at 715–16 (stating that courts are incompetent arbiters of competing scriptural interpretation).

⁶⁷ *Goldman v. Weinberger*, 475 U.S. 503 (1986) (finding that the *Yoder* test does not apply in cases arising in the Armed Forces, and that the Free Exercise Clause does not protect religious apparel from military uniform regulations).

⁶⁸ *O’Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (finding that the *Yoder* test does not apply in cases arising in institutions of confinement, and rejecting holding that placed burden on prison officials to disprove the availability of alternative methods of accommodating prisoners’ religious rights).

Second, the Court construed the idea of “substantial burdens” to limit it to (a) coercive impositions in the form of punishments for religiously motivated acts; or (b) conditions, inconsistent with faith commitments, on government benefits. As the Court elaborated in *Thomas v. Review Board*:

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.⁶⁹

However expansive this idea of “substantial pressure on an adherent to modify his behavior and to violate his beliefs” may seem, it nevertheless omits some government activity that has profoundly negative effects on faith practices. In *Lyng v. Northwest Indian Cemetery Protective Ass’n*, the Court notoriously held that the government’s conduct on public lands, despite the severe and deleterious effects of that conduct on Native American sacred sites, did not constitute a legally cognizable burden on the exercise of religion by tribes whose sites had been disturbed.⁷⁰ The ruling in *Lyng* effectively blocked the use of the Free Exercise Clause as a protector of Native American religious rituals and practices on the public lands.

Third, in particular contexts, the Court retreated from a *Yoder*-style balancing of precise interests at the margin of each side’s concerns—that is, the respective costs of exemption and non-exemption. Instead, it categorically generalized the concept of compelling interest. In cases involving claimed exemption from taxation⁷¹ and from anti-discrimination norms,⁷² the Court stopped analyzing claims at the margin of state interests and vindicated the government’s wholesale interest in refusing to entertain any exemption claims whatsoever.⁷³

⁶⁹ 450 U.S. at 717–18.

⁷⁰ 485 U.S. 439, 447–53 (1988). For fuller elaboration of *Lyng* and the conceptual problem of what constitutes a legally cognizable burden on the free exercise of religion, see generally Lupu, *Where Rights Begin*, *supra* note 51. The conceptual problem is the same under RFRA, which codifies the pre-*Smith* test for “substantial burden.” For an important contribution to analysis of this problem under the Free Exercise Clause, see Nomi Stolzenberg, “*He Drew a Circle That Shut Me Out*: Assimilation, Indoctrination, and the Paradox of a Liberal Education,” 106 HARV. L. REV. 581 (1993) (analyzing in depth the Sixth Circuit’s decision in *Mozert v. Hawkins County School District*, 827 F.2d 1058 (6th Cir. 1987), that compulsory exposure to certain books does not burden the free exercise interests of a child or her family).

⁷¹ *United States v. Lee*, 455 U.S. 252, 254 (1982).

⁷² *Bob Jones Univ. v. United States*, 461 U.S. 574, 577 (1983).

⁷³ See *Lee*, 455 U.S. at 254 (holding that the Social Security tax imposed on employers does not violate the Free Exercise Clause because its uniform application is necessary to the accomplishment of an overriding governmental interest); *Bob Jones Univ.*, 461 U.S. at 604 (stating that the government’s overriding interest in eliminating racial dis-

Beyond the specific subjects of taxation and civil rights, the Court's sweeping approach in *United States v. Lee*⁷⁴ suggested that commercial actors had to comply with generally applicable regulatory regimes and could never successfully assert religious exemption claims: "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."⁷⁵

Thus, on the eve of *Smith*, the law of the Free Exercise Clause was defined by the fact-bound interest balancing of *Yoder*, rather than by the presumption of unconstitutionality ordinarily associated with the "compelling interest" test. And that body of law was deeply qualified by the exceptions and limiting principles the Court had identified as ways of evading the *Sherbert-Yoder* approach. The enclave exclusion, the constrained doctrine of burdens, and the embrace of certain interests as categorically compelling all played an important part in reinforcing judicial reluctance to hold in favor of religious exemption claimants.

Moreover, other considerations operated to hinder free exercise exemption claims in the federal courts. Judges were intuitively hostile to the concept of privileging religious objectors, and found ways to limit and reject their claims.⁷⁶ For example, lower courts systematically found ways to distinguish *Yoder* when other religiously motivated actors sought to remove their children from school.⁷⁷ Beyond the use of fact-specific distinctions in particular contexts, other doctrines operated to further limit exemption claims. These included the rule that the sincerity of free exercise claims is subject to examination by judge or jury,⁷⁸ and the possibility of Establishment Clause limitations on the shifting of religion-driven costs to third parties.⁷⁹

crimination outweighs the burden that denial of tax benefits places on the University's exercise of its beliefs).

⁷⁴ 455 U.S. at 252–53.

⁷⁵ *Id.* at 261. This proposition from *Lee* played a pivotal role in *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2784 & n.43 (2014).

⁷⁶ As then-student and now-Dean of the Harvard Graduate School of Education, James Ryan, wrote in the period after the decision in *Employment Division v. Smith* and prior to enactment of RFRA, free exercise claims in the halcyon days of *Sherbert-Yoder* had a dismal track record in the Courts of Appeals, as well as in the Supreme Court. See James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1413–14, 1416–17 (1992); see also *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 622–25 (9th Cir. 1988) (Noonan, J., dissenting).

⁷⁷ See *Johnson v. Charles City Cmty. Bd. of Educ.*, 368 N.W.2d 74, 83–84 (Iowa 1985); see generally Ira C. Lupu, *Home Education, Religious Liberty and the Separation of Powers*, 67 B.U. L. REV. 971 (1987) (canvassing refusal of state and federal courts to extend *Yoder* to cover a broad right to home education).

⁷⁸ *United States v. Ballard*, 322 U.S. 78, 86 (1944).

⁷⁹ See *Thomas v. Review Bd.*, 450 U.S. 707, 720–26 (1981) (Rehnquist, J., dissenting); *Sherbert v. Verner*, 374 U.S. 398, 413–17 (1963) (Stewart, J., concurring in the result).

B. Employment Division v. Smith and the Religious Freedom Restoration Act

In *Employment Division v. Smith*, Justice Scalia's opinion called precise attention to the many ways that the courts had breached the promise of *Yoder*.⁸⁰ The dispute involved denial of unemployment compensation to drug and alcohol counselors who had lost their jobs for "misconduct"—in particular, using peyote in the sacraments of the Native American Church. The Court could have easily disposed of *Smith* under the weakened compelling interest test, as a "drug case" in which the government's interests were categorically compelling.⁸¹ But the Court recognized that this case differed from earlier unemployment compensation decisions, because it involved a true claim of exemption from conduct norms. Accordingly, the Court seized upon the case as an opportunity to revise the law. Moreover, *Smith* did not overrule *Sherbert*, or its progeny in cases involving unemployment benefits, or *Yoder*. Instead, it rationalized them in ways that significantly limited their scope.⁸² *Smith* transformed *Yoder*, which had been the exclusive lynchpin of a doctrine of religious exemptions, into a decision about hybrid constitutional rights.⁸³

Despite *Smith*'s thick resonance with a decade of decline in the strength of Free Exercise Clause standards, critics vilified the opinion as a sudden and dramatic departure from the controlling law of the clause.⁸⁴ Armed with that rhetoric of unfair, nasty, and constitutionally dangerous surprise, some of the sponsors of the Religious Freedom Restoration Act claimed that the Free Exercise Clause had long and strenuously protected claims for religious exemptions, and that *Smith* had shockingly and unjustifiably erased that protection.⁸⁵ After several years of legislative tragi-comedy, dominated by op-

⁸⁰ 494 U.S. 872, 881–84 (1990).

⁸¹ In *Smith*, Justice O'Connor took precisely this view. *Id.* at 903–06 (O'Connor, J., concurring in the result).

⁸² The *Smith* opinion described *Cantwell* and *Yoder* as cases involving hybrids of free exercise rights and other constitutional rights, and it characterized *Sherbert* and its progeny as cases involving individualized discretion under broad standards of "good cause." *Id.* at 881, 882–84.

⁸³ *Id.* at 881.

⁸⁴ See, e.g., Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1 (1990).

⁸⁵ See, e.g., *Religious Freedom Restoration Act of 1990: Hearing on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 101st Cong. 13–14 (1990) (statement of Rep. Steven Solarz); *id.* at 30, 32–35 (statement of Dean Kelley, Counselor on Religious Liberty, National Council of Churches); *Religious Freedom Restoration Act of 1991: Hearing on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 65–85 (1993) (statement of Nadine Strossen, President, American Civil Liberties Union). Some commentators had a more refined and sophisticated view of these events. See, e.g., Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1109–10 (1990) (describing the law on the eve of *Smith* as a "Potemkin doctrine"); *Religious Freedom Restoration Act of 1991: Hearing on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102d

position to RFRA (as proposed) by the very anti-abortion groups that have relied heavily on RFRA in the widespread litigation challenging the contraceptive mandate,⁸⁶ both Houses of Congress passed the Act by wide margins,⁸⁷ and President Clinton enthusiastically signed it.⁸⁸

Like many regulatory statutes, RFRA represented a classic delegation problem. It offered legislators and the President a chance to support a general good, “religious freedom,” while leaving to others (primarily the judiciary, rather than regulatory agencies) the task of interpreting and applying its plastic standards. Almost everyone in the enacting Congress was a fan of religious freedom; not a single one stood up and said that members of the Native American Church had a constitutional right to use peyote in their sacraments.

One of the most elusive and important meta-questions about RFRA relates to precisely what it restored. Some of its proponents asserted that it was designed to restore the law of the Free Exercise Clause on the eve of *Smith*.⁸⁹ But, as described a few paragraphs above, that body of law included (1) the exclusion of government enclaves from the *Sherbert-Yoder* standards; (2) the tight interpretation of “burdens” to exclude the physical impact of government conduct on worship activities; and (3) the categorical embrace of government interests in uniform application of tax rules, civil rights laws, and (arguably) regulations of the employment relationship in commercial settings, as exemplified in *United States v. Lee*.

Writing in 1995, soon after RFRA’s enactment, I flagged this precise set of questions about the scope and meaning of statutory restoration of judi-

Cong. 152–63 (1993) (statement of Edward McGlynn Gaffney, Jr., Dean and Professor of Law, Valparaiso University School of Law).

⁸⁶ The U.S. Conference of Catholic Bishops originally opposed the Act, out of a concern that it might empower women to seek abortions for religion-related reasons if, as many expected was imminent at that time, the Court overruled *Roe v. Wade*, 410 U.S. 113 (1973).

When the Court reaffirmed the core of *Roe* in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and Bill Clinton prevailed in the 1992 elections, thereby guaranteeing the preservation and expansion of a pro-*Roe* majority, the Conference withdrew its opposition to RFRA. See Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 *FORDHAM L. REV.* 883, 896 (1994).

⁸⁷ Douglas Laycock & Oliver Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 *TEX. L. REV.* 209, 210 (1994).

⁸⁸ William Jefferson Clinton, Remarks on Signing the Religious Freedom Restoration Act of 1993, 2 *PUB. PAPERS* 2000, 2377–78 (Nov. 16, 1993), archived at <http://perma.cc/DF65-3UWZ>.

⁸⁹ *Religious Freedom and Restoration Act of 1990: Hearing on H.R. 5377 before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on Judiciary*, 101st Cong. 32–35 (1990) (statement of Dean Kelley, Counselor on Religious Liberty, National Council of Churches). Moreover, RFRA includes a congressional finding that “the compelling interest test as set forth in prior federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests,” 42 U.S.C. § 2000bb(a)(5), but this recitation is ambiguous because the test “as set forth” was at times stronger than the test actually applied.

cially created constitutional standards.⁹⁰ In March of 2014, those questions ripened in the Supreme Court. As elaborated further in the discussion in Part III below of *Hobby Lobby*, Justice Kagan and Paul Clement, counsel for Hobby Lobby, squared off during oral argument on the scope of what RFRA restored—in particular, whether RFRA codified the language in *Lee*⁹¹ about religious actors effectively waiving religious objections when entering the commercial sphere. Justice Kagan suggested that RFRA should be construed as if it incorporated by reference the pre-*Smith* constitutional law of free exercise, including the general principles put forward in *Lee*.⁹² As one would expect, Clement leaned on the precise formula in RFRA as the relevant law of the statute, and rejected the idea that language used in application of a similar constitutional formula in *Lee* operated to qualify RFRA's governing norms.⁹³ The exchange further highlights the dilemma of RFRA's indeterminacy; the Act recites a purpose of restoring the “standard set forth in *Sherbert* . . . and *Yoder*,”⁹⁴ without reference to the ways that the Court had ignored or weakly implemented that standard in many decisions after 1972.

C. Litigation Under the Federal RFRA

To what extent did the Federal RFRA codify or depart from the pre-*Smith* gloss on the Free Exercise Clause? As the law of RFRA developed in the lower federal courts, what emerged over time was the view that RFRA had adopted some but not all of that interpretive baggage. Significantly, the Act did not specifically address the exclusion of government enclaves from the full protection of the Free Exercise Clause, but subsequent interpretations have accepted that RFRA covers prisons⁹⁵ and the armed forces.⁹⁶ The character of those enclaves affects the analysis, because certain government

⁹⁰ See Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171 (1995) (inquiring whether RFRA restored the law of free exercise as of 1972, when the Court decided *Yoder*, or as of the eve of *Employment Division v. Smith* in the spring of 1990); see also Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1, 56–62 (1993) (elaborating generally on issues raised by enacted law that uses terms from judge-made constitutional law).

⁹¹ *United States v. Lee*, 455 U.S. 252, 261 (1982).

⁹² Transcript of Oral Argument at 8–9, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354), archived at <http://perma.cc/DS4D-RF8T> (“Because this is a statute that specifically refers back to a body of constitutional law. It basically says we want to get right back to the place that we were with respect to religious claims before *Employment Division v. Smith*.”).

⁹³ *Id.* at 9–10.

⁹⁴ 42 U.S.C. § 2000bb(b)(1) (2012).

⁹⁵ See, e.g., *Jolly v. Coughlin*, 76 F.3d 468, 475–76 (2d Cir. 1996) (“RFRA makes clear that the compelling interest test is to apply to free exercise claims by prison inmates.”). After the decision in *City of Boerne*, RFRA no longer applies to state or local institutions of confinement, though RLUIPA has filled that gap. See *infra* pp. 44–47. In a close vote, the Senate rejected an amendment that would have excluded prisons from RFRA. 139 CONG. REC. S14, 468 (daily ed. Oct. 27, 1993). For earlier discussion of the applicability of RFRA in prisons, see S. REP. NO. 103-111, at 9–11 (1993).

interests are stronger in these contexts, but RFRA standards nevertheless apply.⁹⁷

In contrast to its silence on the status of enclaves, RFRA explicitly adopts the judicially created language of substantial burdens and compelling interests. Prior to the litigation over the contraceptive mandate, the pre-*Smith* law with respect to those terms became part of RFRA's gloss. In particular, courts in RFRA cases involving public lands repeatedly rely on the "substantial burdens" limitation from *Lying*.⁹⁸ With respect to the pre-*Smith* treatment of certain interests as categorically compelling, courts hearing RFRA-based challenges to federal taxation continue to adhere to a RFRA policy of rejecting exemption claims in the name of tax uniformity.⁹⁹ More generally, before the contraceptive mandate litigation, few, if any, commercial employers relied on RFRA to seek exemption from business regulation, so the question of RFRA's incorporation of *Lee*'s sweeping repudiation of religious exemptions in commerce was rarely put to the test.¹⁰⁰

The Federal RFRA regime can be fruitfully broken into three periods—(1) enactment until the decision in *City of Boerne*¹⁰¹ (1993 to mid-1997); (2) post-*Boerne* and pre-*Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*¹⁰² (mid-1997 to early 2006); and (3) post-*O Centro* (early 2006 to the present). In the first period, the Act's potential impact was greatest, because its coverage included all of American law. In the second period, the Act effectively covered only federal law, and the Supreme Court had no occasion to construe it. At the outset of the third period, the Court's opinion in *O Centro* implicitly validated RFRA's coverage of federal law and applied RFRA with surprising force.¹⁰³ But *O Centro*, like *Yoder* a quarter-century earlier, represents an outlier rather than a platform for a sustainable regime

⁹⁶ DEP'T. OF DEF., INSTRUCTION NO. 1300.17, ACCOMMODATION OF RELIGIOUS PRACTICES WITHIN THE MILITARY SERVICES (2014), archived at <http://perma.cc/YKG7-V3UF>.

⁹⁷ This coverage is made explicit in the Report of the Senate Judiciary Committee on RFRA. See S. REP. NO. 103-111, at 9-12 (1993).

⁹⁸ See *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1074-76 (9th Cir. 2008) (en banc); *United States v. Sowka*, No. 06-CR-00282-WDM, 2010 WL 2593966, at *4-6 (D. Colo. Jun. 23, 2010); *Winnemen Wintu Tribe v. U.S. Dep't of Interior*, 725 F. Supp. 2d 1119, 1146-47 (E.D. Cal. 2010); *S. Fork Band v. U.S. Dep't of Interior*, 643 F. Supp. 2d 1192, 1207-08 (D. Nev. 2009), *aff'd in part, rev'd in part sub nom.* *Fork Band Council of W. Shoshone v. U.S. Dep't of Interior*, 588 F.3d 718 (9th Cir. 2009).

⁹⁹ See, e.g., *Browne v. United States*, 176 F.3d 25, 28 (2d Cir. 1999); *Thompson v. Comm'r*, 140 T.C. 173 (2013).

¹⁰⁰ *United States v. Lee*, 455 U.S. 252 (1982). As Professor James Oleske of Lewis & Clark Law School reminded me, two religious exemption claims by commercial landlords rested on RFRA, and one of the decisions expressly relied upon the *Lee* language to reject the claim. See *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 283-84 (Alaska 1994) (relying on *Lee*'s "commercial activity" passage, and the effect on potential tenants to reject exemption); *Smith v. Fair Emp't & Hous. Comm'n*, 913 P.2d 909, 925-29 (1996) (relying on commercial context and concern for third-party burdens to reject a RFRA claim, but not explicitly invoking *Lee*'s "commercial activity" passage).

¹⁰¹ 521 U.S. 507 (1997).

¹⁰² 546 U.S. 418 (2006).

¹⁰³ *Id.* at 428-39.

of religious exemptions. As demonstrated by the survey and analysis that follows, RFRA made startlingly little impact on the American law of religious freedom before the onset of litigation over the contraceptive mandate under the Affordable Care Act.

1. *Pre-City of Boerne (1993–1997)*

The Act became law in 1993, and it applied to all law in the United States. In 1997, the decision in *City of Boerne*¹⁰⁴ held it to be unconstitutional as applied to state and local law.¹⁰⁵ Accordingly, the period from 1993 through the *City of Boerne* decision in 1997 represents the only time period in which all of American law was subject to RFRA. This is significant quantitatively, because application to state and local law invited many more potential RFRA claims than would be the case under federal law alone. The original scope of RFRA's application is even more significant qualitatively, because inclusion of state and local government swept a different set of contexts, some (like prisons and public schools) quite religion-sensitive, into RFRA's ambit.

After the Court's decision in *City of Boerne*, I surveyed all of the earlier judicial decisions, federal administrative references, and state attorney general opinions that involved RFRA. I called the resulting article *The Failure of RFRA*,¹⁰⁶ because the results showed that the Act had accomplished very little. Specifically, RFRA had produced 168 judicial decisions at the state and federal levels. Ninety-nine of these involved litigation by prisoners.¹⁰⁷ In those 168 cases, courts (primarily but not exclusively federal courts) granted relief in twenty-four, fifteen of which were prison cases. Both in and out of prison, the claims prevailed at a rate of about 15%.¹⁰⁸ As I wrote at the time, "[w]hen one recalls . . . that RFRA had been trumpeted as the protection of religion against all the religion-neutral, generally applicable rules that would beset it, and that RFRA's terms appeared to widely and stringently protect religious exercise, this record of success seems surprisingly tepid."¹⁰⁹ Tepid,

¹⁰⁴ *City of Boerne v. Archbishop Flores*, 521 U.S. 507 (1997).

¹⁰⁵ Professor Marci Hamilton, who argued successfully for the *City of Boerne*, remains convinced that RFRA is unconstitutional with respect to federal law as well. See generally Marci Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1 (1998); see also Brief for Freedom from Religion Foundation et al. as Amici Curiae Supporting Petitioner at 9–34, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354). Professor Hamilton authored that brief. *Id.* at 35.

¹⁰⁶ Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575 (1998).

¹⁰⁷ *Id.* at 590–91 (arguing that persons incarcerated for crime are highly litigious and suffer considerable restrictions on all of their freedoms, including religious freedom).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 592. As the article demonstrated, the most common maneuver for courts to use in ruling for the government was to find that the asserted burden was insubstantial, typically because the relevant religious practice was not compulsory as a matter of faith. *Id.* at 594–95. Subsequent amendments to the RFRA's definitional section have closed the door to this particular move. See 42 U.S.C. § 2000cc-5(7)(A) ("The term "religious

for sure, but on reflection perhaps no surprise—Dean Ryan had found a similar rate of success for free exercise claims in the federal courts of appeals in the decade leading up to *Smith*.¹¹⁰

2. *Federal Religious Liberty Statutes (1997–2006)*

In the period immediately after *Boerne*, no generalized regime of federal law requiring religious exemptions applied to state or local law. In 2000, after an aborted attempt in Congress to enact a new and general protection of religious liberty in the states,¹¹¹ Congress enacted the Religious Land Use and Institutionalized Persons Act (“RLUIPA”). As its title suggests, RLUIPA is focused on two discrete contexts—land use and institutionalized persons—in which proponents persuaded Congress that issues of religious discrimination, insensitivity, and oppression were widespread. Over the last fourteen years, RLUIPA has made a significant difference with respect to both contexts.¹¹²

In state and local institutions of confinement, in particular, RLUIPA filled an important gap and has led to thousands of lawsuits.¹¹³ Whether or not the pattern of decisions in these lawsuits has been more principled or consistent than the general pattern under the Free Exercise Clause or RFRA prior to 1997, I cannot say. The sheer number and variety of prison cases make it nearly impossible to fully assess the integrity of this body of law.¹¹⁴

exercise” includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”)

¹¹⁰ Ryan, *supra* note 76, at 1416–17.

¹¹¹ The proposal, named the Religious Liberty Protection Act, foundered on the shoals of a dispute about whether it would protect religious objections to anti-discrimination laws. See James M. Oleske, Jr., *Obamacare, RFRA, and the Perils of Legislative History*, 67 VAND. L. REV. EN BANC 77, 82–87 (2014), archived at <http://perma.cc/AP8B-Q4K3>; Douglas Laycock, *Imaginary Contradictions: A Reply to Professor Oleske*, 67 VAND. L. REV. EN BANC 89, 91–94 (2014), archived at <http://perma.cc/P7GM-DZHR>.

¹¹² I have not independently surveyed or appraised RLUIPA decisions. With respect to prison cases, see Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA’s Prisoner Provisions*, 28 HARV. J.L. & PUB. POL’Y 501, 569–572 (2005), (arguing, based on empirical data, that RLUIPA claimants in prisons were faring better than RFRA claimants had in the past). The Becket Fund lists important RLUIPA land use cases on its website. See *Search Results for “RLUIPA,”* THE BECKET FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/?s=RLUIPA>, archived at <http://perma.cc/886S-5MGN>. My colleague Robert Tuttle has appraised the ways in which the Constitution alone could have done much of the work of RLUIPA in land use cases. See Robert W. Tuttle, *How Firm a Foundation? Protecting Religious Land Uses After Boerne*, 68 GEO. WASH. L. REV. 861, 880–913 (2000). For the view that RFRA, RLUIPA, and all such generic religion-protecting regimes have done far more harm than good, see MARCI A. HAMILTON, *GOD VS. THE GAVEL: THE PERILS OF EXTREME RELIGIOUS LIBERTY* 1–3 (rev. 2d ed. 2014); Marci A. Hamilton, *RFRA PERILS*, <http://rfraperils.com>, archived at <http://perma.cc/HQ2T-7LKW>.

¹¹³ Howard Friedman’s excellent Religion Clause blog lists thousands of such cases over the last fifteen years or so. See Howard Friedman, *RELIGION CLAUSE*, <http://religion-clause.blogspot.com>, archived at <http://perma.cc/RZF6-VXR5>.

¹¹⁴ An amicus brief in a case now under advisement in the Supreme Court argues that the lower courts’ interpretations and applications of RLUIPA in prison cases have been

One distinctive vice of the prison cases, however, under RFRA and its successor RLUIPA, is their tendency to invite evaluation, by prison administrators and reviewing courts, of the significance of particular religious practices. As my colleague Robert Tuttle and I have discussed elsewhere, the prison cases have on a number of occasions involved “religious experts” who testify or advise on the relative significance of a religious practice, such as prayer frequency, religious diet, or showering before prayer.¹¹⁵ This is unsurprising as a matter of institutional control, but testimony of this kind involves unconstitutional participation by government officials in the resolution of purely ecclesiastical questions. As an elaborate line of decisions show, the official evaluation of religious meaning or significance is beyond constitutional competence.¹¹⁶ RLUIPA occasionally produces good results, all things considered, but at times does so by using an unconstitutional means of adjudication.

RFRA remained persistently weak in the decade between the decision in *City of Boerne* in 1997 and the surprisingly religion-favorable decision in *O Centro* in 2006. The Act applied to federal law only, and one principal controversy that arose was whether RFRA provided a defense in private civil actions, especially those brought under federal anti-discrimination law.¹¹⁷ My survey of RFRA decisions (federal prison cases excluded) from 1997 to 2006 was limited to cases in the federal courts of appeals. The record here is simple. Either because the courts found no “substantial burden” on religious exercise, or because the government successfully asserted the presence of a “compelling government interest” to impose a burden, RFRA claimants

riddled with inconsistency. See Brief for Anti-Defamation League et al. as Amici Curiae Supporting Petitioner at 4–6, *Holt v. Hobbs*, No. 13-6827 (U.S. May 29, 2014), archived at <http://perma.cc/NE6P-XQP2>. As Professor Micah Schwartzman of the University of Virginia School of Law reminded me, a carefully researched student note, published in 2009, similarly had argued that the circuit courts had weakly and erratically applied RLUIPA’s strenuous statutory formula. See James D. Nelson, Note, *Incarceration, Accommodation, and Strict Scrutiny*, 95 VA. L. REV. 2053, 2109–12 (2009).

¹¹⁵ See LUPU & TUTTLE, *SECULAR GOVERNMENT*, *supra* note 2, at 229–32; Ira C. Lupu & Robert W. Tuttle, *The Forms and Limits of Religious Accommodation: The Case of RLUIPA*, 32 CARDOZO L. REV. 1907, 1931–35 (2011).

¹¹⁶ This is the best explanation of the ministerial exception, broadly upheld in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 704–06 (2012), which rests on the constitutional incompetence of the state to decide fitness for ministry. See LUPU & TUTTLE, *SECULAR GOVERNMENT*, *supra* note 2, at 43–45, 54–61. In Part III, I discuss this problem of judicial resolution of ecclesiastical questions in the context of *Hobby Lobby*, in which the question of attenuation between employer decisions about health insurance coverage and employee decisions about contraception has been litigated as part of the inquiry into whether the mandate “substantially burdens” religion.

¹¹⁷ See Shruti Chaganti, Note, *Why the Religious Freedom Restoration Act Provides a Defense in Suits by Private Plaintiffs*, 99 VA. L. REV. 343, 343–44 (2013). Even when courts held that RFRA did apply in such actions, however, the Act never generated a good defense to federal anti-discrimination claims. The ministerial exception did all of the defensive work in these cases. *Id.* at 345–48.

never prevailed.¹¹⁸ However one explains this pattern, it indicates a persistent and gaping chasm between RFRA's promise, as reflected in its stringent statutory formula, and RFRA's performance.

Of course, a weak RFRA is not the same as a hopelessly inconsistent pattern of results under RFRA. A Federal RFRA could be construed in a consistently weak way, as has been the case under some state RFRA's.¹¹⁹ Or, as recent events may once again portend, a RFRA suddenly made strong by an authoritative Supreme Court interpretation might change the prevailing pattern, and produce consistently pro-religious freedom results.

¹¹⁸ There are a number of decisions finding in favor of the government on the ground that the RFRA claimant had not demonstrated a "substantial burden." *See, e.g.*, Gary S. v. Manchester Sch. Dist., 374 F.3d 15, 21–22 (1st Cir. 2004) (stating that the government's failure to provide disabled Catholic school students the same benefits it provided to disabled public school students placed no burden on the Plaintiffs' exercise of religion); *Henderson v. Kennedy*, 253 F.3d 12, 16–17 (D.C. Cir. 2001) (finding that a ban on selling message-bearing t-shirts on the National Mall imposed no substantial burden); *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1121 (9th Cir. 2000) (finding that a copyright law imposed no substantial burden on a church's exercise of religion); *Branch Ministries v. Rossotti*, 211 F.3d 137, 142–43 (D.C. Cir. 2000) (finding that no substantial burden on religious exercise resulted from restrictions on political campaigning by a tax exempt church); *In re Grand Jury Empaneling of the Special Grand Jury*, 171 F.3d 826, 829–30 (3d Cir. 1999) (finding that compelling a witness to testify against a rabbi, who was also his father, did not impose a substantial burden on the witness's practice of his religion). Other cases have found in favor of the government on the ground that the government has a compelling interest in imposing a burden on religious exercise. *See, e.g.*, *United States v. Israel*, 317 F.3d 768, 772 (7th Cir. 2003) (finding that the government has a compelling interest in prohibiting use of marijuana); *United States v. Brown*, 330 F.3d 1073, 1077 n.4 (8th Cir. 2003) (finding that the government has a compelling interest in taking blood sample for DNA in criminal case that overrides interests of inmates objecting to mandatory blood samples); *United States v. Antoine*, 318 F.3d 919, 921–22 (9th Cir. 2003) (finding that the government has a compelling interest in protecting bald and golden eagles); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 166–67 (D.C. Cir. 2003) (finding that the government has a compelling interest in blocking gift to designated terrorist organization); *United States v. Hardman*, 297 F.3d 1116, 1128 (10th Cir. 2002) (finding that the government has a compelling interest in protecting bald eagles); *Guam v. Guerrero*, 290 F.3d 1210, 1223 (9th Cir. 2002) (finding that the government has a compelling interest in enforcing Guam's restrictions on importing marijuana); *United States v. Oliver*, 255 F.3d 588, 589 (8th Cir. 2001) (finding that the government has a compelling interest in preserving the bald eagle population); *United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 630 (7th Cir. 2000) (stating that the government has a compelling interest in uniform application of tax policy); *Gibson v. Babbit*, 223 F.3d 1256, 1258 (11th Cir. 2000) (stating that the government has a compelling interest in protecting bald and golden eagles); *Adams v. Comm'r*, 170 F.3d 173, 175, 178–79 (3d Cir. 1999) (stating that the government has a compelling interest in uniform tax policy); *Browne v. United States*, 176 F.3d 25, 26 (2d Cir. 1999) (stating that the government has a compelling interest in uniform and mandatory participation in the federal income tax system).

¹¹⁹ *See infra* Part II.D.

3. *O Centro and Its Impact (2006–2014)*

The Court's decision in *O Centro*¹²⁰ advanced a surprisingly strong interpretation of RFRA, and suggested the possibility that RFRA's original promise might actually be realized. In *O Centro*, a unanimous Supreme Court affirmed the grant of a preliminary injunction, blocking enforcement of the Federal Controlled Substances Act against a religious group's importation and use in its sacraments of *hoasca* tea, a hallucinogenic substance made from Brazilian plant material. The government did not dispute that the ban on importation constituted a substantial burden on the religious exercise of members of the group. Nevertheless, the government asserted that it had the requisite compelling interest(s), as required by RFRA, to impose this burden.

First, the government argued that *hoasca* tea was dangerous to human health and that importation by the group presented a risk of diversion into illicit drug trafficking.¹²¹ The district court put the government to its proof of these assertions. The court concluded that the proof left both questions in equipoise,¹²² and that the government therefore had failed to meet the burden of persuasion imposed by RFRA. That conclusion may seem obvious from the language of RFRA taken alone, but religious liberty lawyers immediately recognized the dramatic potential of this emphasis on RFRA's assignment to the government of the risk of non-persuasion.

Second, aside from any demonstrable dangers associated with allowing a RFRA exemption for sacramental use of *hoasca* tea, the government made a far more sweeping argument about the need for uniformity in administration of the Controlled Substances Act.¹²³ This line of argument, drawn from earlier cases about taxation,¹²⁴ drew on the pre-*Smith* move of softening the compelling interest test by making it categorical, rather than asking whether the government had a compelling interest in denying an exemption in the particular case. Drug cases, the government contended, could not be open to religious exemption claims, because of the intrinsic hazards of highly controlled substances, the high risk of insincere claims, and the slippery slope from one substance to the next.

This sort of argument had always fared well in the cases involving reliance on RFRA as a defense to charges related to possession of marijuana,¹²⁵

¹²⁰ 546 U.S. 418 (2006).

¹²¹ *Id.* at 427.

¹²² *Id.* at 426.

¹²³ *Id.* at 435.

¹²⁴ *See* *United States v. Lee*, 455 U.S. 252, 259–60 (1982) (holding that the Social Security tax imposed on employers does not violate the Free Exercise Clause because a uniform tax system is an overriding governmental interest); *see also* *Goldman v. Weinberger*, 475 U.S. 503, 507–10 (1986) (identifying a need for uniformity of apparel within the Armed Forces).

¹²⁵ RFRA has been raised frequently and always unsuccessfully as a defense to federal prosecutions for use, possession, or trafficking of marijuana. *See, e.g.*, *Guam v.*

but the Supreme Court was surprisingly unimpressed by it. Strenuously asserting that RFRA's text demanded adjudication of the validity of a burden as applied to the particular person, the Court seized on the statutory exemption for peyote use in the sacraments of the Native American Church. An interest cannot be compelling, the Court said, if other statutory exemptions permit "appreciable damage" to the same interest.¹²⁶ Because *hoasca* tea and peyote present comparable risks, a statutory religious exemption for sacramental use of peyote undercut the argument that uniform treatment of such substances is essential. Many federal regulatory regimes include a variety of exemptions, at least some of which permit "appreciable damage" to regulatory concerns; accordingly, the unanimous *O Centro* opinion appeared to offer a potent weapon to RFRA claimants.

O Centro's double move to strengthen RFRA—demands for rigorous proof by the government that exemptions threaten its compelling interests, and reliance on analogous statutory exceptions as evidence of weakness in those interests—should have led to spillover effects in the lower courts. But, true to the longstanding experience that judges are presumptively inclined against religious exemptions, the results have been quite to the contrary.

In an exceptionally sophisticated student note, published in 2009, Matthew Nicholson identified a striking tendency in the Courts of Appeals to retain the pre-*O Centro* status quo.¹²⁷ The judicial methods for doing so included a tight limitation on what counts as a substantial burden under RFRA;¹²⁸ continued reliance on pre-*Smith* free exercise decisions that had adopted the categorical approach to compelling interests;¹²⁹ deference to the government's assertion that certain, narrowly framed interests are compelling;¹³⁰ and a weak or deferential application of *O Centro*'s emphasis on stat-

Guerrero, 290 F.3d 1210, 1222–23 (9th Cir. 2002) (recognizing a compelling interest in enforcing Guam's restrictions on importing marijuana); *United States v. Israel*, 317 F.3d 768, 772 (7th Cir. 2003) (recognizing a compelling interest in prohibiting use of marijuana).

¹²⁶ *O Centro*, 546 U.S. at 433 (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (Scalia, J., concurring)).

¹²⁷ Matthew Nicholson, Note, *Is O Centro a Sign of Hope for RFRA Claimants?*, 95 VA. L. REV. 1281, 1285–87 (2009).

¹²⁸ *Id.* at 1301–07 (citing *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1075–76 (9th Cir. 2008) (en banc)). In *Navajo Nation*, the Ninth Circuit followed the pre-*Smith* decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 447–53 (1988), to the effect that government conduct on its own land cannot inflict a legally cognizable burden on Native American worship sites on that land. This continues an earlier trend. In *The Failure of RFRA*, I noted that narrow construction of the "substantial burden" term in RFRA was the most popular lower court strategy for limiting the statute's force. Lupu, *The Failure of RFRA*, *supra* note 106, at 594–96.

¹²⁹ Nicholson, *supra* note 127, at 1307–11 & n.149 (citing *Jenkins v. Comm'r*, 483 F.3d 90, 92 (2d Cir. 2007); *United States v. Vasquez-Ramos*, 531 F.3d 987, 992 (9th Cir. 2008); *Olsen v. Mukasey*, 541 F.3d 827, 831 (8th Cir. 2008)). In all three cases, the circuit courts rejected arguments that *O Centro* has altered the appropriate methodology for determining whether government interests are compelling.

¹³⁰ Nicholson, *supra* note 127, at 1311–19 & nn.184–95 (citing *Kaemmerling v. Lap-pin*, 553 F.3d 669, 682–84 (D.C. Cir. 2008) (stating the government has a compelling

utory exemptions as evidence that government interests are less than compelling.¹³¹ As the Note demonstrates, *O Centro* quickly became an outlier rather than a stimulant to a new and tougher reading of RFRA. One might say that *O Centro* is to RFRA as *Yoder* was to free exercise law—sounds tough, plays weak.

My own inquiry into results in the lower federal courts since publication of that Note has confirmed that, prior to the contraceptive mandate cases, RFRA continued to protect religious freedom quite weakly. Of the thirty or so non-prison cases decided on RFRA merits, claimants prevailed in whole or part in only four. One involved importation of Brazilian Daimé tea, a substance very much like the *hoasca* tea in *O Centro*, used in the sacraments of the Brazilian Santo Daimé religion.¹³² A second concerned the prohibition of beard wearing by firefighters in the District of Columbia;¹³³ the evidence did not support the District's concern that facial hair interrupted the flow of air when the firefighter wore a facemask. A third involved the treatment of bankruptcy of the Archdiocese of Milwaukee.¹³⁴ A fourth resulted in a remand of a claim that a Sikh IRS employee had a RFRA-based right to wear a ceremonial dagger at work, when existing practices appeared to permit exceptions from weapons restrictions in analogous cases in federal buildings.¹³⁵ These four decisions appear to take *O Centro* quite seriously.

The much larger number of losses, however, involved the historically common pattern in which the concepts of "substantial burden" and "compelling interest" were implemented in a government-favoring way. Courts found that religious exercise was not substantially burdened in cases involving claims that the government's use of public lands renders them less suitable for worship;¹³⁶ that religious speakers are entitled to access to public lands for distributing their message better than that afforded to secular

interest in collecting DNA, despite a religious objection, from a person convicted of a non-violent felony).

¹³¹ *Id.* at 1321–23 & n.203 (citing *United States v. Adeyemo*, 624 F. Supp. 2d 1081, 1093 (N.D. Cal. 2008) (discussing how the government's interest in forbidding the importation of leopard skins was not fatally undercut by the other unregulated harms that threatened the species more)); *id.* at n.198 (citing *United States v. Friday*, 525 F.3d 938, 958 (10th Cir. 2008)) (finding that the government's interest in prohibiting the taking of eagles without a permit was not fatally undercut by the failure to do more to protect eagles against harm from electric power lines).

¹³² *Church of the Holy Light of the Queen v. Mukasey*, 615 F. Supp. 2d 1210, 1211–12 (D. Or. 2009), *vacated and remanded sub nom.* *Church of Holy Light of Queen v. Holder*, 443 F. App'x 302 (9th Cir. 2011).

¹³³ *Potter v. District of Columbia*, 558 F.3d 542, 544 (D.C. Cir. 2009).

¹³⁴ *In re Archdiocese of Milwaukee*, 496 B.R. 905, 909–10 (E.D. Wis. 2013).

¹³⁵ *Tagore v. United States*, 735 F.3d 324, 331–32 (5th Cir. 2013) (remanding for further consideration of evidence on RFRA claim).

¹³⁶ *See S. Fork Band v. U.S. Dep't of Interior*, 643 F. Supp. 2d 1192, 1206–08 (D. Nev. 2009), *aff'd in part, rev'd in part sub nom.* *S. Fork Band Council of W. Shoshone v. U.S. Dep't of Interior*, 588 F.3d 718 (9th Cir. 2009); *United States v. Sowka*, No. 06-CR-00282-WDM, 2010 WL 2593966, at *4–5 (D. Colo. June 23, 2010); *Winnemen Wintu Tribe v. U.S. Dep't of Interior*, 725 F. Supp. 2d 1119, 1147 (E.D. Cal. 2010).

speakers;¹³⁷ and that the government motto, “In God We Trust” burdens any individual religious exercise.¹³⁸ Courts ruled that the government had satisfied the compelling interest test in a variety of cases, including several unsuccessful RFRA defenses to charges for religiously motivated killing of bald eagles and the possession of eagle feathers,¹³⁹ and to charges related to religiously motivated uses of marijuana.¹⁴⁰ A smattering of other cases, also decided on compelling interest grounds, raised novel and unsuccessful claims—an asserted RFRA right to transfer funds to private groups in Iraq,¹⁴¹ and to refuse to stand when a federal court convened and recessed.¹⁴²

Of course, it is impossible to prove in the strong sense that this last run of post-*O Centro* decisions is internally inconsistent, or that the full body of RFRA case law (without regard to *City of Boerne* or *O Centro* as era markers) is internally inconsistent. As with pre-*Smith* free exercise decisions, cases can always be distinguished on their facts. But it is telling that the two recent victories include one on all fours with *O Centro*,¹⁴³ and only two others, involving the use of masks by bearded firefighters¹⁴⁴ and the wearing

¹³⁷ See *Boardley v. U.S. Dep’t of Interior*, 605 F. Supp. 2d 8, 14 (D.D.C. 2009), *aff’d in part*, 09-5176, 2009 WL 3571278 (D.C. Cir. Oct. 19, 2009), *rev’d in part on other grounds*, 615 F.3d 508 (D.C. Cir. 2010); *United States v. Dillard*, 884 F. Supp. 2d 1177, 1183 (D. Kan. 2012); *Mahoney v. Doe*, 642 F.3d 1112, 1120–21 (D.C. Cir. 2011).

¹³⁸ See *Newdow v. Peterson*, 753 F.3d 105, 108–10 (2d Cir. 2014); *Newdow v. LeFevre*, 598 F.3d 638, 645–46 (9th Cir. 2010); see also *Carmichael v. Sebelius*, No. 3:13CV129, 2013 WL 5755618, at *6 (E.D. Va. Oct. 23, 2013), *aff’d in part, modified in part*, No. 13-2546, 2014 WL 1647470 (4th Cir. Apr. 25, 2014) (holding that assignment of a Social Security number that includes the “mark of the beast” does not constitute a substantial burden (citing Jack Zavada, *Mark of the Beast*, ABOUT.COM, http://christianity.about.com/od/endtimestopicalstudy/a/Mark-Of-The_Beast.htm (archived at <http://perma.cc/3WVN-VAPH>))).

¹³⁹ *United States v. Aguilar*, 527 F. App’x 808, 812–13 (10th Cir. 2013); *United States v. Wilgus*, 638 F.3d 1274, 1295 (10th Cir. 2011).

¹⁴⁰ *United States v. Lafley*, 656 F. 3d 936, 940–41 (9th Cir. 2011); *United States v. Lepp*, 446 F. App’x 44, 46 (9th Cir. 2011); *United States v. Quaintance*, 608 F. 3d 717, 718–20 (10th Cir. 2010); *Multi-Denominational Ministry of Cannabis & Rastafa, Inc. v. Holder*, 365 F. App’x 817, 820 (9th Cir. 2010); *Gover v. United States*, No. 08–5207, 2009 WL 754692, at *6 (W.D. Ark. Mar. 19, 2009).

¹⁴¹ *United States v. Islamic Am. Relief Agency*, No. 07-00087-CR-W-NKL, 2009 WL 4016478, at *6 (W.D. Mo. Nov. 18, 2009).

¹⁴² *United States v. Ali*, No. 10–187(MJD), 2012 WL 4128387, at *4 (D. Minn. Sept. 19, 2012).

¹⁴³ *Church of the Holy Light of the Queen v. Mukasey*, 615 F. Supp. 2d 1210, 1211–12 (D. Or. 2009) (“Guided by the unanimous decision of the United States Supreme Court in a very similar case, *Gonzales v. O Centro Esp’rita Beneficente União do Vegetal* . . . , I conclude that the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb–4, requires that plaintiffs be allowed to import and drink Daimon tea for their religious ceremonies, subject to reasonable restrictions.”), *vacated and remanded sub nom.* *Church of Holy Light of Queen v. Holder*, 443 F. App’x 302 (9th Cir. 2011).

¹⁴⁴ *Potter v. District of Columbia*, 558 F.3d 542, 547 (D.C. Cir. 2009) (“[T]he District of Columbia can only survive a summary judgment motion by showing that it has established a genuine issue as to whether its clean-shaven requirement is narrowly tailored to further the interest of protecting firefighters—that is, it must demonstrate it argued and proffered evidence to show that SCBAs are not safe for bearded firefighters.”).

of ceremonial daggers into federal buildings,¹⁴⁵ that closely followed *O Centro* by imposing on the government a rigorous burden of proof. For most of the remainder, it was as if *O Centro* had changed little or nothing in judicial attitude or analysis. As before, the record shows occasional outlier victories, and a stark pattern of defeats.

The contraceptive inclusion requirements under the Affordable Care Act have utterly changed the RFRA landscape. Despite the long history of defeats for so many other RFRA claims, plaintiffs relying on RFRA in contraceptive mandate cases have fared exceptionally well.¹⁴⁶ Many of these involve for-profit companies like Hobby Lobby and Conestoga Wood Products; before the Supreme Court decided those two cases in late June 2014, the circuits were split, but for-profit firms won far more cases than they lost.¹⁴⁷ More surprisingly, perhaps, challengers have also been quite successful at the preliminary relief stage in cases involving the Obama Administration's accommodation of religiously affiliated nonprofits, which can certify objection to coverage of contraceptives and thereby be excused from mandatory insurance coverage of such goods and services.¹⁴⁸

¹⁴⁵ *Tagore v. United States*, 735 F.3d 324, 330–31 (5th Cir. 2013) (“The Supreme Court emphasized in *Gonzales*, however, that RFRA requires the government to explain how applying the statutory burden ‘to the person’ whose sincere exercise of religion is being seriously impaired furthers the compelling governmental interest.”).

¹⁴⁶ For a complete list, see *HHS Mandate Information Central*, THE BECKET FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/hhsinformationcentral/#tab1>, archived at <http://perma.cc/A6KH-FBVU>. The cases involving for-profit firms include, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2784 (2014); *Gilardi v. Dep’t. of Health & Human Servs.*, 733 F.3d 1208, 1223–24 (D.C. Cir. 2013), *vacated*, 134 S. Ct. 2902, *remanded to* 575 F. App’x 1 (D.C. Cir. 2014); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106 (D.D.C. 2012), *appeal dismissed*, No. 13–5018, 2013 WL 2395168 (D.C. Cir. May 3, 2013).

¹⁴⁷ According to the Becket Fund’s well-maintained list of cases involving the contraceptive mandate, courts have resolved forty-one cases involving for-profit firms, and the division runs sharply in favor of RFRA claimants—thirty-five preliminary injunctions granted as compared to only six denied. See *HHS Mandate Information Central*, *supra* note 146. Of course, the most prominent cases are the two that were the subject of the grant of certiorari: *Hobby Lobby* and *Conestoga Wood Products*.

¹⁴⁸ See *id.* (listing the cases brought by nonprofits, enumerating the twenty-four preliminary injunctions that were granted, and the only two denied). The most well-known cases in this category are the following: *Little Sisters of the Poor Home for the Aged v. Sebelius*, 134 S. Ct. 1022, 1022 (2014) (granting preliminary relief against enforcement of the mandate, as prescribed in the accommodating regulations governing religiously affiliated charities), *Wheaton College v. Burwell*, 134 S. Ct. 2806, 2807 (2014) (granting an injunction prohibiting the enforcement of the mandate if the college informs the “Secretary of Health and Human Services in writing that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services”), and *Univ. of Notre Dame v. Burwell*, 743 F.3d 547, 554 (7th Cir. 2014) (holding that the accommodation for religiously affiliated nonprofits does not impose a substantial burden on the University), *petition for cert. filed*, 83 U.S.L.W. 3220 (U.S. Oct 3, 2014) (No. 14–392). See also *Priests for Life v. U.S. Dep’t of Health & Human Services*, No. 13-5638, (D.C. Cir. Nov. 14, 2014), archived at <http://perma.cc/339T-3PFH> (holding that the accommodation, in its current form, does not impose a substantial burden on an objecting non-profit entity). In accord with the Seventh Circuit’s

The data strongly suggest that both the analytic method and the victory rate in the entire run of contraceptive mandate cases deviate sharply from the pattern in religious exemption cases in prior times. Throughout the contraceptive mandate litigation, many courts have been unusually receptive to claimants at the “substantial burden” stage, and quite hostile to the government at the “compelling interest” stage. These judicial patterns represent a sharp break with historical tendencies under pre-*Smith* free exercise law, as well as longstanding developments under RFRA, even after *O Centro*. In the for-profit cases, *Lee*’s sweeping assertion that “[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity”¹⁴⁹—a proposition that had effectively deterred or defeated RFRA-based exemption claims by commercial actors for the past twenty years¹⁵⁰—suddenly lost its potency.¹⁵¹

D. State Constitutions and State RFRA

After *Smith* and *City of Boerne*, state law of religious liberty increased significantly in importance. By variety and frequency, most religious liberty-threatening encounters between citizens and their governments occur at the state and local level. *Smith* weakened the First Amendment’s restrictions on state and local government; the Federal RFRA attempted to restore those restrictions, but soon thereafter *City of Boerne* constitutionally precluded application of the Federal RFRA to states. With respect to land use and institutionalized persons, RLUIPA filled this gap, but the great bulk of conflicts between religious liberty and state or local law remain the primary province of state and local law.

In *Smith*’s immediate wake, a few state supreme courts construed their state constitutions to fill the gap created by *Smith*.¹⁵² The enactment of the Federal RFRA dampened this surge, and nothing since has done much to

Notre Dame decision is *Michigan Catholic Conference & Catholic Family Services v. Burwell*, 755 F.3d 372, 387–89 (6th Cir. 2014).

¹⁴⁹ *United States v. Lee*, 455 U.S. 252, 261 (1982).

¹⁵⁰ In addition to *Lee*, the Court’s unanimous opinion in *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 303–05 (1985) (finding that employees working in commercial enterprises of a religious foundation are not substantially burdened by the minimum wage requirements of Federal Fair Labor Standards Act) has also discouraged religious exemption claims by commercial employers.

¹⁵¹ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2784 (2014); *Gilardi v. Dep’t of Health & Human Servs.*, 733 F.3d 1208, 1223–24 (D.C. Cir. 2013), *vacated*, 134 S. Ct. 2902 (2014); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106 (D.D.C. 2012), *appeal dismissed*, No. 13–5018, 2013 WL 2395168 (D.C. Cir. May 3, 2013).

¹⁵² The earliest and best account of these developments can be found in Angela Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence*, 1993 BYU L. REV. 275, 310–12 (1993) (citing decisions by the supreme courts of Minnesota and Washington State).

reawaken it.¹⁵³ The story most relevant to this Article's thesis is that of state RFRAs, which tend strongly to be modeled on the Federal RFRA—that is, most of them are drafted in *Sherbert-Yoder* terms of burdens on individual religious exercise and compelling state interests in imposing such burdens.¹⁵⁴

Writing in 2010, Professor Christopher Lund canvassed the judicial results to that date under state RFRAs.¹⁵⁵ At that time, sixteen states had RFRAs; ten of these were enacted in 1998–2000, in the immediate wake of *City of Boerne*.¹⁵⁶ Professor Lund had hoped and expected that state courts would interpret state RFRAs in light of the surprisingly strong construction and application in *O Centro* of the similarly worded Federal RFRA. He was quite disappointed by his findings in mid-2010. Here is his summary:

[F]our states have never decided even a single case under their state RFRAs. Six other states have decided only one or two cases apiece And when state RFRA claims have been brought, they rarely win. In most jurisdictions, plaintiffs have not won a single state RFRA case litigated to judgment . . . [S]ome states have seen significant state RFRA litigation and there have been some very important victories. But in many states, state RFRAs seem to exist almost entirely on the books.¹⁵⁷

Professor Lund's bottom line was that, despite their seemingly strong language of protection for religious freedom, “[i]n most places, state RFRAs simply have not translated into a dependable source of protection for religious liberty at the state level.”¹⁵⁸

Professor Lund speculated that many lawyers were unaware of their state RFRAs, and he cited complaints in lawsuits where state RFRAs could have been relied upon but were not.¹⁵⁹ He did not limit his criticism to the lawyering process, however. He described a number of decisions in which state courts had dramatically weakened their state's RFRAs by construing them to require no more, and perhaps even less, than the *Smith*-weakened Free Exercise Clause itself.¹⁶⁰

¹⁵³ The California Supreme Court has more recently suggested that it may similarly construe the California Constitution in a pre-*Smith*, religion-protective way. See *N. Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Superior Court*, 189 P.3d 959, 968 (Cal. 2008) (leaving open the standard of review for religious liberty claims under the California Constitution).

¹⁵⁴ Christopher Lund, *Religious Liberty after Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466, 475–78 (2010).

¹⁵⁵ *Id.* at 482–89.

¹⁵⁶ Since then, only Kentucky and Mississippi have been added to that list. For discussion of the recent fight over the proposed Mississippi RFRA in Spring 2014, see *supra* Part I and text accompanying notes 26–38.

¹⁵⁷ Lund, *supra* note 154, at 467.

¹⁵⁸ *Id.* at 468.

¹⁵⁹ *Id.* at 480–81 & n.92.

¹⁶⁰ *Id.* at 484–85 & nn.111–12 (citing *First Vagabonds Church of God v. City of Orlando*, 578 F. Supp. 2d 1353, 1361–62 (M.D. Fla. 2008)); *id.* at 485–86 & n.118 (citing *First Church of Christ, Scientist v. Historic Dist. Comm'n*, 738 A.2d 224, 231 (Conn.

At first glance, such a construction of a RFRA seems shocking to anyone who understands the flow of the law in this field—how can an enactment explicitly designed to restore the compelling interest test and thereby strengthen religious liberty be construed as entirely superfluous? As this Article has demonstrated, however, judges have repeatedly found ways to limit regimes of religious exemptions under general standards, whether they were constitutional standards diluted by the Supreme Court's decisions from the 1980s, or Federal RFRA standards both before and after *City of Boerne*. State court judges, as Professor Lund appraised their performance in 2010, were just following this pattern with a vengeance.

My own inquiry into the decisional law under state RFRA since Professor Lund wrote shows a superficial appearance of greater success for religious liberty claims. Of twenty-two state RFRA cases decided on the merits, I found nine that might be characterized as victories for RFRA claimants—a far better record than in any prior period under state or Federal RFRA. While Professor Lund's scholarly efforts may have influenced these outcomes, the particulars of these decisions cast them in a somewhat narrower light. Of these nine, six came from two states, Illinois and Texas. The Illinois decisions all involved the context of land use,¹⁶¹ and two of the three explicitly involved identical claims under Federal RLUIPA.¹⁶² In those two, the Illinois statute added nothing of independent force.

A second group of three were decided under the Texas RFRA—one of those involved land use,¹⁶³ a second concerned Santerian animal sacrifice,¹⁶⁴ and a third involved public school grooming standards as applied to a Native

Super. Ct. 1998), *adopted by* First Church of Christ, Scientist v. Historic Dist. Comm'n, 737 A.2d 989, 989–90 (Conn. App. Ct. 1999)).

¹⁶¹ *World Outreach Conference Ctr. v. City of Chi.*, 591 F.3d 531 (7th Cir. 2009); *Irshad Learning Ctr. v. Cnty. of DuPage*, 937 F. Supp. 2d 910 (N.D. Ill. 2013); *Our Savior Evangelical Lutheran Church v. Saville*, 922 N.E.2d 1143 (Ill. App. Ct. 2009).

¹⁶² *World Outreach Conference Ctr.*, 591 F.3d at 533 (claiming that the City of Chicago's rezoning of a former YMCA building in a way that prevented World Outreach, a religious organization, from operating it as a community center violated RLUIPA); *Irshad Learning Ctr.*, 937 F. Supp. 2d at 949 (claiming that DuPage County denying a Muslim educational group a conditional use permit to use property for religious purposes violated RLUIPA).

¹⁶³ *Barr v. City of Sinton*, 295 S.W.3d 287, 289–90 (Tex. 2009) (challenging a city ordinance to close a half-way house for low-level offenders across from a pastor's church).

¹⁶⁴ *Merced v. Kasson*, 577 F.3d 578, 581–82 (5th Cir. 2009) (challenging city ordinance prohibiting the keeping of four-legged animal within town borders because the ordinance prevents a Santeria priest from performing animal sacrifice ceremonies). For an insightful discussion of *Merced*, see James Oleske, *Lukumi at Twenty: Legacy of Uncertainty for Religious Liberty and Animal Welfare Laws*, 19 ANIMAL L. 295, 314–22 (2013). Professor Laycock, who successfully argued the Santerian animal sacrifice case (*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)) in the U.S. Supreme Court, was involved in *Merced* as well as in *Barr v. City of Sinton*, 295 S.W.3d 287 (Tex. 2009).

American student.¹⁶⁵ The Texas RFRA has been the most successful in producing a legally strengthened regime of religious freedom, although at least two of the three victories—the land use case and the hair length case—might easily have come out the same way under RLUIPA and the 14th Amendment, respectively.¹⁶⁶

The remainder of state RFRA victories for religious liberty came from Connecticut, Pennsylvania, and Tennessee, respectively. One, a Connecticut decision that dismissed a clergy malpractice claim,¹⁶⁷ would have been decided identically under the First Amendment.¹⁶⁸ In the other two, RFRA mattered. The Pennsylvania case involved a program of food sharing for the homeless; the state's RFRA protected the program against the City of Philadelphia's prohibition on feeding programs in municipal parks.¹⁶⁹ And the decision from Tennessee sustained a RFRA-based objection to an autopsy on an executed prisoner.¹⁷⁰ By my count, in all the state RFRA decisions since Professor Lund wrote on the subject, the state RFRA probably made a dispositive difference in four at most.¹⁷¹ While it is possible that the Texas rulings have changed the climate on the ground for religious exemptions, one would need to know much more before making a judgment about that. The losses in state RFRA cases involve, among other things, religion-based defenses to criminal charges involving marijuana;¹⁷² failed attempts to elevate rights of religious speech over analogous secular speech;¹⁷³ regulation of re-

¹⁶⁵ A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist., 611 F.3d 248, 272–73 (5th Cir. 2010) (challenging school district appearance code as applied to student who wore his hair long for religious reasons).

¹⁶⁶ For an example of a successful pre-RFRA claim that school grooming standards violate the Constitution, see *Alabama & Coushatta Tribes v. Big Sandy Independent School District*, 817 F. Supp. 1319, 1335 (E.D. Tex. 1993).

¹⁶⁷ *Kubala v. Hartford Roman Catholic Diocesan Corp.*, 41 A.3d 351, 354–55, 365–66 (Conn. Super. Ct. 2011), *aff'd*, 38 A.3d 1252 (Conn. App. Ct. 2012), *cert. denied*, 43 A.3d 662 (Conn. 2012).

¹⁶⁸ See Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789, 1816 & n.99 (citing *Nally v. Grace Cmty. Church of the Valley*, 763 P.2d 948, 960 (Cal. 1988)).

¹⁶⁹ *Chosen 300 Ministries, Inc. v. City of Phila.*, No. 12–3159, 2012 WL 3235317, at *15 (E.D. Pa. Aug. 9, 2012).

¹⁷⁰ *Johnson v. Levy*, No. M2009–02596–COA–R3–CV, 2010 WL 119288, at *1, *4–5 (Tenn. Ct. App. Jan. 14, 2010).

¹⁷¹ Those four cases are: *Our Savior Evangelical Lutheran Church v. Saville*, 922 N.E.2d 1143 (Ill. App. Ct. 2009), *Merced v. Kasson*, 577 F.3d 578 (5th Cir. 2009), *Chosen 300 Ministries, Inc. v. City of Philadelphia*, No. 12–3159, 2012 WL 3235317 (E.D. Pa. Aug. 9, 2012), and *Johnson v. Levy*, No. M2009–02596–COA–R3–CV, 2010 WL 119288, at *1 (Tenn. Ct. App. Jan. 14, 2010).

¹⁷² See, e.g., *State v. Hardesty*, 214 P.3d 1004, 1005 (Ariz. 2009) (en banc); *State v. Cordingley*, 302 P.3d 730, 731 (Idaho Ct. App. 2013); *State v. White*, 271 P.3d 1217, 1218–19 (Idaho Ct. App. 2011).

¹⁷³ *Reed v. Town of Gilbert*, No. 07-522-PHX-SRB, 2011 WL 5924381, at *11 (D. Ariz. Feb. 11, 2011), *withdrawn from bound volume*, *aff'd*, 707 F.3d 1057 (9th Cir. 2013) (concerning Arizona's religious freedom statute); *Brown v. City of Pittsburgh*, 586 F.3d 263, 283–88 (3d Cir. 2009) (concerning Pennsylvania's religious freedom statute); *Phelps-Roper v. Cnty. of St. Charles*, No. 4:10CV02232 AGF, 2013 WL 4458979, at *1–2 (E.D. Mo. Aug. 20, 2013) (concerning Missouri's religious freedom statute).

relationships between adults and children;¹⁷⁴ and cases involving sexual abuse by clergy.¹⁷⁵

Overall, these newer results in state RFRA cases do not indicate any significant jurisprudential shift. Since Professor Lund published in 2010, the decisions show that only in Texas have courts vigorously construed the state statute in a series of cases.¹⁷⁶

E. *The Lessons of Religious Exemption Regimes*

Looking back over fifty years of religious exemption regimes—the Free Exercise Clause under the purported reign of *Sherbert-Yoder*, the Federal RFRA, and state RFRAs—I find myself drawn to some stark conclusions. First, the legal language of these regimes, in particular the demand for compelling interests to justify the refusal to exempt burdened religious exercise, is very strenuous. If courts applied these concepts with the vigor one expects from their function in the law of free speech and equal protection, one would expect exemption claims to succeed very frequently. Indeed, because these concepts operate only as-applied to religious objectors in exemption law, but typically operate against laws in their entirety in the fields of equal protection¹⁷⁷ and free speech,¹⁷⁸ one would expect a higher rate of success for religious exemption claims than any others adjudicated under these standards. But the evidence is starkly to the contrary. The Supreme Court made it a steady practice to honor in the breach the free exercise principles nominally stated in *Sherbert-Yoder*. The lower federal courts have implemented *Yoder* itself and then the Federal RFRA very weakly, even after the prod from *O Centro*, and the state courts have tended to do likewise with state RFRAs.

¹⁷⁴ *Peace v. Peace*, No. 1 CA-CV 13-0150, 2014 WL 1884868, at *3–4 (Ariz. Ct. App. May 8, 2014) (finding that a religious freedom statute does not require overturning a family court’s order modifying parental visitation).

¹⁷⁵ *State v. Bent*, 328 P.3d 677, 685–86 (N.M. Ct. App. 2013), *cert. denied*, 321 P.3d 126 (N.M. 2013) (finding that a religious freedom statute is no defense to charges of unlawful sexual contact with minors by leader of spiritual group); *Givens v. St. Adalbert Church*, 56 Conn. L. Rptr. 585, 585 (Conn. Super. Ct. 2013).

¹⁷⁶ *Elane Photography v. Willock*, 284 P.3d 428 (N.M. Ct. App. 2012), *aff’d*, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014) did not produce a decision on its RFRA merits. It involved a New Mexico photographer who refused to provide services for the commitment ceremony of a lesbian couple, and was thereafter the target of a discrimination complaint in the New Mexico Human Rights Commission. In seeking review of the agency order against her, the photographer raised a defense under the New Mexico Religious Freedom Restoration Act. 309 P.3d at 72. The New Mexico Supreme Court rejected the photographer’s federal constitutional defenses on the merits, *id.* at 63–76, and ruled that the state RFRA did not apply to litigation between private parties, *id.* at 76–78. The question of applicability of RFRAs, state and Federal, in suits between private parties has become judicially and legislatively important over the past several years. *See, e.g.*, *Chaganti*, *supra* note 117. I do not address the point in this Article.

¹⁷⁷ *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 326–27 (2003) (rejecting an equal protection argument that would prohibit all use of race in law school admissions process).

¹⁷⁸ *See, e.g.*, *United States v. Stevens*, 130 S. Ct. 1577, 1579, 1593–94 (2010) (invalidating on its face a federal statute outlawing the distribution of animal “crush videos”).

For fifty years, judges at all levels have avoided privileging religiously motivated behavior over its secular counterparts.

To be sure, under all of these regimes, occasional victories appear, even prior to the extraordinary run of victories in the litigation involving the contraceptive mandate. The record shows that these earlier victories tended to reflect the kind of hybrid rights claims discussed in *Smith*,¹⁷⁹ or—in rare instances—cases in which state interests seem extremely weak and the countervailing religious interests seem unusually strong.¹⁸⁰ Taken separately, some of these victories appear manifestly just and appropriate. In most of these cases, however, judges seem ever mindful of the slippery slope of religious exemptions. As I wrote in 1989, “[b]ehind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe.”¹⁸¹ Despite the Court’s sneering reference in *O Centro* to this apprehension,¹⁸² its decision produced very little change in judicial behavior prior to the litigation over the contraceptive mandate.

One promising explanation of this pattern, in both the Free Exercise Clause decisions between 1963 and 1990 and the Federal and state RFRA decisions of the past twenty years, is the enormous range of legal norms that may fall prey to religious exemption claims. The overwhelming majority of speech and press claims attach to laws that regulate the content or process of communications.¹⁸³ In contrast, religious exemption claims may sweep in a

¹⁷⁹ See, e.g., *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996) (finding that a hybrid of the Free Exercise and Establishment Clauses supports the ministerial exemption from prohibition on sex discrimination in employment); see also Nelson Tebbe, *Smith In Theory and Practice*, 32 *CARDOZO L. REV.* 2055, 2059–60 (2011) (arguing, with examples, that *Smith* did not preclude all exemptions under the Free Exercise Clause).

¹⁸⁰ Cases involving attempts under local laws to shut down church-sponsored programs to feed the homeless are a good example of this. See, e.g., *W. Presbyterian Church v. Bd. of Zoning Adjustments*, 862 F. Supp. 538, 547 (D.D.C. 1994) (relying on Federal RFRA to demonstrate that regulation of religious conduct through zoning laws is a substantial burden on the free exercise of religion); *Chosen 300 Ministries, Inc. v. City of Phila.*, No. 12–3159, 2012 WL 3235317, at *15–16 (E.D. Pa. Aug. 9, 2012) (relying on Pennsylvania religious freedom statute to demonstrate that ban on free food distribution in parks violates free exercise of religion). Of course, that assessment is mine; others would weigh interests in this and other cases far differently. That’s the nub of the problem of religious exemptions.

¹⁸¹ Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 *HARV. L. REV.* 933, 947 (1989).

¹⁸² *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 435–36 (2006). (“[T]he Government’s argument for uniformity is different; it rests not so much on the particular statutory program at issue as on slippery-slope concerns that could be invoked in response to any RFRA claim for an exception to a generally applicable law. The Government’s argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I’ll have to make one for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to ‘rule[s] of general applicability.’”).

¹⁸³ Speech claims designed to create exceptions to norms outside the direct regulation of communications are notoriously unsuccessful. See, e.g., *United States v. O’Brien*, 391 U.S. 367, 376–86 (1968) (barring use of First Amendment defense for critic of military

range of religious beliefs and practices as wide and deep as the human condition itself, and a correspondingly broad range of government interests. As Part II.C of this Article demonstrates, the Supreme Court has seen very few such claims in the past twenty years, but the lower courts see them quite regularly, in cases from within and without institutions of confinement.¹⁸⁴ It is hardly a wonder that judges in those lower courts, backed by the Supreme Court's own retreat in free exercise decisions during the 1980s, proceed with great caution and persistent deference to the government, despite RFRA's bold, religion-protective language.¹⁸⁵ Judges just don't know what is coming next, and they lack the discretionary jurisdiction that enables the Supreme Court to decide such cases only on very rare occasion.

Writing in 1999, Professor Eugene Volokh commended the statutory approach to religious exemptions, as distinguished from the constitutional approach, on the ground that the statutory approach preserved democratic accountability and control by permitting legislative overrides of particular judicial decisions.¹⁸⁶ As Professor Volokh pointed out, legislatures are not free to similarly override rights-recognizing decisions, like *Sherbert* and *Yoder*, that root exemptions in constitutional norms.¹⁸⁷

This view made perfect sense as a matter of academic logic. Let judges make case by case decisions under general statutory norms, in light of the facts and the precedents, and permit legislatures to correct perceived mistakes. In practice, however, things have not worked out this way. The only congressional overrides in such cases have been of judicial denials of *constitutional* claims—with respect to the wearing of religious garb while in the armed forces,¹⁸⁸ and with respect to exemption from Federal Insurance Contributions Act (FICA) contributions by business firms owned by members of the Old Order Amish.¹⁸⁹ Congress has *never* overridden a Federal RFRA

scription who willfully destroyed his Selective Service certificate as a symbolic protest during Vietnam War). For my own, quite personal take on *O'Brien*, see Ira C. Lupu, *Teaching United States v. O'Brien: Three Conversations and the Wisdom of John Hart Ely*, 16 GREEN BAG 2d 291 (2013).

¹⁸⁴ See *supra* Part II.C.

¹⁸⁵ *Id.*

¹⁸⁶ Eugene Volokh, *A Common Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1474–75 (1999).

¹⁸⁷ *Id.* at 1467–70 (describing what Volokh calls the constitutional exemption model, under which courts had the final say).

¹⁸⁸ Congress responded to the decision in *Goldman v. Weinberger*, 475 U.S. 503 (1986), which rejected a free exercise claim to wear a *yarmulke* (skull-cap) by an Orthodox Jewish Captain while on duty in the Air Force, by enacting 10 U.S.C. § 774 (2006), which specifies norms and processes for religious accommodations with respect to requirements of wearing certain apparel in the Armed Forces.

¹⁸⁹ Congress responded to the decision in *United States v. Lee*, 455 U.S. 252 (1982), which rejected a free exercise claim by an Old Order Amish employer to be exempted from FICA contributions on behalf of his Old Order Amish employees, by creating a statutory exemption. See 26 U.S.C. §§ 3127(a)(2), (b)(1).

decision, either for or against the government, and no one expects that pattern to change in response to *Burwell v. Hobby Lobby*.¹⁹⁰

At the state level, the results are nearly identical. My research has disclosed no cases in which a state legislature has overridden a state judicial decision in favor of or against a state RFRA claim.¹⁹¹ Professor Lund's work, cited above, identifies two instances in which state legislatures amended RFRA to include a new coverage restriction.¹⁹² One involved permitting Illinois to relocate cemeteries and graves in light of the modernization of Chicago's O'Hare Airport.¹⁹³ The other involved a Florida statute that, while RFRA litigation on the matter was pending, excluded from the state's RFRA the statutory requirement for a full-face photograph on a driver's license.¹⁹⁴ Aside from momentary episodes of that kind, the legislative experience of the past two decades is that RFRA-enacting legislatures are content to delegate in general terms, take credit for protecting "religious freedom," and leave all the hard choices to the judiciary. As this Part has demonstrated, the state and federal judiciaries have been less than eager to exercise that discretion in favor of religious liberty.

The enduring qualities of religious exemption regimes—constitutional and statutory, federal or state—are weakness, plasticity, erratic and unpredictable bursts of religion-protective energy, and the consequent tendency to produce deep inconsistencies. The Supreme Court's disposition of *Hobby Lobby* powerfully reinforces the perception of plasticity in the relevant standards. Moreover, the profound disagreement among the Justices on a wide

¹⁹⁰ Senators Reid, Murray, Boxer, and others have sponsored legislation to overturn the result in *Hobby Lobby*, but no one believes it can be enacted in this Congress. See Robert Pear, *Democrats Push Bill to Reverse Supreme Court Ruling on Contraception*, N.Y. TIMES, July 8, 2014, at A15, archived at <http://perma.cc/YUJ4-XLP5>. Enactments designed to take away particular judicial victories for religious freedom raise the constitutional problem of targeted discrimination against identifiable religious groups. See Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 CARDOZO L. REV. 565, 585 (1999) (stating that *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), would invite free exercise challenges to general legislation apparently designed to suppress practices associated with a particular sect).

¹⁹¹ I inquired of Professor Volokh in June 2014 whether he was aware of any such overrides, and his answer was no. E-mail from Eugene Volokh to author (June 27, 2014) (on file with author and the Harvard Journal of Law & Gender).

¹⁹² Lund, *supra* note 154, at 493–96.

¹⁹³ *Id.* at 493–95. The Seventh Circuit upheld the provision against constitutional attack in *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 630–39, 642 (7th Cir. 2007).

¹⁹⁴ Lund, *supra* note 154, at 495–96. The statute, FLA. STAT. § 322.142(1) (2013), was designed to preempt the state RFRA claim in *Freeman v. Department of Highway Safety & Motor Vehicles*, 924 So. 2d 48 (Fla. Dist. Ct. App. 2006), and may reflect a post 9/11 anti-Muslim bias. For inquiry into that kind of bias in the federal courts, see generally Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence From the Federal Courts*, 98 IOWA L. REV. 231 (2012). I inquired of Professor Lund in June 2014 whether he was aware of any additional episodes of such legislative restrictions on coverage in response to particular litigation or other events, and his answer was no. E-mail from Christopher Lund to author (June 30, 2014) (on file with author and the Harvard Journal of Law & Gender).

range of questions portends a future for religious exemptions just as erratic as their fifty-year past.

III. *BURWELL V. HOBBY LOBBY STORES, INC.*

As expected, the Court's decision (per Justice Alito) in *Hobby Lobby*¹⁹⁵ sent shock waves across the legal and political culture. The division among the Justices took the distressingly predictable form of 5–4, with all the Republican appointees on one side and all the Democratic appointees on the other. Justice Anthony Kennedy wrote a brief and vital concurring opinion that suggests the route forward, discussed below.¹⁹⁶

Recall the operative four questions in *Hobby Lobby*, and the logical linkage among them. First, is a for-profit corporation a “person” who can “exercise religion” within the meaning of RFRA?¹⁹⁷ Second, if so, does the mandate to include all forms of pregnancy prevention services in health insurance “substantially burden” the firm’s religious exercise?¹⁹⁸ Third, if so, is application of that burden to the firm “in furtherance of a compelling governmental interest”?¹⁹⁹ Fourth, if so, is the requirement of such coverage in the employer-purchased health coverage “the least restrictive means of furthering that compelling governmental interest”?²⁰⁰

Hobby Lobby prevailed because the Supreme Court found a for-profit corporation to be a “person” for the purposes of religious exemption (satisfying question one); held that the mandate’s inclusion of all forms of pregnancy prevention in health insurance “substantially burdens” the firm’s religious exercise (satisfying question two); and ruled that such a requirement is not the least restrictive means for furthering this government interest (satisfying question four). As explained below, however, the disposition of question three (compelling governmental interest) proved to be both the most subtle and surprising.

Before sub-dividing analysis along the lines marked out by each of these four issues, I want to flag two meta-questions that I will discuss within each of the following issue-oriented sections. The first is a broad methodological problem of statutory interpretation, identified crisply at oral argument,²⁰¹ and addressed sharply in both the Court opinion²⁰² and Justice

¹⁹⁵ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

¹⁹⁶ *Id.* at 2785–87.

¹⁹⁷ See *supra* pp. 41–42. The opinion does not address whether shareholders of a corporation, closely held or otherwise, are burdened (within the meaning of RFRA) by obligations imposed under the Affordable Care Act on the corporation. This Article will similarly not address the question.

¹⁹⁸ Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(a) (2012); see also *supra* pp. 41–42.

¹⁹⁹ *Id.* § 2000bb-1(b)(1); see also *supra* pp. 41–42.

²⁰⁰ *Id.* § 2000bb-1(b)(2); see also *supra* pp. 41–42.

²⁰¹ Transcript of Oral Argument at 6–7, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354), archived at <http://perma.cc/DS4D-RF8T>.

Ginsburg's principal dissent.²⁰³ What, precisely, did Congress restore when it enacted the Religious Freedom Restoration Act?²⁰⁴ Legislative history strongly suggested that Congress was reacting to *Smith*, and not to particulars of the long run of decisions, such as *Bob Jones University, United States v. Lee*, and *Lyng*, that had qualified and weakened the *Sherbert-Yoder* regime. The government thus argued that RFRA incorporated the pre-*Smith* free exercise decisions by reference, or at least incorporated the decisions that dealt explicitly and directly with the concepts of "substantial burdens" and "compelling governmental interests." In particular, the government relied heavily on the proposition in *Lee* that commercial entities should not be able to secure exemptions from generally applicable regulatory regimes. Following this line of argument exactly, Justice Ginsburg's dissent argued that RFRA had essentially codified this *Lee* principle, and that Hobby Lobby's claims accordingly should fail.²⁰⁵

In Justice Alito's view, however, the language of the statute controlled the case. And that language never points back to any particular result, much less any particular context-specific proposition, in pre-*Smith* cases. The text of RFRA never says that *Sherbert, Yoder*, or any other case was rightly or wrongly decided. RFRA's formally declared purposes include restoration of a legal standard "as set forth," not "as applied," in *Sherbert* and *Yoder*.²⁰⁶ Similarly, RFRA's "findings" reference the "compelling interest test as set forth in prior federal court rulings . . ." ²⁰⁷ However ambiguous that pair of references may be, RFRA explicitly codifies a standard of review, not a set of judicial opinions. As Justice Alito puts it, "nothing in the text of RFRA . . . suggested that the statutory phrase 'exercise of religion under the First Amendment' was meant to be tied to this Court's pre-*Smith* interpretation of that Amendment."²⁰⁸

What renders this dispute about interpretive methodology highly unusual is that virtually all of the relevant terms—exercise of religion, substantial burden, compelling governmental interest, and least restrictive means—are not of congressional creation. The first comes from the Constitution it-

²⁰² *Hobby Lobby*, 134 S. Ct. at 2759–2785.

²⁰³ *Id.* at 2787–806 (Ginsburg, J., dissenting).

²⁰⁴ For contemporaneous elaboration of this point, see Marty Lederman, *Hobby Lobby Part XVIII—The One (Potentially) Momentous Aspect of Hobby Lobby: Untethering RFRA from Free Exercise Doctrine*, BALKINIZATION (July 6, 2014, 4:08 PM), <http://balkin.blogspot.com/2014/07/hobby-lobby-part-xviii-one-potentially.html>, archived at <http://perma.cc/M3AD-SLGU>. Professor Lederman's post flagged my 1995 article that identified this as a core question going forward. See Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 193–98 (1995) (asking whether a statute written in such strenuous terms would eventually break free from its earlier, more restrained case law moorings).

²⁰⁵ *Hobby Lobby*, 134 S. Ct. at 2803–06.

²⁰⁶ Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(b) (2012).

²⁰⁷ *Id.* § 2000bb(a)(5).

²⁰⁸ *Hobby Lobby*, 134 S. Ct. at 2772.

self.²⁰⁹ The second, third, and fourth come directly from judicial opinions applying the Free Exercise Clause to particular claims.²¹⁰ When Congress asserts restorative purposes, and chooses judicial terms of art in the restorative enterprise, is it not reasonable for the Court to treat those terms as importing their pre-existing judicial gloss?²¹¹ If Congress wanted a new approach, why did it legislate in terms associated with the prior regime?

The second meta-question looming above the *Hobby Lobby* opinions is the one to which this entire Article is addressed—can judges be reasonably consistent over time, and across widely different fact patterns, in applying concepts like substantial burden, compelling governmental interest, and least restrictive alternative? As the analysis below reveals, each side of the Court (majority and principal dissent) may have dealt with all four issues in an internally coherent way. There is room for deep doubt, however, as to whether either side’s approach is fully consistent with past decisions under RFRA or the Free Exercise Clause, pre-*Smith*. More troubling by far, the relevant questions are sufficiently vague that any and all answers to them are equally persuasive; that is, they do not cabin judgment in ways consistent with a rule of law.

Readers will be guided most fairly through the four sub-sections that follow if they know my own judgments about the *Hobby Lobby* litigation.²¹² As Professor Tuttle and I argued in February of 2014, the government ultimately should have prevailed.²¹³ We disagreed with the government’s position on corporate religious exercise and on whether Hobby Lobby’s exercise of religion was substantially burdened by the contraceptive mandate. However, we believed then, and still believe, that the Establishment Clause requires a construction of RFRA that does not permit the imposition of significant harms on third parties—in this case, female employees and female dependents of all employees.²¹⁴ Loss of no-cost coverage of pregnancy prevention services, even for an interim period, is precisely one such harm.²¹⁵ I believe that the government satisfied the compelling interest test, and that the alternative means for providing such coverage may well prove

²⁰⁹ U.S. CONST. amend. I.

²¹⁰ See *supra* Part II.A (discussing the Supreme Court’s development of free exercise principles).

²¹¹ I originally focused on these questions at the time Congress was considering RFRA. See Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1, 56–62 (1993).

²¹² *Hobby Lobby*, 134 S. Ct. at 2772.

²¹³ Lupu & Tuttle, *Symposium: Religious Questions and Saving Constructions*, *supra* note 15.

²¹⁴ See *id.*

²¹⁵ For a rigorous presentation of the argument that full insurance coverage of these services is of considerable value, economic and otherwise, see Brief for Guttmacher Institute et al. as Amici Curiae Supporting Petitioners at 7–21, *Hobby Lobby* 134 S. Ct. 2751 (No. 13-354); Gedicks & Van Tassel, *supra* note 3, at 376–79; Kara Loewentheil, *When Free Exercise is a Burden: Protecting “Third Parties” in Religious Accommodation Law*, 62 DRAKE L. REV. 434, 439–44 (2014).

inadequate because of a combination of political, administrative, fiscal, and legal uncertainties. But I do not for a minute believe that the prior law compelled that set of answers and no others.

My analytic breakdown of the four main issues is as follows:

A. *Corporate Religious Exercise*

The question whether for-profit corporations should be legally considered as persons that exercise religion received tremendous attention in the *Hobby Lobby* litigation. Attached to this question was the related one of whether shareholders (obviously considered persons under law) in closely held companies were the relevant, burdened parties. The government had argued consistently that business corporations were not persons capable of exercising religion, and that the shareholder-persons were not obligated to do anything by the ACA, and so were not burdened.

It was inevitable that the ghost of *Citizens United v. FEC*²¹⁶ would haunt this corporate personhood question. The Tenth Circuit Court of Appeals, sitting en banc in *Hobby Lobby*, treated *Citizens United* as a relevant authority.²¹⁷ Not so the Supreme Court majority, which found an easy route to the answer. The Federal Dictionary Act, which defines terms for purposes of the U.S. Code “unless the context indicates otherwise,” states that the word “person . . . includes corporations, companies, associations, firms, partnerships, societies . . . as well as individuals.”²¹⁸ Does the context of RFRA and “religious exercise” indicate otherwise?

The most grievous flaw in the government’s argument to exclude for-profit corporations from RFRA’s coverage is that the overwhelming majority of religious institutions are held in the corporate form. Individual human beings, who live and die, do not own houses of worship, religious colleges and universities, religious charities, or religiously affiliated health care institutions. These entities are held in perpetuity in corporate form, in the name of faith communities. It could not possibly be disputed that these entities exercise religion, and many of the Court’s prior decisions had implicitly recognized that.²¹⁹

²¹⁶ 558 U.S. 310 (2010). For a focus on other connections between *Citizens United* and *Hobby Lobby*, see Ellen D. Katz, *Hobby Lobby and the Pathology of Citizens United*, 9 DUKE J. CON. L. & PUB. POL’Y (forthcoming 2014) (arguing that the Court’s approach to precedent in *Citizens United*, where it read prior decisions to adopt rules that those decisions deliberately chose not to espouse, will likely affect challenges to the Affordable Care Act).

²¹⁷ *Hobby Lobby Stores, Inc., v. Sebelius*, 723 F.3d 1114, 1133 (10th Cir. 2013) (en banc).

²¹⁸ 1 U.S.C. § 1 (2012).

²¹⁹ See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

What distinguishes Hobby Lobby Stores, Inc. from such institutions?²²⁰ First, by definition, Hobby Lobby has a profit motive, and earnings that inure to the benefit of its owners. These features disqualify the company from nonprofit status, which has considerable legal significance, in tax law or otherwise.²²¹ But the state has no constitutional warrant for excluding profit-makers from the ranks of entities with religious purposes; that is a theological move, not open to the state. Second, Hobby Lobby's primary commercial purpose is selling products to hobbyists. But religious colleges have primary educational purposes, and religious hospitals have primary purposes of healing the sick, and these purposes do not disqualify any entity from exercising religion.

The government, perhaps recognizing this weakness in its conceptual argument, fell back on prior law. Never, the government asserted, had the Supreme Court ruled that a business corporation could exercise religion under the First Amendment or RFRA. But the Court had never ruled otherwise, either, even in cases where it might have done so,²²² and it had adjudicated free exercise claims by individual business entrepreneurs.²²³ So the question was entirely open. Even if RFRA restored pre-*Smith* law in its entirety, nothing in that body of law firmly foreclosed a judgment that for-profit corporations might exercise religion.²²⁴

Of the four *Hobby Lobby* questions, only the issue of corporate religious personhood had an answer strenuously rooted in legal authority, widespread practice, and legal logic. It was no surprise to me, though barely mentioned in the media coverage of the case, that the Court divided 5–2 on this question. Justices Kagan and Breyer did not join the portions of the dissent that concluded that for-profit corporations could not be persons that exercise religion.²²⁵ They perhaps did not want to undercut Justice Ginsburg's dissent by openly disagreeing about anything, but they seemed to recognize

²²⁰ The best overall work on this subject is Mark Rienzi, *God and the Profits: Is There Religious Liberty for Money-Makers?*, 21 GEO. MASON L. REV. 59 (2013).

²²¹ See I.R.C. § 501(c)(3) (2012) (“[N]o part of the net earnings of [a charitable corporation may] . . . inure[] . . . to the benefit of any private shareholder or individual”)

²²² *Gallagher v. Crown Koshher Supermarket of Mass., Inc.*, 366 U.S. 617, 631 (1961) (leaving open the question of corporate standing to seek free exercise exemption from Sunday Closing Law).

²²³ *Braunfeld v. Brown*, 366 U.S. 599, 601 (1961) (describing appellants as retail merchants engaged in the selling of clothing and home furnishings).

²²⁴ The fact that *Hobby Lobby* and *Conestoga Wood Products* were closely held, family-run businesses made the argument easier, but there is nothing in the logic of the *Hobby Lobby* majority that restricts religious exercise to such companies. Publicly traded, widely held companies might develop a religious identity, but the impracticality of obtaining internal agreement on the Board of Directors, or among shareholders, as to what that identity is, makes such assertions of corporate religious personhood extremely unlikely.

²²⁵ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2806 (2014) (Breyer and Kagan, JJ., dissenting) (agreeing with Justice Ginsburg that Hobby Lobby should lose on the merits, but asserting the non-necessity of deciding the corporate personhood question and therefore not joining that portion of the Ginsburg dissent).

that the question in the case was not whether Hobby Lobby had RFRA rights; rather, the question was what RFRA rights Hobby Lobby had.

B. *Substantially Burden*

The concept of “substantial burdens” is the trigger for RFRA’s seemingly stringent protection. If the claimant cannot make this showing, the tests of compelling interest and least restrictive means do not kick in. As Professor Tuttle and I explained in a SCOTUSblog post prepared prior to oral argument in *Hobby Lobby*, the test of substantial burden has two parts, not just one:

As *Sherbert* and *Yoder* perfectly illustrate, a burden on religion involves conflict between a person’s legal interests and her religious practices. What is rarely noticed, however, is that the collision of interests must meet two measures of substantiality, not just one. The conflict must involve, as in *Sherbert*, the imposition of substantial secular costs on the religiously compliant person. Less well noticed, the conflict also must involve substantial religious costs for those who comply with secular law.²²⁶

Unpacking the dual inquiries into substantiality of a burden sheds considerable light on both the Alito opinion and the Ginsburg dissent in *Hobby Lobby*. With respect to the secular costs of compliance with faith, Justice Alito emphasized the huge fines that Hobby Lobby would incur if it offered a nonconforming insurance policy to its employees.²²⁷ On this point, the Ginsburg dissent offered no challenge.

The nub of disagreement between majority and dissent attaches to the other, less frequently noticed, half of the inquiry into “substantial burdens”—their religious substantiality. The government had argued, and Jus-

²²⁶ Lupu & Tuttle, *Symposium: Religious Questions and Saving Constructions*, *supra* note 15; *see also* LUPU & TUTTLE, *SECULAR GOVERNMENT*, *supra* note 2, at 241–42.

²²⁷ Justice Alito acknowledged that Hobby Lobby had a choice to drop health insurance and make, under the Internal Revenue Code, an assessable payment of \$2000 per year per full-time employee. *See Hobby Lobby*, 134 S. Ct. at 2776–77 (citing 26 U.S.C. § 4980H (2012)). Notably, the government had never asserted that this option made the secular pressure on employers insubstantial. Justice Alito concluded that the question of whether this option renders the burden insubstantial was an empirical one, turning on the operation of labor markets. *See id.* Ultimately, the majority asserted that the argument is unpersuasive in these two cases because the owners of Hobby Lobby and Conestoga Wood Specialties have religious motivations for offering health insurance to employees. *Id.* at 2777–79. Accordingly, they would bear a religious cost if they dropped the coverage, and a required payment of \$2000 per employee just increases the pressure to maintain coverage that includes the objectionable goods. For the view that this question remains open in future litigation involving other firms, see Marty Lederman, *Hobby Lobby Part XVI—A Half-Dozen Possibilities that Shouldn’t Surprise You in Today’s Decision*, BALKINIZATION (Jun. 30, 2014, 7:50AM), <http://balkin.blogspot.com/2014/06/hobby-lobby-part-xvi-half-dozen.html>, archived at <http://perma.cc/JF4X-TWSB>, points three and four and links therein.

tice Ginsburg agreed,²²⁸ that the religious objections to contraceptive coverage were legally insubstantial because they were too attenuated—that is, removed from the choice to use the contraceptives. The government is requiring the owners of the companies to include coverage of the contested items in an insurance policy, and the employees independently will decide whether to use IUDs or emergency contraception. The majority, per Justice Alito, repudiated any analytic effort to measure the distance between the purchase of insurance and the choice of pregnancy prevention service. Justice Alito insisted that courts have no business addressing whether a set of religious convictions—in this case, that purchasing the objected-to insurance coverage constitutes material cooperation with or facilitation of sin—is reasonable.²²⁹

On this point, Justice Alito's opinion relied heavily on *Thomas v. Review Board*,²³⁰ a free exercise decision in which the Court had refused to adjudicate an apparent dispute between the claimant and another member of his faith with respect to Biblical interpretation on the question of whether participation in the production of weapons is sinful.²³¹ In light of the Court's insistence that RFRA be construed on its own terms, rather than seen through the prism of pre-*Smith* decisions,²³² this reliance on *Thomas* is quite striking. Perhaps judicial elaboration of the restoration of religious liberty is akin to judicial use of legislative history, which can be like "entering a crowded cocktail party and looking over the heads of the guests for one's friends."²³³ The *Hobby Lobby* majority wants to drink with *Thomas*; those who joined the principal dissent prefer to hang out with *Lee*.

Justice Ginsburg did not argue that *Wisconsin v. Yoder*,²³⁴ the lynchpin exemption case and explicit model for RFRA's operative standards, teaches somewhat to the contrary with respect to the judicial role in evaluating the substantiality of religious burdens. The *Yoder* opinion is thick with references to both the impact of compulsory education on the religious development of adolescents and the attendant consequences for survival of the

²²⁸ *Hobby Lobby*, 134 S. Ct. at 2798–99 (Ginsburg, J., dissenting).

²²⁹ *Id.* at 2777–79.

²³⁰ *See id.* at 2778 (citing *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981)). Justice Alito also cites *Employment Division v. Smith*, 494 U.S. 872, 887 (1990) for the same point, *Hobby Lobby*, 134 S. Ct. at 2778, without acknowledging that *Smith* relied on the point as a reason to discontinue religious exemptions, not as a doctrinal move in adjudicating when government must provide such exemptions, *see Smith*, 494 U.S. at 888.

²³¹ *Thomas*, 450 U.S. at 715–16 (stating that courts are incompetent arbiters of competing scriptural interpretation).

²³² *See Hobby Lobby*, 134 S. Ct. at 2784 n.43 (rejecting the *Lee* principle of acceptance by commercial actors of regulatory restraints as controlling in a RFRA case).

²³³ ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 377 (2012) (paraphrasing the late Judge Harold Leventhal).

²³⁴ 406 U.S. 205 (1972).

Amish community.²³⁵ Unlike *Thomas*, *Yoder* did not involve disputed questions of scripture, but neither did *Hobby Lobby*.

The Congress that enacted RFRA gave absolutely no thought to which burdens are substantial, or to the adjudicative methods that courts might use to decide that question. If the relevant inquiry in *Hobby Lobby* is ecclesiastical, pertaining to matters of faith alone and resolvable only by intra-faith exegesis and controversy, Justice Alito is right. If, on the other hand, the relevant inquiry pertains to the degree of involvement of an insurance policy purchaser in the conduct of the insured employees, the question begins to look more like one of accomplice liability in criminal law²³⁶ and less like a matter of Bible study. And if RFRA sets the courts free from pre-*Smith* law, the mode of inquiry into substantiality is an open question, entirely disconnected from free exercise precedents.

It is not my purpose here to resolve the methodological or substantive questions involved in application of the “substantial burden” trigger within RFRA. My point is more simple and direct—all paths were open to the Justices. The majority preferred the *Thomas* rule of judicial abstention; the dissent preferred active judicial involvement in the question of the religious substantiality of the burden. Each took the course he or she wanted, and ignored the others.

C. *Compelling Government Interest*

The Court, having found RFRA’s “substantial burden” requirement satisfied, was then obliged to consider RFRA’s “exception”—the statutory provision that imposes two, independent requirements on the government.²³⁷ The initial requirement was that the government “demonstrate[] that application of the burden to the person (1) is in furtherance of a compelling governmental interest”²³⁸ If the government failed to so demonstrate, the case would be over; the government would lose and would not be able to impose the burden on the complaining person. No inquiry into “least restrictive means” would be necessary in such a case.

The government argued that a variety of very strong policy arguments supported the mandate of no-cost coverage of contraceptives of all kinds. These policy concerns included women’s reproductive health, gender equality in health costs, increased avoidance of unwanted pregnancies, and the need for at least some contraceptive medicines as treatment for other condi-

²³⁵ See, e.g., *Yoder*, 406 U.S. at 216–18.

²³⁶ Eugene Volokh, *The Religious Freedom Restoration Act and Complicity in Sin*, THE VOLOKH CONSPIRACY (June 30, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/30/the-religious-freedom-restoration-act-and-complicity-in-sin>, archived at <http://perma.cc/QE29-GE4E>.

²³⁷ 42 U.S.C. § 2000bb-1(b) (2012).

²³⁸ *Id.* § 2000bb-1(b)(1).

tions.²³⁹ And, at the margin—that is, on the question of a compelling interest in applying the burden to each relevant person or firm—the need to provide every woman with the relevant coverage seemed evident. An exemption for Hobby Lobby would have eliminated that coverage for thousands of female employees and female beneficiaries of all employees. Moreover, a prominent *amicus* brief had asserted that a RFRA exemption for Hobby Lobby would violate the Establishment Clause by imposing the costs of the owners’ faith onto these thousands of women.²⁴⁰

Nevertheless, a number of circuit courts had earlier concluded that the government had not satisfied the compelling interest test.²⁴¹ These lower courts had looked to the Supreme Court’s relatively recent and unanimous decision in *O Centro*, and had noticed the Court’s treatment of the exemption for religious use of peyote by Native Americans. Here is what the Court wrote in *O Centro*:

[T]he Executive and Congress itself have decreed an exception from the Controlled Substances Act for Native American religious use of peyote. If such use is permitted in the face of the congressional findings . . . for hundreds of thousands of Native Americans practicing their faith, it is difficult to see how those same findings alone can preclude any consideration of a similar exception for the 130 or so American members of the UDV who want to practice theirs.²⁴²

In other words, the Act’s exception for some religious uses of peyote weakened considerably the government’s argument that it had a compelling interest in not making exceptions for religious uses of comparable substances.²⁴³ In the contraceptive mandate litigation, the most relevant exception to the mandate was the exception for “grandfathered plans,”²⁴⁴ which employers had selected pre-ACA and had not yet revised in light of market incentives. In *Hobby Lobby*, the Tenth Circuit sitting *en banc* had pounced

²³⁹ Brief for Petitioners at 46–48, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13–354).

²⁴⁰ Brief for Church-State Scholars Frederick Mark Gedicks et al. as Amici Curiae Supporting Petitioners at 7–26, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13–354).

²⁴¹ See *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1143–44 (10th Cir. 2013) (en banc), *aff’d sub nom.* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Gilardi v. Dep’t of Health & Human Servs.*, 733 F.3d 1208, 1219–22 (D.C. Cir. 2013), *vacated and remanded*, No. 13-567, 2014 WL 2931834 (U.S. July 1, 2014).

²⁴² *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433 (2005).

²⁴³ The Court in *O Centro* followed its reference to the peyote exemption with this: *See Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547 (1993) (“It is established in our strict scrutiny jurisprudence that ‘a law cannot be regarded as protecting an interest ‘of the highest order’ . . . when it leaves appreciable damage to that supposedly vital interest unprohibited” (quoting *Florida Star v. B. J. F.*, 491 U.S. 524, 541 (1989) (Scalia, J., concurring in part and concurring in judgment))).

546 U.S. at 433.

²⁴⁴ 42 U.S.C. §§ 18011 (a), (e) (discussed in *Hobby Lobby*, 134 S. Ct. at 2764).

on this exception, among others, to the ACA, and concluded that these exceptions operated to defeat the government's compelling interest argument.²⁴⁵

With that background in mind, consider the Supreme Court's treatment of the "compelling interest" question. Justice Alito wrote that "it is arguable that there are features of ACA that support"²⁴⁶ the view that the government's interest is not compelling, and he referenced the grandfathering exception immediately thereafter.²⁴⁷ With *O Centro*, the most recent and only Supreme Court RFRA precedent, one would have expected the Court in *Hobby Lobby* to apply *O Centro*'s analysis at this point.

There are, of course, some good responses to that argument in the context of *Hobby Lobby*. First, the grandfathering exception to ACA is essentially a transition rule; its coverage will soon wither away. In contrast, the peyote exception is permanent. Moreover, the peyote exception to the Controlled Substances Act is tethered to a particular faith with many members, so it was very hard to explain why the government could not consider a RFRA exception with respect to a comparable substance, for a very small religious community. And the government was insisting in *O Centro* on the need for uniformity in application of the Controlled Substance Act, akin to the claimed need for uniformity in enforcement of tax law.²⁴⁸ The government made no comparable claim in *Hobby Lobby*; HHS could live with some exceptions, especially if the biggest one declined quickly over time.

Despite all of these important lines of argument about compelling interests and the relevance of *O Centro*, none of the Justices directly addressed the significance of non-uniform coverage. Instead, having sympathetically introduced these themes, Justice Alito abruptly announced that the Court:

[F]ind[s] it unnecessary to adjudicate this issue. We will assume that the [asserted] interest . . . is compelling . . . and we will proceed to consider the final prong of the RFRA test . . . whether HHS has shown that the contraceptive mandate is "the least restrictive means of furthering that compelling governmental interest."²⁴⁹

²⁴⁵ For discussion of the significance of these exceptions, see, e.g., *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1123–24, 1143–44 (10th Cir. 2013), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). The other important statutory exception involves employers with fewer than fifty employees; these employers need not provide health insurance at all. See 26 U.S.C. § 4980H(c)(2)(B)(i).

²⁴⁶ *Hobby Lobby*, 134 S. Ct. at 2780.

²⁴⁷ *Id.* Justice Alito also referenced the ACA exemption for employers with fewer than fifty full-time employees, *id.*, but this is inapposite because any health insurance those employees obtain, either through employment or on exchanges, will include full contraceptive coverage.

²⁴⁸ If RFRA is cut loose entirely from *Lee* and free exercise norms, tax cases too should be adjudicated case by case, not categorically.

²⁴⁹ *Hobby Lobby*, 134 S. Ct. at 2780.

This is the mystery of *Hobby Lobby*. *Hobby Lobby* does not mention *O Centro*'s focus on exceptions to coverage as undercutting any argument that an interest is compelling.²⁵⁰ No Justice even mentions *O Centro* in this connection, even though *O Centro* was a unanimous opinion, written by Chief Justice Roberts.²⁵¹ In *Hobby Lobby*, *O Centro* is a big, surprisingly silent beast.²⁵²

Justice Kennedy's concurring opinion offers the clue for solving the mystery. He asserts unequivocally that "[i]t is important to confirm that a premise of the Court's opinion is its assumption that the [challenged] HHS regulation . . . furthers a legitimate and compelling interest in the health of female employees."²⁵³ What is evident from that confirmation, and the discussion of alternatives that follows, is that the price of Justice Kennedy's fifth vote for the Court's opinion was non-adjudication of—not agreement upon—the question of compelling interest. Had Justices Alito, Scalia, Thomas, and Chief Justice Roberts followed the lead of the lower courts that found the government's interest unconvincing, they would have stopped their analysis at that point; the government would have lost, and the availability of alternatives would have become legally irrelevant. If these four had resolved the compelling interest question against the government, however, their opinion very likely would have been for a plurality only. Justice Kennedy's separate opinion would then have represented the controlling law of the case.²⁵⁴

There is nothing sinister or professionally inappropriate about the sort of compromise that would lead four Justices to assume an answer to a question—one they might well have answered differently on their own—in order to hold a majority. In the RFRA context, however, there is something quite troubling about concluding that the government has substantially violated a person's religious freedom, and then refusing to confront the question of whether the government's interest is strong enough to justify the burden. Other cases in the RFRA pipeline, on contraceptive coverage and otherwise, might have been significantly influenced by a four-Justice plurality opinion on the merits of *Hobby Lobby*'s non-trivial argument that exceptions to the

²⁵⁰ See *id.* at 2779–80.

²⁵¹ See *Gonzales v. O Centro Beneficente Uniao do Vegetal*, 546 U.S. 418, 418 (2006). Justice Alito did not participate in *O Centro*, see *id.*, because he joined the Court on January 31, 2006 and *O Centro* was argued in November 2005. See Samuel Alito, http://en.wikipedia.org/wiki/Samuel_Alito, archived at <http://perma.cc/3D4M-Z3W9>.

²⁵² See ARTHUR CONAN DOYLE, *SILVER BLAZE*, in *THE MEMOIRS OF SHERLOCK HOLMES*, 1, 22 (Penguin Books 2011) (explaining "the curious incident of the dog in the night-time" in which the dog's silent response to the approach of a person at night revealed that the person was someone familiar to the dog).

²⁵³ *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring).

²⁵⁴ See, e.g., *Marks v. United States*, 430 U.S. 188, 193 (1977) (asserting and applying the doctrine that in the absence of a majority opinion, the narrowest opinion in support of the result represents the controlling law).

mandate left “appreciable damage” to the government’s interest unremedied.²⁵⁵

For this beast to have remained quiet is thus profoundly significant. But it is more than that. The absence of engagement with a central question in the case is just one more sign that religious exemption cases involve the worst kind of judicial lawmaking, unguided by what has gone before, or by manageable standards for what should come next. The final issue the Court confronts—the issue on which the future of the contraceptive mandate now turns—reveals this sort of ad hoc, all things considered, form of adjudication for which the field is now justly infamous.

D. *Least Restrictive Alternative*

Some of the instant commentary on *Hobby Lobby* suggested that the disposition of the case, on grounds that the government had alternatives less restrictive of religious liberty than the challenged mandate, had been driven by Justice Kennedy’s hope and expectation of an ultimate win-win result.²⁵⁶ And win-win is what we may get, if that is the right label for an outcome in which the government’s accommodation of religiously affiliated nonprofits is (a) extended by the Obama Administration to for-profit firms like Hobby Lobby, and (b) upheld in the Supreme Court, perhaps as early as next Term, in which the Court is likely to hear *University of Notre Dame v. Burwell*.²⁵⁷

If the Court upholds application of this accommodation to objecting religious nonprofits, under which affected women receive full contraceptive coverage through third party administrators and health insurers outside of the employer policy, women may be inconvenienced but not deprived of coverage. And religious objectors will be spared the obligation to purchase the coverage, though they will not be spared some connection, through a network of orders and contracts, with the fact of coverage. Whether either side sees that as a win is a matter of dispute. In any event, the Court’s hotly contested disposition, just three days after the *Hobby Lobby* decision, of an

²⁵⁵ This theme from *O Centro* of course remains open in other cases. See, e.g., *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 472–75 (5th Cir. 2014) (in light of statutory exceptions, questioning the weight of the government interest in a RFRA challenge to regulation of possession of eagle feathers for religious purposes).

²⁵⁶ For this characterization of the Kennedy view, see Marty Lederman, *Hobby Lobby Part XVII—Upshot of the Decision: A Possible Win-Win Solution (and Now All Eyes Turn to Notre Dame)*, BALKINIZATION (July 1, 2014), archived at <http://perma.cc/FVR6-SKSH>.

²⁵⁷ 743 F.3d 547 (7th Cir. 2014), *petition for cert. filed*, 83 U.S.L.W. 3220 (U.S. Oct. 3, 2014) (No. 14-392) See also Anne Marie Jakubowski, *University Asks Supreme Court to Review HHS Case*, THE OBSERVER (Oct. 6, 2014), <http://ndsmcobserver.com/2014/10/university-asks-supreme-court-to-review-hhs-case/>, archived at <http://perma.cc/7FHS-Q5HT>. In August 2014, the Obama Administration announced an interim final rule with respect to the ways in which nonprofit religious entities may express religious objections to the mandate. See Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,092 (Aug. 27, 2014) (to be codified at 45 C.F.R. pt. 147), archived at <http://perma.cc/C835-Q4C5>.

injunction request from Wheaton College²⁵⁸ suggests that such an ultimate outcome remains in considerable doubt.²⁵⁹

Before returning to the operative details, I want to put the analysis of a “least restrictive alternative” in *Hobby Lobby* in a broader constitutional perspective, as well as a broader RFRA perspective. First, the notion of alternative, more constitutionally sensitive means to the same end is widespread in constitutional law. One sees it, for very recent example, in *McCullen v. Coakley*,²⁶⁰ last Term’s decision about the thirty-five foot buffer zone outside abortion clinics; five Justices concluded that the constitutional defect in the Massachusetts law was its overbreadth.²⁶¹ A smaller zone or, narrower still, a firm police presence aimed at stopping physical obstruction of patients, might adequately protect access to abortion clinics while permitting more speech. One sees a similar emphasis on constitutionally less troublesome means in the demand that government consider race-neutral alternatives to race-specific policies for conferring various benefits;²⁶² in this context too, the notion is that government may be able to achieve its legitimate ends with policies that do less damage to constitutionally protected values.

The Supreme Court has utilized such means-focused doctrines for a half-century or more.²⁶³ Notice, however, that trade-offs are always in play when the Court analyzes less drastic alternatives or more narrowly tailored means to legitimate ends. A sturdy police presence, designed to prevent obstruction of access to abortion clinics, would permit more speech than a thirty-five foot “no speech” zone around the building, but the cost would be less protection for the patients’ peace of mind at a moment of great stress. A “top 10%” admission plan will, in some states, produce decent racial and ethnic diversity in a student body, but may undercut optimizing the overall quality of an entering class.²⁶⁴ Such alternative policies are always redistrib-

²⁵⁸ *Wheaton College v. Burwell*, 134 S. Ct. 2806, 2807 (2014).

²⁵⁹ Marty Lederman, *What Next in Wheaton College? Is it Also a “Win/Win” Compromise?*, BALKINIZATION (July 4, 2014) <http://balkin.blogspot.com/2014/07/what-next-in-wheaton-college-is-it-also.html>, archived at <http://perma.cc/8Z73-HJWZ>.

²⁶⁰ 134 S. Ct. 2518 (2014).

²⁶¹ *Id.* at 2537–41.

²⁶² *See, e.g., Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) (arguing that Richmond’s failure to consider race-neutral methods of increasing minority business participation in contracts with the City undercuts the justification for imposing racial set-asides).

²⁶³ The subject is hardly new. *See, e.g., Note, Less Drastic Means and the First Amendment*, 78 *YALE L.J.* 464 (1969); *Note, The First Amendment Overbreadth Doctrine*, 83 *HARV. L. REV.* 844 (1970).

²⁶⁴ *See Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 239–42 (5th Cir. 2011) (describing the Texas Top Ten Percent law which guaranteed state university admission to Texas students in the top ten percent of their high school classes), *vacated and remanded*, 133 S. Ct. 2411, 2422 (2013).

utive in foreseeable and unforeseeable ways; they inevitably make one or more parties worse off.²⁶⁵

Moreover, these doctrines never demand that the government use the absolutely least restrictive means to its ends. The government may always replace sticks with carrots, or just with sweet talk. Abortion protestors could be offered government benefits in exchange for ending their harassing protests in front of clinics or, even less restrictive, public officials could politely ask the protestors to cut it out. At some point along the range of less restrictive policy choices, the means become politically infeasible, useless, or both.

Within RFRA itself, the adoption of the strenuous formula of “least restrictive means” highlights yet again the question of whether the Act restores pre-*Smith* free exercise norms, or restores “religious liberty” by legislating new, more aggressive norms. In *Sherbert*, the Court had insisted that the government avoid gratuitous, religion-suppressing overbreadth—for example, rather than rejecting all religion-based claims of good cause to refuse work because some may be fraudulent, the government must inquire on a case-by-case base into the sincerity of each claim.²⁶⁶ When the Court began to weaken the force of the *Sherbert-Yoder* doctrine in the 1980s, however, it backed away from deploying such a requirement of narrow tailoring, or case-by-case adjudication, across the board. This retreat was most prominent in *United States v. Lee*,²⁶⁷ where the Court cited the concept of means “essential to accomplish an overriding governmental interest,”²⁶⁸ while steadfastly refusing to insist that the government deploy such means in the case of Old Order Amish seeking exemption from FICA contributions for their Amish employees.²⁶⁹

In *Hobby Lobby*, Justices Alito and Ginsburg duelled on the connection between the scope of the “least restrictive means” provision and the larger question of what RFRA restores. Relying on the statutory language, Justice Alito asserted that RFRA goes beyond prior free exercise law;²⁷⁰ relying on legislative history, Justice Ginsburg insisted that RFRA incorporates the pre-

²⁶⁵ The trade-offs are typically starker and more obvious in speech or equality cases, involving attacks on the face of a government policy. If the government loses in such cases, it will have to enact or adopt a substitute policy for everyone. In religious exemption cases, by contrast, the underlying policy can remain. All that may change is the exemption of some number of actors from that policy, and the attendant possibility of a different or narrower policy applying only to those who are exempt from the broader policy.

²⁶⁶ See *Sherbert v. Verner*, 374 U.S. 398, 408–09 (1963).

²⁶⁷ 455 U.S. 252 (1982).

²⁶⁸ *Id.* at 257–58. See also *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981) (“The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.”).

²⁶⁹ Congress eventually created just such a mechanism. 26 U.S.C. §§ 3127(a)(2), (b)(1) (referenced in *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2804 n.29 (2014) (Ginsburg, J., dissenting)).

²⁷⁰ *Hobby Lobby*, 134 S. Ct. at 2784 n.43.

Smith gloss, and goes no further.²⁷¹ In Justice Ginsburg’s view, under RFRA the “least restrictive means” must be “equally effective means.”²⁷²

Justice Alito, however, appeared to have a different view of the trade-off question. On the availability of less restrictive and potentially feasible alternatives, his opinion asserted that:

The most straightforward way of [providing an alternative less restrictive of religious liberty] would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers’ religious objections.²⁷³

It is unlikely in the extreme that Congress will appropriate funds to pay for the various contraceptives to which Hobby Lobby and other firms object on religious grounds, so this alternative may be theoretically adequate but politically impossible.²⁷⁴ If such options count in the calculus of “least restrictive means,” the government will never prevail when a person is “substantially burdened” by a program that involves provision of goods, rather than the elimination of harms. The provision of goods—vaccinations, minimum wages, and the entire stock of benefit-creating policies—can always be accomplished by direct government expenditure rather than forced regulatory transfers among private parties.

Aside from the alternative of direct provision, the contraceptive mandate deck includes a crucial wild card as another potential alternative. Justice Alito’s opinion reminds us that “HHS itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs. . . . HHS has already established an accommodation for nonprofit organizations with religious objections.”²⁷⁵

Justice Kennedy’s concurring opinion seems even more emphatic in its conclusion that the government may not mandate direct insurance coverage of these contraceptives when it has already made an accommodation, for

²⁷¹ *Id.* at 2803–06 (Ginsburg, J., dissenting).

²⁷² *Id.* at 2801 (Ginsburg, J., dissenting).

²⁷³ *Id.* at 2780.

²⁷⁴ Justice Alito goes on to make the novel and highly controversial suggestion that RFRA itself may authorize the Executive Branch to spend money as a way of financing this alternative. *Id.* at 2781. RFRA is not an authorizing statute. Its basic rule protects persons against certain religious burdens, and it blocks exceptions to that rule in cases where alternative ways of achieving government ends exist. 42 U.S.C. § 2000bb-1 (2012). But RFRA does nothing to authorize, much less require, the government to act in those alternative ways. When alternatives involve affirmative authorization of expenditures and appropriations of money, the Executive Branch must depend on Congress. U.S. CONST. art. I, § 8, cl. 1 (giving Congress the power to tax and spend). For elaboration of the irony and political futility of depending on Congress to create a gap-filling contraceptive coverage program, see Frederick Mark Gedicks, *One Cheer for Hobby Lobby: Improbable Alternatives, Truly Strict Scrutiny, and Employee Burdens*, 38 HARV. J.L. & GENDER 153 (2015).

²⁷⁵ *Hobby Lobby*, 134 S. Ct. at 2782.

religious nonprofits, that provides the relevant pregnancy prevention services while impinging less on the objectors' religious beliefs.²⁷⁶ He seems skeptical, however, that direct government provision of contraceptive coverage should be considered as an available, less restrictive alternative, when the existing accommodation for nonprofits can be extended and satisfy all.²⁷⁷

So, as orchestra leader Ted Lewis regularly asked his audience, "Is everybody happy?"²⁷⁸ Joy on either side would be deeply premature. Not a single Justice of the five in the majority has committed to the legality of this accommodation under RFRA.²⁷⁹ The Alito opinion's emphasis on a direct government payment program suggests the possibility that at least four of those who joined it have substantial doubts with respect to the validity of the accommodation as applied to nonprofits. Justice Kennedy's opinion, and the clever swerve around the compelling interest question that he effectively forced, suggests that he believes the accommodation is valid under RFRA as applied to for-profits, though he may well have doubts about its validity when applied to nonprofits. The outcome of any litigation concerning the accommodation of nonprofits thus remains uncertain, and will continue to be for at least another year. Either side may yet wind up being deeply disappointed.

Moreover, there is no guarantee that the Obama Administration will be able to extend the accommodation to for-profits, despite early movement in

²⁷⁶ *Id.* at 2786 (Kennedy, J., concurring).

²⁷⁷ *Id.* ("The parties who were the plaintiffs in the District Courts argue that the Government could pay for the methods that are found objectionable. . . . In discussing this alternative, the Court does not address whether the proper response to a legitimate claim for freedom in the health care arena is for the Government to create an additional program. . . . The Court properly does not resolve whether one freedom should be protected by creating incentives for additional government constraints. In these cases, it is the Court's understanding that an accommodation may be made to the employers without imposition of a whole new program or burden on the Government. As the Court makes clear, this is not a case where it can be established that it is difficult to accommodate the government's interest, and in fact the mechanism for doing so is already in place.") (citations omitted).

²⁷⁸ See Ted Lewis (musician), [http://en.wikipedia.org/wiki/Ted_Lewis_\(musician\)](http://en.wikipedia.org/wiki/Ted_Lewis_(musician)), archived at <http://perma.cc/XS5A-NWAA>. For a similar pre-decision inquiry into the potential for satisfaction on all sides of the *Hobby Lobby* dispute, see Kara Loewentheil, *When Free Exercise is a Burden: Protecting Third Parties in Religious Accommodation Law*, 62 *DRAKE L. REV.* 433, 479–82 (2014) (asking whether a religious accommodation to the contraceptive mandate can "make everyone happy"). For an extended argument that mutually satisfactory arrangements are possible with respect to the potential conflicts between religious liberty and same-sex marriage, see Alan E. Brownstein, *Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodation of Religious Liberty and the Right of Same-Sex Couples to Marry*, 45 *U.S.F. L. REV.* 389 (2010) (urging a "live and let live" approach).

²⁷⁹ See *Hobby Lobby*, 134 S. Ct. at 2782 ("We do not decide today whether an approach of this type complies with RFRA for purposes of all religious claims. At a minimum, however, it does not impinge on the plaintiffs' religious belief that providing insurance coverage for the contraceptives at issue here violates their religion, and it serves HHS's stated interests equally well.").

this direction.²⁸⁰ For the Administration to do so will require an extended notice and comment period for a new regulatory obligation, and many third-party administrators, health insurers, and for-profit firms like Hobby Lobby may push back hard against the effort.

Indeed, Hobby Lobby and others may well litigate under RFRA against such an accommodation if it is ultimately provided. They might assert that they are substantially burdened by any arrangement that makes them cooperate—even by formally announcing their objection to their third party insurance administrator or to the government—in the provision of coverage. They might argue even more broadly that they are substantially burdened when the government makes their employment of someone a but-for cause of contraceptive coverage to which they object. And one would expect these parties to assert that the still less restrictive alternative of a direct government program is fatal to any program that implicates an employer more directly. Whether there will be five votes for or against that position, at the time it may be advanced in the Supreme Court, is impossible to predict. So assuming a win-win outcome, based on an accommodation that is only under early consideration and may yet be questioned under RFRA, seems more like a leap of faith than a reasoned prediction.

More dubious, however, is the entire enterprise of religious exemptions, of which *Hobby Lobby* is but a small part. Look at where we have ended up. Four Justices may well be ready to insist that direct government subsidy, without involvement of employers, is the only lawful way to provide contraceptive coverage to employees whose employers object on religious grounds.²⁸¹ Four others have already approved the legality of the contraceptive mandate as applied to Hobby Lobby and other for-profit employers.²⁸² One—only one—effectively held out for adjudication of the validity of alternatives.²⁸³

More generally, not a single Justice has an approach to RFRA, and an accompanying methodology of interpretation, that will square its history with its text, or produce a consistent practice of drawing on pre-*Smith* deci-

²⁸⁰ In August 2014, the Administration promulgated a Notice of Proposed Rule-Making with respect to extending the accommodation to closely held, for-profit corporations. See Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,118 (Aug. 27, 2014) (to be codified at 45 C.F.R. pt. 147), archived at <http://perma.cc/8Z9K-BSAR>. The major substantive question on which the Notice invites comment is that of criteria for which companies will be considered “closely held” and therefore eligible for any new accommodation offered to firms organized for profit. *Id.* at 51,122.

²⁸¹ These would be the Justices in the *Hobby Lobby* majority, minus Justice Kennedy. A similar line of argument may apply to the objections by religiously affiliated universities to covering contraceptive care for students. See *Univ. of Notre Dame v. Burwell*, 743 F.3d 547, 549, 552–56 (7th Cir. 2014), petition for cert. filed, 83 U.S.L.W. 3220 (U.S. Oct. 3, 2014) (No. 14-392).

²⁸² These would be the four Justices who joined Justice Ginsburg’s dissent in *Hobby Lobby*.

²⁸³ This would be Justice Kennedy in light of his *Hobby Lobby* concurrence.

sions as a guide to interpretation of the Act. Justice Alito and others in the majority dance with *Thomas*; Justice Ginsburg and other dissenters are drawn to *Lee*. Judges in the lower courts, adjudicating RFRA cases in the future, can be forgiven for being completely unsure of where to go from here.

Of course, legal uncertainty and a splintered Supreme Court are not unique to the enterprise of religious exemptions. For leading example, the law of affirmative action in university admissions hung for twenty-five years on the thread of Justice Powell's opinion, the crucial portion of which no one else joined, in *Regents of the University of California v. Bakke*.²⁸⁴ Unlike other doctrines and statutory regimes that are context-specific, however, RFRA applies to all of federal law, so this kind of unpredictability is potentially quite debilitating.

IV. RELIGIOUS EXEMPTIONS IN THE WAKE OF *HOBBY LOBBY*

Part II of this Article argued that regimes of religious exemptions will be powerful in rhetoric and weak in practice. As analyzed in Part III against that backdrop, *Hobby Lobby* looks like yet one more promise of precisely that sort of regime.

The Court itself seemed mindful to limit the scope of its ruling. The opinion suggests that RFRA is unlikely to help religiously objecting employers escape health insurance coverage other than for contraceptives. As Justice Alito wrote, any religious objection to the coverage of vaccinations, blood transfusions, or other treatments must be analyzed with respect to its particular impact.²⁸⁵ If the covered procedure helps to avoid a risk of imminent death, or to limit the spread of serious contagious disease, the government's interest in full and immediate coverage will inevitably trump any religious objections.²⁸⁶

All employers, whether or not organized for profit, may have financial incentives to raise RFRA objections to other regulation of the employment relationship, including wage and hour rules,²⁸⁷ the Family and Medical Leave Act,²⁸⁸ or the Americans with Disabilities Act.²⁸⁹ The presence of such finan-

²⁸⁴ 438 U.S. 265, 287–91 (1978) (formulating and applying the standard of review for challenges to race-based admissions in universities).

²⁸⁵ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014).

²⁸⁶ To the best of my knowledge, there have been no RFRA or free exercise objections to any non-contraceptive coverage required by the ACA. One primary reason for this may be that those who object to such procedures do so only with respect to themselves and their family members, and do not object to the coverage of others who consent to such treatment.

²⁸⁷ In *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 290 (1985), a unanimous Court rejected a Free Exercise Clause objection to application of the wage, overtime, and recordkeeping requirements of the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.* (2012).

²⁸⁸ Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2012).

²⁸⁹ Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12114 (2012).

cial incentives, however, should put courts on guard for the danger of insincerity. Before applying the compelling governmental interest standard, courts should be appropriately skeptical of corporate religious sincerity whenever a RFRA victory would yield significant financial gain. The ACA's contraceptive mandate involves a perfect storm of strong religious convictions among objectors, the possibility of the government working out alternative arrangements, and no apparent financial incentive for firms to raise insincere claims. This combination of circumstances is not likely to recur. The government is highly likely to prevail against RFRA objections that do not similarly line up with absence of financial incentives and alternative means of satisfaction, especially when the religious objectors are commercial actors. If this prediction is accurate, the Court will have inflicted no more than a flesh wound to the *Lee* principle that commercial actors may not use their religious convictions to evade regulation.²⁹⁰

What about civil rights cases, especially those that involve employer objections to paying family benefits to employees with same-sex spouses? This is the next wave of RFRA possibilities,²⁹¹ and there is good reason to be concerned about it. In *Hobby Lobby*, Justice Ginsburg's dissent asked pointedly whether RFRA would require exemptions in cases where commercial businesses assert religious reasons to discriminate based on race, religion, sex, or sexual orientation.²⁹² Justice Alito's direct rejoinder mentioned race and race alone.²⁹³ That response conspicuously left open the possibility that he and others who joined him might hospitably entertain RFRA claimants when other grounds of discrimination are involved.

²⁹⁰ *United States v. Lee*, 455 U.S. 252, 261 (1982) ("When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.").

²⁹¹ Professor Tuttle and I flagged this immediately after the *Hobby Lobby* decision. Ira Lupu & Robert Tuttle, *Hobby Lobby in the Long Run*, CORNERSTONE (July 1, 2014), <http://berkeleycenter.georgetown.edu/rfp/blog/hobby-lobby-in-the-long-run>, archived at <http://perma.cc/9LBG-H4ZX>; see also Ira C. Lupu, *Hobby Lobby Endangers Same-Sex Benefits*, NAT'L L.J. (July 7, 2014), <http://www.nationallawjournal.com/id=1202661872503>.

²⁹² *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2804–05 (2014) (Ginsburg, J., dissenting).

²⁹³ *Id.* at 2783 ("The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. . . . Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.") (citation omitted). Professor Oleske has sharply pointed out the ways in which American law and society (including the academy) quickly marginalized religious objections to racial equality in the 1960s, as contrasted to the respect and concern paid to religious objections to LGBT equality today. James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 HARV. C.R.-C.L. L. REV. (forthcoming 2015), archived at <http://perma.cc/TZS2-RJL3>.

This line of concern would be serious indeed if *Hobby Lobby* is the full invigoration of RFRA that it appears to be. If the past is prologue, however, the lower federal courts are not likely to take much of this bait. I think it unimaginable that a claim by a commercial business, that RFRA empowers it to resist Title VII's prohibition on discrimination in employment based on religion or sex, would have any chance of success. However religiously burdensome those prohibitions may appear to be in a particular case, the government has very strong interests in prohibiting such discrimination, and absolutely no "less restrictive means" are available to deal with the resulting harms.²⁹⁴

What about discrimination based on sexual orientation? This context is highly likely to present the next cutting edge of RFRA claims by both religious nonprofits and for-profit companies. The question may soon arise under President Obama's recent Executive Order which amended long-standing Executive Order 11246 to include "sexual orientation [and] gender identity" as prohibited grounds of discrimination in employment by persons or firms contracting with the federal government.²⁹⁵ Some actual or potential federal contractors may refuse on religious grounds to hire someone who is openly LGBT or, perhaps more likely, refuse to provide any family benefits with respect to a same-sex spouse.²⁹⁶

Prior to issuance of President Obama's Order, opposing interests conducted a fierce public debate on whether the Order should include a broad and categorical exemption for religious nonprofits. A group of faith leaders called on the President to include such an exemption in the Executive Order.²⁹⁷ Other faith leaders and a group of legal scholars, myself included,

²⁹⁴ In the wake of *Hobby Lobby*, one would expect that the inquiry into "least restrictive means" would get more careful attention. See, e.g., McAllen Grace Brethren Church v. Salazar, 764 F.3d 465, 475–81 (5th Cir. 2014) (evaluating regulatory alternatives in a RFRA challenge to regulation of possession of eagle feathers for religious purposes); Perez v. Paragon Contractors Corp., No. 2:13CV00281–DS, 2014 WL 4628572, at *4 (D. Utah Sept. 11, 2014) (RFRA protects church elder against being compelled to testify in an administrative investigation into child labor because other witnesses may agree to testify).

²⁹⁵ Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014).

²⁹⁶ The question of same-sex marriage recognition may also arise under the Family and Medical Leave Act, if an employer objects on religious grounds to a requested leave by an employee to care for a same-sex spouse. In June of 2014, the U.S. Department of Labor proposed a rule that would revise the definition of spouse under the Act in light of the U.S. Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013). See The Family and Medical Leave Act, 79 Fed. Reg. 36,445 (proposed June 27, 2014) (to be codified at 29 C.F.R. pt. 825). The proposed rule would amend the definition of spouse so that eligible employees in same-sex marriages, valid where contracted, will be able to take FMLA leave to care for their spouse, whether or not their state of residence recognizes the validity of their marriage. See *id.*

²⁹⁷ Michelle Boorstein, *Faith Leaders: Exempt Religious Groups from Order Barring LGBT Bias in Hiring*, THE WASHINGTON POST (July 2, 2014), http://www.washingtonpost.com/local/faith-leaders-exempt-religious-groups-from-order-barring-lgbt-bias-in-hiring/2014/07/02/d82e68da-01f1-11e4-b8ff-89afd3fad6bd_story.html, archived at <http://perma.cc/3PWW-CE9D>; see also Letter from Stanley Carlson Theis, President Institutional Religious Freedom Alliance, et al., to Barack Obama, President,

urged the President to issue the Order without any such exemption.²⁹⁸ As issued, the Order did not include the requested exemption. Instead, it simply left intact Section 204(c) of the Order, which provides that it “shall not apply to a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”²⁹⁹

Where does this Order leave nonprofit religious entities that have or seek federal contracts but refuse to extend benefits to a same-sex spouse or exclude from employment persons who are openly LGBT? Advocates for the broad hiring autonomy of religious entities have asserted that the freedom of these employers under the Order to prefer individuals “of a particular religion” permits them to engage in such discrimination if the entities’ religious norms condemn same-sex intimacy,³⁰⁰ but the relevant law is quite to the contrary.

Section 204(c) of the Order is modeled on an identical exemption from the prohibition on religious discrimination in Title VII of the 1964 Civil Rights Act.³⁰¹ This section of Title VII has never been construed to permit discrimination against a group specifically protected by the Civil Rights Act.³⁰² Moreover, the final sentence of Section 204(c) reinforces this precise

United States of America (June 25, 2014), *archived at* <http://perma.cc/P2VK-ALCB> (urging the President to adopt a broad exemption for religious nonprofit entities); Letter from Joel C. Hunter, Senior Pastor, Northland, a Church Distributed, et al., to Barack Obama, President, United States of America (July 1, 2014), *archived at* <http://perma.cc/3N5G-QFQH> (articulating similar support for broad exemption by additional faith group leaders and scholars).

²⁹⁸ See Letter from Daayiee Abdullah, Imam, Light of Reform Mosque, et al., to Barack Obama, President, United States of America (July 8, 2014) (on file with author and the Harvard Journal of Law & Gender) (urging no exclusion of religious entities from the proposed order); Letter from Katherine Franke, Professor of Law, Columbia Law School, et al., to Barack Obama, President, United States of America (July 14, 2014), *archived at* <http://perma.cc/5DBP-X2XU> (articulating similar support for no exclusion of religious entities by additional legal scholars).

²⁹⁹ Compare Exec. Order No. 11,246, 30 Fed. Reg. 12,319, 12,321 (Sept. 24, 1965), and Exec. Order No. 13,279, 67 Fed. Reg. 77,141, 77,143 (Dec. 16, 2002), with Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014).

³⁰⁰ Carl H. Esbeck, *Differences: Real and Rhetorical*, CORNERSTONE (July 22, 2014), <http://berkeleycenter.georgetown.edu/cornerstone/non-discrimination-executive-order-and-religious-freedom/responses/differences-real-and-rhetorical>, *archived at* <http://perma.cc/8MQQ-XSUC> (citing Little v. Wuerl, 929 F.2d 944, 951 (3d Cir. 1991)).

³⁰¹ Civil Rights Act of 1964, § 702, 42 U.S.C. §2000e-1 (2012). The Supreme Court upheld this provision against Establishment Clause challenge in *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 334–40 (1987).

³⁰² A letter from scholars, opposing the broad exemption in the Obama Order, lays this out in detail. See Letter from Scholars to Barack Obama, President of the United States (July 14, 2014) *archived at* <http://perma.cc/5DBP-X2XU>; see also Martin Lederman, *Why the Law Does Not (and Should Not) Allow Religiously Motivated Contractors to Discriminate Against their LGBT Employees*, CORNERSTONE (July 31, 2014), <http://berkeleycenter.georgetown.edu/cornerstone/non-discrimination-executive-order-and-religious-freedom/responses/why-the-law-does-not-and-should-not-allow-religiously-moti->

notion: “Such [religious corporations, associations, educational institutions, or societies] are not exempted or excused from complying with the other requirements contained in this Order.”³⁰³ Accordingly, any attempt by a religious corporation to exclude or discriminate against LGBT persons would have to rest on a religious norm that was itself non-discriminatory. So, for example, such an employer might exclude from employment any person who divorced and remarried, but the employer would have to enforce this norm against all employees, and could not use it as a pretext for discriminating against LGBT employees. More pointedly, any bright-line exclusion of same-sex spouses from family benefits, coupled with a practice of inclusion of all opposite-sex spouses, would be in direct violation of the Executive Order.

Because the Order prohibits LGBT discrimination, even by religious entities, any employer wishing to contract with the federal government while engaging in such discrimination on religious grounds would have to rely exclusively on RFRA as a defense. This is the context in which my appraisal of *Hobby Lobby*'s ultimate force will be put to the test. To be sure, the non-profit religious objectors may be able to show that they are sincere. Whether they are substantially burdened in their religious exercise by the Order is deeply debatable; entities that lose existing contracts would have a respectable argument that they have been so burdened, but entities that wish to compete for new contracts while continuing to engage in such discrimination would be on much weaker ground.³⁰⁴

Even if employers can demonstrate a substantial burden, the government has no alternative less restrictive than a ban on discrimination to achieve the objective of the Obama Order—to put an end to the exclusion of a class of qualified employees from the work force of federal contractors and subcontractors. The only question left open by this analysis is whether the interest in denying a RFRA exemption, in this instance to nonprofits, is com-

vated-contractors-to-discriminate-against-their-lgbt-employees, *archived at* <http://perma.cc/5YRW-Z4WY>; Rose Saxe, *The Truth About Religious Employers and Civil Rights Laws*, CORNERSTONE (July 28, 2014), <http://berkeleycenter.georgetown.edu/responses/the-truth-about-religious-employers-and-civil-rights-laws>, *archived at* <http://perma.cc/9CZD-XJJZ>; Memorandum from Randolph D. Moss, U.S. Assistant Attorney General, to William P. Marshall, Deputy Counsel to the President 30–32, (Oct. 12, 2000), *archived at* <http://perma.cc/PAL9-3NE4>.

³⁰³ Exec. Order No. 13,279, 67 Fed. Reg. 77,141, 77,143 (Dec. 16, 2002); *see also* Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014).

³⁰⁴ *Compare* Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act 31 Op. O.L.C. 1, 9–20 (2007), et. al. *archived at* <http://perma.cc/5G33-NLHG> (denying eligibility for federal grants to religiously affiliated social service agency that prefers co-religionists in its hiring can reasonably be seen as a “substantial burden” under RFRA), *with* IRA C. LUPU & ROBERT W. TUTTLE, *THE STATE OF THE LAW—2008: A CUMULATIVE REPORT ON LEGAL DEVELOPMENTS AFFECTING GOVERNMENT PARTNERSHIPS WITH FAITH-BASED ORGANIZATIONS*, 33–36 (2008), *archived at* <http://perma.cc/SJ5Z-W2AN> (expressing significant doubt about whether loss of ability to compete for federal contracts constitutes a “substantial burden” within the meaning of RFRA).

elling. I will not repeat all of the persuasive arguments of fairness and efficiency that have been advanced in support of federal prohibitions on discrimination against LGBT people in employment.³⁰⁵ In the context of federal contracts, the government has additional and strong interests in avoiding subsidy of invidious discrimination.

More generally, anti-discrimination norms, once enacted nationwide, are tenacious and deep. At a moment of spectacular surge in LGBT rights across many fronts, I do not foresee the executive branch, in its future enforcement of the Obama Executive Order, or the judicial branch concluding that the governmental interest in ending discrimination in employment against LGBT persons is less than compelling.³⁰⁶

This analysis extends with equal or greater force to any attempt by a for-profit corporation to assert a RFRA-based right to discriminate against LGBT employees or job applicants. If RFRA authorized an exemption from the Obama Executive Order for commercial businesses, some firms would advance religious objections as a cover for hard-to-ferret-out bigotry, rather than from sincere religious conviction. Accordingly, the government's interests in denying exemptions to for-profit employers would be even stronger than its interests in denying exemptions to religious entities, and there remains no alternative means to the same objectives. Because allowing for-profit federal contractors to engage in discrimination based on sexual orientation or gender identity would certainly inflict significant harm on third parties, this is the perfect spot to shore up the *Lee* principle: "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the [regulatory] schemes which are binding on others in that activity."³⁰⁷

³⁰⁵ For powerful arguments about the quality and scope of both social and governmental interests at stake in a prohibition on LGBT discrimination in employment, see Jenny Pizer, *Evidence of Persistent and Pervasive Workplace Discrimination against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 720–42 (2012) (finding that that existing legal protections against LGBT discrimination, including state and local antidiscrimination laws, are inadequate and incomplete); William B. Rubenstein, *Do Gay Rights Laws Matter?: An Empirical Assessment*, 75 S. CAL. L. REV. 65, 76–101 (2001) (responding, based on empirical data, to common objections to ENDA); William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2416–30 (1997) (comparing anti-LGBT animus to animus against particular religions).

³⁰⁶ The point in text has nothing to do with whether governmental discrimination against LGBT people, in marriage laws or otherwise, generates "heightened scrutiny" and therefore must be justified by compelling interests. I am addressing an entirely different case, in which the government is prohibiting such discrimination, not engaging in it. In this context, the RFRA-related question is whether the government, having embraced the anti-discrimination norm, has a compelling interest in denying religious exemptions to that norm.

³⁰⁷ *United States v. Lee*, 455 U.S. 252, 261 (1982).

Moreover, this analysis suggests strongly that the President acted prudently in resisting the demands from some faith leaders that nonprofit religious entities be broadly excluded from this new provision in the Executive Order. Had President Obama yielded to these entreaties, I would expect that for-profit firms that wished to likewise discriminate would have jumped on any broad exclusion and argued that the exclusion showed (a) that religious concerns could readily be accommodated and (b) that the government interest was less than compelling because a broad exemption had left appreciable damage to the interest un-remedied. That the Order retains only the prior right of religious entities to prefer co-religionists—a right that no court has ever extended under Title VII or RFRA to a for-profit business³⁰⁸—renders the Order much less vulnerable to a *Hobby Lobby*-style attack from a for-profit religious objector.³⁰⁹

What remains are the possible copycat effects of *Hobby Lobby* on the interpretation of state RFRA. Might such statutes now be construed to protect religiously motivated employment discrimination based on sexual orientation, or discrimination by wedding vendors, merchants in other contexts, or government officials against same-sex couples? Perhaps. But recall several observations from earlier in this Article. State RFRA have been construed very weakly.³¹⁰ It is obviously possible, as my colleagues and I suggested in our letter to the Mississippi legislature,³¹¹ that *Hobby Lobby* will indeed gen-

³⁰⁸ See *EEOC v. Townley Mfg. Co.*, 859 F.2d 610, 617–19 (9th Cir. 1988) (finding that a for-profit corporation could not qualify for Title VII exemption of religious corporations from the ban on preferring co-religionists).

³⁰⁹ The question of RFRA-based rights to engage in employment discrimination based on sexual orientation or identity will arise in a broader way if and when Congress enacts a version of the proposed Employment Non-Discrimination Act (“ENDA”), H.R. 1755, 113th Cong. § 815 (2013). Soon after the Supreme Court’s *Hobby Lobby* decision, a major part of the LGBT rights coalition withdrew its support for any broad exemption, from the currently proposed ENDA, for religious nonprofit entities. See Chris Geidner, *Three Reasons LGBT Groups are Fighting Over a Bill That Isn’t Going to Become Law*, BUZZFEED (July 9, 2014), <http://www.buzzfeed.com/chrisgeidner/three-reasons-lgbt-groups-are-fighting-over-a-bill-that-isnt>, archived at <http://perma.cc/8Z3W-2B5X>. One reason the withdrawing groups cited was the possibility that *Hobby Lobby* would encourage RFRA objections to ENDA by for-profit firms, and that those objections might be strengthened if ENDA exempts religious nonprofits. *Id.* This apprehension is entirely reasonable, even though the government’s interests in barring LGBT discrimination in employment would be very strong, sounding in both fairness and efficiency, and less restrictive means to prevent or cure the harms of such discrimination are unavailable.

³¹⁰ See *supra* Part II.D and text accompanying notes 154–160, and reliance there on the work of Professor Lund. It will be very interesting to see if Connecticut construes its own RFRA to protect *Hobby Lobby* and other objecting firms against state laws requiring that employer-based health insurance include contraceptive coverage. For more on this discussion, see Daniel Townsend, *How to Beat Hobby Lobby: Can the States Force Companies to Cover Birth Control for their Employees?* SLATE (July 23, 2014, 8:18 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/07/hobby_lobby_and_religious_freedom_will_the_company_lose_in_state_court.html, archived at <http://perma.cc/U5E8-RFSA>. I thank Professor Douglas NeJaime (Professor of Law, University of California, Irvine School of Law) for bringing this particular question and news item to my attention.

³¹¹ See *supra* Part I and text accompanying notes 31–36.

erate imitative interpretations by state courts, particularly on the question of corporate religious personhood. Even if that were to occur, however, the states with RFRA tend overwhelmingly to be the states that do not forbid discrimination in employment, or in sale of goods and services, based on sexual orientation.³¹² That is not a happy omission, but it does mean, in the short run, that many states lack such civil rights provisions against which their RFRA might operate.

Same-sex marriage will inevitably arrive, by virtue of judicial decisions under the Fourteenth Amendment,³¹³ in RFRA-states sooner than state or local anti-discrimination law for the LGBT population. I hope and expect that such a development in the constitutional law relating to marriage will eventually provoke the enactment of new laws protecting LGBT people against discrimination. If that development occurs, some for-profit wedding vendors and their religiously conservative allies may urge state courts to follow *Hobby Lobby* as a template for interpretation of a RFRA.³¹⁴ On the question of corporate religious identity, those efforts may well prevail. On the merits of religious objections to application of anti-discrimination norms, however, the loud and recent public outcry against Arizona's proposed religious freedom amendments, and the continuing backlash against Mississippi RFRA,³¹⁵ suggest that state court judges should be deeply hesitant to interpret a state RFRA in ways that permit otherwise unlawful LGBT discrimination by commercial actors.³¹⁶

³¹² By my count, only four states—Connecticut, Illinois, New Mexico, and Rhode Island—have both RFRA and anti-discrimination laws that protect LGBT people. The New Mexico overlap helps explain the state law conflict in the *Elane Photography* case described in note 176, *supra*. I derived this count by comparing the list of state RFRA in *Lund, supra* note 154, at 477 n.67, tbl.I (2010) (listing sixteen states with RFRA) with a list of states that protect LGBT people against various forms of discrimination, Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CAL. L. REV. 1169, 1190 nn.66–67 (2012) (identifying twenty-one states and the District of Columbia as having laws prohibiting discrimination against LGBT people). Since these two articles were published, I believe the only change in either list is the addition of a Kentucky RFRA and the Mississippi RFRA described in Part I, *supra*.

³¹³ See *supra* note 20. But see *DeBoer v. Snyder*, 2014 U.S. App. LEXIS 21191 (6th Cir. Nov. 6, 2014) (holding that refusal by states to recognize or permit same-sex marriage does not violate the Fourteenth Amendment).

³¹⁴ However, state courts need not construe state RFRA in the same ways that federal courts have construed Federal RFRA.

³¹⁵ See *supra* note 43 (describing the quickly spreading merchants' campaign in Mississippi to promote nondiscriminatory treatment of customers).

³¹⁶ The case against allowing religion-based discrimination against same-sex couples is even stronger in the case of governmental actors, such as magistrates, judges, or license clerks, who may assert religion-based exemptions from ministerial duties to cooperate with same-sex couples seeking to marry. The Alliance Defense Fund has offered supportive guidance to officials desiring such exemption who seek to marry in various states. See *ADF Offers Guidance to NC, Ariz., Idaho, Nev. Officials Responsible for Issuing Marriage Licenses*, ALLIANCE DEFENDING FREEDOM, (Oct. 22, 2014), <http://www.adfmedia.org/News/PRDetail/9372>, archived at <http://perma.cc/59XL-D6CP>. For an analysis of why proposals to allow such exemptions are deeply unwise and unconstitutional, see MEMORANDUM RE: PROPOSED CONSCIENCE OR RELIGION-BASED EXEMPTION

As Archibald Cox wisely wrote many years ago, “Once loosed, the idea of Equality is not easily cabined.”³¹⁷ We are witnesses to that proposition playing out with respect to marriage equality. Most recently, the Supreme Court’s decision in *United States v. Windsor*³¹⁸ has generated seemingly unstoppable momentum for growth.

I make no claim to be nearly as wise as the late Professor Cox. But my detailed appraisal of various schemes of religious exemption—federal and state, constitutional and statutory—suggests strongly that such exemptions are in fact rarely loosed and thereafter quite readily cabined. To accomplish this, the courts may rely on narrowing interpretations of substantial burden,³¹⁹ though that now seems unlikely as a dominant legal narrative. The courts more likely will be generous to the government in determining what counts as a compelling interest, especially in cases involving invidious discrimination. Moreover, through emphasis on the unavailability of less restrictive means to prevent such discrimination, courts will be able to stoutly defend anti-discrimination norms against asserted religious exemptions. In addition, for Establishment Clause reasons or otherwise, the courts may become increasingly drawn to RFRA interpretations that limit the costs that RFRA claimants can impose on private third parties. Whatever the judicial moves, the dubious enterprise of religious exemptions will, yet again, shrivel rather than prosper.

CONCLUDING NOTE ON RELIGIOUS LIBERTY

What will yet another false promise of a judicially administered regime of religious exemptions mean for religious liberty in America? At the end of this lengthy piece, I can do no more than summarize briefly the framework

FOR PUBLIC OFFICIALS AUTHORIZED TO SOLEMNIZE MARRIAGES, PUBLIC RIGHTS/PRIVATE CONSCIENCE PROJECT, COLUMBIA UNIVERSITY SCHOOL OF LAW (Nov. 5, 2014), http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/prpcp_marriage_exemptions_memo_nov_5.pdf, archived at <http://perma.cc/BB25-Y5R3>, (arguing that such exemptions would violate the Federal Constitution’s Equal Protection Clause and Establishment Clause). The arguments in the Memorandum apply with equal force to a state RFRA claim for such exemptions as they do to a freestanding version of the exemptions. The author of this article contributed to the preparation of the Memorandum. *Id.* at n.1.

³¹⁷ Archibald Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 91 (1966).

³¹⁸ 133 S. Ct. 2675 (2013) (invalidating section 3 of the Federal Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7 (2012) and 28 U.S.C. § 1738C (2012))).

³¹⁹ This was a typical confining move in the early days of RFRA, especially in cases brought by inmates. Amendments to RFRA in 2000 make that move less likely now. See 42 U.S.C. § 2000cc-5(7)(A) (2012) (“The term ‘religious exercise’ includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”). This amendment defeats the prior practice of some courts to treat burdens on non-obligatory religious practices as less than substantial within the meaning of RFRA. See Lupu, *The Failure of RFRA*, *supra* note 106, at 575, 593–96 nn.86–92.

that Professor Tuttle and I advance in our recent book.³²⁰ Religious liberty in America is currently protected by a series of mutually reinforcing structures and rights. First, non-establishment keeps the government from asserting a religious identity of its own.³²¹ This frees up maximum social space for the exercise of faith by Americans with religious convictions. Second, the guarantee of broad freedoms of speech, press, and association, as well as rights of parental control over the upbringing of children, protects religious and secular causes equally and vigorously.³²² Third, the Free Exercise Clause forbids governmental targeting of unpopular faiths for restriction on activities that are permitted to secular actors.³²³ Fourth, legislators and administrators frequently accommodate the religious needs of the people, most usually in ways that encompass analogous secular conduct.³²⁴ In those few circumstances in which religion-specific accommodations are appropriate, legislators and administrators are free to act, subject to Establishment Clause concerns.³²⁵

Several of my able critics have asked why legislative and administrative accommodations should be acceptable, if the enterprise of judicial exemptions under general regimes like RFRA, or pre-*Smith* free exercise norms, is so dubious. A full answer would require a completely separate paper, but a few reflections on that question seem in order. Most particularly, legislators and administrators need not weigh the religious significance of such requests; instead, they can respond primarily to the frequency and intensity with which these requests are advanced, and evaluate in wholly secular terms the costs and benefits of the desired accommodation. In contrast, judges are obliged to follow the rule of law, evaluating exemption claims as a matter of principle, as compared to prior claims.

The history of broad religious exemption regimes demonstrates, again and again, that judges will not or cannot do this. After *Yoder*, courts did not embrace such exemptions. After RFRA became law, courts found many ways to deny such exemptions. *O Centro* promised an invigoration of RFRA, but until the litigation over the contraceptive mandate, *O Centro* changed nothing. *Hobby Lobby* will have equally limited generative power. I do not expect Congress or state legislatures to repeal their respective RFRAs, but I do hope that lawmakers, observers, and commentators will come to appreciate that a general regime of judicial exemptions is a lawless, sometimes unconstitutional, and pervasively unprincipled charade.

³²⁰ LUPU & TUTTLE, SECULAR GOVERNMENT, *supra* note 2.

³²¹ *Id.* at 24–29.

³²² *Id.* at 180–90.

³²³ *Id.* at 186. The leading decision on this point is *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523–34 (1993).

³²⁴ LUPU & TUTTLE, SECULAR GOVERNMENT, *supra* note 2, at 214.

³²⁵ *Id.* at 216–19.

