

RELIGIOUS ACCOMMODATION AND THE WELFARE STATE

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INTRODUCTION: RELIGIOUS FREEDOM AND THE REGULATORY STATE

The *Hobby Lobby*¹ litigation was a perfect storm. When for-profit closely held businesses raised religious objections to the federal government's mandate to cover contraception in employees' health insurance, the result was a cultural whirlwind formed by the heated interaction of several volatile elements: contraception, alleged abortion of embryos, the rights of corporations, and the furious general debate over the Affordable Care Act.² Mixed in too—and perhaps giving the storm its overall shape—were recurring debates about how far religious freedom should extend in a complex modern society highly regulated by an active state.

The Affordable Care Act and the employer mandate to cover contraception rest on the key premises of the welfare state: that active government, through the regulation of economic activity and the provision of benefits, can increase human freedom.³ On the other side of the debate, the staunchest opponents of the contraception mandate, most notably the Republican Party, have not merely raised objections of religious conscience. They oppose the entire Affordable Care Act as “the high-water mark of an outdated liberalism, the latest attempt to impose upon Americans a euro-style bureaucracy to manage all aspects of their lives.”⁴

The contraception litigation thus reflects, and may accelerate, a trend in which Americans' divisions over economic regulation reinforce their divisions over cultural matters. At least in the most prominent public rhetoric, we see fewer cross-cutting disagreements, and more that line up so as to harden the divisions. If Americans further separate into religious conservative opponents of regulation and secular, progressive proponents of regulation, polarization is likely to become increasingly unhealthy.⁵ Therefore, it is valuable to pursue projects cutting across the divide. One such project is to

¹ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

² Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S.C.).

³ For example, Kathleen Sebelius, Secretary of Health and Human Services during most of the controversy, emphasized that the mandate promoted women's freedom by “put[ting] women and their doctors, not insurance companies or the government, in charge of health care decisions.” Press Release, U.S. Dep't of Health & Human Servs., Health Care Law Gives Women Control Over Their Care, Offers Free Preventive Services to 47 Million Women (July 31, 2012), <http://www.hhs.gov/news/press/2012pres/07/20120731a.html>, archived at <http://perma.cc/765L-FXWZ>. See also *Hobby Lobby*, 134 S. Ct. at 2789–90 (Ginsburg, J., dissenting) (arguing that by mandating employer coverage of preventive services, “Congress left health care decisions—including the choice among contraceptive methods—in the hands of women, with the aid of their health care providers.”).

⁴ *Republican Platform We Believe in America*, GOP.COM, http://www.gop.com/2012-republican-platform_renewing/#Item6, archived at <http://perma.cc/RH8B-YD68> (supporting “the ability of all organizations to provide, purchase, or enroll in healthcare coverage consistent with their religious, moral or ethical convictions without discrimination or penalty.”).

⁵ On polarization, see generally BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* (2008).

explain how one can affirm the active, regulatory state and still support giving religious freedom a wide scope, including in areas of public life and civil society in which the State plays a prominent role.

I began this project in a previous article that argued for strong freedom for religious organizations based on progressive premises rather than premises hostile to government regulation in general.⁶ This Article continues the project by discussing and defending government accommodation of religious objectors as a valuable strategy for protecting religious freedom in the active, regulatory state.

Problems concerning religious freedom are just one example of the more general problem of protecting constitutional rights and interests in an activist state. Courts have faced this tension since the New Deal, when they largely gave up limiting economic regulation under the Commerce Clause or liberty of contract. Instead, as the Supreme Court signaled in 1938 in footnote four of *United States v. Carolene Products Co.*,⁷ courts assumed general governmental power over the economy and enforced other provisions that affirmatively barred certain government actions: discrimination against discrete and insular minorities, restrictions on speech and on voting, restrictions on rights specifically enumerated in the first ten amendments, and so forth.⁸

Unquestionably, the expansion of social-welfare regulation creates new conflicts with the free exercise of religion.⁹ And as I will argue in greater detail below, religious freedom fits within at least two of the categories above: it is specifically enumerated and it often involves vulnerable minorities. With religious freedom, the strategy to limit the increasing reach of government took the form of accommodations for religion. An accommodation, or exemption, is a court ruling or statutory provision declaring that otherwise valid regulations should not be applied in ways that significantly interfere with the religious freedom of organizations or individuals.¹⁰ The

⁶ Thomas C. Berg, *Progressive Arguments for Religious Organizational Freedom: Reflections on the HHS Mandate*, 21 J. CONTEMP. LEGAL ISSUES 279, 284–86 (2013) [hereinafter Berg, *Progressive Arguments*].

⁷ 304 U.S. 144, 152 n.4 (1938).

⁸ See, e.g., DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888–1986*, at 244 (1990) (“No longer would the Court be much concerned with the controversies over social and economic legislation . . . [but the *Carolene Products* footnote] suggest[ed] that the presumption of constitutionality might have less force with respect to measures affecting specific guarantees . . . [, thus setting] the Court’s agenda for the next fifty years.”); ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 122 (Sanford Levinson rev., 2d ed. 1994) (describing the Court’s shift from “the business-government relationship” to “civil rights” i.e. “the relationship between the individual and the government”).

⁹ See, e.g., Richard A. Epstein, *Religious Liberty in the Welfare State*, 31 WM. & MARY L. REV. 375, 375–76 (1990).

¹⁰ See, e.g., Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 686 (1992) (defining “accommodation” as provisions that “have the purpose and effect of removing a burden on, or facilitating the exercise of, a person’s or an institution’s religion”—that is, of “remov[ing]

key decision requiring an accommodation under the First Amendment's Free Exercise Clause was *Sherbert v. Verner*,¹¹ issued in 1963 by the Warren Court and written by its intellectual leader, William Brennan. *Sherbert* held that a Seventh-day Adventist woman could not be denied unemployment benefits because of her refusal to work on Saturday, her Sabbath, and that the government had to justify substantial burdens on religious freedom under strict scrutiny.¹² Courts expanded these mandatory accommodations in other cases, including *Wisconsin v. Yoder*, where the Supreme Court accommodated an Amish objection to compulsory schooling after age fourteen.¹³ And legislatures have also accommodated religion through scores of provisions in multiple areas of regulation.¹⁴ In addition to statutory accommodations specific to various contexts, legislatures have adopted general religious freedom statutes that protect religious conduct from "substantial burdens"—even through the application of general laws—unless the application of the burden satisfies strict judicial scrutiny. The Religious Freedom Restoration Act (RFRA), at issue in *Hobby Lobby*, imposes this scrutiny on federal laws.¹⁵ Similar provisions in nineteen states, and constitutional rulings by state courts in another twelve, impose similar scrutiny on state and local laws.¹⁶

There have been numerous scholarly defenses of religious accommodation.¹⁷ This Article presents one particular defense: that accommodation is a

obstacles to the exercise of a religious conviction adopted for reasons independent of the government's action").

¹¹ 374 U.S. 398, 409–10 (1963).

¹² *Id.* at 406–07 (requiring the state to show that a compelling interest justified a "substantial infringement" and "that no alternative forms of regulation would combat [the problem] without infringing First Amendment rights").

¹³ 406 U.S. 205, 234 (1972).

¹⁴ James E. Ryan, Note, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445–47 (1992) (estimating that "religious exemptions exist in over 2,000 [federal and state] statutes").

¹⁵ Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4 (2012).

¹⁶ See Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 844–45 nn. 22–23 & 26.

¹⁷ For recent defenses of strong free exercise protections, see generally JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* ch. 3 (1996) (doctrinal and jurisprudential defenses); JOHN T. NOONAN, *THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM* (1998) (originalist and doctrinal defenses); Alan E. Brownstein, *Justifying Free Exercise Rights*, 1 U. ST. THOMAS L.J. 504 (2003) (doctrinal and jurisprudential defenses); Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313 (1996) (originalist and doctrinal defenses); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) (originalist defense); Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159 (2013) (originalist and doctrinal defenses). My own contributions on this score include Thomas C. Berg, *Can Religious Freedom Be Protected As Equality?*, 85 TEX. L. REV. 1185 (2007) (historical and doctrinal defenses). For defenses of protection for religious institutions in particular, see generally PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* ch. 7 (2013) (defenses of church autonomy); Richard W. Garnett, *"The Freedom of the Church": (Towards) An Exposition, Translation, and Defense*, 21 J. CONTEMP. LEGAL ISSUES 33 (2013) (defense of the freedom of the church); Frederick M. Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99 (1989) (defense of protection of religious groups); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations*

valuable and flexible resource for maintaining religious freedom in the regulatory state without undercutting the foundations of modern regulation. Accommodation of religion, whether constitutionally compelled or statutory, provides the means for balancing welfare-state regulation and religious freedom. It allows religious exercise to remain free while the regulation accomplishes its goal in the large majority of cases. Accommodation tempers regulation without undoing it: indeed, accommodation often increases regulation's credibility, or its likelihood of passage, by removing objections to it based on religious conscience.

This Article begins, in Part I, by arguing why religious freedom is important enough to merit strong protection, relying on the kinds of arguments that served as constitutional priorities for the post-New Deal Court. Part II then turns to the proper scope of accommodation in a state that is active in regulation but that also gives religious freedom serious weight. This Part focuses in particular on the *Hobby Lobby* decision, arguing that although it correctly gives religious freedom strong weight and recognizes religious-freedom claims by for-profit businesses, it should not lead to wide-ranging exceptions to commercial regulation.

Part III then integrates these observations about the scope of accommodation into a general framework for assessing when accommodation of religious conduct should be denied in order to prevent harms to others. This Part first discusses the considerations that should inform the determination of whether preventing a given harm constitutes a "compelling interest," justifying limiting religious freedom under RFRA and similar statutes. It then turns to arguments that "harms to others" mean that an accommodation is not only not mandated by religious freedom but is actually forbidden by the First Amendment's Establishment Clause. I argue that any such Establishment Clause restrictions should be modest and leave ample room for accommodations.

Finally, Part IV recaps and summarizes this Article's themes by distinguishing religious accommodation—a limited challenge to the regulatory state—from the far more fundamental challenges that succeeded in the era of *Lochner v. New York*¹⁸ but were abandoned after 1937. Religious accommodation is different from *Lochner* in several ways: it places less extensive limits on regulation; it rests on firmer textual foundations; and although it relies in part on the workings of markets to show that religious freedom will not cause unacceptable harm, it does not treat the market as the natural or conclusive mechanism. The reliance on markets, though important, is qualified and instrumental, for the purpose of giving reasonable room to religious freedom while not undercutting government regulatory power in general. For

and the Right to Church Autonomy, 81 COLUM. L. REV. 1373 (1981) (defense of church autonomy).

¹⁸ 198 U.S. 45 (1905).

these reasons, religious accommodation can coexist with—indeed, it plays an important positive role in—a well-functioning regulatory State.

I. WHY ACCOMMODATE RELIGIOUS FREEDOM

As later parts of this Article aim to show, we have ample mechanisms for calibrating the balances between religious liberty and other interests, and reducing the costs to others and society from any given level of religious-liberty protection. But we cannot eliminate the costs altogether. No theory can avoid weighing the competing interests to some extent. Therefore, an initial question is whether religious freedom is important enough to justify some harm to government interests, justify the search for less restrictive ways of achieving those interests, and justify sometimes difficult line-drawing between acceptable and unacceptable costs. Unless religious freedom is viewed as quite important, decision-makers will accept these costs as sufficient to override it, or they will define its scope narrowly enough to reach the same result.

That would be a serious mistake. We should treat religious freedom as quite important and give it broad scope, whether through constitutional or statutory provisions. Although there are many ways to argue for this proposition, my argument here is that religious freedom's importance is shown by the various rationales most prominent in modern, post-New Deal, constitutional doctrine. These rationales include—but are not limited to—the factors in *Carolene Products* footnote 4.¹⁹

In footnote 4, of course, the Court reemphasized the presumption that government regulation was constitutionally permissible, a presumption newly strengthened the previous year, 1937, by the change of course approving New Deal legislation.²⁰ But the Court went on to discuss factors that might override the presumption. Among other things, the Court said “[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.”²¹ The Court declined to decide whether “similar considerations [might] enter into the review of statutes directed at particular religious, or national, or racial minorities,” particularly those that are “discrete and insular,” but mentioned those groups specifically and left open the possibility that such circumstances might call for a “more searching judicial inquiry.”²² By focusing on these features, the Court attempted to provide a new “firm ground” for constitutional review after the *Lochner* era—a “new constitu-

¹⁹ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

²⁰ *See, e.g., W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398–400 (1937).

²¹ *Carolene Prods.*, 304 U.S. at 152 n.4.

²² *Id.* at 153 n.4 (citations omitted).

tional rhetoric . . . that self-consciously recognized that the era of laissez-faire capitalism had ended.”²³

Just as clearly, however, the *Carolene Products* approach cannot explain the whole set of constitutional rights that have become most important after the New Deal. Beginning with contraception rights in *Griswold v. Connecticut*,²⁴ the Court embarked on a new project of defining rights not specified in the first ten amendments, primarily rights of personal freedom in matters involving intimate relationships. The Court’s explanation for its choices in singling out such implied liberties has varied. Sometimes it emphasizes that it will only protect rights “deeply rooted in [the] Nation’s history and tradition[s]” and “careful[ly] descri[bed]” so that traditions show “concrete examples” recognizing that liberty.²⁵ Other times, however, it has more broadly found rights in “matters . . . fundamentally affecting a person [such as] the decision whether to bear or beget a child”;²⁶ the “most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy”;²⁷ and “basic personal relations” such as the right to enter into civil marriages (whether as a matter of equality or liberty).²⁸

It is not my purpose here to evaluate the strength, absolute or relative, of these various grounds for constitutional limitations on government regulations. Under all of the grounds, religious freedom fits comfortably within the rights that have received the strongest protection since the New Deal. First, religious freedom has textual status that reflects a longstanding societal commitment to its importance. Second, it is often asserted by groups who are subject to prejudice at worst and ignorance or insensitivity at best. And finally, it is as central to individuals’ identity and dignity as any of the personal rights strongly protected in the modern constitutional tradition.

A. Textual Status

First, free exercise of religion has an elevated place in the modern constitutional framework sketched above. It ranks among the rights specifically enumerated in the first ten amendments. In that and other ways, it stands among the rights that the Supreme Court undertook to protect at the very

²³ Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 714 (1985).

²⁴ 381 U.S. 479, 484–86 (1965).

²⁵ *Washington v. Glucksberg*, 521 U.S. 702, 720–22 (1997) (rejecting substantive due process challenge to laws against assisted suicide).

²⁶ *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

²⁷ *Id.*

²⁸ *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (establishing the right to equal federal treatment of state-recognized marriages); see also *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (protecting the right to marry because it is “the decision to enter the relationship that is the foundation of the family in our society”).

same moment—1937 and its aftermath—that it effectively recognized a larger role for the government in a complex society. At the dawn of modern rights jurisprudence, the New Deal Justices identified four freedoms—free exercise of religion and freedom of speech, press and assembly—as having a “preferred place,”²⁹ meaning they were “susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.”³⁰ Needless to say, the New Deal Justices did not invent that status for religious freedom. Although the religious freedom tradition in America is complex—marked by contention and blemished by notable failures to give respect and toleration—it nevertheless has been a powerful commitment that has helped make us among the world’s most religiously diverse, and religiously active, nations.³¹

It is true that the Court held in *Employment Division v. Smith* that accommodations usually are not required by the Free Exercise Clause.³² But *Smith* is not the last word on required accommodations: the Court made that clear in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, where it held that *Smith* had no application to “government interference with an internal church decision that affects [the religious organization’s] faith and mission.”³³ In any event, statutory accommodations still serve the values of protecting religious liberty and religious minorities, as *Smith* itself recognized in suggesting that such provisions were “permitted [and] even . . . desirable.”³⁴

Religious freedom is hardly the only constitutional right that legislatures can or should protect in circumstances when they’re not constitutionally compelled to do so. For example, government discrimination based on race, sex, or other prohibited factors violates the Fourteenth Amendment, the Court says, only when the government does it in the text of a law or otherwise intentionally.³⁵ The same rule applies to allegations that a statute violates the Fifteenth Amendment by disproportionately restricting the vote of

²⁹ *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

³⁰ *Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943) (referring to all four freedoms although deciding the case based on freedom of speech). See also *Thomas*, 323 U.S. at 530 (stating that only “the gravest abuses, endangering paramount interests, give occasion for permissible limitation” of the four freedoms); John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. REV. 787, 801–07 (2014) (discussing the place of religious liberty among the “preferred freedoms” in the 1930s and 1940s).

³¹ See generally DIANA L. ECK, *A NEW RELIGIOUS AMERICA: HOW A “CHRISTIAN COUNTRY” HAS BECOME THE WORLD’S MOST RELIGIOUSLY DIVERSE NATION* (2001) (describing American religious diversity); see also ROBERT D. PUTNAM AND DAVID E. CAMPBELL, *AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US* 8 (2010) (“The United States ranks far ahead of virtually all other developed nations in terms of all three Bs of religiosity [behaving, belonging, and believing].”).

³² 494 U.S. 872, 879–81 (1990).

³³ 132 S. Ct. 694, 707 (2012).

³⁴ 494 U.S. at 890 (“[A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.”).

³⁵ *Pers. Adm’r v. Feeney*, 442 U.S. 256, 272 (1979); *Washington v. Davis*, 426 U.S. 229, 239 (1976).

members of a racial group.³⁶ But Congress has expanded statutory rights beyond the narrow demands of the Constitution. Title VII requires defendants, including state and local governments, to show that a disparate impact on race or sex is justified by “business necessity.”³⁷ And the Voting Rights Act allows challenges to laws that dilute minority voting strength, even if unintentionally, based on a totality of the circumstances test.³⁸

In any event, RFRA and its state counterparts direct courts to order exemptions in appropriate cases.³⁹ RFRA’s overwhelming passage—by voice vote without objection in the House and by 97-3 in the Senate⁴⁰—itself indicates the strength of the American tradition of accommodating religious freedom.

The activist State can run afoul of statutory rules by unintentional discrimination. It can also impose unacceptable, even though unintended, burdens on religious freedom. It is justified to prevent those burdens through either specific accommodations or general religious freedom legislation.

B. Protection of Minorities

Carolene Products includes “religious minorities” among those needing protection from regulation, and rightly so. Many claimants for religious accommodations are identifiable minorities subject to prejudice and indifference. Muslims, Sikhs, and Native Americans fit easily into this category. And sometimes they must be protected by accommodations, judicial or statutory, rather than merely rules of formal neutrality or non-discrimination like that of *Smith*. Generally applicable rules not targeted at religion may not, in their enactment, typically reflect prejudice toward religious minorities whose beliefs happen to conflict with the rule. But they certainly reflect ignorance concerning minorities; and if the conflict is known, a decision not to accommodate can easily reflect unsympathetic indifference or even prejudice.

State versions of RFRA have given minority religions significantly stronger protection than *Smith* would. Christopher Lund, probably the lead-

³⁶ *Rogers v. Lodge*, 458 U.S. 613, 617–18 (1982).

³⁷ 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012) (codifying the standard of *Griggs v. Duke Power*, 491 U.S. 424, 429–30 (1971)); see also 42 U.S.C. § 2000e(b) (2012) (defining covered “employer” in a way that includes most state and local agencies, but allocating claims against federal government to civil-service rules).

³⁸ Voting Rights Act Amendments of 1982, §§ 2–3, 96 Stat. 131, 131–34 (amending 42 U.S.C. § 1973); *Thornburgh v. Gingles*, 478 U.S. 30, 43 (1986).

³⁹ See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761 (2014) (holding that RFRA requires exemptions pursuant to compelling interest test); Eugene Volokh, *Religious Exemption Law Map of the United States*, VOLOKH CONSPIRACY (July 9, 2010, 5:36 PM), archived at <https://web.archive.org/web/20100715073724/http://volokh.com/2010/07/09/religious-exemption-law-map-of-the-united-states/> (laying out same standard for state RFRA).

⁴⁰ Peter Steinfelds, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES, Nov. 17, 1993, at A18.

ing expert on state RFRAs, has catalogued a number of cases in which they have protected religious minorities.⁴¹ These include, for example, “the Native American student who got the right to wear his hair long in *A.A. v. Needville Indep. School Dist.*”;⁴² “the Santeria folks who got to continue their religious rituals sacrificing animals in *Merced v. Kasson*”;⁴³ and the “Jehovah’s Witness who got a bloodless liver transplant that was necessary to keep her alive in *Stinemetz v. KHPA*.”⁴⁴

Other religious-freedom claimants do not easily fit as “discrete and insular” minorities. Christian traditionalists, for example, do not immediately stand out as different, and they often integrate into society and participate in politics.⁴⁵ But there is still a good prima facie case for accommodating them. Minority status should not be seen as an all-or-nothing matter. While some religious groups are relatively powerless minorities everywhere, for others the status varies according to context. Traditional evangelicals are a majority in some parts of the country and often act in the insensitive way common to majorities. But they are a minority in other places—the places most likely to adopt legislation that penalizes them for acting according to their beliefs.⁴⁶ They are also a minority, with highly unpopular views, in a great many public educational institutions that likewise exercise state power.⁴⁷

Polls over the last quarter century consistently show significant negative views toward traditionalists: 45% of Americans in 1993 viewed “religious fundamentalists” unfavorably, and in 1989, 30% would not want to have them as neighbors.⁴⁸ A recent poll commissioned by the Human Rights Campaign, a leading pro-marriage-equality group, finds that likely 2016 voters now view evangelical Christians substantially less favorably than they view gays and lesbians: evangelicals were viewed unfavorably by 28%, gays and lesbians by only 18%.⁴⁹

⁴¹ See Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466, 481–82 (2010).

⁴² Posting of Christopher Lund, lund@wayne.edu, to religionlaw@lists.ucla.edu, (Mar. 11, 2014) [hereinafter Lund Post] (citing 611 F.3d 248, 272–73 (5th Cir. 2010)), archived at <http://perma.cc/E93R-KWSV> (titled RE: Letter opposing Mississippi RFA).

⁴³ Lund Post (citing 577 F.3d 578, 595 (5th Cir. 2009)).

⁴⁴ Lund Post (citing 252 P.3d 141, 161 (Kan. Ct. App. 2011)).

⁴⁵ See generally CHRISTIAN SMITH, *AMERICAN EVANGELICALISM: EMBATTLED AND THRIVING* (1998).

⁴⁶ See, e.g., Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919, 945 (2004) (noting varying patterns of majority-minority status, and the repeated efforts of New York-area public school officials “to exclude evangelical groups from meeting in the schools on the same terms as other voluntary groups”).

⁴⁷ See *id.* at 947–48 (describing a university’s actions excluding evangelical students from programs while accommodating other claims, accompanied by statements that the objectors, for example, “should simply not attend the University”).

⁴⁸ Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 760 (1999) (citing, respectively, GEORGE GALLUP, JR., *THE GALLUP POLL: PUBLIC OPINION 1993*, at 75–76, 78 (1994); and GEORGE GALLUP, JR., *THE GALLUP POLL: PUBLIC OPINION 1989*, at 63, 67 (1990)).

⁴⁹ Nikki Schwab, *Poll: Gay People More Popular than Evangelicals*, U.S. NEWS & WORLD REP., Mar. 27, 2014, <http://www.usnews.com/news/blogs/washington-whispers/>

A court should not strike down a law simply because there is antipathy toward the group the law affects. The government may have a legitimate justification, perhaps the same justification on which the antipathy rests. But the existence of antipathy should be an alert to look at the law more closely.

In previous work, Douglas Laycock and I have compared religious conservatives with gays and lesbians and argued that both groups should be protected. Because the two groups “are each viewed as evil by a substantial portion of the population, each is subject to substantial risks of intolerant and unjustifiably burdensome regulation.”⁵⁰ As Alan Brownstein has cogently explained, the danger in such situations is that government will “focus on one characteristic of a person—their race, religion, national ancestry or sexual orientation—and act as if that one attribute determines the value of the person.”⁵¹ Civil liberties protections are meant for people who are vulnerable to such reductionist dismissals of their interests, and that includes religious traditionalists as well as same-sex couples.

C. *Identity and Fundamental Interests*

Finally, protection for a religious group should not depend on whether it qualifies as a discrete and insular minority. Even when they are not the target of discrimination, religious believers and organizations should be protected against substantial government pressure to violate their beliefs. Such pressure inflicts significant harm on religious adherents because religion is such an important component of identity.⁵² Even setting aside its explicit protection in the text of the Constitution, religion is surely as central to individuals’ identity as any of the personal liberties protected in modern constitutional doctrine. Religious decisions “fundamentally affect[t]” a person and are “central to personal dignity and autonomy.”⁵³ As Alan Brownstein has put it:

For serious believers, religion is one of the most self-defining and transformative decisions of human existence. Religious beliefs affect virtually all of the defining decisions of personhood. They influence whom we will marry and what that union represents, the

2014/03/27/poll-gay-people-more-popular-than-evangelicals, archived at <http://perma.cc/9YHX-7EMJ>.

⁵⁰ Douglas Laycock & Thomas C. Berg, *Protecting Same-Sex Marriage and Religious Liberty*, 99 VA. L. REV. ONLINE 1, 5 (2013), <http://www.virginialawreview.org/sites/virginialawreview.org/files/LaycockBerg.pdf>, archived at <http://perma.cc/BA6Z-GS4N>.

⁵¹ Alan 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, 406 (2010) (citation omitted).

⁵² I develop this argument at greater length in Berg, *Progressive Arguments*, *supra* note 6, at 300–01, 305–06.

⁵³ See *supra* notes 26–28 and accompanying text (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) and *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013)).

birth of our children, our interactions with family members, the way we deal with death, the ethics of our professional conduct, and many other aspects of our lives. Almost any other individual decision pales in comparison to the serious commitment to religious faith.⁵⁴

Moreover, for serious believers—the ones who are likely to persist with conscientious objections in the face of legal risk—religious identity is not only important but is also wide-ranging and made up of interconnected beliefs and practices. Christopher Eisgruber and Lawrence Sager describe religious belief and practice as “important components of individual and group identity,” because “[r]eligious affiliation typically implicates an expansive web of belief and conduct”—a “comprehensive” web rather than a set of “discrete propositions or theories”—and “[i]n a variety of ways the perceived and actual stakes of being within or without these webs of belief and membership can be very high,” such as “leading a life of virtue or a life of sin,” or “fulfilling or squandering one’s highest destiny.”⁵⁵ Eisgruber and Sager employ this description in an Establishment Clause context; they are explaining why government adoption of a particular religious identity causes distinctive harms to persons outside that faith.⁵⁶ But the point also applies to the freedom to practice one’s faith: the free exercise of religion. Being forced to act in a way contrary to one’s deepest and most comprehensive beliefs can have broad repercussions, making the believer feel severed from the entire web of beliefs. The same holds by extension for religious organizations, which may be affected greatly by departing from beliefs and practices that tie them to the faith that inspires their workers, volunteers, and donors.⁵⁷

1. *Analogies: Same-Sex Couples’ Claims and Establishment Clause Claims*

To gauge the importance of freedom of religious exercise, as well as its proper scope, it can help to compare it in more detail to other constitutional claims: for example, those made by same-sex couples and those made by religious minorities challenging government-sponsored prayers as establishments of religion.

⁵⁴ Alan Brownstein, *The Right Not to Be John Garvey*, 83 CORNELL L. REV. 767, 807 (1998) (reviewing JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* (1996)).

⁵⁵ CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* 61, 125–26 (2007).

⁵⁶ *See id.* at 61–62.

⁵⁷ For elaboration of these points, see Berg, *Progressive Arguments*, *supra* note 6, at 300–06.

a. *Same-Sex Couples' Claims*

Although claims of same-sex couples frequently conflict with those of traditional religion, they in fact have several parallels, which have been elaborated by scholars of gay, lesbian, and bisexual (GLB) rights⁵⁸ and of religious freedom.⁵⁹ Both sexual orientation and religion are important to personal identity, and consequently either impossible to change or very difficult to change without substantial costs to one's sense of integrity. Accordingly, the State should not tell same-sex couples, "You can have your orientation, but don't act on it"; no state interest is strong enough to justify such a severe and wide-ranging burden.⁶⁰ The corresponding mistake in the context of religious freedom is for the state to tell religious adherents, "You can have your belief, but don't act on it." The believer likewise has an interest in acting in accordance with her identity and deepest commitments, an interest that should be respected unless there is a strong reason to limit it (in RFRA's terms, a "compelling" reason).

Moreover, both same-sex couples and religious believers seek to lead lives of integrity, consistent with their identity, in civil society, not just in insular settings. When the State refuses marriage to same-sex couples, it wrongly tells them, in essence, "Keep your relationship private," in that the marriage will not receive the civil recognition and accompanying civil legitimacy that other marriages enjoy. With religious practice, the corresponding mistake is for the state to tell believers that the scope of their religious freedom is limited to the worship service and the house of worship and does not extend to the ways they act on their beliefs in faith-based service organizations and in their businesses. That wrongly says, in essence, "Keep your faith to the church."

The analogies between GLB rights and religious freedom cannot be dismissed on the basis that same-sex couples seek equality while religious objectors seek a distinctive liberty from regulation.⁶¹ There is no good reason to privilege equality over liberty; both are central features of the constitutional tradition. Claims of liberty may be inherently more qualified, because the limits of freedom must always be defined as against social interests and the rights of others. But that simply means that there should be limits on religious freedom and religious accommodations. It does not detract from the

⁵⁸ See KENJI YOSHINO, *COVERING* 168–70 (1996); 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).

⁵⁹ See Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 *Nw. J.L. & Soc. POLY* 206, 212–24 (2010) [hereinafter Berg, *Claims in Common*]; Laycock & Berg, *supra* note 50, at 4–5. The analysis in this text paragraph and the next condenses the argument of the two articles above.

⁶⁰ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 583 (2003).

⁶¹ I make a fuller set of arguments on this point in Berg, *Claims in Common*, *supra* note 59, at 224–26.

proposition that religious freedom, as a fundamental liberty, must weigh heavily in the balance.

b. Establishment Clause Claims

Another instructive comparison on the importance and sensitivity of religious identity is between *Hobby Lobby* and the 2013 Term's other Religion Clause decision, *Town of Greece v. Galloway*.⁶² There the Court upheld, against an Establishment Clause challenge, a town council's practice of opening meetings with prayers by invited clergy and others.⁶³ The majority rejected the plaintiffs' claims that the pattern of prayers overwhelmingly favored Christianity over other religions and pressured participation by citizens who had to appear before the council for some purpose.⁶⁴ Justice Kagan dissented, in an eloquent opinion that opened with praise for the "momentous offering" and "breathtakingly generous constitutional idea" of religious freedom.⁶⁵ Much of her dissent focused on the ideal of formal religious neutrality: "when each person performs the duties or seeks the benefits of citizenship, she does so not as an adherent to one or another religion, but simply as an American."⁶⁶ But Justice Kagan added another point, which has implications for accommodations from formally neutral laws:

[T]he not-so-implicit message of the majority's opinion—"What's the big deal, anyway?"—is mistaken. The content of Greece's prayers is a big deal, to Christians and non-Christians alike. A person's response to the doctrine, language, and imagery contained in those invocations reveals a core aspect of identity—who that person is and how she faces the world.⁶⁷

Because religion is "a core aspect of identity," the Establishment Clause makes the predicament of the religious dissenter at the council meeting a matter of constitutional concern. And in this respect religion differs from the wide range of secular views that we expect council members to express even though others disagree. Therefore, it is unfortunate that the five Justices in the *Hobby Lobby* majority rejected the objection to council prayers in *Town of Greece*: they should have treated it with seriousness, as they treated RFRA objections.⁶⁸ Justice Kagan is right: when Justice Alito dismissed as "really quite niggling" the claim that the town should have

⁶² 134 S. Ct. 1811 (2014).

⁶³ *Id.* at 1815.

⁶⁴ *Id.* at 1820.

⁶⁵ *Id.* at 1841. (Kagan, J., dissenting).

⁶⁶ *Id.*

⁶⁷ *Id.* at 1853.

⁶⁸ For illuminating discussion of the parallels, see Vikram David Amar & Alan E. Brownstein, *Consistency in the Treatment of Religious Liberty Claims: Hobby Lobby and Town of Greece Viewed Side by Side*, VERDICT (Feb. 28, 2014), <http://verdict.justia.com/2014/02/28/consistency-treatment-religious-liberty-claims>, archived at <http://perma.cc/WQ4V-26AZ> [hereinafter Amar & Brownstein, *Consistency in Claims*].

done more to avoid Christian dominance, he ignored the special sensitivity of religious differences.⁶⁹

But the point applies the other way too, to Justice Kagan and the Court's "liberal" wing. Much of the argument against Hobby Lobby's owners, both on the Court and in the general culture, amounts, in Justice Kagan's phrase, to "What's the big deal, anyway?"⁷⁰ No one—the argument goes—is forcing the owners to use contraceptives or alleged abortifacients, or administer them, or endorse their use.⁷¹ Likewise, no one is forcing Catholic institutions to host or perform same-sex marriages, or endorse them; so what's the real impact on religious commitments? One also hears equivalents of the following argument: "What's so special about religion? People have lots of objections to government policies and don't get to claim an exemption."

Justice Kagan's identification of religious belief as a "core aspect of identity" helps answer why it is a big deal, and why religious objections to majoritarian policies are distinctive. The depth and comprehensive nature of a religious belief, for someone who believes it strongly enough to risk challenging a law, means that the person suffers a serious burden to her integrity when pressured to act in ways inconsistent with the belief. Using Justice Kagan's words again, it matters in *Hobby Lobby*—as it should have mattered in *Town of Greece*—that religious beliefs "speak of the depths of [one's] life, of the source of [one's] being, of [one's] ultimate concern, of what [one] take[s] seriously without any reservation."⁷²

The importance of freedom and integrity on religious matters reveals other commonalities between the two cases. The *Town of Greece* majority said that the town had a formally "nondiscriminatory" policy and Christians had dominated simply because they had the overwhelming majority of congregations in town.⁷³ The *Town of Greece* dissenters criticized this formalism and argued that since several non-Christian houses of worship were just outside the town's borders, the council could, and must, do more to achieve equality among denominations.⁷⁴ But the dissenters then turned around in *Hobby Lobby* and argued that the formal neutrality of a law was sufficient to

⁶⁹ 134 S. Ct. at 1829.

⁷⁰ *Id.* at 1852 n.5 (Kagan, J., dissenting).

⁷¹ *See, e.g.,* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2799 (2014) (Ginsburg, J., dissenting) (claiming that the companies' owners were not substantially burdened because they were not commanded to use, "purchase or provide the contraceptives they find objectionable"); Amar & Brownstein, *Consistency in Claims*, *supra* note 68, at 23 (noting that in *Hobby Lobby*, as in *Town of Greece*, "opponents of the plaintiffs/religious claimants seem incredulous, wondering what the religious adherent can possibly be complaining about.").

⁷² *Town of Greece*, 134 S. Ct. at 1852 (alteration in original) (quoting PAUL TILlich, *THE SHAKING OF THE FOUNDATIONS* 57 (1948)).

⁷³ *Id.* at 1824 ("So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing.").

⁷⁴ *Id.* at 1840 (Breyer, J., dissenting) ("[I]n a context where religious minorities exist and where more could easily have been done to include their participation, the town chose to do nothing."); *id.* at 1852–53 (Kagan, J., dissenting).

eliminate any claim by people seeking to act in the economic sphere through the corporate form.⁷⁵

The *Town of Greece* dissenters also were willing to accept case-specific balancing and narrow judgments in order to distinguish permissible from impermissible religious elements in public events. Justice Alito, a member of the majority, was unwilling, warning that “our often puzzling Establishment Clause jurisprudence” would deter officials from including even permissible religious elements;⁷⁶ and Justice Scalia doubtless agreed, since he has long called the case law on government religious speech incoherent.⁷⁷ But again, in *Hobby Lobby* the roles switched: now it was Justice Ginsburg and the other *Town of Greece* dissenters who warned that the decision would put the Court in the position of “divin[ing] which religious beliefs are worthy of accommodation, and which are not.”⁷⁸

This dilemma between slippery slopes and judicial discretion was the prime reason *Smith* gave for rejecting constitutionally mandated accommodations.⁷⁹ But it is no reason for refusing to follow RFRA, which rests precisely on Congress’s determination that courts can and should make case-sensitive judgments: Congress found that the compelling-interest test is “a workable test for striking sensible balances between religious liberty and competing prior governmental interests.”⁸⁰ Neither religious accommodations nor religiously themed expressions are amenable to a few simple rules. But if religious freedom is a sufficiently important and sensitive matter to justify judicial intervention, then some case-by-case balancing is worth accepting as the cost of permitting that intervention while respecting other interests.

2. *Religious Freedom Beyond Churches*

Given the centrality and comprehensiveness of religious identity for the believer, it cannot be limited solely to relatively insular settings like the worship service or the house of worship. People have an interest in carrying their beliefs into public settings and civil society. One recurrent issue involves the religious freedom of faith-based non-profit service organizations such as schools and social services. In previous work, I’ve argued that these

⁷⁵ See *Hobby Lobby*, 134 S. Ct. at 2787–806 (Ginsburg, J., dissenting). Justices Breyer and Kagan avoided deciding whether for-profit corporations were barred from asserting religious-freedom claims. *Id.* at 2806 (Breyer and Kagan, JJ., dissenting). But by joining in the rest of Justice Ginsburg’s dissent they left serious doubt whether any claim for an exemption would ever be successful.

⁷⁶ 134 S. Ct. at 1831 (Alito, J., concurring).

⁷⁷ See, e.g., *McCreary County v. ACLU*, 545 U.S. 844, 891 (2005) (Scalia, J., dissenting).

⁷⁸ *Hobby Lobby*, 134 S. Ct. at 2805 (Ginsburg, J., dissenting).

⁷⁹ See *Emp’t Div. v. Smith*, 494 U.S. 872, 887 (1990).

⁸⁰ 42 U.S.C. § 2000bb(a)(5) (2012). As the majority put it, the dissent’s “fundamental objection to the claims of the plaintiffs is an objection to RFRA itself.” *Hobby Lobby*, 134 S. Ct. at 2784.

organizations merit substantial protection because their activities—“[w]orks of justice, mercy, and service”—“lie at the core of many religious faiths.”⁸¹ Put differently, “[f]orming in groups to serve others is central to religion and therefore to the free exercise of religion: it lies at the core, not the periphery.”⁸²

Another recurrent controversy, of course, is that involved in *Hobby Lobby* itself: religious freedom claims by for-profit corporations. I will not address this issue in detail, but the importance and the comprehensiveness of religion suggest that *Hobby Lobby* was correct to reject any threshold bar to such claims. People have a significant interest in being able to carry their religious faith into the operation of their businesses, which involve so much of their time and effort—including businesses that become large enough to make the corporate form useful. As the Court recognized, “some for-profit corporations do seek ‘to perpetuate the religious values shared’ . . . by their owners”—as, for example, *Hobby Lobby* does in its stated purpose of “Honoring the Lord in all we do by operating . . . in a manner consistent with Biblical principles.”⁸³

The Court correctly rested the right of for-profit corporations to raise RFRA claims on the fact that the statute should be interpreted vigorously. The majority reasoned that “RFRA was designed to provide very broad protection for religious liberty”; and it doubted “that the Congress that enacted such sweeping protection put small-business owners to the choice” of either foregoing religious-freedom protection or foregoing use of the corporate form.⁸⁴ Technically, this was a question of interpreting statutory terms, such as who are the “persons” entitled to exercise religion; but the majority almost certainly also saw general religious-freedom principles as relevant too. As I’ve already argued, those principles indeed call for broad protection given the importance of religious exercise in believers’ lives.

The Court also recognized that excluding for-profit corporations from RFRA would deny religious objections that many people would find more sympathetic than the objections in *Hobby Lobby* itself. The government “could decide that all supermarkets must sell alcohol for the convenience of customers (and thereby exclude Muslims with religious objections from owning supermarkets)”;⁸⁵ likewise, it could require all gas stations to stay

⁸¹ Berg, *Progressive Arguments*, *supra* note 6, at 298.

⁸² *Id.* at 299.

⁸³ *Hobby Lobby*, 134 S. Ct. at 2770 n.23 (quoting *Hobby Lobby*’s statement of purpose). The Court also rightly noted the connection between recognizing religious-conscience rights here and affirming the premises of corporate social responsibility. *See id.* at 2771 (“For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives. . . . [T]here is no apparent reason why they may not further religious objectives as well.”); *id.* (noting that more and more states are recognizing the benefit corporation, the “dual-purpose entity that seeks to achieve both a benefit for the public and a profit for its owners.”).

⁸⁴ *Id.* at 2767.

⁸⁵ *Id.* at 2781 n.37.

open seven days a week (and thereby exclude observant Jews), or it could require all stores to sell state lottery tickets (and thereby exclude objectors).⁸⁶ To pick a more controversial but still powerful example, the Solicitor General conceded at oral argument that under his position, the government could require corporations to cover any abortion that was permissible in the jurisdiction—that is, any abortion up through the second trimester of pregnancy, and not just the highly disputed emergency contraceptives at issue in *Hobby Lobby*.⁸⁷ The Court responded: “The owners of many closely held corporations could not in good conscience provide such coverage, and thus HHS would effectively exclude these people from full participation in the economic life of the Nation. RFRA was enacted to prevent such an outcome.”⁸⁸

Notwithstanding the controversy over abortion, there is a strong tradition of recognizing—in other contexts as well as abortion—the serious burden on conscience created when one is pressured to contribute to what one regards as unjustified killing.⁸⁹ *Hobby Lobby*’s key point is that a business owner so pressured is effectively “exclude[d] . . . from full participation in the economic life of the Nation.”⁹⁰ Regulation of commercial businesses is often important to permit others to participate in economic life too, but it cannot ignore the business owner’s interest in participation. Whether religious-freedom claims belong to the corporation itself, or to the owners who should not lose them when they choose to incorporate, the most important thing is to recognize the objectors’ ability to bring such claims and put the government to proof when it claims it cannot make accommodation for sincere religious conscience.

⁸⁶ Eugene Volokh, 2A. *Do Religious Exemption Rights Extend To Commercial Behavior?*, VOLOKH CONSPIRACY (Dec. 3, 2013, 2:14 AM), <http://volokh.com/2013/12/03/2a-religious-exemption-rights-extend-commercial-behavior/>, archived at <http://perma.cc/8EXV-PLQK>.

⁸⁷ Transcript of Oral Argument at 75, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354).

⁸⁸ *Hobby Lobby*, 134 S. Ct. at 2783. The question is no longer hypothetical: California state insurance regulators have announced that all group plans must cover elective abortion by virtue of a state law requiring plans to cover all “medically necessary” care. *California: Insurers Must Cover Elective Abortions*, ASSOCIATED PRESS, Aug. 23, 2014, <http://bigstory.ap.org/article/california-insurers-must-cover-elective-abortions>, archived at <http://perma.cc/5W2D-JULC>. Earlier in Washington state, a bill requiring most employers to cover abortions passed the House, although it failed in the Senate. Rachel La Corte, *House Passes Bill Requiring Abortion-Insurance Coverage*, SEATTLE TIMES, Feb. 5, 2014, http://seattletimes.com/html/localnews/2022845818_rpapassesxml.html, archived at <http://perma.cc/SN2G-K9M3>.

⁸⁹ See, e.g., Mark Rienzi, *The Constitutional Right Not to Kill*, 62 EMORY L.J. 121, 125–30 (2012) (describing conscience protections as to military operations, capital punishment, assisted suicide, and abortion).

⁹⁰ *Hobby Lobby*, 134 S. Ct. at 2783.

II. THE BOUNDARIES OF ACCOMMODATIONS

A. *General Observations*

Accommodations do not raise a fundamental challenge to the regulatory state. They take the government's basic regulatory power as a given and simply carve out a zone in which to protect the countervailing, important right of freedom of religion. They are an example of a familiar principle of constitutional law: a law may be valid on its face and yet impinge on a constitutionally protected interest in its application to a particular set of facts. Religious accommodation is appropriate when a facially valid law would, in a particular application, substantially burden religious exercise without a strong countervailing interest. Accommodation provides the means for balancing welfare-state regulation and religious freedom. It allows religious exercise to remain free while the regulation accomplishes its goal in the large majority of cases. Accommodation tempers regulation without undoing it.⁹¹

The nature of accommodation in the American legal system has made it flexible and capable of weighing the competing interests. As already noted, accommodations come from two sources: (1) context-specific statutory enactments or (2) general religious-freedom provisions, constitutional or statutory, that apply to many contexts under a reasonably demanding standard such as the compelling-interest test of RFRA. Both kinds of accommodations facilitate weighing interests in particular situations in the light of a wide range of relevant facts. With specific statutory accommodations, the legislature can seek to strike an appropriate balance by taking testimony and making findings; it can also draw numerical or other lines that are arbitrary at the margin but reflect reasonable weighing overall.

With judicial accommodations under a constitutional provision or a RFRA, the governing standard allows courts to tailor their relief to the religious-freedom claimant and avoid undercutting regulation broadly. RFRA requires that the "application of [a law] to [the particular] person" in question, if it substantially burdens her religious exercise, must further a compelling interest by the least restrictive means.⁹² This means, the Supreme

⁹¹ What Justice Rehnquist said about as-applied challenges in general is relevant here:

When a litigant challenges the constitutionality of a statute, he [normally] challenges the statute's application to him. . . . If he prevails, the Court invalidates the statute, not in toto, but only as applied to those activities. The law is refined by preventing improper applications on a case-by-case basis. In the meantime, the interests underlying the law can still be served by its enforcement within constitutional bounds.

Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 977 (1984) (Rehnquist, J., dissenting).

⁹² 42 U.S.C. § 2000bb-1 (2012).

Court has unanimously emphasized, that courts should not accept “broadly formulated interests justifying the general applicability of government mandates” but should “scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants.”⁹³ Since all the court will do under RFRA is grant an exemption (it will not strike the underlying law), logically the court should only look at the harm resulting from the exemption. By examining government interests and ordering relief “at the margin,” the court can preserve the law’s core purposes while also protecting religious freedom. And the test, which requires the parties to present evidence and looks to all the facts of the case, enables careful weighing of interests. Thus, Congress in 1993 specifically found it “a workable test for striking sensible balances between religious liberty and competing prior governmental interests.”⁹⁴

Of course, the extent to which accommodations undermine basic regulation depends on the scope of the accommodations. The next section of this Part, as well as Part III, deal with questions of scope.

B. Hobby Lobby and Its Limits

Much of the recent hue and cry over religious accommodations has focused on the claims of for-profit businesses. For-profit challenges to the contraceptive mandate, in particular, have made progressives fearful of the compelling interest test, and aghast that a 13,000-employee business like Hobby Lobby could get to square one, let alone win. For example, before the decision came down, a group of progressive-oriented constitutional scholars cited the case as a reason to oppose enactment of any state versions of RFRA in the current context.⁹⁵ They argued that such statutes could seriously undermine enforcement of laws regulating businesses, and they added that “[t]he pendency of the *Hobby Lobby* litigation . . . has intensified these concerns” because a win for Hobby Lobby might influence the interpretation of state RFRA. The letter added:

Please note that the Hobby Lobby Corporation has over 13,000 employees. If Hobby Lobby is covered by federal RFRA, and if state RFRA’s are similarly interpreted, the religious defenses allowed by such laws will extend to very large, for-profit enterprises.⁹⁶

⁹³ *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006).

⁹⁴ 42 U.S.C. § 2000bb(a)(5) (2012).

⁹⁵ Letter from Ira C. Lupu, et al., F. Elwood & Eleanor Davis Professor of Law Emeritus, George Washington Univ., to Philip Gunn, Speaker, Miss. House of Representatives, et al. (Mar. 10, 2014), at 2–3, *archived at* <http://perma.cc/KVD9-GBBX>.

⁹⁶ *Id.* at 3.

However, the actual result in *Hobby Lobby* suggests far less radical consequences than these. It indicates that RFRA will put the government to proof and may result in some required accommodations for commercial businesses. But there is little or no indication that the provisions will significantly undermine economic regulation—not to anywhere near the extent of *Lochner*-era decisions.

As already discussed,⁹⁷ the Court in *Hobby Lobby* firmly held that for-profit closely held corporations can assert religious freedom claims. That holding was correct because people should be able to carry their faith and conscience into their businesses, even when they incorporate, and because RFRA should be interpreted vigorously to take seriously people's ability to follow their faith in all aspects of life.⁹⁸

At the same time, the holding of *Hobby Lobby* is also limited. After firmly establishing that the closely held companies could sue, the majority proceeded cautiously in assessing whether the mandate served a compelling governmental interest by the least restrictive means.⁹⁹ Justice Alito's majority opinion raised questions about whether the mandate served a compelling interest, given various exceptions it already recognized, and whether government subsidies to provide contraceptives would constitute a less restrictive means.¹⁰⁰ But in the end, the majority opinion avoided these questions and pointed to the insurer-pays accommodation, since that mechanism saved the objecting employer from having to pay and there was "no reason why this accommodation would fail to protect the asserted needs of women as effectively as the contraceptive mandate."¹⁰¹

Justice Kennedy, the key fifth vote, joined the majority opinion but also wrote a concurrence clearly emphasizing the ruling's limits.¹⁰² He suggested more pointedly that the application of the mandate served "a compelling interest in the health of female employees," although he likewise did not explicitly decide the issue.¹⁰³ In discussing alternative means of serving this interest, he commended only the non-profit accommodation, which he called "an existing, recognized, workable, and already-implemented framework to provide coverage," one that "equally furthers the Government's interest but does not impinge on the plaintiffs' religious beliefs."¹⁰⁴ While the majority opinion contained language suggesting that a new government funding pro-

⁹⁷ See *supra* notes 83–90 and accompanying text.

⁹⁸ See *id.*

⁹⁹ See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779–85 (2014).

¹⁰⁰ *Id.* at 2779–80, 2780–82.

¹⁰¹ *Id.* at 2782.

¹⁰² *Id.* at 2785 (Kennedy, J., concurring) ("The Court's opinion does not have the breadth and sweep ascribed to it by the respectful and powerful dissent.").

¹⁰³ *Id.* at 2786 ("It is important to confirm that a premise of the Court's opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees.").

¹⁰⁴ *Id.*

gram would also count as an available means,¹⁰⁵ Justice Kennedy showed skepticism about that option. He described it as the “imposition of a whole new program or burden on the Government” and added: “The Court properly does not resolve whether one freedom should be protected by creating incentives for additional government constraints.”¹⁰⁶

Justice Kennedy’s concurrence here recalls *United States v. Lopez*,¹⁰⁷ in which the Court for the first time in six decades invalidated a federal law on the ground that it exceeded the commerce power. There as here, the majority opinion, which Justice Kennedy joined in full, placed a limit on economic regulation in a way that many called a momentous reversal of past law, whether lamentable¹⁰⁸ or laudable.¹⁰⁹ And there, as here, Justice Kennedy added a concurrence emphasizing that the holding was “necessary though limited.”¹¹⁰ He said that basic federalism principles required the Court to “recognize meaningful limits on the commerce power,” but that the holding did not “call in question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature.”¹¹¹ Indeed, no widespread rollback of the commerce power ever materialized.¹¹² The dynamic with religious claims by for-profit corporations seems likely to be similar: limiting regulation in a few ways, but preserving most instances of the government’s power.

The contraceptive-coverage accommodation easily constituted a less restrictive means, for at least two reasons. First, the legal objection in the case was not over women receiving free or subsidized contraception but rather over who would pay for it. The companies did not challenge the govern-

¹⁰⁵ *Id.* at 2780–81 (majority opinion).

¹⁰⁶ *Id.* at 2786 (Kennedy, J., concurring).

¹⁰⁷ 514 U.S. 549 (1995).

¹⁰⁸ *See id.* at 602 (Stevens, J., dissenting) (criticizing “the radical character of the [*Lopez*] Court’s holding and its kinship with the discredited, pre-Depression version of substantive due process.”); *id.* at 608 (Souter, J., dissenting) (suggesting that *Lopez* “portend[s] a return to the untenable jurisprudence from which the Court extricated itself almost 60 years ago.”).

¹⁰⁹ *See, e.g.,* Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 752 (1995) (“[*Lopez*] marks a revolutionary and long overdue revival of the doctrine that the federal government is one of limited and enumerated powers.”).

¹¹⁰ *Lopez*, 514 U.S. at 568 (Kennedy, J., concurring).

¹¹¹ *Id.* at 580, 574. *See also* Stephen M. McJohn, *The Impact of United States v. Lopez: The New Hybrid Commerce Clause*, 34 DUQ. L. REV. 1, 33–34 (1995) (“The approach of the majority opinion . . . is to trim existing Commerce Clause doctrine around the edges. . . . The concurring opinion of Justice Kennedy, joined by Justice O’Connor, is even more careful to cast the holding as consistent with existing case law.”).

¹¹² *Cf. Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (approving the application of federal drug laws to personal medical-marijuana use). The ruling that the Affordable Care Act’s individual mandate exceeded the commerce power, *NFIB v. Sebelius*, 132 S. Ct. 2566, 2591 (2012)—whether lamentable or not—left in place the general “expansive” scope of the commerce power, resting instead on the mandate’s unusual requirement that individuals engage in an economic transaction. *NFIB*, 132 S. Ct. at 2585–86.

ment's power to subsidize contraceptives itself.¹¹³ As Vikram Amar and Alan Brownstein put it, writing before the *Hobby Lobby* decision, “[t]he benefits provided by the Act—generally available and affordable health insurance—are fungible, intangible goods that can be provided by either the public or private sector,” “[a]nd the Act’s beneficiaries have no reason to care about the source of the insurance.”¹¹⁴

In addition, insurers could cover contraception without premiums—the solution employed for the non-profit accommodation—because, by the government’s own calculations, the “costs of providing contraceptive coverage are balanced by cost savings from lower pregnancy-related costs and from improvements in women’s health.”¹¹⁵ If insurers of religious non-profits could thus afford it, so it seems can insurers of for-profits. Likewise, the government had already determined that third-party administrators of self-insured religious non-profits’ plans could, with a few adjustments, pay to cover those employees; again, the same dynamic would seem to work for self-insured for-profits.¹¹⁶

The cost savings from contraception has another relevant implication. It means that the employer’s objections, unlike objections to many other commercial regulations, will give it no commercial advantage and are unlikely to be motivated by desire for such an advantage. Employers have every competitive incentive to cover contraception and little self-interested reason to exclude it. As the next section will discuss, exemptions for commercial business sometimes raise concerns about economic favoritism and about insincere claims seeking commercial advantages.¹¹⁷ But those concerns were not present in this case.

Hobby Lobby turned out to be an easy case: I do not believe that the decision exhausts the rights of for-profit closely held businesses under RFRA. Nevertheless, as Ira Lupu and Robert Tuttle observe, “the fulcrum on which this case turns—the ability of government to satisfy both religious interests and the competing concerns of employees and their dependents—suggests that . . . *Hobby Lobby* is not nearly so sweeping or radical as it may

¹¹³ See, e.g., Brief for Respondents at 35, *Sebelius v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354), 2013 WL 5720377, at *35 (arguing that government “did not explain why it could not use [the Title X funding program] to redress genuine economic barriers to contraceptive access.”).

¹¹⁴ Vikram David Amar & Alan E. Brownstein, *The Narrow (and Proper) Way for the Court to Rule in Hobby Lobby’s Favor*, VERDICT (Apr. 11, 2014), <http://verdict.justia.com/2014/04/11/narrow-proper-way-court-rule-hobby-lobbys-favor>, archived at <http://perma.cc/4LJ4-7V53>. Amar and Brownstein urged the Court to rule on precisely the ground that (most narrowly read) it did: the ability to extend the non-profit accommodation.

¹¹⁵ HHS, Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39870, 39877 (quoted in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2782 n.38 (2014)).

¹¹⁶ See *id.* at 39880.

¹¹⁷ See *infra* note 125 and accompanying text.

seem.”¹¹⁸ The many tweets and opinion pieces saying that the Court, and RFRA, had denied contraceptives to female employees of huge businesses¹¹⁹ were seriously misstating the decision. And there is no prospect that 13,000-employee businesses will prevail in cases outside unusual contexts like insurance coverage.¹²⁰

In short, RFRA worked as Congress intended it would. It led the Court to “strike [a] sensible balanc[e] between religious liberty and competing [g]overnmental interests”¹²¹—in this case, protecting both through the mechanism of payment by insurers and third-party administrators. Without

¹¹⁸ Ira Lupu & Robert Tuttle, *Hobby Lobby in the Long Run*, CORNERSTONE BLOG, BERKLEY CENTER FOR RELIGION, PEACE & WORLD AFFAIRS, GEORGETOWN UNIVERSITY (July 1, 2014), <http://berkeleycenter.georgetown.edu/rfp/blog/hobby-lobby-in-the-long-run>, archived at <http://perma.cc/TAH6-A66U>.

¹¹⁹ Any list of cites would be merely a drop in the bucket, but some examples from members of Congress and national public figures are collected and criticized in Glen Kessler, *Fact Checker: Democrats on Hobby Lobby: “Misspeaks,” “Opinion,” and Overheated Rhetoric*, WASH. POST, July 14, 2014, <http://www.washingtonpost.com/blogs/fact-checker/wp/2014/07/14/democrats-on-hobby-lobby-misspeaks-opinion-and-overheated-rhetoric/>, archived at <http://perma.cc/E96A-LNLT>. While editing this very paragraph for a few minutes, I received a fundraising email from Sen. Al Franken (D-Minn.) stating that the Court had “given employers veto power over their employees’ health care.” Mass e-mail from Al Franken, Sen., to author (July 13, 2014, 09:42 AM CDT) (subject line “Act Now: Update on Hobby Lobby”) (on file with author). Of course, throughout the HHS contraception dispute, some opponents of the mandate engaged in rhetorical excess as well.

¹²⁰ The overreaction was spurred in part by the Court’s order, a few days after *Hobby Lobby*, granting a temporary injunction for a religious college that claimed that even the opt-out process for the non-profit accommodation still made it complicit in the provision of abortifacients. *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2807 (2014). To some people, including three dissenting justices, the Court seemed to be beating a rapid “retreat[] from [its] position” in *Hobby Lobby* that the non-profit accommodation was a proper alternative. *Id.* at 2808 (Sotomayor, J., dissenting). But this too overstates the Court’s action.

Some objecting non-profits have argued broadly that simply “maintaining a contractual relationship” with their insurers would make them complicit in the insurers’ provision of the items; but they also argued more narrowly that the government’s specific form for the opt-out made them complicit by requiring that they “designate” the insurer as the provider. *See, e.g.*, Petition for Writ of Certiorari, *Univ. of Notre Dame v. Burwell* (No. 14-392), 2014 WL 4978601, at *21, *23. The Court’s temporary injunction only remedied the narrower objection: it allowed the objector to give a simple written notice of its objection to HHS rather than designating its insurer, but subject to that change the “insurer pays” process would seem to go forward. *Wheaton Coll.*, 134 S. Ct. at 2807. It is very hard to see how the government has a compelling interest in the precise form of objection. But if the bare relationship between the objector and insurer is enough to create a violation of RFRA, the non-profit accommodation would be unenforceable—and Justice Kennedy, the swing vote, clearly indicated his preference for the accommodation. *See supra* notes 102–106 and accompanying text. The government has now proposed a simplified notice of objection. *See* Mary Agnes Carey, *FAQ: Administration’s New Contraception Rules Explained*, KAISER HEALTH NEWS (Aug. 26, 2014), <http://www.kaiserhealthnews.org/stories/2013/february/01/faq-contraception-mandate-and-religious-employers.aspxform>, archived at <http://perma.cc/C9TR-Z29Y>.

Although it may take a few months, I expect the Court will ultimately reach a sensible result: the accommodation will be upheld, but objectors will only have to give a simple notice of objection to the government.

¹²¹ 42 U.S.C. § 2000bb(a)(5) (2012).

RFRA, the Court would have had no authority to push the government toward that ready alternative.

The following two sub-sections comment on the two distinctive features of the *Hobby Lobby* case: (1) the for-profit status of the objectors, and (2) the possible distinction between the contexts of insurance coverage and those of other laws, in particular antidiscrimination laws.

1. *For-Profits and Non-Profits After Hobby Lobby*

For the reasons already given, the Court was right to extend RFRA to for-profit claims.¹²² At the same time, the commercial context has distinctive features that should, and surely will, make courts and legislatures cautious in extending broad exemptions. First, exemptions in the for-profit sector could affect vastly more employees and patrons than exemptions for religious non-profits: the religious non-profit sector covers perhaps 6–7% of jobs and wages, and the for-profit sector probably covers ten times that.¹²³ The state therefore has a heightened interest in the for-profit context in ensuring that all people are able to participate fully in economic life.¹²⁴

Moreover, in the for-profit sector, the State has an increased interest in avoiding giving unfair commercial advantages to some market actors. This interest is strengthened when the exemption claim is less likely to be sincere; and sincerity of religious purpose can be presumed more safely with a religiously-affiliated non-profit than with a commercial business.¹²⁵ There may be

¹²² See *supra* notes 83–90 and accompanying text.

¹²³ The entire non-profit sector accounted for 10% of the workforce and 9.2% of wages in 2010. See, e.g., *The Sector's Economic Impact*, INDEPENDENT SECTOR, https://www.independentsector.org/economic_role, archived at <http://perma.cc/7AXS-UPRP>. If the percentage of non-profit employment that is religiously affiliated tracks the percentage of giving to religious non-profits, it would be about two-thirds of the total, or 6–7%. STEPHEN V. MONSMA, *WHEN SACRED AND SECULAR MIX* 9 (1996). Subtracting government employment, about 17%, see Lymari Morales, *Government Employment Ranges from 38% in D.C. to 12% in Ohio*, GALLUP (Aug. 6, 2010), <http://www.gallup.com/poll/141785/gov-employment-ranges-ohio.aspx>, archived at <http://perma.cc/M7SW-KHA8>, leaves approximately 70% in the for-profit sector.

¹²⁴ See, e.g., Robert K. Vischer, *Do For-Profit Businesses Have Free Exercise Rights?*, 21 J. CONTEMP. LEGAL ISSUES 369, 391 (2013) (“The primary concern . . . is that for-profit corporations are so central to our ability to participate in modern life, including our ability to earn a livelihood. They are inescapable conduits for many goods deemed fundamental to our modern existence.”); Micah Schwartzman, Richard Schragger & Nelson Tebbe, *Hobby Lobby and the Establishment Clause, Part III: Reconciling Amos and Cutter*, BALKINIZATION (Dec. 9, 2013), http://balkin.blogspot.com/2013/12/hobby-lobby-and-establishment-clause_9.html, archived at <http://perma.cc/VWZ6-JEA6> (“When such [large for-profit] employers exercise religious exemptions that impose significant costs on their employees, those costs are likely to be more substantial and far-reaching.”). I agree with some of the distinctions Schwartzman et al. make between non-profit and for-profit exemptions, but I disagree with their contention that for-profit exemptions as a category violate the Establishment Clause. See *infra* Part III.B.2.

¹²⁵ See, e.g., *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 344 (1987) (Brennan, J., concurring) (“The fact that an operation is not organized as a profit-making commercial enterprise makes colorable a claim that it is not purely secular in orientation.”).

no doubt of the religious sincerity of a given business owner—the government raised none in *Hobby Lobby*—but there might be in other cases.

Moreover, employees and clients in the for-profit sphere have a heightened expectation that they will be able to interact and transact according to general societal norms. That expectation does not apply at all to churches and denominations: as the Court has long said, “All who unite themselves to such a body do so with an implied consent to [its] government, and are bound to submit to it.”¹²⁶ The expectation is also limited when the situation involves a non-profit that holds itself out as religiously affiliated. Employees and clients then have good reason to expect that when they deal with the organization, they may have to follow standards stemming from the organization’s religious identity. Thus, as Micah Schwartzman, Richard Schragger, and Nelson Tebbe put it, “concerns about equality of opportunity in the non-profit context are mitigated in part by the reasonable expectation that employees who work for churches and religious-affiliated non-profits understand that their employers are focused on advancing a religious mission.”¹²⁷ These distinctions between non-profit and for-profit contexts do not mean that business owners’ claims should automatically be overridden: again, *Hobby Lobby* was right to reject that blanket assertion. But the distinctions do increase the State’s interest in protecting others.

Finally, the expectations of employees and clients are a function of another distinction: non-profits that identify themselves as religiously affiliated are generally closer to the core of religious exercise than are for-profit businesses selling ordinary secular products. By their very identity—especially when the identity is announced—these non-profits are carrying out the mission of a religious community. This does not mean that businesses cannot have serious religious interests, or that the pursuit of profit is irreconcilable with religious exercise. But again, one can endorse the right of for-profits to bring claims and still conclude that regulatory interests should limit for-profits’ religious freedom more than non-profits’. Thus it makes sense to give accommodations generously to religious non-profits but more sparingly to for-profit businesses; and *Hobby Lobby* seems consistent with this approach.

2. *Anti-Discrimination Claims After Hobby Lobby*

On the other issue concerning for-profits—objections to anti-discrimination laws—the Court likewise left open the possibility of recognizing some exemptions under RFRA but in no way suggested these would be automatic. Justice Ginsburg asked whether the majority’s approach would allow a restaurant to refuse to serve blacks, a business chain to refuse to hire gays and lesbians, or the wedding photographer to refuse to shoot pictures of a

¹²⁶ *Watson v. Jones*, 80 U.S. 679, 729 (1871).

¹²⁷ Schwartzman, Schragger & Tebbe, *supra* note 124, at 1(2).

same-sex ceremony.¹²⁸ The majority said it was providing “no such shield,” but it gave complete vindication only to the race-discrimination laws: “[t]he Government has a compelling interest in providing an equal opportunity to participate in the work-force without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.”¹²⁹ The majority did not mention Justice Ginsburg’s other examples, which are more current and involve conflicts between gay-rights laws and traditionalist religious tenets, especially in the context of same-sex marriage.

Under RFRA or its state counterparts, most discrimination cases are more complicated than the contraceptive-funding issue turned out to be in *Hobby Lobby*. The insurer’s or third-party administrator’s coverage of contraception without cost sharing gives employees precisely the same benefit as the employer mandate would; it therefore constitutes a less restrictive means no matter how one characterizes the government’s interest. But each act of discriminatory denial of service or employment causes some effect on the plaintiff—at the minimum, the cost of being declined service and turning to the next provider. For the reasons just given, these costs will likely be greater in the for-profit context than the non-profit context. Courts therefore must determine what effects on others, in these varying contexts, implicate compelling governmental interests.

The next Part will discuss in greater detail how to analyze government interests in anti-discrimination laws in the context of both non-profit religious organizations and for-profit businesses.¹³⁰ For the moment the point is simple: religious-freedom claims by for-profits do not always have to be treated the same as claims by non-profits. Courts might conclude, for the reasons discussed, that exempting an ordinary for-profit business from anti-discrimination liability for denying employment or service is never required under a RFRA-type statute. But it would not follow that religious non-profits should similarly be denied protection.

This point has a corollary. *Hobby Lobby* should not deter decision-makers from recognizing accommodations for religiously affiliated non-profits for fear that this will automatically trigger identical exemptions under RFRA for for-profit businesses. Such fears may have contributed to the decision by several civil rights groups, immediately after *Hobby Lobby*, to withdraw support for the federal gay-rights employment bill on the ground that it contained an exemption for religious organizations.¹³¹ But the fact that *Hobby*

¹²⁸ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2804–05 (2014) (Ginsburg, J., dissenting) (citing, respectively, *Newman v. Piggie Park Enters.*, 256 F. Supp. 941, 945 (D.S.C. 1966); *In re Minnesota ex rel. McClure*, 370 N.W.2d 844, 847 (Minn. 1985); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 60 (N.M. 2014)).

¹²⁹ *Id.* at 2783 (majority opinion).

¹³⁰ See *infra* Part III.A.2, notes 160–166 and accompanying text.

¹³¹ See ACLU et al., Joint Statement on Withdrawal of Support for ENDA and Call for Equal Workplace Protections for Gay People 2 (July 8, 2014), https://www.aclu.org/sites/default/files/assets/joint_statement_on_enda.pdf, archived at <http://perma.cc/AG22-LWN8> (giving as one reason for withdrawal that “opponents of LGBT equality are al-

Lobby extended the non-profit contraception accommodation to for-profits does not mean that the same thing will happen in other contexts—certainly not that it will happen willy-nilly. Again, the insurer-pays mechanism, by the government’s own hypothesis, meant no costs for either employees or (on net) insurers and thus could easily be extended. By contrast, there are costs from discriminatory denials of employment or service; the question is whether and when their nature or size makes them compelling. Exempting any for-profit businesses increases the costs some; exempting large businesses magnifies the costs dramatically. Thus, legislatures enacting accommodations and courts applying RFRA are permitted to be—and should be—more cautious in exempting for-profits than exempting religiously affiliated non-profits.

III. THE PROBLEM OF “THIRD-PARTY HARMS”

As the above discussion of discrimination cases shows, the problem of “harms to others” requires fuller discussion. Increasingly, opposition to religious-freedom claims focuses on harm, or the “shifting of costs,” to third parties. In its stronger form, the opposition asserts that accommodations that harm others—or harm them too much—violate the Establishment Clause. For example, several scholars, in articles and amicus briefs, argued that to exempt businesses from the contraception mandate would be unconstitutional because it would harm employees by denying them the valuable statutory benefit of free contraception.¹³² At the very least, opponents might assert that accommodations that harm others cannot be required under religious-freedom statutes, like RFRA, or state constitutional provisions that require exemptions. The government made this argument in *Hobby Lobby*, while refraining from asserting that an exemption would violate the Establishment Clause.¹³³

It may seem intuitively sensible to say simply that religious freedom does not authorize one person to harm or shift costs to another. As Eugene Volokh has observed, “religious freedom rights are often articulated as a right to do what your religion motivates you to do, simply because of your religious motivation, but *only so long as it doesn’t harm the rights of*

ready misreading [*Hobby Lobby*] as having broadly endorsed rights to discriminate.”); see also Thomas Reese, *What’s Next in the Ongoing Struggle Between the Bishops and Obama?*, NAT’L CATH. RPT’R. (July 25, 2014), <http://ncronline.org/blogs/faith-and-justice/whats-next-ongoing-struggle-between-bishops-and-obama>, archived at <http://perma.cc/XTK9-5FX9> (“Ironically, the *Hobby Lobby* decision discouraged compromise because the gay community feared that any exemption for religious nonprofits might be expanded to for-profit corporations by the courts. This, after all, is what happened in the *Hobby Lobby* case.”).

¹³² See generally Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343 (2014); Schwartzman et al., *supra* note 124.

¹³³ See Reply Brief for the Petitioners at 2–3, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354), 2014 WL 985085.

others.”¹³⁴ Obviously religious freedom does not protect killing someone in a ritual sacrifice, or defrauding others simply because the perpetrator perceives a religious duty. But the problem comes in defining terms like “harms” or “shifting costs.” In an earlier era of smaller government, legal prohibitions generally focused on a limited set of direct harms to another’s body, physical or financial property, or contractual rights. This framework certainly restricted the harms that religiously motivated conduct, like non-religiously motivated conduct, could impose on others: no one was free to commit assault, theft, or fraud even if he did so for religious reasons. Thus, a number of founding-era figures emphasized that religious freedom gave no one the right to harm others, but the harms they referred to were immediate, concrete, and serious matters like assault and theft: Pierre Bayle defended magistrates’ power and duty “to maintain society and punish all those who destroy the foundations, as murderers and robbers do”;¹³⁵ and Thomas Jefferson spoke of religious freedom for actions that “neither pic[k] my pocket nor brea[k] my leg.”¹³⁶

While prohibiting many harms, this framework also left a large zone of freedom in which religious organizations and individuals could act—potentially affecting others, but not in ways that the law deemed to be an impermissible harm. For example, before the rise of modern employment regulation, religious organizations were legally free to set religiously grounded standards for their employees: they did not face the possibility that setting such standards might violate collective-bargaining duties under existing labor laws, or norms of nondiscrimination based on sex or sexual orientation.

The rise of the welfare-regulatory State has changed this. The active State declares previously unrecognized legal harms. At-will employment has given way to extensive regulation of the employment relationship: government declares it a legal harm when an employee is barred from unionizing or is discriminated against based on a prohibited factor. Businesses’ freedom to deal or not deal with others has given way to increasingly wide-ranging public accommodations laws declaring discrimination in the provi-

¹³⁴ Eugene Volokh, *5C. RFRA Strict Scrutiny: The Interest in Protecting Newly Created Private Rights*, VOLOKH CONSPIRACY (Dec. 6, 2013), <http://volokh.com/2013/12/06/5c-rfra-strict-scrutiny-interest-protecting-newly-created-private-rights/>, archived at <http://perma.cc/MU4V-JMEC>; see also Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1510 (1999) [hereinafter Volokh, *A Common-Law Model*] (“[A] claim of [a religious-freedom right to conduct that harms others] is normatively unappealing. My relationship with my God may be important to me, but how can it . . . be a constitutionally sufficient justification for my harming you, even slightly?”).

¹³⁵ Pierre Bayle, *Philosophical Commentary on These Words of Christ: Compel Them to Come In*, in PIERRE BAYLE’S PHILOSOPHICAL COMMENTARY: A MODERN TRANSLATION AND CRITICAL INTERPRETATION 7, 167 (Amie Godman Tannenbaum trans., 1987).

¹³⁶ THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 159 (1784) (William Peden ed., 1954).

sion of almost any good or service to be a legal harm.¹³⁷ And a keystone of modern constitutional jurisprudence is that government has broad *prima facie* power to define, declare, and prohibit these harms.¹³⁸

Government can declare new legal harms based on indirect or probabilistic connections between the violator's conduct and the ultimate material harm. The modern State is not limited to imposing liability (criminal or civil) for actual or immediate harms; it may impose regulation designed to head off such harms. Under the typical "rational basis" level of constitutional review, courts defer almost completely to the government's assertions of risk.¹³⁹ And government may frame these regulations as benefits or rights for individual third parties. To prevent the ultimate harms of labor strife and unfair treatment of employees, government can declare rights of employees to unionize and can allow individuals to sue.

At the same time, if religious freedom confers no right to harm others, *and* the legislature can define anything it wishes as a harm, then the regulatory State will severely constrict religious freedom. For example, once civil rights laws defined various forms of discrimination as a legal harm to employees, religious organizations were exposed to lawsuits that would trigger civil court review of many of their decisions concerning their clergy and other leaders. Although some courts held that Congress's intent in Title VII could be interpreted to exclude suits by ministers,¹⁴⁰ most courts held that "the plain text of Title VII and its legislative history foreclose the possibility of imposing a limiting construction" and that protection for religious organizations had to rest in the Constitution.¹⁴¹ Ultimately, therefore, religious organizations retained their ability to choose their leaders, free from civil second-guessing, only because of a court-ordered religious accommodation: the ministerial exception, affirmed in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*.¹⁴²

The *Hobby Lobby* majority addressed this issue in responding to the government's argument that RFRA should never be interpreted so as to with-

¹³⁷ See, e.g., Justin Muehlmeier, *Toward a New Age of Consumer Access Rights: Creating Space in the Public Accommodation for the LGBT Community*, 19 *CARDOZO J.L. & GENDER* 781, 786–90 (2013); Lauren J. Rosenblum, Note, *Equal Access or Free Speech: The Constitutionality of Public Accommodations Laws*, 72 *N.Y.U. L. REV.* 1243, 1251 (1997) ("[T]he concept of 'public accommodations' now sweeps well beyond the traditional category of inns, restaurants, and other common carriers, reaching 'various forms of public, quasi-commercial conduct.'" (footnotes omitted); see also *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625–26 (1984) (noting the "expansive definition" of public accommodations in "many [s]tates and municipalities").

¹³⁸ See Volokh, *A Common-Law Model*, *supra* note 134, at 1521–29.

¹³⁹ See, e.g., *Williamson v. Lee Optical*, 348 U.S. 483, 487 (1955) (concluding that although a regulation may be "a needless [and] wasteful requirement in many cases[,] . . . it is for the legislature, not the courts, to balance [its] advantages and disadvantages").

¹⁴⁰ See *McClure v. Salvation Army*, 460 F.2d 553, 560–61 (5th Cir. 1972).

¹⁴¹ *Petruska v. Gannon Univ.*, 462 F.3d 294, 303 n.4 (3d Cir. 2006); accord *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1165–67 (4th Cir. 1985).

¹⁴² 132 S. Ct. 694, 696 (2012).

hold a statutory benefit from third parties. The question of effects on others, the Court recognized, “will often inform the analysis of the Government’s compelling interest and the availability of a less restrictive means” of advancing it.¹⁴³ But, the Court went on to say:

[I]t could not reasonably be maintained that any burden on religious exercise, no matter how onerous and no matter how readily the government interest could be achieved through alternative means, is permissible under RFRA so long as the relevant legal obligation requires the religious adherent to confer a benefit on third parties. [If that were so, then by] framing any Government regulation as benefiting a third party, the Government could turn all regulations into entitlements to which nobody could object on religious grounds, rendering RFRA meaningless.¹⁴⁴

The Court cited the examples already mentioned: a Muslim-owned store required to sell alcohol so its customers might benefit; a restaurant owner required to stay open on his Sabbath so employees of other faiths could earn wages and tips.¹⁴⁵

It is easy to multiply examples of accommodations that affect third parties and yet are at least constitutionally permissible, whether or not mandated by RFRA. Draft exemptions “shift harm” from the pacifist to another person who must be drafted; the clergy-penitent privilege may shift harm to the crime or tort victim who may lose the benefit of testimony.¹⁴⁶ In unemployment cases like *Sherbert v. Verner*, a former worker’s claim for benefits increases an employer’s rate of assessment for unemployment taxes.¹⁴⁷ In *Wisconsin v. Yoder*, in protecting Amish parents from criminal fines for withdrawing their children from school at age fourteen, the Court noted that none of the defendants’ children had objected to their parents’ decision.¹⁴⁸ Could the state have won the right to impose punishment by fiat by declaring (regardless of any individual child’s wishes) that each child had a statutory

¹⁴³ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ See Eugene Volokh, *3B. Would Granting an Exemption from the Employer Mandate Violate the Establishment Clause?*, VOLOKH CONSPIRACY (Dec. 4, 2013) <http://volokh.com/2013/12/04/3b-granting-exemption-employer-mandate-violate-establishment-clause/>, archived at <http://perma.cc/W3N-ZB25> (“I don’t know of any court that has taken the view that applying the clergy-congregant exemption from the duty to testify in [the victim’s] case would violate the Establishment Clause violation, despite the likely burden this would impose on [the victim]. . . . [I]t seems pretty well-settled that the exemptions are constitutionally *permissible*, notwithstanding these burdens.”).

¹⁴⁷ 374 U.S. 398, 399–400 (1963). See, e.g., Volokh, *A Common-Law Model*, *supra* note 134, at 1513–14 & 1513 n.154 (“Unemployment compensation is generally experience-rated, so an employer’s unemployment tax payments are tied to the number of claims the employer has had to pay out.”).

¹⁴⁸ 406 U.S. 205, 230–32 (1972).

right to attend school to age sixteen?¹⁴⁹ These examples vindicate the concern expressed in *Hobby Lobby* that in the era of the active State, virtually any regulation could be cast as a protection of the rights of identifiable third parties. Religious accommodation offers the means to mediate between the expanded State and the free exercise of religion—to affirm the legitimacy of the former while preserving room for the latter. The first section of this Part discusses the scope of accommodation under statutes like RFRA. The second section discusses the limits the Establishment Clause may impose on accommodations that affect others.

A. Harms and Compelling Interests

If we are to affirm the legitimacy of the welfare state, we cannot say that only historic common-law, libertarian harms—physical force, theft, or fraud—are cognizable grounds for overriding religious freedom. On the other hand, to preserve the importance of religious freedom in the welfare state, there must be some limits on what counts as a harm to others that justifies state regulation seriously burdening religion. This question is complicated precisely because since 1937 there has been no simple way to define a “legally cognizable harm” other than what the legislature says is a harm.¹⁵⁰ The best that can be done is to describe an overall approach toward limiting government burdens on religion, and the most common considerations that inform that approach.

With respect to the overall posture, I believe we have come up with no better formulation than to say that substantial restrictions on religious practices should be relieved unless the government interest in the situation is quite strong—“compelling,” in RFRA’s terms—and no less restrictive means can be adopted without significantly compromising the government’s interest. This is the standard set forth in RFRA, but it also provides a guide for legislatures to enact specific statutory accommodations. It is “a balancing test,” but “with the thumb on the scale in favor of protecting constitutional rights.”¹⁵¹

¹⁴⁹ This is to say nothing of the fact that constitutional doctrine allows harms to third parties in the course of protecting other constitutionally important interests. Free speech law protects the imposition of reputational harms on negligently defamed plaintiffs, see *N.Y. Times v. Sullivan*, 376 U.S. 254, 282–83 (1964); criminal-procedure provisions may harm victims by preventing convictions or even prosecutions of criminals.

¹⁵⁰ See Volokh, *A Common-Law Model*, *supra* note 134, at 1522 (“The Court ultimately repudiated [pre-1937] substantive due process jurisprudence, because it concluded that the legislature may redefine private rights . . .”).

¹⁵¹ Douglas Laycock, *The Religious Exemptions Debate*, 11 *RUTGERS J.L. & RELIG.* 139, 151–52 (2009). Even strict scrutiny will permit many applications of general laws to religious practice—unlike its results in free speech, racial discrimination, and even religious discrimination cases, where it nearly always invalidates the law. See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 *VAND. L. REV.* 793, 861–62 (2006) (finding that 74% of claims for religious exemptions were rejected in the relevant sample; concluding that “there is a major differ-

As to the factors in the analysis, no algorithm is possible. All that one can do is identify the most common factors and give examples of the roles they play. These various factors should be weighed to produce a balance with the thumb on the scale of religious freedom.

1. *Immediacy and Severity of the Harm*

It is one thing to say that a person cannot rely on religious grounds to assault another or trespass on her property. It is another thing to say that a person cannot ingest drugs at a worship service because some of the supply might be trafficked and end up harming others. Both cases ultimately involve asserted harms to others, but the harms in the drug case are indirect, dependent on contingent chains of events, and diffuse. Such asserted harms must be subject to stringent questioning, including judicial review under a RFRA standard, to ensure that the harm will be both certain and severe. Much of the expanded regulation in the modern state depends on such assertions of indirect harm; after 1937, the government has the power to legislate on this basis.¹⁵² But in the context of a religious exemption, assertions of indirect harm must be subject to stringent questioning; otherwise, they will gravely shrink religious freedom.

In contrast, direct, particularized harms to an individual are more likely to justify denying an exemption. James Madison, a strong defender of free exercise, referred to such harms when he said that free exercise should prevail unless it “trespass[es] on private rights” (or, he added, “the public peace”).¹⁵³ Religious freedom gives no one the right to commit direct invasions of another’s life, liberty, or property—the historic framework of criminal or tortious acts.

But even with particularized harms, other factors still need to be considered. If no action immediately affecting another individual should ever be exempted, then the ministerial exception would be inappropriate, since it allows a religious organization to deny employment to a specific individual. Nor would it ever be appropriate to order an exemption allowing a religious organization to employ members of its faith preferentially for non-ministerial positions—but courts have declared that RFRA’s principles require an exemption from religious-discrimination laws in such situations.¹⁵⁴

ence between strict scrutiny’s deadliness as applied in exemption cases compared to discrimination cases”). Arguably the standard has elements of intermediate rather than strict scrutiny; but, as I’ve written before, the “compelling interest” language still is warranted because of the tendency of courts to underenforce whatever exemptions test they follow. Thomas C. Berg, *The New Attacks on Religious Freedom Legislation, and Why They Are Wrong*, 21 CARDOZO L. REV. 415, 426 (1999).

¹⁵² See *supra* notes 137–38 and accompanying text.

¹⁵³ Letter from James Madison to Edward Livingston (July 10, 1822), reprinted in 9 THE WRITINGS OF JAMES MADISON 98, 100 (Gaillard Hunt ed., 1910).

¹⁵⁴ See, e.g., *Porth v. Roman Catholic Dioc. of Kalamazoo*, 532 N.W.2d 195, 199–200 (Mich. Ct. App. 1995) (applying RFRA, when it still applied to states, to exempt a Catholic school from a state religious-discrimination suit by a fifth-grade teacher);

In those situations, a religious organization's actions that immediately affect specific individuals should nonetheless be protected because they are part of the organization's internal governance and self-definition (a factor in the analysis discussed in the next sub-section). Courts additionally need to examine whether the effect is significant enough in itself to involve a compelling interest. For example, consider the contraception mandate: the public health benefits of contraception are strong,¹⁵⁵ but employers were not stopping employees from getting contraception. The interest behind the coverage mandate was in ensuring effective access to contraception for each female employee no matter how modest her income or resources.¹⁵⁶ Had contraception always been relatively cheap, the government's case under the compelling-interest component of RFRA's test would have been weakened.¹⁵⁷ The government's case for a compelling interest was stronger because some contraceptives—those most effective, or in some cases necessary—cost considerably more and were a significant expense for modest-income women.¹⁵⁸ These facts should be considered under the case-by-case analysis mandated by RFRA.

2. *Nature of the Claimant and Claimant's Interest*

As has already been discussed, there are multiple reasons to distinguish the claims of religious non-profit organizations from those of for-profit businesses—to recognize accommodations generously in the former cases but more sparingly in the latter.¹⁵⁹ To give an example of how the analysis may differ in the two contexts, let me return to the example of exemptions from anti-discrimination laws.

see also Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 335–36 (1987) (assuming, pre-*Smith*, that the Free Exercise Clause would require exempting a religious organization from liability for favoring persons of its own faith for any jobs involving religious activities, not just for ministerial positions).

¹⁵⁵ See Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2799 (2014) (Ginsburg, J., dissenting) (“The coverage helps safeguard the health of women for whom pregnancy may be hazardous, even life threatening. And the mandate secures benefits wholly unrelated to pregnancy, preventing certain cancers, menstrual disorders, and pelvic pain.” (citations omitted)).

¹⁵⁶ See, e.g., *id.* at 2789 (noting that the mandate rested on the “disproportionate burden women carried for comprehensive health services and the adverse health consequences of excluding contraception from preventive care available to employees without cost sharing.”).

¹⁵⁷ See, e.g., Megan McArdle, *Sell Birth Control Over-the-Counter*, BLOOMBERG VIEW, Sept. 10, 2014, <http://www.bloombergview.com/articles/2014-09-10/sell-birth-control-over-the-counter>, archived at <http://perma.cc/M6ED-2WHQ> (“Generic birth-control pills are a cheap, regular expense used by many millions of people, exactly the sort of thing that insurance is not designed for.”).

¹⁵⁸ See, e.g., *Hobby Lobby*, 134 S. Ct. at 2800 (the cost of an IUD, which is “significantly more effective” than other methods, is “nearly equivalent to a month’s full-time pay for workers earning the minimum wage”); McArdle, *supra* note 157 (noting the higher costs of IUDs).

¹⁵⁹ See *supra* notes 123–27 and accompanying text.

What interests underlying anti-discrimination laws are sufficient to limit religious freedom? The courts have divided over that question. If the relevant compelling interest served by anti-discrimination law is to ensure that the protected class has ample access to economic transactions and opportunities, then it is possible—and it is a less restrictive means—to exempt a limited class of small commercial providers whose objections would not affect access. Thus Massachusetts’s highest court, applying the state constitution, held that a small landlord might prevail on a religious-freedom defense to a charge of marital status discrimination in refusing to rent to an unmarried male-female couple.¹⁶⁰ Under the compelling interest test of the state provision, the court said:

We have no indication, beyond the facts of this case, whether the rental housing policies of people such as the defendants can be accommodated . . . without significantly impeding the availability of rental housing for people who are cohabiting or wish to cohabit. Market forces often tend to discourage owners from restricting the class of people to whom they would rent.¹⁶¹

By contrast, other courts have held that government has a compelling interest in preventing each and every act of discrimination; there is no alternative means to satisfy that interest other than to penalize each objector. In a nearly identical case involving a small landlord and an unmarried opposite-sex couple, the Alaska Supreme Court held that the state had a compelling “transactional interest in preventing discrimination based on irrelevant characteristics,” regardless of whether the refusal materially impeded the couple’s access.¹⁶² The court said that “[t]he government views acts of discrimination as independent social evils even if the prospective tenants ultimately find housing. Allowing housing discrimination that degrades individuals, affronts human dignity, and limits one’s opportunities results in harming the government’s transactional interest in preventing such discrimination.”¹⁶³

If a for-profit claim in the discrimination context undermines the access interest—if the protected class would find it materially harder to get jobs or access goods and services—it will surely, and rightly, be denied. The only question is whether the compelling interest extends to preventing discrimination in every commercial transaction, foreclosing any exemptions, even when there is no material effect on access. One might answer yes, on the ground that it is especially important to ensure everyone’s full participation in economic life, to prevent refusals that foment resentment and division, and to head off a possible multiplicity of claims.

¹⁶⁰ Attorney Gen. v. Desilets, 636 N.E.2d 233, 241 (Mass. 1994).

¹⁶¹ *Id.* at 240.

¹⁶² Swanner v. Anchorage Equal Rights Comm’n, 874 P.2d 274, 283 (Alaska 1994).

¹⁶³ *Id.*

On the other hand, we can also identify a few limited categories in which claims by for-profit businesses are at their strongest and, because of the limits, do not present the systemic policy risks identified above. I mean here only to suggest these categories, not to attempt a full defense of them, or an exhaustive list. Most obviously, a business offering distinctively religious goods or services—a kosher food producer or an evangelical book publisher or broadcaster—might discriminate on a ground connected to its religious purpose, for example hiring only members of the faith. Such businesses have distinctively strong religious interests, usually providing clear indicia of their sincerity, and they seldom if ever control broad economic opportunities.¹⁶⁴ More controversial, but meriting consideration, are businesses (most of them very small) that provide typical goods and services but seek to create a pervasively religious workplace: an example is some law firms made up of evangelical Christians who pray as well as practice law together. If the criteria for “pervasive integration” of religion were demanding enough—religious meetings, codes of conduct for employees, and other indicia—only a very small number of deeply committed business owners would be likely to choose it.

Finally, and most controversial, are the cases of sole proprietors or small-business owners providing personal services to facilitate directly a ceremony or relationship to which they object. These include the small landlords discussed earlier who object to renting to unmarried cohabiting couples, and the wedding photographer in *Elane Photography, LLC v. Willock*¹⁶⁵ who declined to provide services for a same-sex commitment ceremony. These objectors plausibly feel the most direct personal responsibility for their contribution to others’ actions. To apply the anti-discrimination rule forces such a provider, by law, to violate her conscience by directly supporting behavior she believes sinful or to pay monetary sanctions that, as they aggregate, may drive her from her business.¹⁶⁶

It must be recognized, of course, that those denied service can experience offense, resentment, or jarring at a single provider’s discriminatory refusal, even if they can get services from the very next provider. But striking a balance between rights requires comparing the two harms. If the patrons have access, without hardship, to another provider, then the legal burden on the provider is the more serious one.

¹⁶⁴ See, e.g., *Grote v. Sebelius*, 708 F.3d 850, 856 (7th Cir. 2013) (Rovner, J., dissenting) (in the contraception-mandate case, distinguishing business making ordinary goods from, for example, “for-profit publisher of Christian texts” whose profits were ultimately directed to charitable purposes) (citing *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106 (D.D.C. 2012), *appeal dismissed on government’s request*, 2013 WL 2395168 (D.C. Cir. 2013)).

¹⁶⁵ 309 P.3d 53 (N.M. 2013).

¹⁶⁶ For example, the photographer in *Elane Photography* was assessed approximately \$6,600 in attorney’s fees (with no proof of actual damages); the plaintiff couple waived the award, *see id.* at 60, but of course there is no guarantee that will happen in subsequent cases.

Whatever courts conclude about these cases, two points should be clear. First, the cautious approach to accommodation in the for-profit sphere means that anti-discrimination exemptions should not extend beyond a set of small businesses providing services directly to activities to which they conscientiously object. The arguments for such a carefully defined small-business exception do not justify exemption for much larger businesses or for those that have market power (for example in lightly populated areas). Nor should we exempt the objector who refuses service in a context that has no real nexus to the behavior she opposes. Exemption may extend to those who seek to avoid providing such a service directly, but not to those who seek to avoid dealing with same-sex or unmarried couples altogether. If a wedding photographer has a right to avoid providing services to a wedding, a restaurant owner still has no right to refuse couples a table. These lines may be difficult to draw at the margin, but they are worth drawing if we value both interests.

Second, as has already been emphasized, accommodations should be broader for non-profits than for for-profits. It is possible that courts will conclude, for reasons already discussed, that no for-profits should be exempted from anti-discrimination laws at all—that is, that the for-profit marketplace must be free from prohibited discrimination in every transaction. But it would not follow, of course, that religious non-profits should be denied accommodation—certainly not when they lack the market power to harm the interest in access to services. Even if the wedding photographer is not exempted, there remain good reasons why Catholic Charities adoption agencies should be exempted when ample alternative providers are willing to place children with same-sex couples.

3. *Likelihood That the Harm Will Repeat and Accumulate*

Even if a harm does not implicate a compelling interest in each individual case, it may do so if it repeats in significant numbers. For example, even if we concluded that a few instances of discrimination by small businesses would not significantly affect members of a protected class, widespread discrimination surely would harm them by reducing their access to services. This will happen, first, if religious objectors are numerous or large enough to hold market power over the matter in question. Thus, among the cases of small landlords refusing rentals to unmarried couples, even the Massachusetts court—which was open to exempting the landlord—would not do so if exemption would “significantly imped[e] the availability of rental housing” for such couples.¹⁶⁷

Cumulative accommodations are also a threat if the religious objection coincides significantly with secular self-interest, such as financial benefit or commercial advantage. Self-interest threatens to encourage multiple claims, not always because the claimant is insincere, but sometimes because con-

¹⁶⁷ See *Attorney Gen. v. Desilets*, 636 N.E.2d 233, 240 (Mass. 1994).

science and self-interest affect each other. Draft exemptions present this concern, which may be a reason why they were never constitutionally required even before *Employment Division v. Smith*.¹⁶⁸ So do tax exemptions, which probably helps explain why the Court in *United States v. Lee*¹⁶⁹ held that a claim by a few Amish artisans against paying employees' Social Security taxes posed a danger to the whole Social Security system. Such a parade of further claims and exemptions cannot simply be assumed under RFRA; there must be a convincing showing that it is likely. And often religious conduct cannot be chalked up to self-interest.¹⁷⁰ Hoasca tea and peyote, hallucinogenic substances at issue in recent cases, are both unpleasant to ingest.¹⁷¹ And returning to the case of small landlords, "[m]arket forces often tend to discourage owners from restricting the class of people to whom they would rent."¹⁷² But in some cases, the accumulation of exemptions is a worry.

Self-interested exemption claims can be reduced by imposing alternative burdens on objectors. Draft objectors, for example, have typically been required to work in roles, such as hospital caregiver, that do not directly advance the fighting. These may not only reduce the incentives to make insincere claims; they may also, to some extent, serve the government's overarching goals. Draft objectors who work in medical settings still perform a public service by caring for those who have fought.

4. *Alternative Means*

Finally, there is the factor that was decisive in *Hobby Lobby*: under RFRA, the government that substantially burdens religion must show not only that the burden serves a compelling interest but also that it does so by the least restrictive means.¹⁷³ *Hobby Lobby* held that the mechanism for coverage by the insurer or third-party administrator was an available, less restrictive means. That mechanism was practicable, remember, because by the government's own calculations, insurance coverage of contraception saves costs on net by avoiding costs from pregnancies.¹⁷⁴

As already noted, the majority was less clear on whether the option of increasing public funding of contraception would constitute an available less restrictive means—at least Justice Kennedy, the crucial vote, seemed doubt-

¹⁶⁸ See *Gillette v. United States*, 401 U.S. 437, 461 n.23 (1971) (citing cases rejecting constitutional claims to draft exemptions).

¹⁶⁹ 455 U.S. 252, 258–60 (1982).

¹⁷⁰ Cf. *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 436 (2006) (RFRA rests on "the feasibility of case-by-case consideration of religious exemptions to generally applicable rules").

¹⁷¹ *Id.* at 418 (hoasca tea); *Emp't Div. v. Smith*, 494 U.S. 872 (1990) (peyote); Brief for Dr. John H. Halpern et al. as Amici Curiae Supporting Respondents in *O Centro*, 546 U.S. 418 (No. 04-1484), 2005 WL 2237541, at *21 ("Both [peyote and hoasca] may induce nausea and vomiting.").

¹⁷² *Desilets*, 636 N.E.2d at 240.

¹⁷³ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

¹⁷⁴ See *supra* notes 114–17 and accompanying text.

ful in his separate opinion about requiring that option.¹⁷⁵ Justice Kennedy may have been influenced by the fact that there seemed to be no chance Congress would ever pass such a funding program. But in many cases, the government could increase access to a good or service by increasing its subsidies or providing tax incentives to encourage manufacturers or distributors to provide it at lower cost.¹⁷⁶ By these mechanisms, the government would take the impact of an employer's religious-freedom right—the refusal to provide mandated contraception—and spread it from the relatively small number of employees directly affected to a much larger group, the overall taxpaying public. As Alan Brownstein has argued, such measures answer the objection that it is unfair to shift the costs of religious exercise to other specific individuals.¹⁷⁷ Moreover, when the general public bears the costs, “the balancing analysis in free exercise cases is more appropriately analogized to the kinds of judicial balancing that occurs” in, for example, free speech cases, where the public bears costs such as the security measures necessary to protect unpopular speakers from angry crowds.¹⁷⁸ This mechanism would work even if contraception coverage involved net costs for providers: the government would simply bear the costs, spreading them widely over the general population to avoid burdening anyone significantly.

These options illustrate a crucial point about alternative means. The government can develop them based simply on pragmatic considerations—what will work best—and the RFRA framework encourages such solutions. Under pressure from lawsuits relying on RFRA, the government came up with a creative mechanism to accommodate objections by religious nonprofits; in hearing and deciding the *Hobby Lobby* case under RFRA, the Court likewise turned to this mechanism to accommodate objections by closely held for-profits. Without RFRA's mandate to explore accommodations for religious objections, there would have been little or no legal pressure for the administration, or the Court, to engage in this problem solving.

In some cases, alternative means may be available without the government creating them. The private economy may itself provide alternative means, for example, in assuring that same-sex couples have full access, in material respects, to personal marriage-related services. There may be multiple adoption services, or multiple wedding photographers, ready to provide such service at little or no extra cost to the clients. As the court in the Massa-

¹⁷⁵ See *supra* notes 102–06 and accompanying text.

¹⁷⁶ See, e.g., *Korte v. Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013) (arguing that “[t]he government can provide a ‘public option’ for contraception insurance; it can give tax incentives to contraception suppliers to provide these medications and services at no cost to consumers; it can give tax incentives to consumers of contraception and sterilization services,” and that “[n]o doubt there are other options”).

¹⁷⁷ Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 CASE W. RES. L. REV. 55, 128–29 (2006).

¹⁷⁸ *Id.* at 128.

chusetts landlord case noted, providers have market incentives to serve paying customers.¹⁷⁹

B. Establishment Clause Limits on Accommodation: Why They Should Not Be Strict

While it may be complicated to analyze whether RFRA requires an accommodation that allows harm to others, it is simpler to analyze whether the Establishment Clause prohibits such accommodations. The clause places some outside limits on how far a statutory accommodation may go, but those limits should be lenient. Given the role of accommodations in preserving religious freedom in the era of the active State, stringent judicial policing of the permissibility of accommodations is not appropriate. An accommodation should not be struck down unless the direct, immediate burdens it imposes on others are clearly disproportionate to the legal burdens it removes from religious practice.

It is clear that an accommodation provision is not invalid simply because it singles out religious practice for protection. Two rulings decisively reject that proposition by upholding an accommodation unanimously: *Corporation of Presiding Bishop v. Amos*, approving Title VII's exemption of religious organizations from liability for religious discrimination;¹⁸⁰ and *Cutter v. Wilkinson*, affirming the provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA) that protects state prisoners' exercise of religion unless the prison can show a compelling interest in restricting it.¹⁸¹ In *Amos*, the Court said that "there is ample room for accommodation of religion," that a law does not advance or sponsor religion "merely because it allows churches to advance religion," and that "when government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities."¹⁸² History confirms that exemptions of religious practice from government regulation were not generally components of establishment. "Exemptions protect minority religions," Douglas Laycock has shown, "and they emerged only in the wake of toleration of dissenting worship," as part of "a political commitment to free exercise," not to establishment.¹⁸³

The Court, however, has indicated that an accommodation may go too far and eventually violate the Establishment Clause. *Estate of Thornton v.*

¹⁷⁹ Attorney Gen. v. Desilets, 636 N.E.2d 233, 241 (Mass. 1994).

¹⁸⁰ 483 U.S. 327, 339 (1987).

¹⁸¹ 544 U.S. 709, 726 (2005).

¹⁸² *Amos*, 483 U.S. at 337–38.

¹⁸³ Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1796, 1803 (2006); accord Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 693 (1992).

Caldor, Inc., for example, invalidated a statute imposing an absolute duty on employers to grant an employee's request for his Sabbath day off.¹⁸⁴ In *Cutter*, while upholding RLUIPA's prison provisions, the Court laid out three considerations defining whether an accommodation is unconstitutional.¹⁸⁵ In addition to removing a substantial burden from religious practice and observing equality among religions, an accommodation must take "adequate account of the burdens [it] may impose on nonbeneficiaries."¹⁸⁶

This narrower challenge to the constitutionality of accommodations, emphasizing the existence of "burdens on nonbeneficiaries," has now taken center stage in the continuing disputes. In the *Hobby Lobby* litigation, the argument was that a RFRA exemption would unconstitutionally deprive employees of statutorily guaranteed free coverage of contraception; the argument was energetically pressed in amicus briefs and articles by Frederick Gedicks and Rebecca Van Tassell¹⁸⁷ and by Micah Schwartzman, Richard Schragger, and Nelson Tebbe.¹⁸⁸

The validity of this argument turns on how stringently the test of *Cutter* is applied—and it should not be applied stringently. Under the *Cutter* test, the burden the accommodation imposes on others is not determinative: it must be weighed, if only in a rough way, against the burden the accommodation removes from sincere religious practice. And for several reasons, only a great disparity between the two factors should suffice to disapprove the accommodation.

1. Case Law

First, only such weighing can explain the results of the cases. The exemption for religion-based hiring in *Amos* allowed the organization to discharge an individual from his job¹⁸⁹—unquestionably a significant, individualized burden. Yet the Court unanimously upheld it because, as Justice Brennan later wrote, it "prevented potentially serious encroachments on protected religious freedoms."¹⁹⁰ The critics of for-profit exemptions to the contraception mandate concede, as they must, that exemptions for religiously affiliated non-profits are permissible even when they significantly affect identifiable individuals.¹⁹¹ Only by taking into account the legal burden

¹⁸⁴ 472 U.S. 703, 708–10 (1985).

¹⁸⁵ 544 U.S. at 720.

¹⁸⁶ *Id.*

¹⁸⁷ Gedicks & Van Tassell, *supra* note 132, at 363.

¹⁸⁸ Schwartzman et al., *supra* note 124.

¹⁸⁹ Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 330 (1987).

¹⁹⁰ *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 18–19 n.8 (1989) (Brennan, J., plurality opinion).

¹⁹¹ *See, e.g.*, Gedicks & Van Tassell, *supra* note 132, at 368 (noting that the religious-hiring exemption "created a substantial burden [on an employee] where none previously existed"). The critics do offer widely varying formulations of this principle, some of which would severely limit the ability to accommodate religious organizations. *Compare, e.g., id.* at 369–70 (arguing that the religious-hiring exemption approved in *Amos* was

removed from religion in its consideration can the court give the necessary weight to the free exercise interests that support accommodation.

The two decisions invalidating accommodations show that the rule of invalidity is actually quite narrow. In *Caldor*, which invalidated a state law requiring private employers to give employees their Sabbath day off,¹⁹² the issue was not just that the costs imposed on others were large (the statute gave employees an unqualified right no matter what the cost to employers and other employees)¹⁹³: it was also that the burden on employees' religion that the statute removed had been imposed not by the state, but rather by private employers. Accordingly, as Justice O'Connor put it, the statute "[was] not the sort of accommodation statute specifically contemplated by the Free Exercise Clause."¹⁹⁴ Surely the strongest case for government to adopt a religious exemption is one in which government itself has created the burden, implicating the Free Exercise Clause's special concern for religious freedom against the government. In *Caldor*, with that justification absent, the interests the statute served were far outweighed by the threatened effects it could have on others. And in *Texas Monthly v. Bullock*, which struck down a sales-tax exemption for religious publications, only three Justices joined a plurality opinion questioning religious accommodations in a significant range of circumstances.¹⁹⁵ The others found that rationale too broad: they focused on the fact that the statute favored religious messages and publications, which among other things implicated content-neutrality principles under the Free Speech and Free Press Clauses.¹⁹⁶

2. *Historical/Theoretical Foundations*

Second, the theoretical and historical foundations for calling accommodation an establishment are shaky, and they support only a modest Establishment Clause limit. As already noted, statutory exemptions from general laws

only a "modest extension" of church autonomy doctrine and "merely gave to religious nonprofit organizations the same right held by secular cause-based nonprofits to discriminate in favor of employees who affirm and live according to the principles on which the organization is founded," and suggesting that beyond that non-profit accommodations affecting others are impermissible) with Schwartzman et al., *supra* note 124 (suggesting only that non-profit exemptions raise establishment issues in "special circumstances" such "as where a religious non-profit (e.g., a hospital) monopolizes a local market").

¹⁹² Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 708–10 (1985).

¹⁹³ *Id.* at 709–10.

¹⁹⁴ *Id.* at 712 (O'Connor, J., concurring).

¹⁹⁵ See *Tex. Monthly*, 489 U.S. at 14–20 (Brennan, J., plurality opinion).

¹⁹⁶ See *id.* at 25–26 (White, J., concurring in the judgment) (concluding that "the proper basis for reversing the judgment below" was that exemption violated the Free Press Clause by discriminating among publications based on content); *id.* at 28–29, 27 (Blackmun, J., concurring in the judgment) (concluding that exempting only religious publications unconstitutionally gave "preferential support for the communication of religious messages," but criticizing Brennan's broader rationale for "subordinating the Free Exercise value").

historically served to protect minority faiths, not to favor the majority.¹⁹⁷ Gedicks and others argue that “[p]ermisive accommodations that require unbelievers and nonadherents to bear the costs of someone else’s religious practices constitute a classic Establishment Clause violation.”¹⁹⁸ They point out that “establishments imposed legal and other burdens on dissenters and nonmembers that it did not impose on members.”¹⁹⁹ But those establishments pressured dissenters to attend the favored church and required them to pay taxes for its support.²⁰⁰ Such requirements differ from regulatory exemptions in the very ways that are at issue. Compulsion to attend a church is indeed compulsion to engage in a religious practice, something that no regulatory exemption requires. Required tax support for the favored religion removes no legal burden on that faith and thus serves no free exercise interest. Accommodations from regulation serve those interests. To cite forced worship or tax support as the analogies that condemn accommodations is to beg the very questions at issue.

A more pertinent historical case for religious exemptions is the original “benefit of clergy,” the arrangement by which clerics in the medieval church were free from civil jurisdiction—triable and punishable only in church courts—for any felonies they committed.²⁰¹ King Henry II’s attempt to constrict this privilege and prosecute “criminous clerks” in royal courts for rapes, murders, and thefts lay at the core of his confrontation with Archbishop Thomas Becket from 1163–1170.²⁰² Unlike compelled worship or tax support, benefit of clergy actually involved the feature most relevant to accommodations: exemption of religious actors from secular regulation when they had caused harm to others.²⁰³

Long before the American founding, benefit of clergy evolved away from a religious privilege; by the time it crossed the Atlantic, it had become a means for a wide range of defendants to claim reduced sentences, mitigating the harsh (typically capital) punishments of English law.²⁰⁴ The distinc-

¹⁹⁷ See *supra* note 183 and accompanying text.

¹⁹⁸ Gedicks & Van Tassel, *supra* note 132, at 363.

¹⁹⁹ *Id.* at 362 (citing Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2144–46 (2003)).

²⁰⁰ McConnell, *supra* note 199, at 2144–46.

²⁰¹ See, e.g., GEORGE W. DALZELL, *BENEFIT OF CLERGY IN AMERICA & RELATED MATTERS* 9–15 (1955); THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 439–41 (5th ed. 1956).

²⁰² HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 255–64 (1983); PLUCKNETT, *supra* note 201, at 439.

²⁰³ See PLUCKNETT, *supra* note 201, at 439. Despite this, almost no critics of accommodations refer to benefit of clergy in making their case; the chief exception is Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099, 1122–35 (2004). I agree with Professor Hamilton that benefit of clergy is the right analogy but disagree with her assertions that it suggests extensive limits on modern accommodations.

²⁰⁴ BERMAN, *supra* note 202, at 611 n.12 (the test of “ability to read . . . swept more and more people into the immunity as time went on”); DALZELL, *supra* note 201, at

tively English religious establishment, created under Henry VIII, actually restricted benefit of clergy, since a prime purpose of the establishment was to subject the Church to royal control.²⁰⁵ Nevertheless, the earlier arrangement can easily be seen as a feature of establishment, in that it granted a privilege to a favored church. An Indiana court in 1820 rebuffed a claim to benefit of clergy—i.e. to a reduced sentence—by a man convicted of murder, saying: “The benefit of clergy . . . originated with that of sanctuary in the gloomy days of popery. . . . The statutes of England on the subject are local to that kingdom . . . and are certainly not adopted as the laws of our country.”²⁰⁶

But rejecting benefit of clergy as an incident of establishment does not mean rejecting most modern accommodations, for there are multiple differences between the two. First, benefit of clergy was for the favored church (Catholicism in medieval Europe, Anglicanism in Tudor England).²⁰⁷ Second, it shielded wrongdoers from state jurisdiction even when there was no particularized conflict between the law in question and the demands of faith. Neither clerics nor the church presented a conscientious claim to be able to engage in assault, rape, or theft. Rather, the conflict was between the church’s jurisdiction and the civil court’s; and the church’s near-absolute position—“You have no jurisdiction over us”—is unsustainable in the American context. When a religious actor’s conduct harms third parties, accommodation may still sometimes be appropriate (as I’ve argued in this Article); but the civil authorities must have the final call on how far regulation may go.

Finally, benefit of clergy limited civil power even over serious, direct harms: murder, rape, theft.²⁰⁸ No one argues today that religious freedom blocks the government from acting against such basic harms. The issues concern laws that reflect the far more extensive aims of the post-New Deal state. Thus, any analogy to benefit of clergy merely returns to the question to what extent religious accommodation sets limits on the regulatory-welfare state when it affects the countervailing interest in free exercise of religion. Again, the proper balance between these two means recognizing government’s ex-

16–23 (describing the expansion of “clergyable persons” from clerics—often distinguished by their ability to read—to laypersons who could read, to peers, and to women); PLUCKNETT, *supra* note 201, at 441 (“[T]he survival of [benefit of] clergy greatly modified the harshness of the penal law and permitted the growth of a graduated scale of punishment.”).

²⁰⁵ DALZELL, *supra* note 201, at 18 (“Trevelyan suggests that the Tudor legislation was an incident of the nationalization of England under their rule. The church was subordinated to the crown. Benefit of clergy was a relic of a rival power obtruding into the administration of national justice and defeating it at its climax, the sentence. Accordingly, it was curtailed.”).

²⁰⁶ *Id.* at 238 (citing *Fuller v. State*, 1 Blackf. 66 (Ind. 1820)).

²⁰⁷ *See id.* at 19 (noting that after the Reformation, “[English]-born Catholic priests returning from abroad . . . were hanged without benefit of clergy” unless they took “an oath [renouncing papal loyalty] to which they could not possibly subscribe”).

²⁰⁸ *See* authorities cited *supra* in notes 201–03.

panded power—but not simply deferring to whatever the government defines or asserts as a harm.²⁰⁹

3. *Deference to Legislative Judgments*

Finally, when the question is whether a statutory accommodation is permissible, the policy of deference to legislative judgments now cuts in favor of the accommodation. If we presume that modern regulators have leeway to define legal harms in order to balance competing interests, then surely they should have leeway to protect religious freedom along with other statutory interests. It would make little sense, for example, to say that a state that recognized same-sex marriage could not simultaneously exempt the small wedding photographer, in order to balance the two rights. Why is it any different if the legislature responds to a court decision ordering same-sex marriage than if the legislature enacts the accommodation at the time it recognizes marriage legislatively?

Court review of the balance struck in a legislative accommodation should not be stringent. As Michael McConnell has observed, “when legislatures adjust the benefits and burdens of economic life among the citizens, they regularly impose more than a *de minimis* burden for the purpose of protecting important interests of the beneficiary class”: consider, for example, the duty of reasonable accommodation of disabilities.²¹⁰ “The legislature should have as much latitude to protect the exercise of religion that it has to protect other important values in life.”²¹¹ Moreover, because “[a]ny comparison of benefits and burdens will admittedly suffer the problem of comparing apples and oranges,” the analysis cannot be highly rigorous: “The courts should be satisfied if they have examined the legislative accommodation and determined that the burden on nonbeneficiaries is not obviously disproportionate. Deference to legislative judgment is appropriate here; secular economic interests are not under-represented in the political process.”²¹²

IV. SUMMARY: HOW ACCOMMODATION DIFFERS FROM *Lochner*

To recap this Article’s theme that religious accommodation serves a valuable function in the welfare-regulatory state, I summarize how religious accommodation differs from the liberty of contract regime of *Lochner v. New York*.²¹³ Claims have appeared, both in scholarship and in popular ve-

²⁰⁹ Interestingly enough, the three features of medieval benefit of clergy—denominational favoritism, no particularized burden removed, and no consideration of serious direct harms to others—are the indicia in the *Cutter* test for an impermissible accommodation. *Cutter v. Wilkinson*, 544 U.S. 709, 717–18 (2005).

²¹⁰ McConnell, *supra* note 10, at 704.

²¹¹ *Id.*

²¹² *Id.* at 705.

²¹³ 198 U.S. 45 (1905).

nues, that *Hobby Lobby* reflects the discredited approaches of *Lochner* that were discarded after 1937. Elizabeth Sepper calls the claims upheld in *Hobby Lobby* “Free Exercise *Lochnerism*.”²¹⁴ Akhil Amar, among other observers, referred to *Hobby Lobby*—along with other business-protective decisions of the Roberts Court—as “the new *Lochner*.”²¹⁵

These claims are overstated against *Hobby Lobby*, and they certainly do not undercut the legitimacy and importance of religious accommodation in general. The multiple differences between accommodation and the discredited aspects of *Lochner* can be sorted into three categories, reiterating points I’ve made earlier.

A. *Accommodation as an Incremental Exception to Regulation*

First, religious accommodation does not interfere nearly as greatly with regulation as *Lochner* did. As has already been emphasized, accommodation does not undo legislation in toto and put the subject beyond government’s power; rather, it leaves the legislation in place as to the vast majority of applications and simply requires an exception in certain cases for the countervailing interest of religious freedom.²¹⁶

The strength of this point, of course, depends on how broad the scope of religious accommodation turns out to be. But, as I’ve argued, in the for-profit sphere, accommodation should not be too broad: although *Hobby Lobby* is correct that for-profit businesses should be able to assert claims, it is also correct in approaching the scope of their accommodations cautiously.²¹⁷ And the analogies to *Lochner*, by the critics’ own terms, apply almost solely to the for-profit sphere.²¹⁸ Accommodation should be broader for religious non-profit organizations, but accommodating those organizations does not present an analogy to *Lochner*. For reasons already discussed, religious organizations are different because (even after *Hobby Lobby*) they lie closer to the core of religious activity and because they have less of an effect on the general marketplace.²¹⁹

B. *Accommodation’s Textual Legitimacy (Constitutional and Statutory)*

Religious accommodation also has a textual legitimacy that *Lochner* lacked, in two senses. First, while *Lochner* rested on at least partially dis-

²¹⁴ Elizabeth Sepper, *Free Exercise Lochnerism* (June 3, 2014) (unpublished manuscript) (on file with the *Harvard Journal of Law and Gender*).

²¹⁵ See Nina Totenberg, *Rare Unanimity in Supreme Court Term, With Plenty of Fireworks*, NAT’L PUB. RADIO (July 6, 2014), <http://www.npr.org/2014/07/06/329235293/rare-unanimity-in-supreme-court-term-with-plenty-of-fireworks>, archived at <http://perma.cc/R4MJ-UJJ3>.

²¹⁶ See *supra* notes, 91–94 and accompanying text.

²¹⁷ See *supra* Parts II.B, III.A.3.

²¹⁸ See, e.g., Totenberg, *supra* note 215.

²¹⁹ See *supra* Parts II.B, III.A.3.

credited notions of implied constitutional rights (the substantive due process liberty of contract), religious accommodation—as noted earlier—enforces the textually explicit right of free exercise of religion, one of the personal rights to which the Court turned its attention after 1937.²²⁰

Second, in many cases religious accommodation now rests on statutory directives, under RFRA, its state counterparts, RLUIPA, or context-specific statutory provisions. As Eugene Volokh has emphasized, the statutory grounding of accommodation reduces objections to it, compared with constitutionally mandated accommodations, by allowing the legislature to reverse judicial rulings that, in its view, push accommodation too far.²²¹ In particular, while Volokh believes that constitutionally mandated religious exemptions raise the same problem as *Lochner*—because both rulings claim “[t]he power to define, as a final, constitutional matter, the limits of another’s lawful private rights or to decide what constitutes an unjustified externality”²²²—he does not see the same problem with a regime of federal and state RFRA. Under a RFRA, the courts can determine in the first instance what constitutes a sufficient or cognizable harm to others. But “if [Congress or the state legislature] disagrees, either immediately or after looking at the results of several years of this experiment, it can reverse this judgment and prevent what it concludes is harm to others.”²²³ Any *Lochner*-like problems involved in drawing lines, both as to what constitutes a direct “private right” of others and as to what will cause serious harms later, are significantly reduced by giving the legislature the final word.

C. *The Qualified Use of Market Logic in Accommodation*

Finally, accommodations have been criticized as “*Lochnerism*” because they sometimes rely on market mechanisms to reduce or eliminate, assertedly, the harm to others from the accommodation in question. As already noted, a common argument in favor of religious accommodations for certain service providers is that there are ample alternative providers. For example, a major reason for exempting Catholic Charities adoption agencies from anti-discrimination rules when they conscientiously decline to place children with same-sex couples is that there are numerous other agencies willing to do the placements. And a major argument for exempting a few small landlords from having to rent to unmarried cohabiting couples is that the vast majority of other landlords, large and small, are willing to rent. Meaningful accommodation relies on market dynamics in its balancing between religious liberty and the interests of others or society. Indeed, one could argue for presumptive accommodation on the ground that, while a

²²⁰ See *supra* notes 29–30, and accompanying text.

²²¹ Volokh, *A Common-Law Model*, *supra* note 134, at 1479–83, 1521–29.

²²² *Id.* at 1521.

²²³ *Id.* at 1529.

legal restriction usually leaves the religious objector no alternative but to comply, the objector himself wields only private power. Often, others can avoid that power by taking their labor or their patronage elsewhere.

To accept that logic unqualifiedly would conflict with the premises of modern regulation. Since the New Deal, Americans have accepted on balance that some regulations overriding market decisions can promote liberty and equality and prevent unacceptable impositions of private power. Thus, Cass Sunstein's influential critique of the *Lochner* era emphasizes that under that jurisprudence, "[m]arket ordering under the common law was understood to be a part of nature rather than a legal construct, and it formed the baseline from which to measure the constitutionally critical lines that distinguished action from inaction and neutrality from impermissible partisanship."²²⁴ The lesson from the New Deal shift, Sunstein says, is that market ordering "is not prepolitical; [*Lochner's*] conception of the function of the state has been repudiated by the political branches of government, and for good reasons."²²⁵ The New Deal Court in *West Coast Hotel v. Parrish* stated that "the exploiting of workers at [low] wages" produced a subsidy for employers from the public (who would have to care for those workers).²²⁶ In this passage, Sunstein says, the Court shifted the baseline for analysis from market ordering to "a system in which all workers had a living wage."²²⁷ Elizabeth Sepper has applied this criticism to *Hobby Lobby*, arguing that the employers' religious claim there took the previous legal state—with no broad federal requirement concerning employees' insurance benefits—as natural and ignored the imbalance of powers between employers and employees.²²⁸

But religious accommodation does not treat market logic like this as natural, pre-political, or unqualified. Instead it makes use of this logic, in a limited way, to serve the purpose of accommodation: making reasonable room for people of fundamentally differing views to follow their identities in cases of conflict.

It is sensible to rely in some part on the workings of markets to achieve accommodation's purpose. The Constitution's Religion Clauses themselves rest on, and preserve, a private market on religion: the Constitution forbids the government from making demands on citizens in matters of religion and discriminating on the basis of religion, but private religious entities are permitted to do those very things. They are permitted to select their ministers and other employees on the basis of religion; such powers, indeed, frequently lie at the core of religious freedom. And more generally, markets do serve as a means by which people of fundamentally conflicting views and

²²⁴ Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874 (1987).

²²⁵ *Id.* at 904.

²²⁶ 301 U.S. 379, 399 (1937).

²²⁷ Sunstein, *supra* note 224, at 881 (quoting *Parrish*, 301 U.S. at 399).

²²⁸ Sepper, *supra* note 214.

identities can live together in a society. A competitive, non-concentrated market allows room for individuals to pursue differing, even conflicting, projects without impeding or coercing each other. The minister who has come to disagree with his congregation or denomination can seek to serve elsewhere. More controversially, but at least arguably, the wedding photographer or small landlord should be protected as well when the client couple can easily seek the next provider in the directory. Markets unquestionably can play an important role, not just in increasing production or allocative efficiency, and not just in promoting economic freedom, but in promoting personal freedom as well.

But these market-based arguments are constrained in accommodation analysis, and they are only one component of it: other factors matter as well. Again, for-profit accommodations are more limited; the presence of market alternatives by no means guarantees a for-profit exemption even under a RFRA-type analysis. For example, even the Massachusetts case that expressed openness to exempting landlords only contemplated doing so for those with very few units.²²⁹ If a commercial provider's claim for exemption from anti-discrimination law is viable, it is not just because of market alternatives, but also because the provider is sufficiently small, and sufficiently directly connected to the services, that providing them is a personal extension of the provider.

CONCLUSION

In short—and to reiterate—religious accommodation does not simply adopt market logic. It does not reject the logic of regulation. It simply places limits on regulatory logic in order to protect the important countervailing right of free exercise of religion. As such, religious accommodation plays an important and valuable role in the regulatory State.

²²⁹ *Attorney Gen. v. Desilets*, 636 N.E.2d 233, 240 (Mass. 1994).

