


February 2016

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Recommended Citation

Frank S. Ravitch, *Be Careful What You Wish for: Why Hobby Lobby Weakens Religious Freedom*, 2016 BYU L. Rev. 55 (2016).
Available at: <http://digitalcommons.law.byu.edu/lawreview/vol2016/iss1/6>

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Be Careful What You Wish for: Why *Hobby Lobby* Weakens Religious Freedom

Frank S. Ravitch*

The United States Supreme Court's decision in Burwell v. Hobby Lobby Stores, Inc., which brought for-profit corporations under the protection of the Religious Freedom Restoration Act, has been the subject of widespread support and criticism. Some have lauded the Hobby Lobby decision as an important step in protecting religious freedom. Others have derided it as an affront to the civil rights of corporate employees. This Article suggests a third perspective, namely, that Hobby Lobby harms, rather than helps, religious freedom. Both legally and politically, Hobby Lobby is likely to lead to a reduction in protection for religious individuals and entities that have traditionally been included under the Free Exercise Clause and the Religious Freedom Restoration Act. This is particularly troubling because the Hobby Lobby decision is legally flawed. The Article takes seriously the reality that many religious people do not experience religion as a divisible phenomenon that they can separate from the rest of their lives. Sometimes this requires exemptions to generally applicable laws if there is a legal mechanism for doing so, but cases involving large, for-profit entities like Hobby Lobby raise additional concerns. In these cases, religious individuals seek exemptions in the name of the company, which imposes the owners' religious tenets on corporate employees. This creates a confrontation between "lived religion" and the legal or civil rights of others. Over time, as courts create precedent in cases involving for-profit entities, the rights of religious individuals and religious entities will likely be weakened. Moreover, the legislative, legal, and public response to Hobby Lobby does not bode well for religious accommodation claims in the long run, and, sadly, will have a negative impact on accommodation claims brought by religious individuals and entities.

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I. INTRODUCTION

The United States Supreme Court’s decision in *Burwell v. Hobby Lobby*,¹ has been hailed by some as an important step in protecting religious freedom. This article explains that *Hobby Lobby* will be a pyrrhic victory—if a victory at all—for religious freedom. Both legally and politically, *Hobby Lobby* is likely to lead to a reduction in protection for religious individuals and entities that have traditionally been included under the Free Exercise Clause and the Religious Freedom Restoration Act (RFRA).² Simply put, in the long run the *Hobby Lobby* Court’s expansion of RFRA to protect closely held, for-profit entities regardless of their size, and to potentially allow religious freedom claims to harm third parties, will weaken religious freedom for individuals and traditional religious entities. This is particularly troubling because, as this Article asserts, the *Hobby Lobby* decision is legally flawed.

This is not to understate the stakes in cases like *Hobby Lobby*. Many religious people do not experience religion as a divisible

1. 134 S. Ct. 2751 (2014).

2. See *infra* Part III.

phenomenon that they can separate from the rest of their lives.³ Under RFRA, religious exemptions to generally applicable laws are available unless the government has a compelling interest to deny the exemption and can meet the narrow-tailoring requirement.⁴ This makes sense for claims by individuals and religious entities, which were the original focus of RFRA. But cases involving large, for-profit entities like *Hobby Lobby* raise additional concerns. In these cases, religious individuals seek exemptions in the name of the company, which imposes the owners' religious tenets on corporate employees in contexts where many of those imposed upon are not of the same faith (or the same perspective from within a faith).⁵ This creates a confrontation between what this Article calls "lived religion" and the legal or civil rights of others.

It was clear long before *Hobby Lobby* that RFRA and the Free Exercise Clause apply to religious individuals and the houses of worship where many come together to practice their religion.⁶ Moreover, it was also clear that some other religious entities were protected.⁷ Yet, until recently, it seemed unlikely that for-profit

3. MEREDITH B. MCGUIRE, *LIVED RELIGION: FAITH AND PRACTICE IN EVERYDAY LIFE* (2008) (exploring religion and spirituality in daily practices and explaining that religion should be defined based on how it is lived every day rather than how religious entities define it); RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* 250 (2d ed. 1986) (explaining that when people make religion significant in their lives they often seek to conform all aspects of their life to their religious commitments); *see also* Steven H. Resnicoff, *A Jewish Look at Lawyering Ethics—A Preliminary Essay*, 15 *TOURO L. REV.* 73, 77–78 (1998) (“[T]he nature of Jewish law is that it is a 24-hour a day, 7-day a week religion with prescribed rules for virtually every activity. A Jew is not entitled to separate her existence into discrete personal and professional lives; the same religious guidelines govern business as well as private conduct.”); Frederick Mark Gedicks, *Some Political Implications of Religious Belief*, 4 *NOTRE DAME J.L. ETHICS & PUB. POL’Y* 419, 430 (1990) (“A religious believer’s inability to live her life consistent with her ultimate concern—her deepest and most compelling reality—puts in question the meaning of her life, and undermines her very existence.”).

4. *See* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2012).

5. *Hobby Lobby*, 134 S. Ct. at 2795–96 (Ginsburg, J., dissenting); Caroline Mala Corbin, *The Contraception Mandate*, 107 *NW. U. L. REV.* 1469, 1481–82 (2013).

6. *Sherbert v. Verner*, 374 U.S. 398 (1963) (individuals); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (individuals); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694 (2012) (religious entities); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (religious entities).

7. *Hobby Lobby*, 134 S. Ct. at 2768–69 (noting that non-profit religious corporations are covered under RFRA). The *Hobby Lobby* Court asserts that because non-profit religious

entities—or at least those that are not sole proprietorships—would enjoy protection under RFRA or the Free Exercise Clause.⁸ This does impose significant burdens on those who operate for-profit businesses in the public sphere, but as the Court explained in *United States v. Lee*, that is part of the price for operating a profit-making business.⁹ Or so we thought.

Until recently, the “Culture Wars” in the U.S. had not led to widespread political or public disagreement over accommodating religious individuals, and even religious entities,¹⁰ except perhaps in the context of religious exemptions for medical professionals and facilities.¹¹ In fact, exemptions to generally applicable laws for religious people were not controversial when RFRA was passed with extensive bi-partisan and public support in 1993.¹² RFRA was a reaction to the Supreme Court’s decision in *Employment Division v. Smith*.¹³ In *Smith*, the Court formally abandoned a line of cases requiring government to provide religious exemptions to generally applicable laws absent a compelling interest and narrow tailoring.¹⁴ *Smith* effectively held there is no duty to provide such exemptions.¹⁵ The public response was swift and overwhelming. RFRA was passed by a vast majority in Congress (97-3 in the Senate; unanimous in the

corporations are covered by RFRA, for-profit corporations should be covered. *Id.* The numerous problems with this argument are discussed *infra* at Parts II and IV.

8. *Id.* at 2795 (Ginsburg, J., dissenting); *United States v. Lee*, 455 U.S. 252, 261 (1982).

9. *Lee*, 455 U.S. at 255, 261.

10. Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247, 248 (1994) (explaining that RFRA was widely supported when passed); Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 845–46 (2014) (noting that religious accommodations and RFRA have “become far more controversial than [they] used to be”); cf. Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015) (explaining that complicity-based claims are different and more controversial than traditional claims for religious accommodation, and that complicity based claims have increased in recent years).

11. Laycock, *supra* note 10, at 846–48; NeJaime & Siegel, *supra* note 10, at 2535–37.

12. MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY 157–58, 160–61 (2008); Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1, 42 (2013).

13. 494 U.S. 872 (1990); Idleman, *supra* note 10, at 248.

14. *See Smith*, 494 U.S. at 883–86.

15. *Id.*

House),¹⁶ and was signed by President Clinton.¹⁷ RFRA was also supported by an incredibly diverse group of civil liberties and religious groups.¹⁸

When the Court held four years later that Congress had exceeded its authority by applying RFRA to the states,¹⁹ a number of states passed state RFRA or amended state constitutions to include broader religious freedom provisions.²⁰ Other states continued to interpret their state constitutions in a manner consistent with pre-*Smith* law.²¹ None of this was seen as terribly controversial at the time. Yet in recent years RFRA has become a central issue in the Culture Wars in the United States,²² and state RFRA are now subject to serious opposition.²³

What accounts for this shift in public and political opinion? The answer is highly complex, but two interrelated factors have clearly contributed: first, a sense that religious people are trying to force their beliefs and morals on others through government accommodations of religion²⁴ and, second, related to the first, a sense that exemptions for religious individuals and entities are likely to lead to discrimination against innocent third parties.²⁵ Each of these concerns will be addressed in this Article.

There is something to be said for both of these concerns. Yet, in most religious exemption cases, neither apply, and in fact many claims for religious exemptions have little or no effect on anyone other than the believer(s) or religious entity involved. Individuals

16. Idleman, *supra* note 10, at 248.

17. President William J. Clinton, Remarks on Signing the Religious Freedom Restoration Act of 1993, Nov. 16, 1993, in 29 WEEKLY COMP. PRES. DOC. 2377.

18. See Idleman, *supra* note 10.

19. City of Boerne v. Flores, 521 U.S. 507 (1997).

20. Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRA's*, 55 S.D. L. REV. 466, 474–76 (2010).

21. See Christine M. Durham, *What Goes Around Comes Around: The New Relevancy of State Constitution Religion Clauses*, 38 VAL. U. L. REV. 353, 366 (2004); Piero A. Tozzi, *Whither Free Exercise: Employment Division v. Smith and the Rebirth of State Constitutional Free Exercise Clause Jurisprudence?*, 48 J. CATH. LEGAL STUD. 269, 276 (2009).

22. The term, “Culture Wars,” is borrowed from JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991), although the term is also used in common parlance with the same meaning.

23. See *infra* Section III.B.3.

24. Laycock, *supra* note 10, at 868–70.

25. *Id.*; Corbin, *supra* note 5; NeJaime & Siegel, *supra* note 10.

and religious entities, such as churches, synagogues, temples, and mosques, are central to this article's discussion of "traditional religious entities."²⁶ This Article argues that the shift in public opinion has been aided by *Hobby Lobby*, and will ultimately work against accommodating "traditional religious entities."

The *Hobby Lobby* decision provides an example of why the shift in public and political perception has occurred so rapidly. Religious freedom claims by large corporate entities, whether closely held or not, were not on the radar until recent years when a slew of them were filed in response to the Affordable Care Act's Health and Human Services Mandate (HHS Mandate).²⁷ Ironically, traditional religious entities such as churches were already exempted from the HHS Mandate,²⁸ and affiliates of religious entities and religious non-profits were also accommodated,²⁹ although that accommodation has been challenged as inadequate to protect religious freedom.³⁰ When for-profit corporations began to sue for exemptions to the mandate

26. See *infra* Section III.B.2 (discussing the meaning of "traditional religious entities").

27. Affordable Care Act, 26 U.S.C. § 5000A(f)(2) (2012) (provision requiring "minimal essential coverage"); 45 CFR § 147.131 (2015) (regulations promulgated by HHS regarding the mandate). In addition to the *Hobby Lobby* and *Conestoga Woods* suits that gave rise to the Supreme Court's decision in *Hobby Lobby*, a number of other suits were filed by for-profit entities. See, e.g., *Grote v. Sebelius*, 708 F.3d 850 (7th Cir. 2013); *Korte v. Sebelius*, 2012 WL 6757353 (7th Cir. 2012); *O'Brien v. U.S. Dep't of Health & Human Servs.*, 894 F. Supp. 2d 1149 (E.D. Mo. 2012), *rev'd in part, vacated in part, remanded*, 766 F.3d 862 (8th Cir. 2014) (per curiam); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106 (D.D.C. 2012); *Legatus v. Sebelius*, 901 F. Supp. 2d 980 (E.D. Mich. 2012); *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012); see also *Annex Med., Inc. v. Sebelius*, No. 12-2804, 2013 WL 101927, at *3-4 (D. Minn. Jan. 8, 2013) (listing a number of unreported opinions), *order vacated in part, case remanded sub nom. Annex Med., Inc. v. Burwell*, 769 F.3d 578 (8th Cir. 2014).

28. 45 CFR § 147.131(a).

29. 45 CFR §147.131(b). As discussed *infra* at Part IV, some religious organizations were not satisfied with this accommodation.

30. *Geneva Coll. v. Sec'y of Health & Human Servs.*, 778 F.3d 422, 427 (3rd Cir. 2015); *Mich. Catholic Conference v. Burwell*, 755 F.3d 372 (6th Cir. 2014); *Priests for Life v. Dep't of Health & Human Servs.*, 772 F.3d 229, 235 (D.C. Cir. 2014); *Wheaton Coll. v. Sebelius*, 703 F.3d 551 (D.C. Cir. 2012); *Colo. Christian Univ. v. Sebelius*, 51 F. Supp. 3d 1052 (D. Colo. 2014); *Catholic Benefits Ass'n LCA v. Burwell*, 81 F. Supp. 3d 1269 (W.D. Okla. 2014); *Univ. of Notre Dame v. Sebelius*, 988 F. Supp. 2d 912 (N.D. Ind. 2013). Recently, the United States Supreme Court granted certiorari in *Little Sisters of the Poor Home for the Aged v. Burwell*, and consolidated it with six other cases. See *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151 (10th Cir. 2015), *cert. granted*, 136 S. Ct. 446 (Nov. 6, 2015) (No. 15-105).

in order to limit contraceptive coverage, the resulting public outrage was predictable in the midst of today's culture wars. As recent events in several states demonstrate, Hobby Lobby's victory in the United States Supreme Court has become part of the problem for those advocating for religious freedom, not part of the solution.³¹ In fact, even before the Court issued its decision, the ACA litigation by for-profit entities led to widespread opposition to state religious freedom measures.³²

One profound element affecting the public's perception of religious freedom is a misconception about what it means to be religious. For some people, religion is something in which they believe and are able to separate from other aspects of their lives, but for others religion is lived every moment and in every context.³³ It is a part of one's being and cannot be artificially separated out when one enters the public sphere.³⁴ Yet many people do not understand this sort of "lived religion" and how generally applicable laws may affect it; therefore, some view this sort of lived religion as threatening when it enters public life.³⁵

Of course, just because one lives one's religion does not mean government has to facilitate one's ability to do so in a way that negatively affects others. Yet, today, this is precisely what many people think RFRA is about. Rather than viewing RFRA as it was viewed by many in 1993³⁶—a statute that could help protect Native Americans who must chew peyote as part of their religious exercise, Jews who need to have meat prepared in a certain way for it to be Kosher, adult Jehovah's Witnesses who cannot have blood transfusions, etc.—many people today view RFRA³⁷ as a license for landlords to discriminate based on sexual orientation or religion, companies to discriminate in benefits by denying women important

31. *See infra* Part III.

32. *See infra* Section III.B.

33. *See supra* note 3 and accompanying text.

34. *Id.*

35. Laycock, *supra* note 10; NeJaime & Siegel, *supra* note 10.

36. NUSSBAUM, *supra* note 12, at 160–61.

37. All references to RFRA in this article include federal and state RFRA's unless otherwise noted. These references at the federal level, unless otherwise noted, also include RLUIPA, which applies to land use issues. 42 U.S.C. § 2000cc (2012).

treatments, and shops to discriminate in the provision of generally available products and services, etc.³⁸

Until the *Hobby Lobby* litigation, this latter view was a demonstrably skewed view of what RFRA had actually done. Yet, after *Hobby Lobby*, the latter view seems more realistic and has gained in political strength. This is evidenced by recent state battles over RFRA. *Hobby Lobby* gives opponents of religious freedom the best ammunition yet to undermine it, and with good reason. It is now *possible* that large, for-profit landlords may discriminate and use RFRA (or RLUIPA, the Religious Land Use and Institutionalized Persons Act) to avoid liability, and that large, closely held companies will be able to discriminate in the benefits they provide and avoid liability. Those who argue such results are likely, however, often minimize the fact that in many of these situations government will succeed in demonstrating a compelling interest to prohibit the conduct. Even so, *Hobby Lobby* makes such scenarios more likely than before.

At the same time, another factor is likely to come into play to weaken religious freedom in the wake of *Hobby Lobby*. Unfortunately, it is often true that when the breadth of a constitutional right or civil rights statute is expanded, the courts begin to interpret the constitutional right or statute more narrowly. So breadth in coverage often leads to less depth in protection.³⁹ This can be seen in a number of civil rights and civil liberties contexts from Title VII of the Civil Rights Act of 1964 (Title VII),⁴⁰ to the Americans with Disabilities Act (ADA),⁴¹ to 42 U.S.C. § 1983, as well as in the constitutional context under the Free Speech Clause and under the Free Exercise Clause itself.⁴² Since RFRA is a civil liberties statute, the Title VII, ADA, and § 1983 examples may be most apropos.

38. See *infra* Section III.B.

39. Cf. Philip Hamburger, *More Is Less*, 90 VA. L. REV. 835, 837–38 (2004) (addressing this phenomenon under the First Amendment).

40. See Judith Olans Brown et al., *Some Thoughts about Social Perception and Employment Discrimination Law: A Modest Proposal for Reopening the Judicial Dialogue*, 46 EMORY L.J. 1487 (1997).

41. See Frank S. Ravitch & Marsha B. Freeman, *The Americans with “Certain” Disabilities Act: Title I of the ADA and the Supreme Court’s Result Oriented Jurisprudence*, 77 DENV. U. L. REV. 119 (1999).

42. Hamburger, *supra* note 39.

For those of us who value religious freedom, this is not simply a question of political trends and tactics. It is a question of what religious freedom means in a pluralistic society when religious people seek accommodation by government entities. What is it we are trying to protect and *who* is it we are trying to protect? Religious individuals, religious entities, entities affiliated with religious institutions, or any entity run by religious people even if that entity employs, markets to, and is engaged with the general public directly? Would we rather have weaker religious protection for all of these groups, as this Article argues will happen in the wake of *Hobby Lobby*,⁴³ or would we rather have stronger protection for religious individuals, religious entities, and affiliates of religious entities?

Part II of this Article provides an introduction to the *Hobby Lobby* decision. Part III discusses why the expansion of free exercise rights under RFRA to cover for-profit entities will lead to a weakening of free exercise rights overall, and especially for what this Article refers to as “traditional religious entities.”⁴⁴ There is significant evidence that as rights are expanded to cover a broader range of individuals or entities, courts frequently interpret those rights in a narrower way.⁴⁵ This Part will address why this phenomenon, seen clearly under civil rights statutes and the Free Exercise Clause,⁴⁶ will also likely impact free exercise rights under RFRA.

Part III will also address the legislative response to *Hobby Lobby*, and demonstrate that not long after the decision, there is already evidence that the free exercise rights of “traditional religious entities” are suffering a negative impact in the wake of the *Hobby Lobby* decision. This Part will also address the impact the *Hobby Lobby* litigation, and related Affordable Care Act (ACA) litigation, have had on public opinion regarding religious exemptions.

Part IV will set forth a detailed analysis of the weaknesses in the *Hobby Lobby* decision. The Court makes a number of nuanced legal arguments, but the decision fails to adequately address the most significant precedent on whether for-profit entities should have free

43. *See infra* Part III.

44. *See infra* Section III.B.2.

45. *See infra* Section III.A.

46. *Id.*

exercise rights, and if so, how those rights should be analyzed when they have a negative impact on third parties. The Court also skews its analysis of whether pre-*Employment Division v. Smith* cases under the Free Exercise Clause should govern analysis under RFRA.⁴⁷

II. THE *HOBBY LOBBY* DECISION

Hobby Lobby is actually two cases that were consolidated by the Supreme Court when granting the petitions for certiorari.⁴⁸ Both cases involved challenges to the HHS Mandate by for-profit corporations under the ACA, requiring employers to provide contraceptive services as part of their health care coverage.⁴⁹ If the corporations did not do so, hefty fines would be levied against them.⁵⁰ The companies did not object to providing contraception coverage generally, but rather to providing what they considered to be abortifacients, including Plan B, Ella, and certain IUDs.⁵¹

The first case involved a Pennsylvania corporation, Conestoga Woods, which is closely held by the Hahn family and employs 950 people. Conestoga Woods sued to challenge the HHS Mandate.⁵² The district court ruled against the company,⁵³ and the Third Circuit held for-profit corporations are not protected by RFRA because they cannot “engage in religious exercise”⁵⁴ The second case, and the namesake of the Court’s decision, involved Hobby Lobby, a large for-profit hobby and crafts chain incorporated under Oklahoma law.⁵⁵ Hobby Lobby is owned by the Green family and has over 500 stores and 13,000 employees.⁵⁶ The Greens also own a chain of Christian bookstores called Mardel that employs 400 people.⁵⁷ Both companies sued to challenge the HHS mandate.⁵⁸ The district court

47. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2767–69 (2014).

48. *Id.* at 2764–67.

49. *Id.*

50. *Id.* at 2762, 2766, 2775–76.

51. *Id.* at 2765–66.

52. *Id.* at 2764–65.

53. *Id.*

54. *Id.* at 2765.

55. *Id.* at 2765–66.

56. *Id.* at 2765.

57. *Id.*

58. *Id.* at 2766.

held Hobby Lobby and Mardel were not likely to succeed on their claims under the First Amendment or RFRA because the companies could not meet the first two requirements for obtaining a preliminary injunction.⁵⁹ The Tenth Circuit overturned that decision and held that the companies were likely to succeed on their RFRA claim under the first two requirements for a preliminary injunction and remanded to the District Court to address the final two requirements.⁶⁰ Both the Third and Tenth Circuits' decisions were appealed to the Supreme Court and the petitions for certiorari were granted.⁶¹

The fines for non-compliance with the HHS mandate are large.⁶² Significantly, however, the HHS Mandate contains exemptions for traditional religious entities such as churches, integrated auxiliaries of churches, and associations of churches.⁶³ Moreover, it contains an exception for other nonprofit, religiously affiliated entities, which could cover entities such as charities and schools.⁶⁴ This exemption, in effect, requires third-party coverage for contraceptive services to which the nonprofit religious entity objects.⁶⁵ Additionally, businesses with fewer than fifty employees are exempt from the Affordable Care Act,⁶⁶ and thus the HHS Mandate.⁶⁷ Therefore, the plaintiffs' claims in the consolidated *Hobby Lobby* cases are only applicable to for-profit entities with more than fifty employees.

59. *Id.*

60. *Id.*

61. *Id.* at 2767.

62. *Id.* at 2762, 2766, 2775–76.

63. 45 C.F.R. § 147.131(a) (2015) (“[A] ‘religious employer’ is an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.”).

64. 45 C.F.R. § 147.131(b).

65. 45 C.F.R. § 147.131(b), (c). Some religious nonprofits do not find this accommodation adequate to protect their religious freedom because they are still required to act by certifying and signing that they are using the accommodation of third-party coverage, which they believe would facilitate the harm they seek to avoid. *Geneva Coll. v. Sec’y of Health & Human Servs.*, 778 F.3d 422 (3d Cir. 2015); *Priests for Life v. Dep’t of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014); *Mich. Catholic Conference v. Burwell*, 755 F.3d 372 (6th Cir. 2014); *Wheaton Coll. v. Sebelius*, 703 F.3d 551 (D.C. Cir. 2012); *Catholic Benefits Ass’n v. Burwell*, No. CIV-14-685-R, 2014 WL 7399195 (W.D. Okla. Dec. 29, 2014); *Colo. Christian Univ. v. Sebelius*, 51 F. Supp. 3d 1052 (D. Colo. 2014); *Univ. of Notre Dame v. Sebelius*, 988 F. Supp. 2d 912 (N.D. Ind. 2013).

66. 26 U.S.C. § 4980H(c)(2) (2012).

67. *Id.*

The *Hobby Lobby* case raises two key questions under RFRA. First, are for-profit corporations covered under RFRA? Second, if so, what happens when a for-profit corporation denies its employees a benefit required under federal law because it has a religious objection to providing that benefit? These same questions were raised under the Free Exercise Clause,⁶⁸ but given that the HHS mandate is a law of general applicability under *Employment Division v. Smith*,⁶⁹ the Free Exercise Clause argument would only have traction if the court had reversed or seriously limited *Smith*. It did not.⁷⁰ Therefore, RFRA was the main focus of the *Hobby Lobby* decision.

The Court held that closely held for-profit corporations are protected by RFRA.⁷¹ Detailed criticism of this holding based on the meaning of the “free exercise of religion” as understood by courts prior to *Hobby Lobby* will be addressed later in this article.⁷² This part will address the bases for the Court’s holding more generally.

The *Hobby Lobby* Court explained that RFRA applies to for-profit entities because there is no basis to exclude such entities from the definition of “person” under RFRA.⁷³ RFRA specifically states that persons are protected from substantial burdens on religion unless the burden is supported by a compelling state interest and the law creating the burden is narrowly tailored to meet that compelling interest.⁷⁴ The Court correctly notes that cases decided under both RFRA and the Free Exercise Clause have protected religious entities and religious nonprofits, and thus it makes sense that such entities are “persons” for purposes of RFRA protection.⁷⁵

From there, however, the Court’s analysis becomes more strained. The Court suggests there is no practical difference between protecting a religious entity or a religious nonprofit under RFRA and protecting a closely-held for-profit corporation.⁷⁶ This breezes past the fact that under pre-*Smith* law there is ample support for the

68. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2764–66 (2014).

69. 494 U.S. 872 (1990).

70. *See generally Hobby Lobby*, 134 S. Ct. at 2751.

71. *Id.* at 2768–75.

72. *See infra* Part IV.

73. *Hobby Lobby*, 134 S. Ct. at 2768–75.

74. 42 U.S.C. § 2000bb-1 (2012).

75. *Hobby Lobby*, 134 S. Ct. at 2768–69.

76. *Id.* at 2769.

notion that for-profit entities were viewed differently from nonprofit religious entities.⁷⁷ The Court avoids this concern in two ways.

First, it argues that because a Free Exercise challenge was allowed to proceed in *Braunfeld v. Brown*,⁷⁸ a case involving Sunday closing laws that had a negative impact on Orthodox Jewish businesses, for-profit businesses are covered by RFRA.⁷⁹ This argument is creative, but weak. The dissent correctly points out that *Braunfeld* involved a sole-proprietorship, and the burden on the entity and the individual were treated by the Court as indivisible.⁸⁰ More importantly, the dissent points out that the plaintiff—who suffered a significant burden in that case—lost the free exercise claim.⁸¹

It may be that the *Hobby Lobby* Court thought *Braunfeld* would have won his claim under RFRA (or a state RFRA), if RFRA had existed at that time, but the Court does not address this. Regardless, the differences between the complainants in the Sunday closing cases and the complainants in *Hobby Lobby* are stark given that the former was a sole proprietorship and the latter are large corporations employing many people.

The *Braunfeld* Court referenced the complainant in that case in a manner that demonstrated the complainant's personal rights were the issue, and it never addressed the distinction between those personal rights and the rights of the sole-proprietorship business the complainant ran.⁸² Interestingly, twenty years later in *United States v. Lee*, the one case where the Court did mention the for-profit nature of an employer, it found the for-profit business had to follow a generally applicable law even if it burdened the owner's religious beliefs.⁸³ The *Hobby Lobby* Court attempts to distinguish *Lee* based on the fact that it is a Free Exercise Clause case and that it involved taxation,⁸⁴ but the relevant portion of *Lee* demonstrates the

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

78. 366 U.S. 599 (1961).

79. *Hobby Lobby*, 134 S. Ct. at 2769–70.

80. *Id.* at 2797 (Ginsburg, J., dissenting). The majority did recognize this fact. *Id.* at 2770 (majority opinion).

81. *Id.* at 2797 (Ginsburg, J., dissenting).

82. *Braunfeld*, 366 U.S. at 599.

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

84. *Hobby Lobby*, 134 S. Ct. at 2784.

discussion of for-profit entities is not so limited.⁸⁵ The *Lee* case is discussed further in Part IV.

Second, the Court argues that RFRA, which when enacted clearly applied pre-*Smith* law under the Free Exercise Clause,⁸⁶ is no longer bound by that law in light of the legislative history of RLUIPA.⁸⁷ This issue will be discussed in detail in Part IV, but the crux of the argument is that Congress, by stating in RLUIPA that both laws should be interpreted broadly and by deleting a reference to the First Amendment, changed the meaning of RFRA and detached it from pre-*Smith* law.⁸⁸ As explained in Part IV, this is not what that amendment did. RFRA, as originally enacted, was to be interpreted broadly and the removal of the reference to the First Amendment in RLUIPA makes sense given that First Amendment protection for religious freedom after *Smith* has been weak.⁸⁹ It has nothing to do with whether pre-*Smith* law is relevant in interpreting RFRA.⁹⁰

This is quite important to the Court's analysis, however, because if pre-*Smith* law does not govern, the Court can look to the Dictionary Act to determine the meaning of the term "person."⁹¹ This is absolutely correct *if* pre-*Smith* law does not apply. If pre-*Smith* law does apply, however, the Dictionary Act does not apply on its own terms because it has a provision stating the Act should be applied when the context of the statute in question does not "indicate[] otherwise."⁹² In other words, if the statute to which the Dictionary Act is applied is connected to other law that helps define its provisions, courts should look to that other law. As will be seen in

85. *Lee*, 455 U.S. at 261 ("When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees.").

86. *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 424 (2006); *Hobby Lobby*, 134 S. Ct. 2791–92 (Ginsburg, J., dissenting); Idleman, *supra* note 10 at 248–50.

87. *Hobby Lobby*, 134 S. Ct. at 2761–62.

88. *Id.*

89. *Id.* at 2791–93 (Ginsburg, J., dissenting).

90. *Id.*

91. *Id.* at 2768–69.

92. 1 U.S.C. § 1 (2012).

Part IV, pre-*Smith* law does not support the Court's holding that closely held for-profit corporations are protected by RFRA.⁹³ Therefore, the Court's RLUIPA/Dictionary Act argument becomes more important because it allows the Court to hold that pre-*Smith* law does not bind interpretations of RFRA.

The next issue the Court addresses is whether the HHS mandate imposes a "substantial burden" on the plaintiffs' religion.⁹⁴ This is one of the toughest questions in the case because it requires a determination of whose religion is substantially burdened if we give for-profit corporations free exercise rights under RFRA. Is it the corporation? The owners? Some other group?

The Court held that in a closely held corporation the owners' religious freedom is what should be considered.⁹⁵ It also held that while corporations are creatures of state law they can have values and expression as earlier decisions had recognized.⁹⁶ The Court rejected the notion that the purpose of a corporation is just to make money.⁹⁷ It rejected the argument that religious values are inherently different from other forms of corporate values,⁹⁸ and held that a closely held corporation, at least, can exercise religion.⁹⁹ That exercise must be viewed from the perspective of the owners of the closely held corporation.¹⁰⁰ This holding, too, is controversial and will be addressed further in Part IV.

Even if a closely held corporation can exercise religion, the question remains whether the HHS Mandate serves a compelling governmental interest and is narrowly tailored to serve that interest.¹⁰¹ The Court assumed *arguendo* that the HHS Mandate met a compelling government interest by requiring that health plans

93. *See infra* Part IV.

94. *Hobby Lobby*, 134 S. Ct. at 2775–79.

95. *Id.* at 2768–69.

96. *Id.* at 2771–72.

97. *Id.*

98. *Id.*

99. *Id.* at 2768–74.

100. *Id.* at 2768–69.

101. *Id.* at 2779–82.

include contraceptive coverage.¹⁰² It found, however, that the HHS Mandate was not narrowly tailored to meet that interest.¹⁰³

The Court noted that there are already several exceptions to the HHS Mandate.¹⁰⁴ Ironically, two of these were to protect the religious freedom of traditional religious entities like churches and religious nonprofits. The former are completely exempt from the HHS mandate, and the latter are not responsible to pay anything towards contraceptive care to which they have religious objections. Rather the entities' insurance carrier, or a designated insurance carrier if the entity is self-insured, would pay for the coverage. The HHS mandate also has an exemption for employers with less than fifty employees as is common for many federal statutes.¹⁰⁵ This provision would, of course, protect small, closely held for-profit entities whose owners have religious objections, but not based on those objections.¹⁰⁶ Finally, the HHS Mandate has a grandfather provision that allows companies to elect to keep their preexisting plans under certain conditions.¹⁰⁷ This grandfather exemption was designed to give companies time to adapt to the general requirements of the broader statutory scheme and will be phased out in the coming years.¹⁰⁸

The Court relied on these exemptions to suggest that the government need not have uniformity of enforcement in order to satisfy its compelling interest. Rather, government had already created a system that could be used to protect its interest in universal access to contraceptive care.¹⁰⁹ Namely, the government could do what it already does for religious nonprofits by setting up a third-party payor system, or the government could pay for the care itself.¹¹⁰ The Court held, therefore, that the burden on female employees

102. *Id.* at 2780.

103. *Id.* at 2781–85.

104. *Id.* at 2781–82.

105. *See supra* notes 64–67 and accompanying text.

106. The protection would be based on the size of the employer rather than any religious objections. *Id.*

107. 42 U.S.C. § 18011(a), (e) (2012).

108. *Hobby Lobby*, 134 S. Ct. at 2801 (Ginsburg, J., dissenting).

109. *Id.* at 2781–82 (majority opinion).

110. *Id.* at 2780–81.

would be “precisely zero.”¹¹¹ This, of course, ignores the fact that other employers may object to contraceptives generally, or to other medical treatments, and that the solution of the government payer, whether politically feasible or not, can always be raised to show a less restrictive alternative.¹¹² The idea that government could pay the way when for-profit entities object to government mandates will likely have a negative impact on religious freedom claims in the future. This will be discussed further in Part III.

III. *HOBBY LOBBY* AND THE WEAKENING OF RELIGIOUS FREEDOM FOR TRADITIONAL RELIGIOUS ENTITIES

Many advocates of religious freedom hailed the *Hobby Lobby* decision as an important and welcomed victory. While I share their support for religious freedom generally, my response to the *Hobby Lobby* decision is quite different. Simply put, *Hobby Lobby* is a threat to religious freedom.

Religious freedom was weakened immeasurably by the *Smith* decision, and more recently has come under attack in public discourse.¹¹³ Both the courts and the public have been slow to understand “lived religion,” the idea that for many religious people religion is inseparable from other aspects of life and is lived daily, not just at services on Saturday or Sunday.¹¹⁴ Ironically, while the *Hobby Lobby* decision recognizes this, it does so in a context where lived religion is being asserted by a for-profit entity to the detriment of employees who do not necessarily share the owners’ religious commitments.¹¹⁵

This will not help the cause of protecting lived religion for individuals and traditional religious entities. As this section explains, it will undermine that religious freedom in the long run. There are two reasons for this.

First, as rights have been applied to broader classes of people and situations, the courts have often interpreted those rights more

111. *Id.* at 2760.

112. *Id.* at 2802–03 (Ginsburg, J., dissenting).

113. *See infra* Section III.B.3.

114. *See supra* note 3.

115. *See generally Hobby Lobby*, 143 S. Ct. at 2751.

narrowly for everyone.¹¹⁶ Second, we are already witnessing significant backlash against the *Hobby Lobby* decision in battles over state RFRA and other state and federal legislation.¹¹⁷ Moreover, arguments that for-profit corporations should be protected by RFRA, and the decision in *Hobby Lobby* confirming them, have helped push religious freedom directly into the Culture Wars in a way that it was not before these claims arose.¹¹⁸ In fact, after the Supreme Court decided *Obergefell v. Hodges*, recognizing a constitutional right to same-sex marriage,¹¹⁹ one of the major concerns was that religious freedom claims would be used by for-profit entities, such as caterers and wedding companies, to deny services or benefits.¹²⁰ There are also concerns over denials of service by government officials such as county clerks,¹²¹ and other entities such as universities.¹²²

Both in public discourse and in legislative battles *Hobby Lobby* has left a wake of destruction for religious freedom, and discourse about religious freedom, and this trend is only beginning. RFRA was once seen as a mechanism to protect religious minorities and other religious people from state intrusion on their religious freedom, but now RFRA is increasingly being characterized as a license for religious entities to discriminate against and harm third parties.

116. Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 479-80 (1985) (addressing this phenomenon under the First Amendment during “pathological” periods, with a significant focus on free speech issues); Hamburger, *supra* note 39 (addressing this phenomenon under the First Amendment); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980) (addressing this phenomenon in the context of intimate associational freedoms).

117. *See infra* Section III.B.3.

118. NeJaime & Siegel, *supra* note 10; *see also* Corbin, *supra* note 5 (written before the Supreme Court decided *Hobby Lobby*, but noting the impact claims by for-profit entities could have on the debate); *cf.* Laycock, *supra* note 10 at 848-51 (noting increasing tensions over religious freedom issues).

119. Recently, the court decided *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

120. *See, e.g.*, James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 HARV. CIV. RTS.-CIV. LIB. L. REV. 99, 135-47 (2015) (addressing this concern just prior to the final decision in *Obergefell*).

121. *See, e.g.*, Frank S. Ravitch, *Complementary or Competing Freedoms: Government Officials, Religious Freedom and LGBTQ Rights*, FLA. J. INT’L L. (forthcoming 2016).

122. David R. Wheeler, *Gay Marriage and the Future of Evangelical Colleges*, ATLANTIC (July 14, 2015), <http://www.theatlantic.com/education/archive/2015/07/evangelical-colleges-struggle-gay-marriage-ruling/398306/>.

A. Broadening Rights Often Narrows their Depth

Philip Hamburger has explained that by expanding the substance of Free Exercise rights, advocates of religious freedom have actually narrowed the depth of those rights:

In this way, the conditions imposed [on Free Exercise] during the last half of the twentieth century suggest how well-intentioned efforts to enlarge a right can inflate it so far as to weaken it. It is a strange legal trope, through which overstatement can have a cost. More really can be less.¹²³

While I disagree with some of Hamburger's specific applications of the concept, his overall argument that courts often narrow rights after those rights have been enlarged is well supported in a variety of contexts. Other scholars have made the same point regarding freedom of speech and freedom of intimate association.¹²⁴

Of course, the assertion made in this article is slightly different because RFRA is a statute, not a constitutional provision, and the expansion in this case is not of the right itself, but rather who is protected by the right. Yet these two factors strengthen, rather than weaken, the concern that *Hobby Lobby* will move religious freedom backwards for individuals and traditional religious entities. Courts deciding RFRA or state RFRA cases involving for-profit entities may be more wary in applying those statutes, and in turn, can set precedent for all claims under these statutes. Significantly, the phenomenon of "more being less" that Hamburger mentions in the Free Exercise context has been even more pronounced in the context of civil rights statutes.

The most obvious examples are the treatment by courts of sexual harassment, disparate treatment, disparate impact, and religious exemption claims under Title VII,¹²⁵ claims for accommodation and disparate treatment under the ADA,¹²⁶ and the application of 42

123. Hamburger, *supra* note 39, at 837–38.

124. Blasi, *supra* note 116 (addressing this phenomenon under the First Amendment with a significant focus on free speech issues); Karst, *supra* note 116 (addressing this phenomenon in the context of intimate associational freedoms).

125. Henry L. Chambers, Jr., *The Supreme Court Chipping Away at Title VII: Strengthening It or Killing It?*, 74 LA. L. REV. 1161 (2014).

126. Ravitch & Freeman, *supra* note 41.

U.S.C. § 1983 generally.¹²⁷ Each of these laws were initially broadly interpreted by courts, and were based on statutes intended to be interpreted broadly; yet, each was ultimately interpreted more narrowly—in some cases shockingly so—by the Supreme Court or lower courts. There are many other examples, but the civil rights examples are most similar to the RFRA context.

Moreover, both under civil rights statutes and the Constitution, expansion of the individuals/entities protected has led to a narrowing of rights. This can be seen clearly under the ADA and the Free Speech Clause.¹²⁸ Of course, even without the latter examples, the lesson of “more is sometimes less” applies naturally to both substantive expansion of laws and expansion of those covered by laws.

It is useful to explore some of these examples in further depth. The next three sub-sections will do so. The first will explore the growth and retrenchment of hostile work environment law under Title VII. The second will explore accommodation under the ADA. The third will explore an example from constitutional law, the Free Exercise Clause itself.

1. Example one: hostile work environment sexual harassment

Hostile Work Environment as a form of workplace sexual harassment was recognized by the Supreme Court at the federal level in 1986. That case, *Meritor Savings Bank v. Vinson*,¹²⁹ recognized a relatively broad right. The Court held that “Title VII is not limited to ‘economic’ or ‘tangible’ discrimination,”¹³⁰ and is aimed “‘at the entire spectrum of disparate treatment of men and women in employment.’”¹³¹ In doing so, the Court held that a claim for hostile work environment could be established if unwelcome conduct in the workplace based on gender was “severe or pervasive” enough to

127. Sheldon Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 GEO. L. J. 1719 (1989).

128. Blasi, *supra* note 116 (Free Speech Clause); Ravitch & Freeman, *supra* note 41 (ADA).

129. 477 U.S. 57 (1986).

130. *Id.* at 64.

131. *Id.* (internal quotation marks omitted) (quoting *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

create a “hostile or abusive work environment.”¹³² This right was quickly and appropriately expanded to apply to other groups protected under Title VII, including race, religion, and national origin.

Yet, two important questions remained regarding how one determines what environments are severe or pervasive enough to constitute a hostile work environment. First, what aspects of the workplace are to be considered in determining whether discrimination is severe or pervasive enough to create a hostile work environment? Second, from whose perspective must the environment be hostile? The first question was far easier to answer than the second.

The answer to the first question is that courts should look to the totality of the circumstances to determine what constitutes a hostile work environment.¹³³ The second question is more important, however, because it determines from whose perspective the conduct should be viewed. Should it be a reasonable person? A reasonable woman? Or some other perspective? Ultimately, the Court adopted a vague reasonable person standard.¹³⁴ In failing to specifically adopt a reasonable woman standard (or reasonable member of the same protected class standard) the Court ignored hints in earlier decisions that the standard is a reasonable woman standard,¹³⁵ and this resulted in significant scholarly criticism of the reasonable person standard.¹³⁶

This was an important setback to the breadth of the hostile work environment cause of action,¹³⁷ but the retrenchment was far from over. Lower courts seemed uncomfortable with the breadth of the

132. *Id.* at 66–67.

133. *Harris v. Forklift Systems*, 510 U.S. 17 (1993).

134. *Id.* at 21.

135. Caroline Forell, *Essentialism, Empathy and the Reasonable Woman*, 1994 U. ILL. L. REV. 769 (1994).

136. *Id.* at 783 (criticizing the “reasonable person” standard in hostile work environment cases); Liesa L. Bernardin, Note, *Does the Reasonable Woman Exist and Does She Have Any Place in Hostile Environment Sexual Harassment Claims Under Title VII After Harris*, 46 FLA. L. REV. 291, 321–22 (1994) (same); J. Tod Hyche, Comment, *The Reasonable Woman Standard in Sexual Harassment Cases. Is it Reasonable?*, 24 CUMB. L. REV. 559, 567–68 (1994) (same).

137. Judith J. Johnson, *License to Harass Women: Requiring Hostile Environment Sexual Harassment to Be “Severe or Pervasive” Discriminates Among “Terms and Conditions” of Employment*, 62 MD. L. REV. 85 (2003).

right even before the Supreme Court applied the reasonable person standard.¹³⁸ After that, however, courts had an easy tool to find no hostile work environment existed by finding conduct that many women might find severe or pervasive to not be so under the reasonable person standard.¹³⁹ This trend has been significant as the originally broad protection against hostile work environments has become weaker, with fewer plaintiffs winning.¹⁴⁰ The right was born, expanded, and then after its expansion severely restricted.¹⁴¹ This is just one of many such examples under Title VII, including religious accommodation, disparate treatment, and disparate impact.

2. *Example two: reasonable accommodation under the ADA*

There are numerous examples of the Supreme Court or lower courts limiting protection under the ADA despite the fact the law specifically states it is to be construed broadly.¹⁴² Most of these cases involve claims by disabled individuals for reasonable accommodation.¹⁴³ The judicial rollback of the ADA seems to be heavily motivated by the fact that the Act was designed to cover a broad range of people.¹⁴⁴

Two of the most notorious examples of this phenomenon can be seen in the Supreme Court's decisions in *Sutton v. United Air Lines, Inc.*,¹⁴⁵ and *Murphy v. United Parcel Service, Inc.*¹⁴⁶ Congress ultimately overturned these decisions in an amendment to the ADA, but the holdings in these cases are a prime example of courts narrowly interpreting a law because of the breadth of that law. These cases addressed whether the definition of an "individual with a

138. Sarah E. Burns, *Evidence of a Sexually Hostile Workplace: What Is It and How Should It Be Assessed After Harris v. Forklift Systems, Inc.*?, 21 N.Y.U. REV. L. & SOC. CHANGE 357 (1994).

139. Johnson, *supra* note 137.

140. *Id.* at 111–34.

141. *Id.* at 85.

142. 42 U.S.C. § 12101 (2012) (explaining, in the purpose and findings sections, that one of the goals of the ADA is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities”).

143. Ravitch & Freeman, *supra* note 126.

144. *Id.* at 144–47.

145. 527 U.S. 471 (1999).

146. 527 U.S. 516 (1999).

disability” should be determined based on the individual’s unmitigated condition (that is, the condition without regard to medication or prosthetics) or the individual’s mitigated condition.¹⁴⁷ This question is especially important because if the determination is made based on the mitigated condition, many individuals with disabilities will not be covered by the ADA. Therefore, these individuals would be unable to request accommodation for disabilities even where failure to accommodate would exacerbate the disability to the point that the disability is no longer mitigated by medication.¹⁴⁸

Prior to the Court’s decisions in *Sutton* and *Murphy*, the answer seemed clear.¹⁴⁹ Mitigating measures such as medications and prosthetics were not to be considered in determining whether someone is disabled for ADA purposes.¹⁵⁰ In fact, all three agencies charged with implementing the ADA, and most of the courts that had addressed the issue, considered this threshold question a straightforward one.¹⁵¹ This view was supported by substantial legislative history.¹⁵²

The Court disregarded all of this, and held over strong dissents in both cases that the plain meaning of the law required mitigating measures to be considered in disability determinations.¹⁵³ This was a huge rollback of ADA protection, but it is only one of many examples. The Court’s decisions in these cases effectively precluded many individuals with disabilities from getting accommodations under the ADA if their disabilities are controlled by mitigating measures such as medications, unless they can show that they are “regarded as disabled” under the ADA, an argument that the Court also substantially limited.¹⁵⁴ Ironically, as a result of these individuals not being considered disabled, employers could plausibly discriminate against them based on their impairments without

147. Ravitch & Freeman, *supra* note 41.

148. *Id.* at 121–22, 137–50.

149. *Id.* at 137–45.

150. *Id.* at 142–47.

151. *Id.* at 122–23.

152. *Id.* at 146–47.

153. *Id.* at 124–33.

154. *Id.* at 147–50.

running afoul of the ADA.¹⁵⁵ These decisions seem odd given that Title I of the ADA is to be interpreted broadly to prevent employment discrimination based on unfounded stereotypes of disabilities and disabled individuals.¹⁵⁶ By removing individuals from the ADA's coverage in answering the threshold question of whether they are disabled, the Court denies them ADA protection entirely, thus denying them the opportunity to receive accommodation and even to obtain redress when they are victims of intentional discrimination based on their condition.¹⁵⁷ Even if an accommodation would help avoid problems related to the condition, if those problems have not yet occurred and the individual is otherwise well controlled by medication, prosthetics, etc., that individual is not disabled under the Court's analysis, and thus cannot get to the issue of reasonable accommodation under the Act.¹⁵⁸ And, as the Court also made it less likely that such individuals will meet the "regarded as" having a disability standard, even an employer's use of broad-based stereotypes may not be availing to such individuals.¹⁵⁹ This effectively removes many employees with disabilities from coverage under the ADA, and may actually protect employers who discriminate based on unfounded stereotypes, misconceptions, or outright animus.¹⁶⁰

Simply put, courts know how to contract statutory protections—even against the weight of the rules of statutory interpretation—when they view the statute as too broad. While the ADA was initially interpreted to cover more individuals, both the substance of that protection and the protection itself, even for those obviously intended to be protected under the Act, was significantly limited. Luckily, Congress fixed the situation by amending the ADA. Of course, And unlike religious freedom the ADA was not smack in the middle of the Culture Wars.

155. *Id.* at 150.

156. 42 U.S.C. §§ 12101, 12102(4)(A) (2012).

157. Ravitch & Freeman, *supra* note 41.

158. *Id.* at 121–33.

159. *Id.* at 147–50.

160. *Id.* at 150.

3. Example three: the free exercise clause

The history of claims for exemptions to generally applicable laws under the Free Exercise Clause is full of twists and turns, but in the end it demonstrates that as rights became more broadly recognized a retrenchment occurred, turning the promise of more religious freedom into a tale of less religious freedom.¹⁶¹ The United States Supreme Court's initial struggles with the issue led to the development of a dichotomy between belief and practice.¹⁶² *Reynolds v. United States*¹⁶³ is generally considered a major early precedent for this dichotomy. Essentially, the dichotomy suggests that belief must be protected in order to have religious freedom, but behavior or practice may be regulated (under generally applicable laws in the modern version) for the good of society.¹⁶⁴ This dichotomy was altered in the landmark case of *Sherbert v. Verner*,¹⁶⁵ and in turn this was undermined by the Court's decision in *Employment Division v. Smith*.¹⁶⁶

As I have explained elsewhere, this account of the evolution of free exercise rights and their subsequent destruction in *Smith* is flawed.¹⁶⁷ Sadly, the Free Exercise rights set forth in *Sherbert* were on the decline within fifteen years as the Court began to chip away at the broad protection recognized in *Sherbert*.¹⁶⁸ Also of note is the fact that religious minorities (especially non-Christian religious minorities) did not reap great benefits from *Sherbert*.¹⁶⁹

161. Hamburger, *supra* note 39, at 837–38; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1120–21 (1990).

162. Frank S. Ravitch, *Rights and the Religion Clauses*, 3 DUKE J. CONST. L. & PUB. POL'Y 91, 97–103 (2008).

163. 98 U.S. 145 (1878).

164. See generally *Emp't Div., Dep't of Human Res. of the State of Or. v. Smith*, 494 U.S. 872 (1990); *Reynolds*, 98 U.S. at 161–67. There is, however, a strong argument that the law at issue in *Reynolds* was designed as a mechanism to discriminate against an unpopular religious minority. See Keith E. Sealing, *Polygamists Out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy Are Unconstitutional Under the Free Exercise Clause*, 17 GA. ST. U. L. REV. 691 (2001).

165. 374 U.S. 398 (1963).

166. 494 U.S. 872 (1990).

167. FRANK S. RAVITCH, *MASTERS OF ILLUSION: THE SUPREME COURT AND THE RELIGION CLAUSES* (2007).

168. *Id.*

169. STEPHEN M. FELDMAN, *PLEASE DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE* 218–54 (1997).

In *Sherbert v. Verner*, the Court abandoned the belief/practice dichotomy and held that a state must have a compelling governmental interest for denying a religious exemption when a generally applicable law substantially burdens someone's religion.¹⁷⁰ In that case, the plaintiff was denied unemployment benefits after being fired for refusing to work on her Sabbath.¹⁷¹ The Court held that the state did not have a compelling interest for denying the benefits, and, in fact, noted that the state unemployment laws contained a number of exemptions including one for Sunday Sabbatarians.¹⁷² *Sherbert* was a broad recognition of rights under the Free Exercise Clause. Earlier cases had been a mixed bag,¹⁷³ although, as Philip Hamburger explains, the application of any test, including the compelling interest test, may narrow free exercise more than originally intended by the framers of the Free Exercise Clause.¹⁷⁴

After *Sherbert*, it remained to be seen how the Court would greet this broad reading of the Free Exercise Clause in subsequent cases. In *Wisconsin v. Yoder*, the Court held that Amish families with high-school age children were entitled to exemptions from the state's compulsory education laws in the absence of a compelling state interest and narrow tailoring.¹⁷⁵ The court looked at the Amish community's track record of good citizenship, hard work, and the success of its young people within the community to demonstrate that the state had no compelling interest for denying the exemption.¹⁷⁶

Following *Yoder*, however, the Court decided a string of Free Exercise exemption cases in which the plaintiffs almost always lost,

170. 374 U.S. at 406–09.

171. *Id.* at 399–401.

172. *Id.* at 406; see also Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 50 (“The other point in the Court’s explanation of its unemployment compensation cases is secular exemptions. If the state grants exemptions from its law for secular reasons, then it must grant comparable exemptions for religious reasons. . . . In general, the allowance of any exemption is substantial evidence that religious exemptions would not threaten the statutory scheme.”).

173. RAVITCH, *supra* note 167.

174. Hamburger, *supra* note 39.

175. *Wisconsin v. Yoder*, 406 U.S. 205, 234–36 (1972).

176. *Id.* at 209–12, 216–18, 222–27, 235–36.

and in which non-Christian plaintiffs always lost.¹⁷⁷ With the exception of a few unemployment cases,¹⁷⁸ the compelling interest test was turned into a paper tiger. In some cases the nature of the government institution (i.e., the military or prisons)¹⁷⁹ served as a basis for not applying the compelling interest test.¹⁸⁰ In others, the relief requested was decisive in not applying the compelling interest test:¹⁸¹ for example, cases where the government entity involved would have had to change its policies to grant an exemption.¹⁸² Finally, there were cases where the court ostensibly applied the compelling interest test, but in a manner that made it anything but strict scrutiny.¹⁸³ It should be noted, however, that *Sherbert* and *Yoder* did influence the outcomes of some lower court cases.¹⁸⁴

177. FELDMAN, *supra* note 169.

178. In fact, no non-Christian has ever won a Free Exercise Clause exemption case before the United States Supreme Court and even most Christians have lost such cases. Mark Tushnet, "Of Church and State and the Supreme Court": *Kurland Revisited*, 1989 SUP. CT. REV. 373, 381 (1989).

179. *See, e.g.*, O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (prison setting); Goldman v. Weinberger, 475 U.S. 503 (1986) (military setting).

180. *See, e.g.*, Frazee v. Ill. Dept. of Emp't Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987).

181. Bowen v. Roy, 476 U.S. 693 (1986).

182. *Id.*

183. *E.g.*, United States v. Lee, 455 U.S. 252 (1982).

184. Lower court cases went both ways after *Sherbert* and *Yoder*, and while many denied the claimant's exemptions, a number did not. *See, e.g.*, Dayton Christian Schs., Inc. v. Ohio Civil Rights Comm'n, 766 F.2d 932 (6th Cir. 1985) (school's free exercise rights violated by application of civil rights laws); McCurry v. Tesch, 738 F.2d 271 (8th Cir. 1984) (enforcement of state order against operation of church school in violation of state law infringed church's free exercise rights); Warner v. Graham, 675 F. Supp. 1171 (D.N.D. 1987) (Free Exercise Clause violated where plaintiff lost her job because of sacramental peyote use); United States v. Lewis, 638 F. Supp. 573 (W.D. Mich. 1986) (rule requiring government to consent to waiver of a jury trial violated defendants' free exercise rights); United States v. Abeyta, 632 F. Supp. 1301 (D.N.M. 1986) (Bald Eagle Protection Act violated defendant's free exercise rights); Congregation Beth Yitzchok of Rockland, Inc. v. Town of Ramapo, 593 F. Supp. 655 (S.D.N.Y. 1984) (regulations interfering with congregation's operation of its nursery school violated free exercise rights); Chapman v. Pickett, 491 F. Supp. 967 (C.D. Ill. 1980) (free exercise rights of Black Muslim prisoner were violated by his punishment for refusal to follow order to handle pork); Geller v. Sec'y of Def., 423 F. Supp. 16 (D.D.C. 1976) (regulation denying Jewish chaplain right to wear facial hair violated his free exercise rights); Lincoln v. True, 408 F. Supp. 22 (W.D. Ky. 1975) (denial of unemployment compensation to claimant who terminated employment for religious reasons infringed her free exercise rights); Am. Friends Serv. Comm. v. United States, 368 F. Supp. 1176 (E.D. Pa. 1973) (tax withholding statute violates plaintiffs' free exercise rights); Nicholson v. Bd. of Comm'rs, 338 F. Supp. 48

In *Employment Division v. Smith*, Native American employees of a drug rehabilitation center were fired, and subsequently denied unemployment benefits because they used peyote at a ritual service.¹⁸⁵ There was no evidence that these employees used peyote at any time other than the ritual services;¹⁸⁶ in fact, their religion forbade use outside of ritual ceremonies.¹⁸⁷ They sued under the Free Exercise Clause of the First Amendment to the United States Constitution to receive unemployment benefits.¹⁸⁸ In an opinion written by Justice Scalia, the Supreme Court explicitly restored the belief/practice dichotomy,¹⁸⁹ and held that the state need not create exemptions to laws of general applicability to accommodate religious practices.¹⁹⁰ The opinion noted that states remained free to create exemptions to laws that have an adverse impact on religious practices.¹⁹¹

The facts of the case are well documented.¹⁹² As noted above, two members of the Native American Church were denied unemployment benefits after being fired from their jobs at a substance abuse rehabilitation center.¹⁹³ The employees were fired because they had chewed peyote, an illegal substance under Oregon law, during religious rituals.¹⁹⁴ Oregon law stated that being fired for misconduct—which is how the firing was characterized—precludes the receipt of unemployment benefits.¹⁹⁵ Neither individual abused peyote and there was no evidence that either had used peyote

(N.D. Ala. 1972) (statutory oath required of applicant for admission to state bar infringed on applicant's free exercise rights).

185. 494 U.S. 872, 874 (1990).

186. See Respondents' Brief at 1–5, Emp't Div., Dept. of Human Res. of the State of Or. v. Smith, 485 U.S. 660 (1988) (Nos. 86-946, 86-947), 1987 WL 880316.

187. GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 60–62 (2001).

188. *Smith*, 494 U.S. at 875.

189. *Id.* at 879.

190. *Id.* at 879–80.

191. *Id.* at 890.

192. See EPPS, *supra* note 187 (providing detailed discussion of the factual background leading to the *Smith* case).

193. *Smith*, 494 U.S. at 874.

194. *Id.*

195. *Id.*

anywhere other than in religious ceremonies.¹⁹⁶ In fact, it would violate the tenets of the Native American Church to use peyote outside of appropriate religious rituals because the substance has significant religious import for members of the faith.¹⁹⁷ Oregon, unlike many states and the federal government,¹⁹⁸ did not have a religious exemption for Native American peyote use under its general drug laws.¹⁹⁹

Thus, the Court had to decide whether the two men denied unemployment benefits had a constitutional right to an exemption to the drug laws given the religious nature of their peyote use.²⁰⁰ An exemption would have precluded the denial of unemployment benefits based on ritual peyote use.²⁰¹ Interestingly, the attorney general for the state of Oregon never argued that the compelling interest test should be disregarded,²⁰² but rather he argued that compliance with the state's drug laws satisfied the burden under that test, especially in light of post-*Sherbert* and *Yoder* case law.²⁰³

The *Smith* Court nonetheless held that there is no duty to provide exemptions to a generally applicable law.²⁰⁴ The compelling interest test set forth in *Sherbert* was limited to the unemployment context where there are generally a variety of exemptions built into

196. See Respondents' Brief, *supra* note 186, at 1–5, 17; Garrett Epps, *To an Unknown God: The Hidden History of Employment Division v. Smith*, 30 ARIZ. ST. L.J. 953, 962–63, 981–85 (1998).

197. Garrett Epps, *What We Talk About When We Talk About Free Exercise*, 30 ARIZ. ST. L.J. 563, 583 (1998) (“An uncontroverted part of the record was the relentless opposition by the peyote religion to the use of peyote outside the ritual context, and to the use of other drugs and alcohol for any reason whatsoever.” (citation omitted)); see also *Smith*, 494 U.S. at 872, 913–16 (Blackmun, J., dissenting).

198. *Smith*, 494 U.S. at 912 n.5 (Blackmun, J., dissenting).

199. See generally *id.* at 876 (majority opinion).

200. *Id.*

201. *Id.* at 875–76.

202. See Brief for Petitioners at 8–10, Emp't Div., Dept. of Human Res. of the State of Or. v. Smith, 494 U.S. 872 (1990) (No. 88-1213), 1989 WL 1126846; Epps, *supra* note 196, at 1010–15. This was also confirmed in a conversation I had with former Oregon Attorney General David Frohnmayer in Kyoto, Japan in 2001, when we both spoke at a forum addressing the free exercise of religion at Doshisha University (Frohnmayer was speaking as the President of the University of Oregon and I was a Fulbright Scholar at the Faculty of Law at Doshisha University).

203. Brief for Petitioners, *supra* note 202.

204. *Smith*, 494 U.S. at 884–85.

the unemployment laws.²⁰⁵ Furthermore, the Court held that the claim in *Smith* was different from earlier Free Exercise cases granting exemptions to unemployment laws because the claimants in *Smith* sought an exemption based on illegal conduct while the claimants in the earlier cases sought an exemption based on religious conduct that was otherwise legal.²⁰⁶

Yoder was harder to distinguish, but the Court created the concept of “hybrid rights”—and I stress the word “created”—because the concept makes no legal sense as explained below. “Hybrid rights” cases are cases in which the Free Exercise Clause right is connected to some other important right (in *Yoder* parental rights).²⁰⁷ This concept was used to distinguish several earlier cases that involved freedom of expression as well as free exercise concerns,²⁰⁸ and to distinguish *Yoder*. Yet, to characterize *Yoder* as a hybrid rights case is patently disingenuous.²⁰⁹

Divorcing *Smith* from all the important baggage regarding *stare decisis*, etc., we are left with the basic notion that the Free Exercise Clause does not require exemptions to generally applicable laws. The argument seems to be that because these laws are religion neutral the

205. *Id.* at 883–84.

206. *Id.* at 874–75, 878.

207. *Id.* at 881–82.

208. *Id.*

209. Moreover, the concept of “hybrid rights” makes no sense whatsoever. Is the Court saying that two inadequate constitutional rights combined can make an adequate one? If so, it would not be hard to hybridize almost anything into a viable constitutional right. Or are hybrid rights the combination of two adequate constitutional rights? This possibility is precluded by the *Smith* Court’s reasoning because clearly the Free Exercise Clause right would be inadequate by itself in an exemption case under the *Smith* Court’s reasoning. This leaves two possibilities. First, the other constitutional right in the hybrid rights context would be adequate on its own and the Free Exercise Clause right is not, in which case why mention the Free Exercise Clause in exemption cases because it essentially serves no function other than being an anti-discrimination principle. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). Of course, such an antidiscrimination principle could be covered under the Equal Protection Clause and perhaps the Establishment Clause, which raises the question of whether the Free Exercise Clause serves any function under the *Smith* Court’s reasoning other than in unemployment cases. Maxine Eichner, *Who Should Control Children’s Education?: Parents, Children, and the State*, 75 U. CIN. L. REV. 1339, 1384–85 (2007); Ira C. Lupu, *Employment Division v. Smith and the Decline of Supreme Court-Centrism*, 1993 BYU L. REV. 259, 267 (1993); McConnell, *supra* note 161. Second, and apparently accurate, hybrid rights are just a judicial creation to get around inconvenient precedent. The last possibility seems to be the obvious answer. McConnell, *supra* note 161.

Free Exercise Clause has no impact on them except through the political process.²¹⁰ This, of course, begs the question of whether such laws can ever be neutral given the vast array of religions and huge amount of government activity in the United States.²¹¹ The history of Free Exercise Clause jurisprudence, especially in the latter part of the Twentieth Century, is a staggering example of the more-is-less phenomenon.²¹²

RFRA was passed in response to *Smith*.²¹³ It was an attempt to roll back the Court's retrenchment on free exercise rights and return the law to where it was pre-*Smith*, with a particular emphasis on *Sherbert* and *Yoder*.²¹⁴ When the Court limited RFRA's reach, by holding that Congress overstepped its enumerated powers by imposing RFRA on the states,²¹⁵ states reacted by passing their own RFRA's.²¹⁶ Congress followed up by passing the Religious Land Use and Institutionalized Persons Act, which applies a similar standard as that under RFRA to cases involving prisons or land use.²¹⁷

At the time these laws were passed, religious freedom was mostly viewed as beneficial because it protected religious individuals and entities from government actions that substantially burdened their practice. As the support for RFRA when it was passed demonstrates, most on both sides in the culture wars initially viewed RFRA as protecting important freedoms.²¹⁸ This perception has changed dramatically. The next section addresses how *Hobby Lobby* may be the beginning of the end for religious freedom due to public opposition to the outcome and the fuel it adds to the arguments in opposition to religious accommodations more generally. It shows we are coming full circle and suggests that over time the shift in public opinion could affect how courts view religious freedom claims.

210. See generally *Smith*, 494 U.S. at 872.

211. RAVITCH, *supra* note 167.

212. Hamburger, *supra* note 39.

213. 42 U.S.C. § 2000bb(b)(1) (2012); Mark L. Rienzi, *Unequal Treatment of Religious Exercises Under RFRA: Explaining the Outliers in the HHS Mandate Cases*, 99 VA. L. REV. ONLINE 10, 12–13 (2013).

214. 42 U.S.C. § 2000bb(b)(1); Rienzi, *supra* note 213.

215. *City of Boerne v. Flores*, 521 U.S. 507 (1996).

216. Laycock, *supra* note 10, at 845 (providing number of state RFRA's as of 2014).

217. 42 U.S.C. § 2000cc (2012).

218. Idleman, *supra* note 10; Laycock, *supra* note 10, at 845–46 (noting that religious accommodations and RFRA have “become far more controversial than [they] used to be”).

B. The Culture Wars and Shifting Perceptions of Religious Freedom

When RFRA was passed it enjoyed widespread public support and bipartisan political support.²¹⁹ For religious people, RFRA was necessary to protect religious practice from intentional or unintentional government interference. For civil libertarians and other members of the public, RFRA was a way to protect people who—even if their religious views seemed odd or out of date—were still deserving of the freedom to practice their religion so long as that freedom is balanced appropriately against public interests.²²⁰

Recently, this calculus has changed for many. A big factor in this change is the assertion by some religious individuals and entities that their religious freedom includes the right to violate the rights of others.²²¹ The most salient examples of this are cases where landlords—and now under *Hobby Lobby* this could include large corporate landlords that are closely held—discriminate against LGBT individuals in renting properties;²²² where churches and other religious entities attempted, with occasional success, to avoid liability for clergy abuse based on the Ecclesiastical Abstention Doctrine,²²³

219. Idleman, *supra* note 10; Laycock, *supra* note 10, at 845–46.

220. See Idleman *supra* note 10, at 248–49.

221. Corbin, *supra* note 5, at 1481–82; NeJaime & Siegel, *supra* note 10.

222. Emily Badger, *Look How Many States Still Allow Housing Discrimination Against Gays*, ATLANTIC: CITYLAB (Apr. 12, 2013), <http://www.citylab.com/housing/2013/04/states-where-its-still-legal-discriminate-against-gays-single-women-and-poor-housing/5273>.

223. See, e.g., *Ehrens v. Lutheran Church-Mo. Synod*, 269 F. Supp. 2d 328, 333 (S.D.N.Y. 2003) (holding that negligent supervision and retention claim against church for retaining pastor who allegedly sexually abused plaintiff when he was a minor was barred by First Amendment, and would necessarily involve impermissible analysis for the standards and rules “as to the duty of care by which a denomination keeps its ‘roster’ of those priests . . . authorized to accept canonical employment”); *Sanders v. Casa View Baptist Church*, 898 F. Supp. 1169 (N.D. Tex. 1995) (holding that Church employees who brought claim for professional malpractice against minister who began sexual relationships during marriage counseling could not bring action against Church for negligent supervision when marriage counseling was not one of the minister’s duties); *Isely v. Capuchin Province*, 880 F. Supp. 1138 (E.D. Mich. 1995) (federal court sitting in diversity not convinced that Wisconsin would, at the time, adopt yet unrecognized independent cause of action for negligent supervision); *Napieralski v. Unity Church of Greater Portland*, 802 A.2d 391 (Me. 2002) (deciding a negligent supervision claim against minister who sexually assaulted woman in his own home during private personal visit unrelated to Church business or function, despite the fact that the Church owned the home, dismissed due to Maine not recognizing negligent supervision cause of action); *Swanson v. Roman Catholic Bishop of Portland*, 692 A.2d 441, 444–45 (Me. 1997) (holding that “[p]astoral supervision is an ecclesiastical prerogative” and it

which is grounded, at least in part, on free exercise concerns;²²⁴ where government officials refuse to perform their designated functions based on religious objections to those seeking their help;²²⁵ and where for-profit entities, such as *Hobby Lobby*, seek to deny benefits to employees based on religious objections.²²⁶

Anybody who deals regularly with religious freedom claims understands that these are a tiny minority of cases. Most claims for religious accommodation have no significant effects on anyone other

would be improper to impose secular supervision standards on a church); *Teadt v. Lutheran Church Mo. Synod*, 603 N.W.2d 816 (Mich. Ct. App. 1999) (holding that negligent supervision claim was not independently actionable without first establishing wrongdoing by the Church employee; without an actionable claim that the minister had violated some duty in beginning sexual relationship, the parishioner could not establish that the Church had been negligent in supervising him); *Franco v. Church of Jesus Christ of Latter-day Saints*, 21 P.3d 198 (Utah 2001) (holding that claim against church for negligence stemming from counseling and referral to unlicensed counselor would be a clergy malpractice claim barred by the First Amendment); *Shull v. Caroline Furnace Lutheran Camp and Retreat Ctr.*, 64 Va. Cir. 472 (2004) (holding a church camp not liable for negligence stemming from child who drowned at camp due to charitable immunity); *S.H.C. v. Lu*, 54 P.3d 174 (Wash. Ct. App. 2002) (holding that negligent supervision claim against Buddhist temple would necessarily involve questions of how obedient the Temple should have been to the defendant Grandmaster and thus involve impermissible religious entanglement).

224. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694 (2012).

225. Ravitch, *supra* note 121 (discussing this issue in depth and suggesting that government officials can be accommodated so long as someone else with authority is available to serve the people seeking help without delay or reduction in service). For some specific examples, see *Miller v. Davis*, No. 15-44-DLB, 2015 WL 4866729 (E.D. Ky. Aug. 12, 2015); *Robicheaux v. Caldwell*, Nos. 13-5090, 14-97 & 14-327, 2015 WL 4090353 (E.D. La. Jul. 2, 2015); *Strawser v. Strange*, 105 F. Supp. 3d 1323 (S.D. Ala. 2015) (order granting plaintiffs' motion for preliminary injunction); Valerie Howell, *Kentucky Clerk Continues to Refuse to Issue Same-Sex Marriage Licenses Despite Court Ruling*, JURIST (Aug. 28, 2015), <http://jurist.org/paperchase/2015/08/kentucky-clerk-continues-to-refuse-to-issue-same-sex-marriage-licenses-despite-court-rulings.php> (discussing the case of a Kentucky county clerk who lost her claim to deny same-sex marriage licenses in Federal District Court and had her request for a stay of that judgment denied by the Sixth Circuit pending disposition of the appeal, yet still refuses to issue marriage licenses to same-sex couples); Zoë Schlanger, *Florida County Clerks Go Rogue, Refuse to Marry Anyone to Avoid Same-Sex Weddings*, NEWSWEEK (Jan. 2, 2015), <http://www.newsweek.com/florida-county-courts-go-rogue-refuse-marry-anyone-avoid-same-sex-weddings-296300>.

226. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2551 (2014); Alan E. Garfield, *The Contraception Mandate Debate: Achieving a Sensible Balance*, 114 COLUM. L. REV. SIDEBAR 1 (2014).

than the religious individual(s) or entity,²²⁷ involve no discrimination against others,²²⁸ and are designed to remedy the failure of legislative bodies to recognize the impact laws may have on religious people whose backgrounds and traditions are not well understood by the majority.²²⁹ Claims for exemptions to school policies requiring students to take tests or attend class on holy days, claims for access to Kosher or Halal food in government-run facilities such as prisons, claims by Muslims, Jews, Sikhs, and others to be able to cover their heads in places where the law generally requires the removal of head coverings, claims by adults to refuse certain medical treatments that they believe threaten their eternal being, claims by Native Americans to be able to follow rituals regardless of contrary government regulation, claims by churches to not be bound by laws that fundamentally impact their religious values—these are the bread and butter of religious freedom claims.

Every landlord who seeks to discriminate against members of the LGBT community and every for-profit company that seeks to deny its employees benefits based on religion—especially when those employees are not co-religionists—attracts media attention and weakens public support for religious freedom, even if the claimants do so based on deeply held religious beliefs.²³⁰ This mostly hurts the bread and butter claims mentioned above.

Recent debates over state RFRA and other laws show this in painstaking detail. RFRA have become, in the public's mind, statutes granting companies a right to discriminate and avoid the law based on religious objections, rather than statutes protecting the faithful who need protection.²³¹ The less the public views RFRA as being about protecting the rights of religious people, and the more it views RFRA as being a license for those making money to harm third parties, the

227. *Holt v. Hobbs*, 135 S. Ct. 853 (2015); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

228. *Holt*, 135 S. Ct. at 853; *Gonzales*, 546 U.S. at 418; *Yoder*, 406 U.S. at 205; *Sherbert*, 374 U.S. at 398.

229. *See, e.g., Holt*, 135 S. Ct. at 853; *Gonzales*, 546 U.S. at 418; *Yoder*, 406 U.S. at 205; *Sherbert*, 374 U.S. at 398.

230. *See infra* Section III.B.3.

231. *Id.*

greater the risks to religious freedom for those traditionally protected by RFRA—religious individuals and entities—will be.

Many of my fellow advocates for strong religious freedom protection will point out that these lines are artificial and miss the point about lived faith. For people of faith like the Greens and the Hahns, there is no artificial line between the different aspects of their life and their religion.²³² If they were made to cover the contraceptives they objected to, they would be complicit in evil that violates the most fundamental nature of their beliefs.²³³ These are powerful arguments that will be addressed in greater detail below, and they are arguments with which I sympathize to a point,²³⁴ but they are irrelevant to the dynamic I am addressing; a dynamic based in cold, hard, and pragmatic reality.

At this point warriors on both sides of the Culture Wars are taking no prisoners, and the reality is that perception matters if religious freedom for traditional religious entities is to remain strong.²³⁵ While detailed debates about the nature of facilitating evil and accommodating religion are important to me and to those concerned with religious freedom questions as matters of the boundary between lived religion and society generally, these issues become irrelevant outside of theological and academic discourse if the Federal RFRA or state RFRA are repealed, if state RFRA are opposed by the public and are not passed when proposed, if RFRA becomes ridden with holes of legislative or judicial creation, or if other legislation is passed that prevents even individuals and religious entities from gaining exemptions to laws of general applicability. All of these things have happened, or have been proposed, since the *Hobby Lobby* litigation began, and especially since *Hobby Lobby* was decided.²³⁶ *Hobby Lobby* may very well be a case of winning the battle,

232. See *supra* note 3.

233. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2764–66, 2775 (2014).

234. For me, that point ends when a large for-profit entity, whether closely held or not, that through the corporate form protects its owners from legal liability and receives numerous tax breaks subsidized by the public, claims it need not provide benefits to its employees that the government requires it to provide. I am far more amenable to claims by religious entities and non-profits that they should not be required to facilitate evil; although where that line should be drawn under the ACA given its accommodation of these entities is unclear.

235. Laycock, *supra* note 10, at 869–77, 879–80.

236. See *infra* Section III.B.3.

but losing the war. The following three subsections will address the Culture Wars, “traditional religious entities,” and the legal and public response to *Hobby Lobby*, respectively.

1. *The culture wars*

The term “Culture Wars” came into common use after James Davison Hunter’s seminal book, *Culture Wars: The Struggle to Define America*, was published in 1992.²³⁷ Hunter wrote about the struggles between social conservatives and progressives, and those who align themselves on issues with one side or the other, to define American values.²³⁸ Others have argued with some force that many Americans seek a middle ground and that the Culture Wars are issue specific or more salient at the political fringes.²³⁹ However, in the context of religious freedom, availability of contraceptives, civil rights and civil liberties issues involving the LGBT community, lived religion, and government support for religion, the Culture Wars are quite real.²⁴⁰ In light of the United States Supreme Court’s recent decision in *Obergefell v. Hodges*,²⁴¹ and the response by opponents of same-sex marriage, the Culture Wars have reached a fevered pitch. In fact, Hunter’s book, though written more than twenty years ago, seems especially relevant today.

In order to understand the negative impact *Hobby Lobby* has had, and will continue to have, on religious freedom for traditional religious entities, it is helpful to look at the battle lines drawn by culture warriors on both sides in the wake of *Hobby Lobby*. Specifically, it is important to look at the battle over what it means to be a religious person in a pluralistic society and the importance of contraceptive coverage for women’s health. Obviously, these are the two issues at the heart of *Hobby Lobby* and the strong public backlash that has occurred since the Court decided that case.²⁴²

237. HUNTER, *supra* note 22.

238. *Id.*

239. MORRIS P. FIORINA, CULTURE WAR? THE MYTH OF A POLARIZED AMERICA (3d ed. 2011).

240. Laycock *supra* note 10; NeJaime & Siegel, *supra* note 10.

241. 135 S. Ct. 2584 (2015).

242. *See infra* Section III.B.3.

As mentioned above, many religious people cannot separate their lives into neat sections; some sections involving religion and other sections not. The notion that religion is a private thing that can be separated from other aspects of life is inconsistent with the way many people experience religion.²⁴³ For many, religion is not something that can be tossed aside to make life easier or to fit in. It is at the core of one's being.²⁴⁴

Therefore, religion is with us when we wake up, when we go to sleep, and every minute in between, whether consciously or not. It effects how we deal with others, how we view the world, and in some cases what we eat or what we wear. Those of us whose religions might be viewed as progressive can identify with both sides in the Culture Wars. We support gay marriage and LGBT rights, believe that science and religion need not conflict, support women's reproductive rights, and so forth. Yet, much of this comes from religious, as well as social, commitments and therefore we understand deeply the concerns of those whose faith seems to be under assault by modernity and progressive values.

For many in this latter group, their most deeply held views on faith, the family, the place of humanity in the world and the universe, eternal life, and more are under daily assault.²⁴⁵ For these people the Culture Wars are not about tolerance or intolerance, they are about values that are at the core of what it means for them to be human and to honor G-d.²⁴⁶ You and I may disagree with their values at a political level, but it is naive and intolerant to assume that they should have to give up their most central beliefs because we don't like those beliefs.²⁴⁷ Robust religious freedom (and, for that matter, freedom of expression) must protect everyone, not just those whose faith is consistent with the current political climate. This is what civil liberties are supposed to do under U.S. law.

243. *See supra* note 3.

244. *Id.*

245. HUNTER, *supra* note 22 and accompanying text.

246. *Id.*; Laycock, *supra* note 10; NeJaime & Siegel, *supra* note 10.

247. FRANK S. RAVITCH, FREEDOM'S EDGE: RELIGIOUS FREEDOM, SEXUAL FREEDOM, AND THE FUTURE OF AMERICA (forthcoming 2016) (manuscript at chs. 1-2) (on file with author) (arguing that trying to force religious people to violate their religious commitments by rejecting the concept of religious accommodations is not necessary because a balance can be reached between religious freedom, reproductive rights, and LGBT rights by focusing on accommodating religion where possible without causing direct harm to others).

The question remains, however, what should happen when such religious values impact the established rights of others who do not share the same religious commitments? On one side of the Culture Wars are the social conservatives who believe that their values—including religious values—are core American values and can therefore be enforced by government and that contrary values are somehow un-American and/or immoral, so not worthy of respect.²⁴⁸ Aligned with the social conservatives on some issues are others whose deeply held religious values fall on the same side as the social conservatives on these issues.²⁴⁹ These values often focus on reproductive rights and LGBT issues, among other things.²⁵⁰ From this point of view, religious individuals and entities should be free to exclude who they want, and people of faith should be free to run their businesses as they see fit without government interference.²⁵¹

On the other side are individuals who support equality for diverse groups, including the LGBT community, and view reproductive freedom as central to a woman's right to control her body, medical care, and future.²⁵² For lack of a better term, I will refer to this group as "progressives." Aligned with the progressives are people of faith and others who believe it is important for each individual to have dignity and therefore government should not interfere or impede a woman's reproductive freedom.²⁵³ For many on this side of the debate, religious freedom ends where the rights of others begin.²⁵⁴ Therefore, religious freedom must give way when the rights of non-coreligionists are endangered or harmed.²⁵⁵ This is more likely to happen in the for-profit context because employees and customers of larger companies are rarely, if ever, going to all be co-religionists. In fact, for some on this side of the Culture Wars, religious freedom itself is impossible because it privileges one set of

248. HUNTER, *supra* note 22, at 136–45.

249. *Id.* at 77–104.

250. *Id.* at 3–12, 49–50, 90–95, 122–26, 176–82, 284–85.

251. *Id.* at 62–95; Laycock, *supra* note 10.

252. HUNTER, *supra* note 22, at 43–48, 78–82, 107–34, 144–45.

253. *Id.*

254. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2790–91 (2014) (Ginsburg, J., dissenting).

255. *See id.* at 2795–96, 2804; Corbin, *supra* note 5, at 1481–82.

world-views over others.²⁵⁶ One concern is that *Hobby Lobby* may blur the line between those on this side of the culture wars who support religious freedom for individuals and traditional religious entities, and those who view any form of religious freedom as privileging a particular set of world-views over the rights of others.

2. *Traditional religious entities*

I have used the term “traditional religious entities” throughout this Article and it is useful to elaborate on the meaning of this term before the next sub-section. The term is key because these are the entities that are most traditionally associated with religious freedom but which stand to lose the most if the basic concept of religious freedom is undermined by its expansion to cover for-profit entities. The term, as used in this Article, refers to those that have long been understood to be covered under the Free Exercise Clause. These are also the individuals and entities that RFRA was designed to protect.

First, no one questions that individuals are protected under the Free Exercise Clause and RFRA. If government seeks to impose on an individual’s free exercise of religion it must meet the test set forth in RFRA (or, where applicable, state RFRAs). A straightforward example of this is where a judge insists that a Muslim woman remove her hijab or a Jewish man remove his yarmulke in the courtroom. RFRA clearly prohibits the judge from enforcing this rule.²⁵⁷

There are a number of religious entities that have also been traditionally protected under the Free Exercise Clause and RFRA. The most obvious of these are churches, synagogues, mosques, temples, etc.²⁵⁸ The Court long ago acknowledged that while the Free Exercise Clause (and later RFRA) was clearly designed to

256. See WINNIFRED FALLERS SULLIVAN, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* (2007); cf. MARCI A. HAMILTON, *GOD VS. THE GAVEL: THE PERILS OF EXTREME RELIGIOUS LIBERTY* (Rev. 2d ed. 2014) (arguing that, while some religious conduct might be protected, the concept of religious freedom can be misused in a manner that greatly harms third parties); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994) (rejecting the idea of special treatment for religion when that treatment would violate the principle of “equal regard”).

257. Cf. *Holt v. Hobbs*, 135 S. Ct. 853 (2015) (RLUIPA protects prisoner’s right to wear a short beard consistent with his faith).

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

protect individuals, it can also protect the entities through which individuals of shared faith come together to express their religion.²⁵⁹ While some have argued that these entities do not enjoy free exercise rights, the general consensus among judges, legislators and scholars, is that they do.

Next are affiliates or auxiliaries of religious entities—for example, a school or a soup kitchen run by a church. These entities too have been generally protected under the Free Exercise Clause and RFRA.²⁶⁰ In a similar vein, non-profit religious entities like Catholic Charities or Jewish Family Services, to cite two examples, have also been protected.²⁶¹ These entities are also generally bound by the requirements of Section 501(c)(3) of the Internal Revenue Code.²⁶²

The final, and perhaps most controversial, class of entities protected under RFRA are hospitals and universities run by religious entities. Powerful arguments have been made for excluding these entities from Free Exercise Clause and RFRA protections because these entities generally serve the broader community.²⁶³ Even so, hospitals and health care providers already have religious exemptions to performing religiously objectionable procedures under many states' laws and under Federal law.²⁶⁴ These exemptions themselves

259. *Gonzales*, 546 U.S. at 418 (applying RFRA to such an entity); Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 340–42 (1987) (Brennan, J., concurring in the judgment) (addressing shared faith under the Free Exercise Clause).

260. *W. Presbyterian Church v. Bd. of Zoning and Adjustment of the D.C.*, 862 F. Supp. 538 (D.D.C. 1994); *Jesus Ctr. v. Farmington Hills Zoning Bd. of Appeals*, 544 N.W.2d 698 (Mich. Ct. App. 1996). Of course, just because an entity has free exercise rights, or is protected by RFRA, does not mean it will win its claim. *Daytona Rescue Mission, Inc. v. City of Daytona Beach*, 885 F. Supp. 1554 (M.D. Fla. 1995).

261. See *Korte v. Sebelius*, 735 F.3d 654, 675 (7th Cir. 2013); Jacqueline Gilbert, Note, *When Rights Collide: In a Battle Between Pharmacists' Right of Free Exercise and Patients' Right to Access Contraception, Who Wins?—A Possible Solution for Nevada*, 7 NEV. L.J. 212, 230 (2006) (addressing Catholic Charities).

262. 26 U.S.C. § 501(c)(3) (2012).

263. Cf. Brietta R. Clark, *When Free Exercise Exemptions Undermine Religious Liberty and the Liberty of Conscience: A Case Study of the Catholic Hospital Conflict*, 82 OR. L. REV. 625, 631, 633–34, 647–48 (2003).

264. Katherine A. White, Note, *Crisis of Conscience: Reconciling Religious Health Care Providers' Beliefs and Patients' Rights*, 51 Stan. L. Rev. 1703, 1705, 1709–11 (1999); see also 42 U.S.C. § 300a-7 (2012) (codifying federal law known as the “Church Amendment” after Senator Church who sponsored the law, which protects medical facilities and providers who

have been controversial.²⁶⁵ Yet, for purposes of defining “traditional religious entities,” I include them because they are generally nonprofit parts of a religious sect’s mission, and in most cases where exemptions are requested, they are openly serving the religious mission of the sect.²⁶⁶ That does not, however, mean that these entities are as likely to be successful in their RFRA claims as churches, synagogues, mosques, temples, etc., since the government may have a greater range of compelling interest when a hospital or University serves the general public. Even in the case of churches, synagogues, mosques, and temples, the government may have a compelling interest in enforcing anti-discrimination laws for non-clergy employees,²⁶⁷ although this would not apply to religious discrimination claims.²⁶⁸

Thus, if a religious university engages in discrimination prohibited by federal law, it may be sanctioned by, for example, losing its tax exempt status, even if it asserts a religious basis for the discrimination.²⁶⁹ If a religious hospital is the only hospital in a community, it may lose a negligence claim for failure to provide appropriate care,²⁷⁰ and it could possibly be ordered by a court to allow a doctor to perform a procedure that is medically necessary, despite the hospital’s religious objections.²⁷¹ In other words, a state RFRA might apply, but these sorts of entities may lose under the compelling interest analysis due to strong government interests.

3. The legal and public response to Hobby Lobby

At the time of this writing the *Hobby Lobby* decision has only been on the books for about one year. Yet, well before the Court

receive certain federal grants from being required to perform, or having their facilities used to perform, abortions or sterilizations).

265. NeJaime & Siegel, *supra* note 10.

266. Laycock, *supra* note 10, at 846–48.

267. *See Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 132 S. Ct. 694, 707, 710 (2012) (applying the ministerial exception to a “called” teacher who was a minister, but noting that the exception applies to ministers and similar employees. If respondent has not been a minister it seems the answer would have been different).

268. *Id.*; *see also Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring).

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

270. Clark, *supra* note 263, at 641–44.

271. *Id.* at 629–30.

issued its ruling, concerns over for-profit entities being protected under RFRA and the impact this could have on third parties was building. *Hobby Lobby* and/or the build-up to the Court's decision has led, in part, to the failure of a state RFRA in Michigan;²⁷² to serious challenges to RFRA proposed in Indiana,²⁷³ Georgia,²⁷⁴ and Maine;²⁷⁵ to legislation that could dramatically limit religious freedom even for traditional legal entities in California;²⁷⁶ and to potential weakening of state RFRA in other states that require contraceptive coverage under state law.²⁷⁷ Moreover, public outrage over the *Hobby Lobby* decision and the build up to it has blurred the line between traditional religious entities and for-profit entities, and has changed the perception of RFRA from being a civil rights or civil

272. Kathleen Gray, *Religious Freedom Legislation Stalls in Lansing*, DETROIT FREE PRESS, Dec. 18, 2014, at A13.

273. Tony Cook, *Religious Freedom Bills Get Hearing*, INDIANAPOLIS STAR, Feb. 9, 2015, at A1; Abdul-Hakim Shabazz, Editorial, *No Service*, INDIANAPOLIS STAR, Jan. 18, 2015, at A16; Tony Cook & Marisa Kwiatkowski, *Religious Freedom Bill is Drafted*, INDIANAPOLIS STAR, Dec. 27, 2014, at A1; Editorial, *Freedom to Discriminate*, KOKOMO TRIB. (Feb. 22, 2015, 6:00 AM), http://www.kokomotribune.com/opinion/editorials/editorial-freedom-to-discriminate/article_bd2786da-b92e-11e4-9a51-0357d2050012.html [hereinafter KOKOMO TRIB.].

274. April Hunt, *Georgia Equality Spokesman Correct on Claim*, ATLANTA J.-CONST., Jan. 21, 2015, at 1B; Peter Berg & David Key, Sr., *Law, Religion: Keeping Balance*, ATLANTA J.-CONST., Jan. 16, 2015, at 12A; Jeff Graham, Editorial, *No Threat to Religious Liberty*, ATLANTA J.-CONST., Apr. 10, 2014, at 10A.

275. Christopher Cousins, *Controversial Maine 'Religious Freedom' Bill Rejected by Legislative Committee*, BANGOR DAILY NEWS (Jan. 23, 2014, 4:24 PM), <http://bangordailynews.com/2014/01/23/politics/controversial-maine-religious-freedom-bill-rejected-by-legislative-committee/>; Mario Moretto, *'Religious Freedom' Bill in Maine Would Lead to Legalized Discrimination, Opponents Say*, BANGOR DAILY NEWS (Jan. 16, 2014, 7:35 PM), <http://bangordailynews.com/2014/01/16/politics/religious-freedom-bill-in-maine-would-lead-to-legalized-discrimination-opponents-say/?ref=relatedBox>.

276. CAL. HEALTH & SAFETY CODE § 1367(i) (West 2014) (requiring all health care service providers to provide “all of the basic health care services provided in subdivision (b) of Section 1345”); CAL. HEALTH & SAFETY CODE § 1345(b) (West 2003) (defining “basic health services”); Letter from Michelle Rouillard, Director, Dep’t of Managed Health Care of Cal., to Mark Morgan, Cal. President of Anthem Blue Cross (Aug. 22, 2014), <https://www.dmhc.ca.gov/Portals/0/082214letters/abc082214.pdf>.

277. Cf. Brian Dowling, *Health Care Ruling Studied For Its Effect On Connecticut*, HARTFORD COURANT (Jun. 30, 2014), http://articles.courant.com/2014-06-30/business/hc-connecticut-contraceptive-mandate-questions-20140630_1_coverage-gutmacher-institute-insurers (discussing potential conflict between state law requiring contraceptive coverage and state RFRA).

liberties statute, to one that threatens civil rights and civil liberties.²⁷⁸ And this is just the beginning.

For those who view *Hobby Lobby* as an important victory for religious freedom, the recent experience with the state RFRA proposed in Michigan should be quite sobering. Even those who strongly agree with *Hobby Lobby* cannot ignore the role it played in undermining of Michigan's RFRA. As will be shown, RFRA was often portrayed as a license for companies to discriminate and not meet their duties under state and federal law, based on religious objections.²⁷⁹ As

278. See Editorial, *The Justices Endorse Imposing Religion on Employees*, N.Y. TIMES, July 1, 2014, at A20; Christopher Snowbeck, *Hobby Lobby Ruling 'Opens Floodgates' to Test Boundaries*, ST. PAUL PIONEER PRESS, July 12, 2014, at A1; Sandhya Somashekhar, *Religious Liberty Push Stirs New Fight: Some Conservatives Seek Legal Right Not to Serve Gay Couples*, CHI. TRIB., Dec. 21, 2014, at C29; Hunt, *supra* note 274; Berg & Key, *supra* note 274; Cook, *supra* note 273; Shabazz, *supra* note 273; KOKOMO TRIB., *supra* note 273; Cousins, *supra* note 275; Moretto, *supra* note 275; Justin A. Hinkley, *Report Slams Michigan for Inequality*, LANSING ST. J., Jan. 24, 2015, at A8; Teresa Wiltz, *Michigan Religious Freedom Act May Open Door to Discrimination, Critics Say*, SUN-SENTINEL, Dec. 21, 2014, at 16A; Gray, *supra* note 272; Kendall Stanley, Editorial, *Lame is Right*, PETOSKEY NEWS-REV. (Dec. 15, 2014, 7:00 AM), http://www.petoskeynews.com/news/opinion/kendall-stanley-lame-is-right/article_b2fa4bab-5f41-5585-8ab6-cb76ac9e4345.html; Nathan Triplett, Editorial, *Passing Religious Freedom Bill Spells Trouble for Michigan*, ARGUS-PRESS (Dec. 14, 2014, 7:00 AM), http://www.argus-press.com/opinion/guest_commentaries/article_83f6fc3c-8329-11e4-bffe-c3b8b276ba91.html; Editorial, *Religious Freedom Bill Wrong for State*, LIVINGSTON COUNTY PRESS, Dec. 14, 2014, at A14 [hereinafter LIVINGSTON COUNTY PRESS]; Olivia Lewis, *Some Local Clergy Not Sold on Bill*, BATTLE CREEK ENQUIRER, Dec. 11, 2014, at A2; John Matuszak, *Protestors Say GOP Bill is a 'License to Discriminate'*, HERALD PALLADIUM (Dec. 9, 2014, 5:00 AM), http://www.heraldpalladium.com/news/local/protesters-say-gop-bill-is-a-license-to-discriminate/article_728d87af-2c3e-5ed8-8783-e0b85761f233.html; Fox 2 Detroit, *Pending State Religious Freedom Act a 'License to Discriminate'*, EQUALITY MICH. (Dec. 9, 2014), <https://www.equalitymi.org/media-center/in-the-media/pending-state-religious-freedom-act-license-discriminate>; Kathleen Gray, *Religious Freedom Bill Passes Out of Michigan House*, DETROIT FREE PRESS (December 7, 2014, 9:30 PM), <http://www.freep.com/story/news/local/michigan/2014/12/04/michigan-religious-freedom-bill-moves-house/19889979/> [hereinafter Gray, *Religious Freedom Bill Passes*]; Editorial, *Religious Freedom or Bias Hiding Behind Law*, CLARION-LEDGER, July 15, 2015, at A3; Kim Severson, *Mississippi Chefs to Protest State Law on the Eve of Annual New York Picnic*, N.Y. TIMES (May 7, 2014), http://www.nytimes.com/2014/05/07/dining/mississippi-chefs-to-protest-state-law-on-the-eve-of-annual-picnic.html?_r=0.

279. See Hinkley, *supra* note 278; Wiltz, *supra* note 278; Gray, *Religious Freedom Bill Passes*, *supra* note 278; Stanley, *supra* note 278; Triplett, *supra* note 278; LIVINGSTON COUNTY PRESS, *supra* note 278; Lewis, *supra* note 278; Matuszak, *supra* note 278; Fox 2 Detroit, *supra* note 278.

will also be shown, the for-profit HHS mandate litigation led, in part, to the failure of state RFRA in Ohio and Kentucky.²⁸⁰

The Michigan Religious Freedom Restoration Act, HB 5958, was introduced on November 13, 2014 by state representative Jase Bolger.²⁸¹ Another bill was introduced that would amend Michigan's Elliott Larsen Act (a civil rights statute) to include statewide protection for gays and lesbians against discrimination in housing and employment.²⁸² Notably, that bill did not include transgender individuals, which led to the proposal of an alternative bill by Rep. Sam Singh.²⁸³ Had either of these amendments passed the state House of Representatives it might have provided a statewide compelling interest for government to protect gays and lesbians from discrimination based on religious assertions.²⁸⁴ Representative Bolger supported both bills.²⁸⁵ The latter bill seemed especially aimed at for-profit entities since the Elliott Larsen Act exempts traditional religious entities.²⁸⁶

From the time HB 5958 was introduced, however, the Michigan RFRA was portrayed as a license for companies to avoid legal obligations and to discriminate.²⁸⁷ On December 4, 2014 the state house voted 59-50 to pass the Michigan RFRA and it was referred to the state Senate.²⁸⁸ Media coverage regularly portrayed the law as a license for companies to discriminate and avoid legal obligations.²⁸⁹ Television ads did the same. Opponents of RFRA must have been quietly grateful for the weapon *Hobby Lobby* gave them.

280. Chrissie Thompson, *Sponsors Kill Religious Freedom Bill*, LANCASTER EAGLE GAZETTE, Feb. 27, 2014, at A2 (Ohio); Tom Loftus, *Beshear Vetoes Religion Measure*, COURIER-J., Mar. 22, 2013, at A1 (Kentucky); Joseph Gerth, *RELIGIOUS FREEDOM ACT: Fischer Adds His Voice in Opposition*, COURIER-J., Mar. 20, 2013, at A1 (Kentucky).

281. H.R. 5958, 97th Leg., Reg. Sess. (Mich. 2014).

282. Jonathan Oosting, *'Historic' Gay Rights Hearing Ends Without Vote on Michigan Anti-Discrimination Proposals*, MLIVE (Dec. 4, 2014, 7:44 AM), http://www.mlive.com/lansing-news/index.ssf/2014/12/historic_hearing_on_gay_rights.html.

283. *Id.*

284. RAVITCH, *supra* note 247 (manuscript at ch. 5).

285. Gray, *supra* note 272.

286. MICH. COMP. LAWS § 37.2202 (2009).

287. *See supra* note 272 and accompanying text.

288. H.R. 5958, 97th Leg., Reg. Sess. (Mich. 2014); JOURNAL H.R., 97th Leg., Reg. Sess. 2099-100 (Mich. 2014).

289. *See supra* note 278 and accompanying text.

Public support for RFRA weakened further when the state House voted down the proposed extension of the Elliott Larsen Act to protect gays and lesbians from discrimination on December 3, just one day before the house approved RFRA.²⁹⁰ Concerns about businesses using RFRA to support discrimination and avoid legal requirements were raised repeatedly.²⁹¹ If traditional religious entities were the only ones that would have been protected by RFRA, the debate would have been quite different. Some might have still objected to allowing even churches to discriminate based on sexual orientation, but for many that was not the concern.

The concern was stated plainly in numerous news reports, articles and op-ed pieces around the state. It was that companies and landlords would be able to discriminate against LGBT individuals based on religious convictions,²⁹² pharmacists would be able to refuse to fill prescriptions for contraceptives,²⁹³ and employers would be able to fire non-coreligionists, among similar concerns.²⁹⁴

Others, including Representative Bolger, insisted the bill was designed to protect religious freedom so that, for example, Jewish parents could object to autopsies being performed on a child as per Jewish law,²⁹⁵ and so forth.²⁹⁶ The problem was, however, that HB 5958 did not define “person” for purposes of the state religious freedom protection, and therefore the state supreme court might have interpreted the state RFRA to include for-profit entities just as the U.S. Supreme Court interpreted the Federal RFRA.²⁹⁷

The Michigan Supreme Court already protects religious freedom under the state constitution by applying the pre-*Smith* compelling interest test,²⁹⁸ but that could change in one decision. The state RFRA, however, was patterned on the Federal RFRA, and since it

290. Gray, *Religious Freedom Bill Passes*, *supra* note 278; Stanley, *supra* note 278; Matuszak, *supra* note 278.

291. *See supra* note 278 and accompanying text.

292. *Supra* note 278.

293. Matuszak, *supra* note 278 (referencing pharmacists); Stanley, *supra* note 278 (same).

294. Matuszak, *supra* note 278 (referencing employment discrimination).

295. Gray, *Religious Liberty Bill Passes*, *supra* note 278.

296. *Id.*

297. H.R. 5958, 97th Leg., Reg. Sess. (Mich. 2014).

298. *McCready v. Hoffius*, 586 N.W.2d 723, 729 (Mich. 1998), *vacated and remanded on other grounds*, 593 N.W.2d 545 tbl. (Mich. 1999).

did not define the term “person” to exclude for-profit entities, there was a valid concern that the Michigan Supreme Court might follow *Hobby Lobby* if the state RFRA were enacted, even though it did not follow *Smith*.²⁹⁹

Public pressure against the state RFRA was strong and the bill languished for weeks in the state Senate. Additionally, there was no guarantee that the Governor would have signed the bill had it made it to his desk.³⁰⁰ The state RFRA had become a political hot potato even for the Republican-controlled Senate, so the Governor was wary.³⁰¹ As the legislative session came to a close there was an opportunity for the Senate to vote on the bill, but it never came to a vote and thus the quest for a state RFRA ended in the state Senate.³⁰² There is little doubt that, if the bill enjoyed broader public support and was not seen as a license for businesses to discriminate, it would have passed.³⁰³ Thus, it is not an overstatement to say that without *Hobby Lobby* the result might have been different.

If this were an isolated incident, perhaps it could be dismissed. It is, however, just one example in an evolving trend. As opposed to the wide-ranging support for RFRA in 1993, today religious freedom claims are regularly being characterized in the media and by some legislators as licenses to discriminate.³⁰⁴ In Arizona, a “religious liberty bill” that would have included protection for for-profit businesses was vetoed by Governor Brewer only a few months before *Hobby Lobby* was decided.³⁰⁵ The bill ignited a firestorm of condemnation and was opposed by women’s rights groups, LGBT groups, business groups, a number of religious groups, the Chamber of Commerce, and others.³⁰⁶ The idea of protecting for-profit businesses from general laws based on religious objections was seen

299. *Id.* (applying pre-*Smith* precedent instead of *Smith* under state constitution).

300. *See* Gray, *supra* note 272.

301. *Id.*

302. *Id.*

303. *Id.*

304. *See* Teresa Wiltz, *Michigan Religious Freedom Act May Open Door to Discrimination, Critics Say*, SUN-SENTINEL, Dec. 21, 2014, at 16A; Dowling, *supra* note 277 and accompanying text.

305. Juliet Eilperin, *Conservatives Urge Religious Exemptions to Limit Gay Rights*, CHI. TRIB., Mar. 2, 2014, at C24; Editorial, *With Veto, Ariz. Governor Changes Everything*, WIS. RAPIDS DAILY TRIB., Mar. 15, 2014, at A4.

306. Eilperin, *supra* note 305.

by many in Arizona and in the national media as backwards and dangerous.³⁰⁷

More troubling, however, was the bleed between exempting for-profit businesses and other religious organizations seen in some of the coverage of the situation in Arizona.³⁰⁸ Much of the coverage,³⁰⁹ and certainly Governor Brewer's veto,³¹⁰ was based on the protection the "religious liberty bill" would have afforded for-profit entities, but some of the rhetoric in Arizona opposed religious exemptions generally.³¹¹ This was also true in Ohio, Kentucky, and Georgia, where more traditional RFRA bills failed, in part, because of concerns they would have allowed for-profit entities to discriminate.³¹² After *Hobby Lobby*, this bleed between the arguments against exemptions for for-profit entities and exemptions generally has increased, as was seen in Michigan.³¹³ Michigan is not alone, however.

Recent RFRA legislation in Maine,³¹⁴ Indiana,³¹⁵ and a new bill in Georgia³¹⁶ faced strong opposition that would have been unthinkable a few years ago.³¹⁷ Like the law proposed in Michigan, these laws are generally modeled on the Federal RFRA that was uncontroversial in 1993.³¹⁸ The Indiana law, however, specifically included protection for for-profit entities. Unlike the other bills mentioned in this section the Indiana bill passed, but the backlash was intense. This led to what is called the "Fix," which amended the law to protect against

307. *Id.*

308. *See supra* note 305.

309. *Id.*

310. *Id.*

311. *Id.*

312. *Supra* note 281 and accompanying text; Graham, *supra* note 274 (2014 Georgia Bill).

313. *See supra* notes 281–303 and accompanying text.

314. *Supra* note 275.

315. *Supra* note 273.

316. Hunt, *supra* note 274; Berg & Key, *supra* note 274.

317. *See supra* note 278 and accompanying text.

318. Idleman, *supra* note 10, at 248.

discrimination by for-profit entities asserting religious freedom claims.³¹⁹ Even so, backlash against the Indiana RFRA remains.

Even in Georgia, where one would think RFRA legislation might receive a warmer welcome, there has been serious backlash.³²⁰ After *Hobby Lobby*, this backlash is especially understandable. Business groups, LGBT groups, patients' rights groups, and women's rights groups have all spoken out against these state RFRAs as licenses to discriminate, bad for business in the state, and bad for the freedom of third parties that might be affected by these exemptions. In Maine, similar opposition has formed and the bill has been portrayed by many in the media and by legislators who oppose it as a step backwards for the state of Maine.³²¹

Yet, as noted above, most of the exemptions under these laws would go to religious individuals and entities who were not considered in the legislative process.³²² Still, the failure to define "persons" in the acts leaves open the possibility that for-profit entities will be protected and thus gives the opposition fuel.³²³ Most troubling is that the line between religious exemptions for individuals and religious entities and those for for-profit entities, government officials, and those who deal with the public generally are being blurred.³²⁴ The movement against RFRA is more and more against religious exemptions generally.³²⁵

Ironically, those legislators promoting RFRA in some state legislatures are either blind to, or politically incapable of, defining "person" to protect only religious individuals and traditional religious entities.³²⁶ This is part of the Culture Wars. Many of those supporting this legislation *do* want to protect for-profit entities, government officials, and others who serve the public generally from

319. S. 101, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015) (original RFRA bill); S. 50, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015) (the "Fix"). Both Acts are codified together under IND. CODE § 34-13-9 (2015).

320. *See supra* note 274 and accompanying text.

321. *See supra* note 275 and accompanying text.

322. *See supra* notes 227–229 and accompanying text.

323. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768–70 (2014) (defining "person" to include for-profit corporations); *supra* note 278 (illustrating the public's negative response to recent state RFRAs).

324. *See supra* notes 278–279 and accompanying text.

325. *Id.*

326. *See id.*; Laycock, *supra* note 10, at 868–69.

anti-discrimination laws based on sexual orientation or from providing services to which religious individuals object. This may seem like laudable idealism, but it is a shortsighted strategy. In trying to protect these individuals from current views on social issues, protections for religious individuals who do not serve the general public and traditional religious entities may be sacrificed.

Significantly, the laws that may be most helpful to religious freedom if they pass are those that seek to redefine “person” in Federal or state RFRA to exclude for-profit entities and government officials.³²⁷ These would protect the core of RFRA in garden-variety cases, and perhaps remind the public that most RFRA claims are not about discrimination or for-profit companies, but rather about protecting religious freedom for individuals and traditional religious entities in contexts that do not interfere with others’ civil or political rights.³²⁸

There has also been proposed legislation since *Hobby Lobby* that could be destructive to religious freedom generally. Most notably, a California regulation that denies religious exemptions even to traditional religious entities.³²⁹ These are countered by legislation in still other states attempting to widen RFRA protection for a wider array of entities, but these latter bills have received much negative media attention and are only likely to be successful in states where social conservatives have strong control.³³⁰ Yet, the national trend, fueled by *Hobby Lobby*, of characterizing religious exemptions in a negative way seems to have more momentum at this point.³³¹

One final trend in a number of states involves a potential conflict that has arisen since *Hobby Lobby* between state mandatory contraceptive coverage laws and state RFRA (or state constitutional interpretations that follow pre-*Smith* legal approaches).³³² Most of these state mandatory contraception coverage laws have exemptions

327. See, e.g., Protect Women’s Health From Corporate Interference Act, H.R. 5051, 113th Cong. (2014) (introduced in the House); Protect Women’s Health From Corporate Interference Act, S. 2578, 113th Cong. (2014) (placed on the Senate calendar).

328. *Supra* note 327.

329. See *supra* note 276.

330. See *supra* note 278 and accompanying text.

331. See *supra* notes 275–321 and accompanying text.

332. Dowling, *supra* note 277.

for traditional religious entities.³³³ Since *Hobby Lobby*, there has been concern in some states that for-profit entities may be exempted.³³⁴ Connecticut is an example of a state where some have questioned this issue.³³⁵ The movement seems to be toward making it clear that for-profit entities are not exempt from these contraceptive coverage laws.³³⁶

As the situation in Michigan and the other states addressed above demonstrate, public perception of religious freedom is changing. When RFRA was passed more than twenty years ago, it was supported by a wide range of civil liberties, civil rights, and religious groups.³³⁷ Today, many of these same groups have shifted their positions and oppose RFRA legislation.³³⁸ The *raison d'être* for this shift is the impact religious freedom claims can have on innocent third parties.³³⁹ This concern is obvious when for-profit businesses are protected by RFRA.³⁴⁰

RFRA was once widely seen as landmark legislation protecting the religious freedom of those who are not considered in the legislative process.³⁴¹ Now it is seen as a threat to women, members of the LGBT community, and others who may be harmed if certain religious beliefs are accommodated.³⁴² When homeowners rented a room and discriminated against LGBT individuals it made

333. ARIZ. REV. STAT. ANN. § 20-826(Z) (2010 & Supp. 2015); CONN. GEN. STAT. § 38a-530e (2012); MO. REV. STAT. § 376.1199.4 (2012) (held preempted by the Federal ACA in *Mo. Ins. Coal. v. Huff*, 947 F. Supp. 2d 1014, 1020 (E.D. Mo. 2013)); N.J. STAT. ANN. § 17B:26-2.1y (West 2006); N.M. STAT. ANN. § 59A-46-44(c) (2001); R.I. GEN. LAWS § 27-18-57 (2008).

334. This concern has received a good deal of attention in Connecticut. Dowling, *supra* note 277.

335. *Id.*

336. *See supra* notes 277–278.

337. NUSSBAUM, *supra* note 12, at 157–58, 160–61; Idleman, *supra* note 10, at 248; J. Thomas Sullivan, *Requiem for RFRA: A Philosophical and Political Response*, 20 U. ARK. LITTLE ROCK L.J. 295 (1998).

338. Garfield, *supra* note 226.

339. *See supra* note 281; Corbin, *supra* note 5, at 1481–82.

340. *See supra* notes 304–307 and accompanying text.

341. Idleman, *supra* note 10, at 248–51.

342. *See supra* note 278 and accompanying text; Mary Anne Case, *Why “Live-and-Let-Live” Is Not a Viable Solution to the Difficult Problems of Religious Accommodation in the Age of Sexual Civil Rights*, 88 SO. CAL. L. REV. 463 (2015); Oleske, *supra* note 120.

headlines,³⁴³ but we still spoke in terms of that individual's religious freedom balanced against the state interest in prohibiting discrimination. The homeowner might have won or lost in court depending on how the court viewed the weighing of those interests. Today, however, larger corporate landlords may try to discriminate citing *Hobby Lobby*. Whether they win or lose their cases, however, each such case will further alienate the public from the concept of religious freedom.

In a debate about *Hobby Lobby* several months before the case was decided, I argued that if *Hobby Lobby* wins, within five years there will be a significant increase in the backlash against religious freedom and that religious freedom would be eroded through the more-is-less phenomenon, legislative activity, public perception, and a failure to distinguish between traditional religious entities and for-profit entities. It seems I was naive in thinking it would take five years for the decline in the perception of religious freedom to gain significant support from the *Hobby Lobby* decision. At the time of this writing, it has been about a year since *Hobby Lobby* was decided and *Hobby Lobby* has given significant PR support to those opposed to religious freedom.

As Douglas Laycock has explained, both sides in the Culture Wars have dug in their heels, and co-existence of religious freedom and personal freedom is less the goal of either side:

There is no apparent prospect of either side agreeing to live and let live. Each side respects the liberties of the other *only* when it lacks the votes to impose its own views. Each side is intolerant of the other; each side wants a total win. The mutual insistence on total wins is very bad for religious liberty. The religious side persists in trying to regulate other people's sex lives and relationships so long as it thinks it has a chance of success. That motivates much of the other side's hostility to religious liberty. And those on the other side persist in demanding not only the right to live their own lives by their own values, but also the right to force religious objectors

343. See, e.g., Mike McKinnon, *Calls to End Gay Renter Discrimination*, GLOBAL NEWS (Mar. 28, 2014, 7:54 PM), <http://globalnews.ca/news/1238128/calls-to-end-gay-renter-discrimination/>.

to assist them in doing so. And to that end, they are making arguments calculated to destroy religious liberty.³⁴⁴

In the long run, *Hobby Lobby* will add much weight to the political arguments on one side of the debate, and that side is not the one concerned about religious freedom. Failure to compromise in the public sphere when society is quickly changing in ways that go against what you believe, which may be important for some faiths or some people of faith, may be a victory of faith over modernity, but it is a sure way to lose in court and the court of public opinion over time.

IV. *HOBBY LOBBY* WAS WRONGLY DECIDED

Justice Ginsburg's dissent in *Hobby Lobby* responds to some of the majority opinion's distortions of precedent and statutory meaning.³⁴⁵ Specifically, Justice Ginsburg addressed: 1. The majority's odd claim that RLUIPA somehow amended both the definition of who is protected under RFRA and the breadth of RFRA;³⁴⁶ 2. The majority's failure to adequately address pre-*Smith* precedent holding religious accommodations should not generally be given when doing so will result in harm to third persons;³⁴⁷ 3. The majority's failure to adequately address the substantial burden question;³⁴⁸ 4. The majority's failure to address the nature of the government's compelling interest in order to better consider what means would be narrowly tailored to serve that interest;³⁴⁹ and 5. The majority's novel implication that government can be made to pay the cost for religious exemptions if doing so would be narrowly tailored to meet the government's compelling interest.³⁵⁰

Instead of regurgitating the dissenting opinion, I will address each of these points where appropriate. There are, however, other problems with the majority opinion, and this section will focus

344. *Id.* at 879–80; Laycock, *supra* note 10, at 879.

345. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2787 (2014) (Ginsburg, J., dissenting).

346. *Id.* at 2792.

347. *Id.* at 2801–04.

348. *Id.* at 2797–99.

349. *Id.* at 2799–801.

350. *Id.* at 2802–03.

heavily on those. This section will also address an important point made by the majority that Justice Ginsburg's dissent perhaps does not take seriously enough, namely, the nature of lived religion and concerns about facilitating evil,³⁵¹ or what Doug NeJaime and Reva Siegel have called "complicity" claims.³⁵² Interestingly, while the majority is to be commended for raising these issues, it fails utterly to address what relationship these concepts should have to government action, nor does it seriously balance these concepts against competing concerns.

By addressing the nature of lived religion, the majority addresses something that few courts have considered. It is easy for people who do not experience lived religion to misunderstand, or be unable to empathize with, those who do.³⁵³ While the *Hobby Lobby* Court's substantial burden analysis is a mess, the Court makes a valiant effort to explain that for people like the Greens and the Hahns religion is a fundamental aspect of being that is inseparable from other parts of their lives.³⁵⁴ It is not something one only does when one goes to church, synagogue, mosque, or temple.

Those in the secular world often scoff at this, but such scoffing is unfair, disrespectful, and sad in a pluralistic society. In fact, it is sometimes the very secular progressives who scoff at lived religion that should most understand it. After all, most progressives' values are not just something they have when they go to rallies. Rather, these values are often lived every day and in every interaction with others.

As a person who lives religion, but shares a number of values with progressives such as support for marriage equality and reproductive rights, I view these life experiences as both embedded in who I am. The best way to address these views (even internally) is through a sort of dialogue. All too often, the main dialogue between those with lived religion and those with values that make lived religion hard to understand, is one filled with caricatures and strawmen.

351. *Id.* at 2764–68, 2775–77 (majority opinion).

352. *See* NeJaime & Siegel, *supra* note 10.

353. *See* HUNTER, *supra* note 22 and accompanying text.

354. *Hobby Lobby*, 134 S. Ct. at 2764–68.

The Court, ironically, captures lived religion well, but then utterly fails to grasp the value of reproductive rights that can be just as central to people's lives as lived religion can be.³⁵⁵ In doing so, it pre-sets the outcome without ever addressing how lived religion can be balanced against other central rights and values. This failure was the loss of a golden opportunity for the Court to address an issue simmering at the heart of freedom of religion claims that affect the rights of others. Of course, this failure might be a result of the fact that any serious analysis of this question based on precedent would be likely to result in the claimants losing, since the rights that would be affected are the rights of employees who do not necessarily share the for-profit business owners' religious faith.³⁵⁶

The supposed ease of less restrictive means that the majority relies on to skirt this question does not cure this deficiency in the opinion. First, as Justice Ginsburg explains in dissent, there is precedent stating that religious accommodations should not be granted, even to individuals, when the rights of others would be negatively affected.³⁵⁷ As explained in Part I and below, nothing in RLUIPA makes this precedent irrelevant to RFRA claims. After *Hobby Lobby* the HHS implemented the same accommodation for for-profit entities that was already in place for religious non-profits. Significantly this does not mean employees of for-profit entities with religious objections to contraceptive coverage are protected in the long-run because a new President or Secretary of Health and Human Services could reject this option either due to the cost of implementation or substantive disagreement with the accommodation.

Moreover, the current accommodation is being challenged in the United States Supreme Court by religious non-profits because it requires the entities to certify that they oppose contraceptive coverage which sets the accommodation in motion resulting in contraceptive coverage. The religious non-profits challenging the accommodation argue that the certification requirement makes them complicit in the ultimate prescribing and distributing of the

355. *Id.* at 2787–90, 2800–03 (Ginsburg, J., dissenting).

356. *Id.* at 2799–2803.

357. *Id.* at 2801–04; *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985).

contraceptives they oppose on religious grounds.³⁵⁸ Of course, in *Hobby Lobby* the Court equated nonprofits with for-profits,³⁵⁹ so if the current challenge before the United States Supreme Court to the accommodation is successful, for-profit entities might also challenge the accommodation, alleging the requirement that they self-certify makes them complicit in something that imposes a substantial burden on their religion.

Thus, the Court sets forth accommodations that may not be politically or financially feasible in the long run or which may violate RFRA under the Court's approach, and then suggests these hypothetical solutions mean the employees' harm would be "precisely zero."³⁶⁰ This does not balance the importance of lived religion to the Greens and Hahns with the rights of female employees. It is a potential imposition of the Greens' and Hahns' lived religion on their female employees,³⁶¹ with the hypothetical hope of a government-funded solution if all else fails. Sadly, it is an imposition made without adequately addressing the underlying tension between the accommodation of lived religion and the negative impact such accommodations can on rare occasions have on the rights of others.

Second, the government-payer option the Court suggests is unprecedented because, despite the Court's protestations otherwise, the least restrictive means analysis opens up the possibility that the government could be required to foot the bill for remedying the negative effect of religious accommodations on third parties.³⁶² Government funding is a means that could be argued as an alternative in many cases and certainly in cases involving contraceptive care.³⁶³ The government funding option becomes a license for closely held companies with religious objections to deny benefits to employees so long as a court finds government can fund the benefits,³⁶⁴ and therefore the harm is "precisely zero."³⁶⁵

358. *See supra* note 30.

359. *Hobby Lobby*, 134 S. Ct. at 2768–69.

360. *Id.* at 2760.

361. *Id.* (Ginsburg, J., dissenting); Corbin, *supra* note 5, at 1481.

362. *Hobby Lobby*, 134 S. Ct. at 2801–03 (Ginsburg, J., dissenting).

363. *Id.* at 2801–02.

364. *Id.*

365. *Id.* at 2760 (majority opinion).

Yet, if as the Court seems to assert, accommodating lived religion can require government financial support we would expect the Court to have more to support this result than its own bare assertion. We might at least expect a broad statement about the value of lived religion being something that government should financially support. Of course, this would raise Establishment Clause questions. Regardless, all we have is the Court's bare assertion. There is nary a citation in support of the proposition that government can be made to directly fund religious accommodations under RFRA or pre-*Smith* law.³⁶⁶

Third, while the Court minimized the burden on third-party rights under the facts in *Hobby Lobby*, the decision is not so limited.³⁶⁷ Every time government creates a substantial burden on someone's religion, even if government has a compelling interest in protecting the rights of third parties, there may always be a government-funded solution so long as the courts are willing to find one that is not unduly burdensome.³⁶⁸ Those who question the breadth of the majority opinion on this point should pay particular attention to footnote thirty-seven, which suggests that the majority may have no problem with a variety of impositions on the rights of third parties in order to accommodate religion.³⁶⁹

Yet, at the core, there is something profound in the majority's recognition of lived religion. Put yourself in the shoes of the Greens and the Hahns. You have lived your life according to a set of values, beliefs, practices, and principles that come from your religion, your heart, your mind, and if you believe in one, your soul. These values, beliefs, and principles are part of who you are. You have built a business and run it consistently with those values to the greatest extent you can. Now the government has come along and told you that you must do something, even indirectly, that would facilitate evil—or if you don't like the word evil—that would harm the world in an irreversible way. This is not just an opinion you have. It is something you know to be true, even if others may disagree. You are not a lawyer or a scholar. All you know is you built this business and

366. *Id.* at 2780–82.

367. *See generally id.* at 2751.

368. *Id.* at 2802 (Ginsburg, J., dissenting).

369. *Id.* at 2781 n.37 (majority opinion).

everyone employed there has benefitted from that. Surely you have benefitted too, but you have done a lot to use those benefits to support your values and beliefs. If you don't do what the government wants you will face fines that could put you out of business or require you to lay off workers.

This is how the Greens and Hahns experienced the HHS Mandate. It was not just a legal duty for them. It was an imposition of a requirement that they aid—in their minds—in the killing of an innocent being. From their perspective whether they were directly or indirectly aiding in the killing, they were complicit nonetheless.³⁷⁰

None of this means they should win the case, but it does mean that it would have been a mistake for the Court to have unflinchingly followed Justice Ginsburg's approach. Just as the majority undervalues the impact on female employees of its imposed accommodation, Justice Ginsburg underestimates the nature of lived religion for the Greens and Hahns. In the end, however, Justice Ginsburg's legal analysis is vastly better than the majority's because it is far more consistent with prior precedent, does not play games with the impact RLUIPA had on RFRA, addresses—even if it inadequately values lived religion in doing so—the relationship between religious freedom claims and impacts on third parties, and, of course, does not buy into the incredible proposition that government could pay for wide-ranging religious accommodations regardless of whether government is ever likely to enact or fund such accommodations.

The *Hobby Lobby* Court's disregard of precedent and creation of new doctrines does not stop there. As explained in Part I, and in Justice Ginsburg's dissent, the majority opinion claims that RLUIPA somehow amended the substance of RFRA by no longer connecting RFRA with pre-*Smith* law.³⁷¹ This is not what RLUIPA did.³⁷² Unless the *Hobby Lobby* Court has created a new concept of statutory interpretation where a subsequent statute can silently amend a prior statute on matters specifically spelled out in the prior statute, while disregarding other far more likely ways in which the language in the

370. Cf. NeJaime & Siegel, *supra* note 10 (addressing complicity based claims for religious exemption).

371. *Hobby Lobby*, 134 S. Ct. at 2761–62.

372. *Id.* at 2792 (Ginsburg, J., dissenting).

later statute could affect the earlier statute, the majority's error regarding the relationship of RLUIPA and RFRA seems inescapable.

This is important because the majority's reasoning suggests that pre-*Smith* law does not govern interpretation under RFRA. Maybe the Court engaged in this odd exercise because there is a pre-*Smith* decision that seems to specifically address the question of for-profit entities. In that decision the Court held for-profit entities are bound to follow regulations binding on all for-profits even where a for-profit has a religious objection to doing so. In *United States v. Lee*, the Court held:

Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees.³⁷³

It doesn't get much more direct than that. The majority misstates the holding from this highly relevant precedent and pays it short shrift by suggesting *Lee* is relevant only when broad taxes like social security are involved.³⁷⁴ The *Lee* case was indeed about a religious exemption from social security taxes, but the above quoted excerpt from the holding is not so limited.³⁷⁵

Aside from the obvious suggestion that for-profit companies were not covered under the Free Exercise Clause prior to *Smith*—and therefore are not covered under RFRA, at least in cases involving government programs³⁷⁶—*Lee* teaches us another lesson. After *Lee*, Congress, which had already exempted individual Amish from paying Social Security taxes because of the Amish communities' demonstrated commitment to social welfare for community members, created an exemption to social security taxes for Amish

373. 455 U.S. 252, 261 (1982).

374. *Hobby Lobby*, 134 S. Ct. at 2783.

375. *Lee*, 455 U.S. at 261.

376. *Id.*

businesses that primarily employ Amish employees.³⁷⁷ If Congress wanted for-profit businesses to be protected by RFRA, legislation explicitly stating this would be a better way to achieve this than imposition by the Court.

One final note. There is something else missing in the majority's analysis. The Court does not engage in the "private choice" analysis it has relied on in so many cases in recent years.³⁷⁸ Private-choice analysis means that state action can be cut off when the choices of third parties are said to intervene.³⁷⁹ This type of analysis has most commonly been used under the Establishment Clause.³⁸⁰

For example, the Court has held that if government creates a program that ends up funneling large amounts of money to predominantly religious schools there is no violation of the Establishment Clause so long as the decision to send the students to those schools was the private choice of the parents.³⁸¹ This choice is said to cut off the state action.³⁸² In other words, it cuts off the causal chain between the initial state action of funding the program and the end result that 94.6% of that funding ended up going to religious schools representing only one or two denominations.³⁸³

I think this private-choice analysis is misguided,³⁸⁴ but it is mystifying that the Court failed to address it in *Hobby Lobby*. Clearly, any money that flows from the employers in *Hobby Lobby* as a result of the government program does so only as a result of a multitude of private choices by employees. A female employee would have to choose in consultation with her doctor to use one of the alleged abortifacients out of the many possible means of birth control, actually use the abortifacient, and pay for it using her insurance. Under the Court's private choice approach, this would cut off any

377. Exemption Act of 1988, 26 U.S.C. §3127 (2012).

378. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (applying private-choice analysis to voucher program challenged under the Establishment Clause); Corbin, *supra* note 5 (raising the private-choice argument in the context of the HHS mandate).

379. *Zelman*, 536 U.S. 639.

380. Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 GA. L. REV. 489 (2004).

381. *Zelman*, 536 U.S. 639.

382. *Id.*

383. *Id.*

384. RAVITCH, *supra* note 167; Ravitch, *supra* note 380.

connection between the government's HHS requirement and the harm imposed on the complainants. Moreover, to the extent it would be relevant, a similar analysis could be used to cut off the connection between the employers' provision of insurance plans and the ultimate use of those plans by employees for a particular treatment. Given the other problems with the *Hobby Lobby* opinion mentioned above, the Court's failure to address the private choice doctrine seems odd.

A simple response to this line of reasoning is that the private-choice analysis does not apply in this context because the concern is whether the employer itself is facilitating evil, not whether the private choice cuts off the government's involvement. Yet, according to the Court private choice can cut a causal chain,³⁸⁵ and thus it may cut the *legal* causal chain from the employer to the use of the contraceptives.³⁸⁶ This may be little solace to the employer who does not find such formalistic distinctions to be an accurate description of reality. After all, the government is demanding that they provide a benefit that makes them complicit in what they view as a sin. Thus, the employer believes it is facilitating evil despite the legal line.³⁸⁷ Of course, the point here is not that the employer would be wrong in this context. Rather, the private-choice analysis used in cases like *Zelman v. Simmons-Harris* could be abandoned.³⁸⁸ Until it is, however, it seems odd that the *Hobby Lobby* Court did not address this line of analysis, which seems especially relevant in the context of a claim that the provision of a benefit that is only used through the private decisions of employees is somehow attributable to the employer. The Court's failure to address this is odd indeed, but it is only one of the many oddities in the Court's *Hobby Lobby* reasoning.

CONCLUSION

The *Hobby Lobby* decision has galvanized people on all sides of the culture wars. When the dust settles, the impact of *Hobby Lobby* will most likely be a reduction in free exercise protection for

385. *Zelman*, 536 U.S. at 639.

386. Corbin, *supra* note 5.

387. Laycock, *supra* note 10.

388. Ravitch, *supra* note 380 (recommending that the *Zelman* private-choice approach, or at least its claim to neutrality, be abandoned).

individuals and traditional religious entities. The Federal RFRA, state RFRA and RLUIPA are likely to be interpreted less broadly as for-profit entities bring cases that set precedent under those statutes. Moreover, public support for RFRA will continue to wane.

Over time it will be the bread-and-butter religious freedom plaintiffs that will pay the price for *Hobby Lobby*—religious students seeking exemptions to school rules that harm their religious practice; prisoners who need Kosher or Halal food; Native Americans whose religious freedom is threatened by the application of a law for which an exemption could easily be made; adult Jehovah’s Witnesses who do not want blood transfusions; or churches seeking to use their facilities to feed the poor based on their religious calling to do so.

We have repeatedly witnessed the more-is-less phenomenon in civil rights and civil liberties cases. There is no reason to expect RFRA to buck this trend, especially since the public is quickly tiring of those who seek religious accommodation that could directly and negatively affect third parties, and is increasingly viewing religious freedom as synonymous with a license to discriminate. In responding to public pressure and social change legislators and judges may not always distinguish between traditional religious freedom claims and those of for-profit entities.

