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Mark Satta

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Political Partisanship and Sincere Religious Conviction

Mark Satta*

*In order for a religious conviction to receive protection under the First Amendment or the Religious Freedom Restoration Act (RFRA), it must be a sincere religious conviction. Some critics of the Supreme Court’s ruling in *Burwell v. Hobby Lobby* have suggested that the plaintiffs in that case and in related cases were motivated more by political ideology than by sincere religious conviction. The remedy, they argue, is for courts to be quicker to scrutinize claims of religious sincerity. In this Article, I consider another possibility—namely, that current sociopolitical partisanship in the United States has eroded a clear distinction between political ideology and religious conviction for plaintiffs in cases like *Hobby Lobby*. If this theory is correct, it is far less obvious what the proper remedy is. I consider and reject the view that newly formed religious convictions with political origins should be treated as less than sincere on those grounds. However, I do argue that whether a religious conviction seems to have been newly generated by political circumstances should be taken into account when deciding religious free exercise cases. I suggest that this could best be accounted for if the courts adopted a balanced interests approach instead of the winner-takes-all “checklist” approaches that have developed under *Employment Division v. Smith* and RFRA.*

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* Assistant Professor of Philosophy, Wayne State University. My thanks to Brock Mason and Ashlee Burton for their insightful editorial suggestions. Thanks also to the editorial team at *Brigham Young University Law Review* and to Brad Roth, Rachel Kroll, and Mary Ann Glendon for feedback on earlier versions of this article.

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INTRODUCTION

In order for a religious conviction to receive protection under the First Amendment or the Religious Freedom Restoration Act (RFRA), it must be a sincere religious conviction.¹ Some critics of the Supreme Court's ruling in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), have identified inconsistencies in the behavior of the Green family, who own Hobby Lobby, and other plaintiffs who brought lawsuits against the Affordable Care Act's contraception coverage requirement. These critics use these inconsistencies to argue that the Greens and other plaintiffs were motivated not by sincere religious convictions, but by political ideology. Here I consider a different explanation: sociopolitical partisanship in the United States has eroded a clear distinction between religious

1. See, e.g., *United States v. Seeger*, 380 U.S. 163, 185 (1965) (holding that in free exercise cases "while the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case."); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 717 n.28 (2014) ("To qualify for RFRA's protection, an asserted belief must be 'sincere'; a corporation's pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail."). Throughout this article, I use the terms "belief" and "conviction" interchangeably.

convictions and political ideology for many individuals, including the plaintiffs in *Hobby Lobby*.

If my explanation is correct, the issue is far more complicated than the critics' suggestion that political ideology rather than religious conviction motivated the lawsuits. When claims to sincere religious conviction are just a smokescreen for ideologically motivated lawsuits, the proper remedy is to scrutinize claims of religious sincerity. But if the line between political ideology and sincere religious conviction has all but disappeared for large segments of the population, it is less clear what the appropriate response is. Yet, as I will argue, this is the situation we find ourselves in, so we must determine how to respond.

In Part II, I provide a brief overview of *Burwell v. Hobby Lobby*. In Part III, I present the arguments that the Greens and others were motivated not by sincere religious conviction, but by political ideology. In Parts IV and V, I offer an alternative explanation of such inconsistent behavior—namely, that the Greens' and others' religious convictions have morphed over time as a result of political partisanship and the United States' highly combative sociopolitical environment. Part IV focuses on sociopolitical partisanship in the United States. Part V focuses on how partisanship appears to have shaped the Greens' worldview. I conclude Part V by offering reasons to think that partisan-motivated religious conviction has motivated litigants in other religious freedom lawsuits. This is especially true among plaintiffs who are white Americans with a strong partisan mega-identity as both a Christian and a Republican. For many such persons, so long as this identity remains intact and so long as negative partisanship remains high, their religious convictions are likely to develop alongside politics in a way that consistently puts them at odds with the political efforts of those perceived to be in their outgroup. The reason this is particularly acute for white Christian Republicans is not due to inherent features of being white, a Christian, or a Republican. Rather, it is for the contingent reason that one of the two dominant sociopolitical identities in the United States is one in which white (conservative) Christianity and Republicanism are closely linked.

In Part VI, I argue that even newly formed religious convictions with political origins should be treated as sincere religious convictions. That said, I argue that these features of a religious conviction should factor into the adjudication of free exercise claims through a factual assessment of how central the religious conviction is

for the relevant religious adherents. I argue that this could best be done if courts adopted a balanced interests approach to free exercise cases, rather than what I call the “checklist” approach that currently dominates the Court’s free exercise jurisprudence.

I. *BURWELL V. HOBBY LOBBY*

In 2010, Congress enacted and President Obama signed into law the Patient Protection and Affordable Care Act, known colloquially as the Affordable Care Act (ACA) or “Obamacare.”² Among the ACA’s provisions was a requirement that certain employers include in their health insurance plans “preventive care and screenings” for women without “any cost sharing requirements.”³ The ACA delegated authority to the Health Resources and Services Administration (HRSA) to create the guidelines for what must be covered under this requirement.⁴ The U.S. Department of Health and Human Services (HHS), of which HRSA is a component, included all forms of FDA-approved contraception as part of the coverage required by the relevant ACA provision.⁵ In its decision, the Supreme Court referred to this coverage requirement as the “contraceptive mandate” and the “HHS mandate.”⁶ HHS exempted “religious employers,” such as houses of worship, from the coverage requirement, and later added accommodations to exempt other nonprofit organizations with religious objections to the mandate.⁷ Religious employers received the exemption automatically, while other eligible nonprofits would receive the exemption if they notified their insurance provider or third-party administrator in writing of their religious objection.⁸ No exemptions were offered to for-profit corporations.

Numerous for-profit corporations filed suit, arguing that the contraceptive mandate violated their religious freedom rights

2. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in 26 U.S.C. and 42 U.S.C.).

3. 42 U.S.C. § 300gg-13(a)(4).

4. *Id.*

5. 76 Fed. Reg. 46,621 (Aug. 3, 2011).

6. *Hobby Lobby*, 573 U.S. at 692, 698. The primary dissent referred to this requirement as the “contraceptive coverage requirement.” *Id.* at 745 (Ginsburg, J., dissenting).

7. *Hobby Lobby*, 573 U.S. at 698 (majority opinion); 77 Fed. Reg. 8725 (Feb. 15, 2012); 78 Fed. Reg. 39,870 (July 2, 2013).

8. *Hobby Lobby*, 573 U.S. at 698; 77 Fed. Reg. 8725 (Feb. 15, 2012); 78 Fed. Reg. 39,870 (July 2, 2013).

under the First Amendment and the Religious Freedom Restoration Act.⁹ The suit that gained the most attention was the one brought by Hobby Lobby Stores, Inc., a chain of retail art-and-craft supplies stores owned by the Green family.¹⁰

The Green family objected to covering in their company health insurance plans four of the twenty FDA-approved forms of contraception: two types of emergency contraception (known by the brand names Plan B and Ella) and two types of intrauterine devices (IUDs).¹¹ The reason the Greens objected to those forms of contraception and not the others is because the Greens believe that those forms of contraception can be used to prevent a fertilized egg from attaching to the uterus and believe that preventing a fertilized egg from attaching to the uterus is a type of abortion, which they oppose on religious grounds.¹²

Hobby Lobby's brief filed with the Supreme Court expresses the Greens' relevant religious convictions as follows: "The Greens believe that human beings deserve protection from the moment of conception, and that providing insurance coverage for items that risk killing an embryo makes them complicit in the practice of abortion."¹³ Their conviction is later restated as the "belief that by providing insurance coverage for contraceptives that could prevent a human embryo from implanting in the uterus, they themselves would be morally complicit in 'the death of [an] embryo.'"¹⁴

Because this article examines the grounds and motivations for the Greens' purported religious convictions, it is worth reflecting on how their religious convictions are presented. The Greens' general position for seeking to avoid providing health insurance coverage for emergency contraception and IUDs consists of several more fine-grained beliefs, including the following:

- (i) Abortion is morally wrong.

9. See, e.g., *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012); *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394 (E.D. Penn. 2013); *Autocam Corp. v. Sebelius*, 730 F.3d 618 (6th Cir. 2013); *Eden Foods, Inc. v. Sebelius*, 733 F.3d 626 (6th Cir. 2013); *Gilardi v. U.S. Dep't of Health and Hum. Servs.*, 733 F.3d 1208 (D.C. Cir. 2013); *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013).

10. See generally *Hobby Lobby*, 870 F. Supp. 2d 1278.

11. Brief for Respondent at 3, *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (2013) (No. 13-354).

12. *Id.*

13. *Id.*

14. *Id.* at 11 (alteration in original).

- (ii) Preventing a human embryo from implanting in the uterus is a type of abortion.
- (iii) Certain types of contraception (Plan B, Ella, and IUDs) can be used to prevent a human embryo from implanting in a uterus.
- (iv) Providing health insurance for items that could be used to prevent a human embryo from implanting in a uterus makes one morally complicit in the practice of preventing human embryos from implanting in uteruses.¹⁵

Beliefs (i)–(iv) above provide a line of reasoning that leads the Greens to conclude they would be morally complicit in something morally wrong if they were to cover emergency contraception and IUDs in their employees' health insurance plan.¹⁶ This line of reasoning requires that every step be accepted in order for the objection to providing the contraceptives to follow logically.¹⁷

The premises in the line of reasoning are of different types, which is significant because these different types of claims are apt to be defended with different kinds of evidence or reasoning. Belief (i) is a moral claim. Belief (ii) is an analytical claim about the definition of abortion, but it is a definition that comes with moral implications given belief (i). Belief (iii) is an empirical claim about how emergency contraception and IUDs actually work. Belief (iv) is also a moral claim, but of a more complex form than belief (i).

15. A similar line of reasoning seems to have motivated the objections of the Hahn family, the owners of Conestoga Wood Specialties Corp., whose case was consolidated with Hobby Lobby's. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 700–02 (2014).

16. In general, I write about the beliefs and convictions of the Green family, rather than those of Hobby Lobby. This is in keeping with the Court's understanding of why it sided with Hobby Lobby in *Burwell v. Hobby Lobby*. In the majority opinion, Justice Samuel Alito writes:

As we will show, Congress provided protection for people like the Hahns and Greens by employing a familiar legal fiction: It included corporations within RFRA's definition of "persons." But it is important to keep in mind that the purpose of this fiction is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends. . . . When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.

Id. at 706–07.

17. The logical form of the reasoning laid out in beliefs (i)–(iv) above is something like this: (i) A is morally wrong. (ii) B is a type of A. (iii) C is a type of B. [Implicit premise: therefore, C is morally wrong.] (iv) If one does D, then one is morally complicit in C. [Tacit premise: it is wrong to be complicit in that which is morally wrong]. Conclusion: It is wrong to do D.

Belief (i) is a claim about a moral wrong. Belief (iv) is a relational claim, whereby one action, X, is linked to another action, Y, in such a way that X becomes morally wrong by virtue of Y being morally wrong.

In their brief, the Greens appealed to evidence of their general commitment to their Christian values as an indication of their sincere religious objection to including emergency contraception and IUDs as part of their employees' health care plan. The brief notes, among other things, that Hobby Lobby's official statement of purpose contains a commitment to "[h]onoring the Lord in all we do by operating the company in a manner consistent with Biblical principles," that the Greens close their stores on Sundays for religious reasons despite their estimates of substantial annual financial loss, that each year the Greens buy "hundreds of full-page newspaper ads inviting people to 'know Jesus as Lord and Savior,'" and that the Greens "avoid promoting alcohol" even when such avoidance may result in lost profits.¹⁸

The question of the sincerity of the Greens' religious beliefs did not play a substantial role in the litigation between Hobby Lobby and the federal government. This is because the federal government did not challenge the sincerity of the Greens' belief.¹⁹ The Court sided with Hobby Lobby in a 5-4 decision, holding that the contraceptive mandate violated the Religious Freedom Restoration Act and that as such there was no need to address the Greens' First Amendment claim.²⁰

II. CHARGES OF INSINCERITY IN *HOBBY LOBBY*

Some critics of the decision in *Hobby Lobby* suggested that the government erred by failing to challenge the sincerity of the Greens' religious beliefs given the circumstances. In this Part, I recount the reasoning put forward by those critics.

Most challenges to the Green family's sincerity in *Hobby Lobby* have centered on three facts. First, prior to filing suit challenging the contraceptive mandate, Hobby Lobby's health insurance plans covered both forms of emergency contraception (Plan B and Ella) that the Greens claimed to have a religious objection to covering in

18. Brief for Respondent, *supra* note 11, at 2-3.

19. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 717, 720 (2014).

20. *Id.* at 736.

their health insurance plans.²¹ Second, even after filing their lawsuit, Hobby Lobby's retirement plan—which received employer matched funds—contained mutual funds that invested in companies producing emergency contraception and IUDs.²² Third, many experts challenged the Greens' empirical beliefs about how emergency contraception and IUDs work to prevent pregnancy.²³

Professor Nadia N. Sawicki identified these first two facts as “activities that seemingly run afoul” of Hobby Lobby's assertion that “it ha[s] a sincere religious belief that life begins at conception, and that this belief prohibited it from facilitating access to contraceptives that operate after that point.”²⁴ Sawicki argued that

[w]hile these facts were not raised before the courts hearing Hobby Lobby's RFRA claims, First Amendment precedent suggests that they would be relevant to a judgment about the sincerity of Hobby Lobby's religious beliefs. Surely a company that believes life begins at conception would have more difficulty demonstrating the sincerity of its beliefs when some of its conduct supports activities that are in direct opposition to this stated belief.²⁵

Similarly, journalist Stephanie Mencimer wrote that

[t]he company admits in its complaint that until it considered filing the suit in 2012, its generous health insurance plan actually covered Plan B and Ella (though not IUDs). The burden of this coverage was apparently so insignificant that God, and Hobby

21. See Brief for Respondent, *supra* note 11, at 3–4.

22. See generally Molly Redden, *Hobby Lobby's Hypocrisy: The Company's Retirement Plan Invests in Contraception Manufacturers*, MOTHER JONES (Apr. 1, 2014), <https://www.motherjones.com/politics/2014/04/hobby-lobby-retirement-plan-invested-emergency-contraception-and-abortion-drug-makers/>.

23. See, e.g., Brief for the Physicians for Reproductive Health et al. as Amicus Curiae at 1, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (No. 354) [hereinafter Brief for the Physicians] (“Amici curiae are physicians and other health care professionals with expertise in women's health, including reproductive health and contraception, with the common goals of disseminating current medical and scientific data concerning the method of action of various contraceptives that are frequently mischaracterized as abortifacients and ensuring that the scientific distinction between contraceptives and abortifacients be recognized and preserved in judicial decisions on the issue.”); Pam Belluck, *Abortion Qualms on Morning-After Pill May Be Unfounded*, N.Y. TIMES (June 2, 2012), <https://www.nytimes.com/2012/06/06/health/research/morning-after-pills-dont-block-implantation-science-suggests.html>.

24. Nadia N. Sawicki, *Sincerity and Religious Belief in Hobby Lobby*, BILL OF HEALTH (July 1, 2014), <https://blog.petrieflom.law.harvard.edu/2014/07/01/sincerity-and-religious-belief-in-hobby-lobby/>.

25. *Id.*

Lobby executives, never noticed it until the mandate became a political issue.²⁶

Here Mencimer identifies a factor that other critics do as well—namely, the political circumstances under which the Greens objected to providing contraceptive coverage. Mencimer also reported that Gretchen Borchelt, senior counsel and director of state reproductive health policy at the National Women’s Law Center, said of Hobby Lobby’s previous coverage of emergency contraception that it was “evidence that these cases are part of a broader effort to undermine the Affordable Care Act, and push new legal theories that could result in businesses being allowed to break the law and harm others under the guise of religious freedom.”²⁷

Some amicus curiae in *Hobby Lobby* also suggested that political conditions were salient to the way in which the Green family’s objections to contraceptive coverage had developed. For example, the amicus brief for Physicians for Reproductive Health et al. states that the amici “are cognizant that the public discourse on contraception generally, and emergency contraception in particular, is infused with misleading or charged rhetoric stemming from political or religious views.”²⁸

In an op-ed written shortly after the Court announced its decision in *Hobby Lobby*, columnist Michael Hiltzik also raised worries about the sincerity of the Greens’ religious beliefs:

If the only requisite for an exemption from this important mandate is a religious claim, why should it not be subject to challenge? Otherwise, how do we limit the exemption only to those with genuinely religious scruples? . . .

. . . .

Shouldn’t the courts, at the very least, determine if a family-owned company follows its religious precepts consistently?²⁹

Citing Hobby Lobby’s financing of mutual funds invested in companies producing emergency contraception and IUDs, Hiltzik

26. Stephanie Mencimer, *Are You There God? It’s Me, Hobby Lobby*, MOTHER JONES (Mar. 21, 2014), <https://www.motherjones.com/politics/2014/03/hobby-lobby-supreme-court-obamacare/>.

27. *Id.*

28. Brief for the Physicians, *supra* note 23, at 1.

29. Michael Hiltzik, *Danger Sign: The Supreme Court Has Already Expanded Hobby Lobby Decision*, L.A. TIMES (July 2, 2014, 12:37 PM), <https://www.latimes.com/business/hiltzik/la-fi-mh-expanded-hobby-lobby-20140702-column.html>.

argued that “Hobby Lobby itself might fail” such a test.³⁰ But Hiltzik did not limit his concern to just Hobby Lobby and the Green family. Hiltzik noted that in light of the Court’s decision in *Hobby Lobby*, the Court also issued orders for six other cases dealing with religious objections by for-profit corporations to the contraceptive mandate.³¹ Hiltzik highlighted the Sixth Circuit case, *Eden Foods, Inc. v. Sebelius*, in which the sole shareholder and CEO of Eden Foods, Michael Potter, claimed religious objections to covering any type of contraception in his employee’s health insurance plan.³²

Potter’s case attracted considerable media attention because, in an interview for *Salon*, Potter stated the following:

I don’t care if the federal government is telling me to buy my employees Jack Daniel’s or birth control. What gives them the right to tell me that I have to do that? That’s my issue, that’s what I object to, and that’s the beginning and end of the story.³³

In that interview, Potter also stated “I’ve got more interest in good quality long underwear than I have in birth control pills.”³⁴ In light of these remarks, the United States Court of Appeals for the Sixth Circuit stated that Potter’s “deeply held religious beliefs” (a phrase which the court put in quotes) “more resembled a laissez-faire, anti-government screed.”³⁵ Yet, after deciding *Hobby Lobby*, the Supreme Court vacated the Sixth Circuit’s judgment against Eden Foods and remanded the case for further consideration in light of the Court’s *Hobby Lobby* ruling.³⁶ Hiltzik offered the following critique of the Supreme Court’s response:

This hint that Potter had merely swaddled an anti-government rant within a “religious” blanket illustrates the main problem with Justice Samuel Alito’s majority opinion in *Hobby Lobby*: it takes claims of religious scruples for granted.

30. *Id.*

31. *Id.*

32. *Id.*; see also *Eden Foods, Inc. v. Sebelius*, 733 F.3d 626 (6th Cir. 2013).

33. Irin Carmon, *Eden Foods Doubles Down in Birth Control Flap*, SALON (Apr. 15, 2013, 11:45 AM), https://www.salon.com/2013/04/15/eden_foods_ceo_digs_himself_deeper_in_birth_control_outrage/ (quoting Michael Potter, Eden Foods CEO).

34. *Id.*

35. *Eden Foods*, 733 F.3d at 629 n.3.

36. *Eden Foods, Inc. v. Burwell*, 134 S. Ct. 2902 (2014).

But how are government agencies or the courts to know when claims of religious piety are just pretexts for some other viewpoint, such as libertarianism or misogyny?³⁷

Here Hiltzik expresses worry that at least some of the lawsuits brought against the contraceptive mandate were motivated by non-religious ideology rather than sincere religious conviction.

Gregory Lipper has offered a more detailed case for concluding that the Green family and others who filed lawsuits against the contraceptive mandate were motivated by political ideology rather than sincere religious convictions.³⁸ Lipper refers to the contraceptive lawsuits as “campaigns of free-exercise litigation seemingly motivated by political ideology rather than sincere religious belief,”³⁹ and states that there were “serious questions about the sincerity of many of the plaintiffs [in the contraceptive mandate lawsuits] – whether their objections were purely political, rather than religious”⁴⁰ Lipper further specifies that he views the challenges to the Affordable Care Act’s contraceptive-coverage regulations as emerging “from broader political, ideological, and religious opposition to the Obama administration and its reform of the healthcare system.”⁴¹

Like other critics, Lipper points to evidence of inconsistency on the part of the Green family and others as evidence that their religious convictions were not sincerely held.⁴² Lipper also suggests that some plaintiffs’ reliance on questionable empirical beliefs

37. Hiltzik, *supra* note 29.

38. See generally Gregory M. Lipper, *The Contraceptive-Coverage Cases and Politicized Free-Exercise Lawsuits*, 2016 U. ILL. L. REV. 1331 (2016) [hereinafter Lipper 2016]; Gregory M. Lipper, *Not Your Father’s Religious Exemptions: The Contraceptive-Coverage Litigation and the Rights of Others*, in *LAW, RELIGION, AND HEALTH IN THE UNITED STATES* (Holly Fernandez Lynch, I. Glenn Cohen & Elizabeth Sepper eds., 2017) [hereinafter Lipper 2017].

39. Lipper 2016, *supra* note 38, at 1331.

40. Lipper 2017, *supra* note 38, at 60. These comments suggest that Lipper sees the contraceptive mandate lawsuits as stemming from political ideology rather than religious conviction. However, in at least one place, Lipper suggests that he may view things more in line with the theory I offer in the next Part of this paper when he writes that “the lawsuits brought by for-profit corporations suggested that opposition to the regulations flowed from ideology as much as religion.” Lipper 2016, *supra* note 38, at 1338 (emphasis added).

41. Lipper 2016, *supra* note 38, at 1333.

42. *Id.* at 1336 (“From the start, many of these free-exercise challenges to the contraceptive-coverage regulations seemed insincere. Many of the for-profit plaintiffs had previously provided the very contraceptive coverage which they all of a sudden claimed to oppose Hobby Lobby, meanwhile, invested and continues to invest its 401(k) plan in companies that manufacture the very drugs and devices to which it purports to object on religious grounds.”)

about how the objected-to forms of contraception work indicate insincerity.⁴³ But this is not all that Lipper thinks indicates possible insincerity and political motivation on the part of the contraceptive mandate plaintiffs. He offers at least four additional considerations: (1) that the religious objectors appealed to “a series of increasingly attenuated claims,”⁴⁴ (2) that the plaintiffs “refused to take yes for an answer,”⁴⁵ (3) that plaintiffs treated similar accommodations differently when they were offered by courts versus when they were offered by the Obama administration,⁴⁶ and (4) that religious and political opposition to the Obama administration had created “a perfect storm of political and legal opposition” to the contraceptive mandate.⁴⁷

Lipper’s suggestion that the plaintiffs’ claims were “attenuated” has roots in arguments offered by the federal government and Justice Ruth Bader Ginsburg’s dissent in *Hobby Lobby*.⁴⁸ According to these arguments, the thing too attenuated is “the connection between the families’ religious objections and the contraceptive coverage requirement.”⁴⁹ But Lipper uses this claim of attenuation differently than the government or the principal dissent. The government and the dissent use the claim of attenuation to argue that the contraceptive coverage requirement failed to constitute a substantial burden on the plaintiff’s religious freedom.⁵⁰ Lipper seems to agree, but also claims that the attenuated nature of the claim—when combined with other considerations—“highlights the possibility that the asserted religious objections are insincere.”⁵¹ Lipper’s general idea seems to be that there is a core religious conviction—namely, that abortion is wrong—but that objection to the provision of a health insurance

43. Lipper 2016, *supra* note 38, at 1337 (“[T]hese plaintiffs purported to object to covering only certain contraceptives—in most cases, emergency contraceptives and the intrauterine device (‘IUD’)—which they claimed were ‘abortifacients,’ because (they said) those forms of contraception prevent the implantation of fertilized eggs. Virtually all modern science, however, refutes the factual premise of the argument”) (citation omitted); *see also* Lipper 2017, *supra* note 38, at 68–70.

44. Lipper 2017, *supra* note 38, at 65.

45. *See* Lipper 2017, *supra* note 38, at 1332; *see also* Lipper 2016, *supra* note 38, at 1338–42.

46. Lipper 2016, *supra* note 38, at 1338–42; *see also* Lipper 2017, *supra* note 38, at 66–68.

47. Lipper 2016, *supra* note 38, at 1334–35.

48. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 723 (2014); *see also id.* at 760 (Ginsburg, J., dissenting).

49. *Hobby Lobby*, 573 U.S. at 760 (Ginsburg, J., dissenting).

50. *See id.* at 723 (majority opinion); *see also id.* at 760 (Ginsburg, J., dissenting).

51. Lipper 2017, *supra* note 38, at 65.

plan in which beneficiaries have *the option* to select contraceptives that *may* be used to prevent pregnancy, *possibly* by stopping prevention of a fertilized egg in the uterus (*despite* claims by medical experts to the contrary), is so far removed from that core conviction that the specific nature of the objection itself becomes potential evidence of insincerity.

Lipper's next two considerations – that plaintiffs “refuse to take yes for an answer” and respond differently to accommodations offered by courts versus the Obama administrations – are interrelated considerations that focus more on the objections of religiously affiliated nonprofits rather than for-profit corporations like Hobby Lobby.⁵² Lipper notes that these nonprofit organizations’ “[c]hallenges to the contraceptive-coverage accommodation brought the politicization of free-exercise cases into even sharper focus.”⁵³ Lipper’s slogan that the plaintiffs “failed to take yes for an answer” stands in for the idea that the accommodations the Obama administration offered to nonprofits with objections to the religious mandate were rejected as insufficient, despite their apparent robustness. Originally, the Obama administration only exempted religious employers from the contraceptive coverage requirement. They later sought to accommodate any nonprofit organization with religious objections to the mandate. All such organizations needed to do to obtain an exemption from providing coverage for objected-to forms of contraception was to complete a form and send it to their insurance provider or third-party administrator.⁵⁴ But many plaintiffs saw this accommodation as insufficient. The Obama administration thus expanded the accommodation by permitting nonprofits to opt-out of the contraceptive coverage requirement by notifying the government of their religious objection.⁵⁵

Lipper’s first argument is that if the lawsuits had been motivated by sincere religious convictions, the plaintiffs would have accepted these accommodations rather than continuing to object.⁵⁶ He views the accommodations offered by the Obama administration as similar to those offered by the Supreme Court. Based on this observation, Lipper claims that “[i]f the plaintiffs

52. Lipper 2016, *supra* note 38, at 1332.

53. *Id.* at 1338.

54. *Id.* at 1339.

55. *Id.* at 1340.

56. *See id.* at 1339–40.

were making genuine efforts to obtain religious accommodations from actual burdens on religious exercise, we would expect the plaintiffs to react similarly to each set of decisions [i.e. those offered by the Obama administration and the Supreme Court]. But that is not what happened.”⁵⁷ From this he concludes that it is “difficult, if not impossible, to believe that these anomalous responses reflected bona fide reactions to good-faith attempts to relieve genuine burdens on religious exercise.”⁵⁸ Based on what Lipper sees as the plaintiffs’ inconsistent responses, depending on who was giving the accommodation, he concludes that such responses suggest that “the objectors and their lawyers were more concerned with scoring political points against the Obama administration” than in alleviating substantial burdens to religious free exercise.⁵⁹

This leads us to Lipper’s final reason for thinking that lawsuits brought against the contraceptive mandate appear to have been “motivated by political ideology rather than sincere religious belief.”⁶⁰ This reason concerns not the circumstances of the lawsuits in particular, but rather the general political and cultural climate during the passage of the ACA and in the years following. Lipper notes that “President Obama has drawn sustained and intense opposition from conservative religious entities” and that “[m]any conservatives have criticized President Obama for being insufficiently Christian, for supposedly waging war on religion generally or Christianity more specifically.”⁶¹ Lipper also notes that there has been “ongoing conservative opposition to the Affordable Care Act” and that such “[o]pposition seems to be nakedly partisan.”⁶² Lipper also identifies various ways in which conservatives have turned to litigation as a way of challenging the ACA.⁶³ Lipper says that these circumstances “combined to create a perfect storm of political and legal opposition to the Affordable Care Act’s contraceptive-coverage regulations.”⁶⁴

Lipper, like some of the other critics of the contraceptive mandate lawsuits, suggests that the primary motivation for the

57. *Id.* at 1340.

58. *Id.* at 1341.

59. Lipper 2017, *supra* note 38, at 68.

60. Lipper 2016, *supra* note 38, at 1331.

61. *Id.* at 1333.

62. *Id.* at 1333–34.

63. *Id.* at 1334–35.

64. *Id.* at 1335.

lawsuits was political ideology rather than religious conviction and that the evidence indicates that the stated religious convictions of the Greens and other plaintiffs were insincere. This explanation presupposes that we can make a distinction between the plaintiffs' political views and their religious convictions. In the abstract, many of us seem to have at least an intuitive sense of the difference between political positions and religious convictions. For example, at least in the United States today, the doctrine of transubstantiation is typically taken to be a religious doctrine, but not a political one. Conversely, supporting a budget increase for National Public Radio is naturally viewed as a political position, but not a religious one.⁶⁵ But, as I will argue in the next two Parts, there is good reason to think that for the Greens and plaintiffs like them, the boundary between political ideology and religious conviction has been so thoroughly eroded that often there is not a clear answer as to whether an actor is motivated by political ideology or religious conviction.

65. This does not mean that what counts as a political belief versus a religious conviction is immutable. For example, if contrary to fact, the United States required religious orthodoxy to hold political office, the doctrine of transubstantiation could be politicized. It is beyond the scope of this article to offer a full account of what makes a belief political and/or religious. Perhaps it turns out that the distinction is never as clear as it may initially seem. If this were so, it would not undermine my argument. Rather, it would just show that the problem I identify is more pervasive.

III. PARTISAN MEGA-IDENTITIES AND WHITE EVANGELICAL CHRISTIANITY

In this Part and the next, I make my case for the view that there may be no clear delineation between the political ideology and religious convictions of the Greens and many other detractors of the contraceptive mandate. I then offer reasons to think that this problem generalizes to many other lawsuits involving hot button issues that combine concerns for religious freedom and the “culture wars.” My arguments rest upon contingent premises about current social and political circumstances in the United States. I present the relevant empirical and historical information about these circumstances in this Part. I take a closer look at the Green family in the next Part. Based on the considerations presented in this Part and the following, I conclude that so long as these social and political circumstances remain, lawsuits brought under the First Amendment and RFRA will continue to be the locus of conflicts between white conservative Christians and Democratic lawmakers.⁶⁶

My conclusion that there may be no clear distinction between the political ideology and religious convictions that motivated the Greens and others to challenge the contraceptive mandate rests on empirical information coming from a variety of fields including history, political science, sociology, and religious studies, among others. What follows is an overview of the relevant information and concepts from these fields. This overview begins by unpacking some key terms: political sectarianism, negative partisanship, and partisan mega-identities. Next, I review social science research which indicates that religious conviction shapes political ideology. This research suggests this is especially common among white conservative Evangelical Republicans in the United States. I then end the Part with a brief history of contemporary Evangelical-Republican partisanship in the United States.

66. Here, I use the term “lawmaker” somewhat broadly to include not only legislators but also other government officials who play a role in making and interpreting laws, such as presidents and governors who pass executive orders and other government officials who issue regulations.

A. *Political Sectarianism, Negative Partisanship, and Partisan Mega-Identities*

To begin, it will be useful to examine three key concepts: political sectarianism, negative partisanship, and partisan mega-identities. As defined by a prominent group of scholars in a 2020 article for *Science*, political sectarianism is the “tendency to adopt a moralized identification with one political group and against another.”⁶⁷ In the context of U.S. politics, the authors describe political sectarianism as a “poisonous cocktail of othering, aversion, and moralization.”⁶⁸ They elaborate as follows:

Political sectarianism consists of three core ingredients: othering—the tendency to view opposing partisans as essentially different or alien to oneself; aversion—the tendency to dislike and distrust opposing partisans; and moralization—the tendency to view opposing partisans as iniquitous . . . [W]hen all three [ingredients] converge, political losses can feel like existential threats that must be averted—whatever the cost.⁶⁹

The authors note that political polarization and sectarianism are particularly strong in the United States compared to other Western democracies.⁷⁰ Living in a highly politically sectarian society has consequences for how citizens negotiate political and legal conflicts. If sectarians view members of the opposing sect as not only mistaken but as a moral threat, it will be unsurprising if they feel the need to seek to thwart their opposition at every turn. In addition, living in a highly politically sectarian society will shape what becomes a source of political conflict in the first place.⁷¹

These political conflicts are driven, in part, by the second “core ingredient” of political sectarianism: aversion to opposing

67. Eli J. Finkel, Christopher A. Bail, Mina Cikara, Peter H. Ditto, Shanto Iyengar, Samara Klar, Lilliana Mason, Mary C. McGrath, Brendan Nyhan, David G. Rand, Linda J. Skitka, Joshua A. Tucker, Jay J. Van Bavel, Cynthia S. Wang & James N. Druckman, *Political Sectarianism in America*, 370 *SCIENCE* 533, 533 (2020), <https://www.science.org/doi/10.1126/science.abe1715>.

68. *Id.*

69. *Id.*

70. *Id.*

71. *See, e.g., id.* at 535 (“America’s response to the coronavirus disease 2019 (COVID-19) pandemic highlights the perils of political sectarianism. An October 2019 report from Johns Hopkins University suggested that America was better prepared for a pandemic than any other nation (SM), but that report failed to account for the sort of political sectarianism that would, months later, make mask-wearing a partisan symbol, one favored more by Democrats than by Republicans.”)

partisans. This phenomenon has been studied under the label of “negative partisanship.”⁷² Alan Abramowitz and Stephen Webster define negative partisanship in the United States as “the phenomenon whereby Americans largely align *against* one party instead of affiliating *with* the other.”⁷³ Negative partisanship in the United States has steeply increased since the 1980s, and negative partisanship is now stronger than positive feelings towards one’s own party for both major U.S. political parties.⁷⁴ But negative partisanship is more than mere alignment against. This alignment against the opposing party is experienced as “partisan animosity” wherein many members of one party view the other party with frustration, fear, and anger.⁷⁵

Significantly, negative partisanship can also consist of viewing the opposing party as a threat. In a 2014 report published just weeks before the decision in *Hobby Lobby* was announced, the Pew Research Center wrote that “[i]n each party, the share with a highly negative view of the opposing party has more than doubled since 1994. Most of these intense partisans believe the opposing party’s policies ‘are so misguided that they threaten the nation’s well-being.’”⁷⁶ The report also noted the elevated antipathy of Republicans toward the Obama Administration:

72. Alan I. Abramowitz & Steven W. Webster, *Negative Partisanship: Why Americans Dislike Parties but Behave Like Rabid Partisans*, 39 ADVANCES POL. PSYCH. 119 (2018) [hereinafter Abramowitz & Webster, *Negative Partisanship*]; Alan I. Abramowitz & Steven W. Webster, *The Rise of Negative Partisanship and the Nationalization of U.S. Elections in the 21st Century*, 41 ELECTORAL STUD. 12 (2016) [hereinafter Abramowitz & Webster, *The Rise of Negative Partisanship*].

73. Abramowitz & Webster, *Negative Partisanship*, *supra* note 72, at 119.

74. Abramowitz & Webster, *The Rise of Negative Partisanship*, *supra* note 72, at 14; Abramowitz & Webster, *Negative Partisanship*, *supra* note 72, at 119; PEW RSCH. CTR., PARTISANSHIP AND POLITICAL ANIMOSITY IN 2016 (June 22, 2016), <https://www.pewresearch.org/politics/2016/06/22/partisanship-and-political-animosity-in-2016/>.

75. PEW RSCH. CTR., *supra* note 74 (“More than half of Democrats (55%) say the Republican Party makes them ‘afraid,’ while 49% of Republicans say the same about the Democratic Party. Among those highly engaged in politics—those who say they vote regularly and either volunteer for or donate to campaigns—fully 70% of Democrats and 62% of Republicans say they are afraid of the other party.”)

76. PEW RSCH. CTR., POLITICAL POLARIZATION IN THE AMERICAN PUBLIC (June 12, 2014), <https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public/> (“Those who have a very unfavorable impression of each party were asked: ‘Would you say the party’s policies are so misguided that they threaten the nation’s well-being, or wouldn’t you go that far?’ Most who were asked the question said yes, they would go that far. Among all Democrats, 27% say the GOP is a threat to the well-being of the country. That figure is even higher among Republicans, 36% of whom think Democratic policies threaten the nation.”)

With Barack Obama in the White House, partisan antipathy is more pronounced among Republicans, especially consistently conservative Republicans. Overall, more Republicans than Democrats see the opposing party's policies as a threat and the differences are even greater when ideology is taken into account. Fully 66% of consistently conservative Republicans think the Democrats' policies threaten the nation's well-being.⁷⁷

Negative partisanship can also affect moral assessments of one's opposing partisans. A more recent report from the Pew Research Center found that "55% of Republicans say Democrats are 'more immoral' when compared with other Americans; 47% of Democrats say the same about Republicans."⁷⁸ In light of empirical observations about the increase in negative partisanship and relative stability of positive partisanship, Abramowitz and Webster conclude that "[t]he rise of negative partisanship within the American electorate implies that fear and loathing of the opposing party and its candidates, rather than affection for one's own party and its candidates, is the most important factor in maintaining partisan loyalty."⁷⁹ Given all this, it is easy to see how partisans could come to see the actions of the opposing party as "existential threats that must be averted – whatever the cost."⁸⁰

Increases in negative partisanship in the United States can be explained, in part, by the fact that the current partisan divisions in the United States are not merely political divisions. Rather, the two partisan teams have also sorted along racial, religious, educational, and geographic dimensions of social identity.⁸¹ That is to say, being a member of a certain political party in the United States is highly correlative with other social identities such as being a member of a certain race or religion. Members of these partisan teams in which their multiple social identities are aligned develop what Professor Lilliana Mason has called a partisan "mega-identity."⁸² Mason describes the process and its effects as follows:

77. *Id.*

78. PEW RSCH. CTR., *PARTISAN ANTIPATHY: MORE INTENSE, MORE PERSONAL* (Oct. 10, 2019), <https://www.pewresearch.org/politics/2019/10/10/partisan-antipathy-more-intense-more-personal/>.

79. Abramowitz & Webster, *Negative Partisanship*, *supra* note 72, at 133.

80. Finkel et al., *supra* note 67, at 533.

81. *Id.* See generally LILLIANA MASON, *UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY* (2018); BILL BISHOP WITH ROBERT G. CUSHING, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* (2009).

82. MASON, *supra* note 81, at 14.

The trouble arises when party competitions grow increasingly impassioned due to the inclusion of additional, nonpartisan social identities in every partisan conflict. The American political parties are growing socially polarized. Religion and race, as well as class, geography, and culture, are dividing the parties in such a way that the effect of party identity is magnified. . . . This is no longer a single social identity. Partisanship can now be thought of as a mega-identity, with all the psychological and behavioral magnifications that implies.⁸³

Crucial to Mason's argument is the fact that creation of a partisan mega-identity can amplify partisan conflict and can distort partisans' perception of those on the opposing team.⁸⁴ This is because, as Mason notes, "[i]n very basic ways, group identification and conflict change the way we think and feel about ourselves and our opponents."⁸⁵ Mason concludes that "American partisans today are prone to stereotyping, prejudice, and emotional volatility."⁸⁶ She refers to this partisan behavior as social polarization.⁸⁷

As Mason notes, her findings align with observations Bill Bishop documented roughly a decade earlier. Bishop describes the warping effect of partisan teams that are homogenized along multiple lines of identity, writing that "when two groups think of each other, they define themselves as 'us' and 'them.' People enhance their social identities by viewing their own groups positively and seeing other groups negatively. This is how they derive a sense of themselves."⁸⁸ These differences in how one views their ingroup and outgroup are intensified when multiple social identities align as part of a single partisan identification.⁸⁹

83. *Id.*

84. *See, e.g., id.* at 7 ("[I]f a person is a member of one party and also a member of another social group that is mostly made up of fellow partisans, the biasing and polarizing effect of partisanship can grow stronger . . .").

85. *Id.* at 2. Among the changes she notes are that negative stereotyping of members of opposing political parties "has increased by 50 percent between 1960 and 2010" and that partisans "view the other party as more extreme than their own, while they view their own party as not at all extreme." *Id.* at 3 (citing Shanto Iyengar, Gaurav Sood & Yphtach Lelkes, *Affect, Not Ideology: A Social Identity Perspective on Polarization*, 76 *PUB. OP. Q.* 405 (2012); Gary C. Jacobson, *The Electoral Origins of Polarized Politics: Evidence from the 2010 Cooperative Congressional Election Study*, 56 *AM. BEHAV. SCIENTIST*, 1612, 1624 (2012)).

86. *Id.* at 4.

87. *Id.*

88. BISHOP, *supra* note 81, at 282–83.

89. *See* MASON, *supra* note 81, at 23.

The two partisan teams in the United States can be described as follows. One is conservative, Republican, white, Christian, rural, older, and less educated. The other is comparatively progressive, Democratic, multi-racial, multi-religious, urban, younger, and highly educated.⁹⁰ For the purposes of this paper, it is significant that the plaintiffs in the contraceptive coverage requirement cases all had multiple aligned social identities typical of the Republican partisan team (conservative, white, and Christian being the most notable), while the Obama administration – which had passed and was seeking to enforce the requirement – was viewed by many in the Republican partisan team as highly aligned with the social identities typical of the Democratic partisan team.⁹¹

Let's pause to briefly review what we have covered so far. The United States is highly politically sectarian. Much of this sectarian behavior is driven by negative partisanship whereby partisans view the opposing partisan group as threatening and immoral. Political sectarianism is exacerbated by the fact that political partisanship is accompanied by homogenization along many aspects of social identity including race and religion. This sorting effect has led to two partisan "mega-identities," which make it easier for partisans to fear and to stereotype the opposing partisan team. The lawsuits against the contraceptive coverage requirement were filed by those whose religious and political identities were aligned as part of one of the partisan teams against a presidential administration that was part of the opposing partisan team.

B. White Conservative Evangelical Christian Identity

Just because religious identity and political partisan identity are highly aligned in the United States and were aligned for the contraceptive mandate plaintiffs does not on its own show that the plaintiffs lacked a clear distinction between their religious identity

90. See, e.g., *id.* at 14, 33; PEW RSCH. CTR., *The Changing Composition of the Political Parties* (Sept. 13, 2016), <https://www.people-press.org/2016/09/13/1-the-changing-composition-of-the-political-parties/>.

91. While President Obama is a center-left Democrat and a Christian, many on the right mistakenly believe he is a Muslim and a socialist. See, e.g., PEW RSCH. CTR., *Republicans Believe Obama is a Muslim* (Sept. 13, 2010), <https://www.pewresearch.org/fact-tank/2010/09/13/republicans-believe-obama-is-a-muslim/>; Nicole Hemmer, *Shock Poll: Why Do So Many Republicans Think Obama is a Socialist, a Muslim, or Even the Anti-Christ?*, CHRISTIAN SCI. MONITOR (March 25, 2010), <https://www.csmonitor.com/Commentary/Opinion/2010/0325/Shock-poll-Why-do-so-many-Republicans-think-Obama-is-a-socialist-a-Muslim-or-even-the-anti-Christ>.

and partisan identity, nor does it show on its own that they lacked a clear distinction between their political convictions and their religious convictions. What I examine next is the specific way in which white socially conservative Evangelical Christian identity (which I will sometimes call simply Evangelical identity) has become interwoven with politically conservative Republican identity (which I will sometimes call simply Republican identity).⁹² I begin with some recent findings by social scientists about the porous, bidirectional relationship between Evangelical identity and Republican identity in the United States.⁹³ I then briefly cover some of the history that led to this current state of affairs.

92. While going forward I will sometimes forego including the modifiers “white” and “conservative” when referring to the social identity of white conservative Evangelical Christians, this is not because the modifiers “white” and “conservative” are unimportant. On the contrary, they are very important. The overlapping identities of non-white Evangelicals, especially Black Evangelicals, is very different from their white coreligionists: while white Evangelicalism is closely aligned with the Republican Party, Black Evangelicalism (and Black Protestantism more generally) is closely aligned with the Democratic Party. *See, e.g.*, MICHELE F. MARGOLIS, FROM POLITICS TO THE PEWS: HOW PARTISANSHIP AND THE POLITICAL ENVIRONMENT SHAPE RELIGIOUS IDENTITY 147 (2018) (“African Americans’ religious and political attachments demonstrate that the religiosity gap found in American politics does not apply to everyone. Politically, African Americans are solidly Democratic. . . . Based on the preceding chapters, we might incorrectly assume that this strong Democratic constituency is not very religious. But African Americans are the single most religiously devout racial or ethnic group in the United States[,] . . . particularly those who identify with a black Protestant tradition . . .”). *See generally* ANTHEA BUTLER, WHITE EVANGELICAL RACISM: THE POLITICS OF MORALITY IN AMERICA (2021); ROBERT D. PUTNAM & DAVID E. CAMPBELL, AMERICAN GRACE: HOW RELIGIOUS DIVIDES AND UNITES US 209–38 (2010); ROBERT P. JONES, THE END OF WHITE CHRISTIAN AMERICAN (2016); MICHAEL O. EMERSON & CHRISTIAN SMITH, DIVIDED BY FAITH: EVANGELICAL RELIGION AND THE PROBLEM OF RACE IN AMERICA (2001); JEMAR TISBY, THE COLOR OF COMPROMISE: THE TRUTH ABOUT THE AMERICAN CHURCH’S COMPLICITY IN RACISM (2019).

93. There are various ways one can define an Evangelical. Evangelicals have been defined in terms of the theological doctrines they accept, in composite terms appealing to both religion and politics, in primarily political terms, and based on self-selection as Evangelical. Historian Anthea Butler notes that “[i]n the American context, ‘evangelical’ means different things in different centuries.” BUTLER, *supra* note 92, at 3. Noting that some scholars have done otherwise, Butler opts for a more political definition:

Many historians of evangelicalism, such as Mark Noll, Thomas Kidd, David Bebbington, and George Marsden, have been concerned for much of their academic careers with defining evangelicalism via theology and history. . . . Evangelicals are, however, concerned with their political alliance with the Republican Party and with maintaining the cultural and racial whiteness that they have transmitted to the public.

Id. at 4. This can be contrasted with historian George Marsden who writes that [t]he essential evangelical beliefs include (1) the Reformation doctrine of the final authority of the Bible, (2) the real historical character of God’s saving work recorded in Scripture, (3) salvation to eternal life based on the redemptive work of

One might look at the widely recognized alliance between white Evangelicals and the Republican Party and conclude that white Evangelicals have simply chosen the Republican Party because it better reflects their values and policy preferences.⁹⁴ While such a view may appear reasonable at first glance, social science research suggests that the actual relationship is much more complex. Not only have the religious convictions of white Evangelicals shaped the political aims of the Republican Party, but the political aims of the Republican Party have in turn shaped the religious convictions of white Evangelicals. It is the second part of this bidirectional relationship that is of the greatest significance for this paper.

Professor Michele F. Margolis concludes, based on a series of studies, that “partisan identities can profoundly shape identification with and engagement in the religious sphere.”⁹⁵ In the relevant studies, Margolis focuses specifically on white Christian religiosity. Using ‘religion’ as shorthand for the Christian religion, Margolis summarizes her conclusions as follows:

The 1970s saw new political issues and electoral strategies emerge that resulted in the parties becoming distinct along a religious dimension that did not previously exist. Once the parties and party elites diverged on questions related to religiosity, Americans could draw on their partisan identities when making religious choices. Elite cues provide information to voters as they

Christ, (4) the importance of evangelism and mission, and (5) the importance of a spiritually transformed life.

GEORGE M. MARSDEN, UNDERSTANDING FUNDAMENTALISM AND EVANGELICALISM, 4–5 (1991); see also CHRISTIAN SMITH, CHRISTIAN AMERICA? WHAT EVANGELICALS REALLY WANT 10 (2000). For the purposes of this paper, while I have primarily a theological definition of Evangelicalism in mind, the distinctions between the various ways of defining Evangelicalism end up being relatively unimportant, given that the plaintiffs in the kinds of cases I am concerned with here, such as the Green family and Jack Philips – the petitioner in *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719 (2018) – typically satisfy all the definitions of Evangelical that scholars have offered.

94. In this paper, I focus primarily on Evangelical Republicans as the largest and loudest segment of the “religious right” in the United States. Similar dynamics have been at play for some conservative Catholics, Orthodox Jews, and members of the Church of Jesus Christ of Latter-day Saints. See, e.g., Jeremy Leaming, *Religious Right*, THE FIRST AMENDMENT ENCYCLOPEDIA (2009), <https://www.mtsu.edu/first-amendment/article/1375/religious-right>; Nomi Stolzenberg, *Religious Identity and Supreme Court Justices – A Brief History*, THE CONVERSATION (Oct. 19, 2020, 8:24 AM), <https://theconversation.com/religious-identity-and-supreme-court-justices-a-brief-history-146999>.

95. MARGOLIS, *supra* note 92, at 3.

transition from young adulthood into adulthood about how people “like them” engage with religion.⁹⁶

Unsurprisingly, the cues that partisans in the United States have received for the last half-century suggest that the Republican Party is the party of the Christian religion. Thus, in speaking of the Christian religion, Margolis provides the following summary:

Two survey experiments show that the close relationship between the Republican Party and organized religion affects Democrats and Republicans alike, but in opposite ways: Republicans’ religious identities become stronger while Democrats’ religious identities become weaker. Panel data additionally show how partisans respond when the linkages between religion and the Republican Party become more salient. Party identification corresponds with changing religious practices after gay marriage became a more salient political issue. Democrats (Republicans) reported lower (higher) rates of religiosity in 2004 than they did in 2000 and 2002.⁹⁷

But these relationships between the parties and religiosity are not symmetrical. Margolis finds that the connections between the Republican Party and the Christian religion is stronger than any lack of such relationship in the Democratic Party.⁹⁸ Thus, Margolis writes that “[e]ven though Democratic politicians do not reject the notion of religion or faith, the present-day political landscape is marked by a more prominent relationship between the Republican Party and conservative religion.”⁹⁹

That Republican politics has played a significant role in shaping white Christianity in the United States is further corroborated by the work of sociologist Lydia Bean.¹⁰⁰ Bean uses comparative sociology to better understand how the close fusion of the Republican Party and white Evangelical Christianity has influenced the religious beliefs and worldview of white Evangelical

96. *Id.* at 3–4.

97. *Id.* at 15.

98. *Id.* at 56–57. (“Perceptions of the Democratic Party illustrate that the linkage between the Democratic Party and religion is less clear than the relationship between the Republican Party and religion. While the Republican Party is more closely associated with religion than the Democratic Party, the Democratic Party is not perceived as a strongly secular force or hostile toward religion . . .”).

99. *Id.* at 110.

100. LYDIA BEAN, *THE POLITICS OF EVANGELICAL IDENTITY: LOCAL CHURCHES AND PARTISAN DIVIDES IN THE UNITED STATES AND CANADA* (2014).

Christians in the United States. Bean spent time with four white Protestant congregations near Niagara Falls, two of which were in the United States and two of which were in Canada. Despite the theological similarities between the churches, Bean found significant differences in the political priorities of the U.S. churches compared to the Canadian churches. Bean summarizes her key conclusion as follows:

By comparing evangelicals in the United States and Canada, I find that American evangelicals are not bound to political conservatism by the content of their distinctive theology or moral worldview. Rather, the U.S. Christian Right has successfully defined evangelical identity in ways that delegitimize political diversity within the subculture.¹⁰¹

Bean writes that her work “raises the possibility that not only does religious morality inform political conflict; political conflict can also shape the content of religious morality. A particular formulation of evangelical orthodoxy may be the outcome of power struggles, driven by the exigencies of partisan coalition-building rather than theological deliberation.”¹⁰²

Bean’s findings reinforce the views put forward by Mason and Bishop about the partisan mega-identities present in the United States and their influence on social polarization. For example, Bean found that “[b]oth churches [in the United States] used abortion and homosexuality to draw *group boundaries* between ‘us’ and ‘them,’ to define the relationship between evangelicals and the wider world.”¹⁰³ She later expands on this theme:

I found that both American churches did more than just signal the “right” positions for Christians to hold on the moral issues. They also signaled the “right” party identification: which party “we” support, and which party “we” oppose. In this way, both churches signaled that voting Republican on these two issues [opposition to abortion and gay rights] was an important part of being a Christian. Religious identity became symbolically and socially inseparable from affiliation with the Republican Party and conservative ideology. By contrast, both Canadian churches defined their subcultural identity in different terms,

101. *Id.* at 18.

102. *Id.* at 8.

103. *Id.* at 64.

which were more easily separated from the cultural meanings of partisanship.¹⁰⁴

Bean found that this “us” versus “them” dynamic in the U.S. churches involved such a complete fusion of the political and the religious that the distinction between opposition to liberal theology and liberal politics was often lost.¹⁰⁵ Bean also notes that the U.S. churches drew on narratives that “conflated religious identity with opposition to liberal politics.”¹⁰⁶

Bean also identified various “public narratives” that members of the American churches used to reinforce negative partisanship and their religious-political mega-identities.¹⁰⁷ She noted that, unlike the Canadian churches, in the American churches “narratives of Christian nationalism defined liberals as the villains of the story, as a political and cultural out-group responsible for America’s ‘moral decline.’”¹⁰⁸ In addition, Bean found that “religion and partisanship became fused in the *narratives of Christian nationalism* that church members used to make sense of their responsibilities to a broader society.”¹⁰⁹

Professor Andrew L. Whitehead and Professor Samuel L. Perry have also noted the political significance of Christian nationalism on partisanship in the United States.¹¹⁰ Whitehead and Perry describe Christian nationalism as “an ideology that idealizes and advocates a fusion of American civic life with a particular type of Christian identity and culture.”¹¹¹ They describe the kind of “Christian identity and culture” they have in mind as follows:

We use “Christian” here in a specific sense. . . . [T]he explicit ideological content of *Christian nationalism* comprises beliefs about historical identity, cultural preeminence, and political influence. But just as important, it also contains ideological content that is often implicit. This includes symbolic boundaries

104. *Id.* at 13 (footnotes omitted).

105. *Id.* at 87 (“Christian identity [in the U.S. churches] was defined in opposition to liberals, understood as both a religious and a political category. Within local religious practice, it was difficult to separate religious identity from affiliation with the Republican Party and conservative ideology.”).

106. *Id.* at 87.

107. *Id.* at 15.

108. *Id.*

109. *Id.* at 14.

110. ANDREW L. WHITEHEAD & SAMUEL L. PERRY, *TAKING BACK AMERICA FOR GOD: CHRISTIAN NATIONALISM IN THE UNITED STATES* (2020).

111. *Id.* at ix-x.

that conceptually blur and conflate religious identity (Christian, preferably Protestant) with race (white), nativity (born in the United States), citizenship (American), and political ideology (social and fiscal conservative). Christian nationalism, then, provides a complex of explicit and implicit ideals, values, and myths—what we call a “cultural framework”—through which Americans perceive and navigate their social world.¹¹²

In short, Christian nationalism is “as ethnic and political as it is religious.”¹¹³

Christian nationalism is analytically distinct from both a doctrinal conception of Evangelicalism and from political conservatism. Still, Whitehead and Perry note that “a large percentage of Christian nationalists are affiliated with evangelical Protestant denominations and hold characteristically evangelical beliefs,” and that “[f]ar and away the strongest predictor of Christian nationalism is identifying oneself with political conservatism.”¹¹⁴ Whitehead and Perry conclude that the essence and primary concern of Christian nationalism “is not *moral* in a personal sense, but *political*.”¹¹⁵ Specifically, they conclude that Christian nationalism is about political power, including “male authority over women’s bodies.”¹¹⁶

This melding of white Christianity with conservative political power grabs has been observed by people across the political spectrum. Margolis concludes that “[n]ot only is there a religious divide in American politics today, but Americans know about it.”¹¹⁷ Based on such observations, Professor Philip Gorski concludes that “America’s white evangelicals . . . are alienating an entire generation of young Americans from organized Christianity of any sort, by turning their faith communities into political action committees. They may claim that religion drives their politics. But oftentimes the reality is more nearly the reverse.”¹¹⁸ Similarly, Peter

112. *Id.* at x.

113. *Id.* at 10.

114. *Id.* at x, 13. Whitehead and Perry provide a theological definition of Evangelicalism. *See id.* at x (writing that American Evangelicalism is “a theological tradition prioritizing certain doctrinal commitments including biblical inerrancy and conversionism”).

115. *Id.* at 142.

116. *Id.* at 76, 86 (stating that “Christian nationalism is all about power”).

117. MARGOLIS, *supra* note 92, at 57; *see also* Stratos Patrikios, *Self-Stereotyping as “Evangelical Republican”: An Empirical Test*, 6 POL. & RELIGION 800, 800–22 (2013).

118. PHILIP GORSKI, *AMERICAN COVENANT: A HISTORY OF CIVIL RELIGION FROM THE PURITANS TO THE PRESENT*, at x (paperback ed. 2019).

Wehner, a Christian author who served in three different Republican presidential administrations, has written that “I have long been troubled by what I perceived as the subordination of Christianity to partisan ideology[,]” and that “[t]o put the case bluntly, evangelicals and others were correct to say that religion should inform politics—but they let down their guard against politics corrupting religion.”¹¹⁹ And Nathaniel Manderson, a self-identified Evangelical pastor, has recently written that, in the United States, “[o]ver the last 70 years, Christian theology has been steadily replaced, within the evangelical world, by Republican or ‘conservative’ ideology.”¹²⁰

C. The History of Modern Evangelical-Republican Partisanship

Having shown that white Evangelical Christianity and the Republican Party have, for many, fused together into a single partisan mega-identity through which the political can inform the religious, I turn to the historical circumstances that led to this outcome. The current amalgamation of white socially conservative Evangelical Christianity and the politically conservative Republican Party began in the 1970s and did not truly coalesce until the end of that decade with the formation of Jerry Falwell, Sr.’s “moral majority” and the Evangelical move to support Ronald Reagan’s candidacy for President of the United States.¹²¹ The late 1970s also marked a significant shift in Protestant Christians’ views about the morality and legality of abortion. The 1973 Supreme Court decision in *Roe v. Wade*, which recognized a woman’s right to choose to terminate a pregnancy, did not initially generate much

119. PETER WEHNER, *THE DEATH OF POLITICS: HOW TO HEAL OUR FRAYED REPUBLIC AFTER TRUMP* 62, 76 (2019).

120. Nathaniel Manderson, *How Evangelicals Abandoned Christianity—and Became “Conservatives” Instead*, SALON (July 17, 2021, 12:00 PM), <https://www.salon.com/2021/07/17/how-evangelicals-abandoned-christianity--and-became-conservatives-instead-3/>.

121. See, e.g., FRANCES FITZGERALD, *THE EVANGELICALS: THE STRUGGLE TO SHAPE AMERICA* 291–432 (2017); RANDALL BALMER, *THY KINGDOM COME: HOW THE RELIGIOUS RIGHT DISTORTS FAITH AND THREATENS AMERICA* (2006); BULTER, *supra* note 92, at 4; MARGOLIS, *supra* note 92, at 27–35; MASON, *supra* note 81, at 32–37; WHITEHEAD & PERRY, *supra* note 110, at 73. This current alignment has centered around social issues beginning with segregated schools, and later moving to abortion, gay rights, and now, increasingly, trans rights. See, e.g., JONES, *supra* note 92. For evidence that the alignment between white Evangelical Christians and conservative Republicans regarding economics positions began much earlier in the twentieth century, see, for example, KEVIN M. KRUSE, *ONE NATION UNDER GOD: HOW CORPORATE AMERICA INVENTED CHRISTIAN AMERICA* (2015); BEAN, *supra* note 100, at 26–31.

backlash among Protestant Christians—Evangelicals included.¹²² In the 1960s and 1970s, several prominent Protestant denominations such as the United Methodist Church, the American Baptist Convention, and the Southern Baptist Convention advocated for the legal permissibility of abortion under at least some circumstances.¹²³ During that time prominent Evangelical publications like *Christianity Today* included pieces written by authors in support of abortion under some circumstances.¹²⁴ At the time, this represented a stark difference in the views of conservative Catholics—who strongly opposed the legality of abortion and the decision in *Roe*—from conservative Protestants.¹²⁵

Modern-day Evangelical opposition to abortion and fixation on *Roe* was intentionally cultivated by influential actors within American Evangelical circles and the Republican Party to create a political coalition united around social issues.¹²⁶ For example, during the late 1970s Evangelical thought leader Francis Schaeffer used his platform to denounce *Roe v. Wade* and to argue that abortion was murder.¹²⁷ While Schaeffer’s messages regarding *Roe* initially generated little fanfare among Evangelicals, his ideas became increasingly influential during the 1980s.¹²⁸ Simultaneously, conservative Republican elites incentivized powerful Evangelical figures like Jerry Falwell, Sr. to enter into the political fray on the side of the Republicans.¹²⁹ The result is that

122. See Jamelle Bouie, “God Does Not Regard the Fetus as a Soul”, SLATE (Mar. 25, 2014, 2:34 PM), <https://slate.com/news-and-politics/2014/03/hobby-lobby-and-contraception-how-conservative-evangelicals-went-from-not-caring-about-abortion-and-birth-control-to-being-obsessed-with-them.html>; LINDA GREENHOUSE & REVA B. SIEGEL, BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT’S RULING 258–59 (2012); GEOFFREY R. STONE, SEX AND THE CONSTITUTION: SEX, RELIGION, AND LAW FROM AMERICA’S ORIGINS TO THE TWENTY-FIRST CENTURY 369–98 (2017).

123. STONE, *supra* note 122, at 374; Bouie, *supra* note 122.

124. Bouie, *supra* note 122.

125. See, e.g., GREENHOUSE & SIEGEL, *supra* note 122, at 258–59; STONE, *supra* note 122, at 375.

126. See, e.g., BALMER, *supra* note 121, at xi–xxviii, 1–34; FITZGERALD, *supra* note 121, at 291–363; MASON, *supra* note 81, at 35–38.

127. See FITZGERALD, *supra* note 121, at 354–56, 362–63; see also MOLLY WORTHEN, APOSTLES OF REASON: THE CRISIS OF AUTHORITY IN AMERICAN EVANGELICALISM 213–19 (2014).

128. See FITZGERALD, *supra* note 121, at 362.

129. See, e.g., MARGOLIS, *supra* note 92, at 31 (“Falwell formed the Moral Majority only after leaders of the secular New Right approached him and promised support in the form of direct-mail lists, organizational support, and training of state and regional leaders Religious conservatives, therefore, did not enter politics by happenstance; Republican political elites helped religious elites enter the political sphere. The Republican elites, most of whom were not religious themselves, thought they could draw support from these

while “abortion was not a vital voting issue for many evangelicals before the rise of the Religious Right in 1979[,] . . . for the last four decades abortion has been a wedge issue.”¹³⁰ Beginning in the 1990s and escalating in the early 2000s, gay rights joined abortion as a “culture war” topic and a wedge issue for many white Evangelical-Republican partisan identifiers.¹³¹

In understanding the historical formation of the white conservative Evangelical-Republican partisan tribe, one other set of actors is worth identifying: those operating conservative mass media. Both in their identity as Evangelicals and in their identity as Republicans, white conservative Evangelical Republicans have had the option of sticking to media sources with a shaky commitment to truth and a firm commitment to telling their audience what they would like to hear. Notable examples include James Dobson’s *Focus on the Family* from the Evangelical perspective and Rush Limbaugh and Fox News from the Republican perspective.¹³² These separate sources of media have amplified troublesome epistemic dynamics concerning how those with a white Evangelical-Republican mega-identity have assessed those viewed as outgroup members.

In this Part, I have shown how “[p]olitical conservatism [takes] on a sacred quality because it [is] woven into the fabric of everyday religious life.”¹³³ I have also shown how the influence between white Evangelical Christianity and conservative Republican politics is bidirectional—that is to say, for white Evangelical Republicans, religious conviction influences political ideology, but political ideology in turn also influences religious conviction.

IV. THE EVOLVING CULTURE WARS AND RELIGIOUS

religious voters by focusing on politics relating to religion and morality.”) (internal citation and quotation marks omitted).

130. WHITEHEAD & PERRY, *supra* note 110, at 73.

131. See, e.g., JONES, *supra* note 92, at 111–46.

132. See, e.g., Susan B. Ridgely, *Conservative Christianity and the Creation of Alternative News: An Analysis of Focus on the Family’s Multimedia Empire*, 30 RELIGION & AM. CULTURE 1, 1–25 (2020); see generally KATHLEEN HALL JAMIESON & JOSEPH N. CAPPELLA, *ECHO CHAMBER: RUSH LIMBAUGH AND THE CONSERVATIVE MEDIA ESTABLISHMENT* (2008) (discussing how the conservative media arose and Rush Limbaugh’s part in it).

133. BEAN, *supra* note 100, at 15.

FREEDOM JURISPRUDENCE

The previous Part established the following facts. The United States currently is experiencing high levels of political sectarianism, which leads to moralized aversion to those in one's outgroup. Partisan social divisions are about more than just identity. The two partisan teams in the United States offer "mega-identities" for members through the homogenization of additional markers of identity like race and religion within each partisan team. In one of those partisan teams there is a close identity between conservative white Evangelical Christianity and conservative Republican partisanship. For many with an Evangelical-Republican mega-identity, there is a fusion of political ideology and religious conviction. Republican political ideology has shaped Evangelical religious conviction, just as Evangelical religious conviction has shaped Republican political ideology.

In this Part, I continue to make my case that the fusion of religion and politics among many white Evangelical Republicans provides a plausible explanation of the inconsistencies identified in the Greens' and other contraceptive mandate plaintiffs' behavior concerning emergency contraception and IUDs. In order to do so, I first offer some information about the Green family that is meant to show that they exhibit a partisan Evangelical-Republican mega-identity. Second, I argue that the specific shape of their religious convictions in *Hobby Lobby* appear to have been generated by partisan politics. Third, I examine the facts considered in Part II that some have argued suggest the Greens or other plaintiffs may have been insincere in their stated religious objections to the contraceptive coverage requirement. I argue that these facts also support my hypothesis that the convictions of the Greens and the other plaintiffs were sincere but were formed in a manner that makes it difficult to say that they are simply religious or simply political. Rather, the Greens' convictions mirror their social identities: a hyper-fusion of Christian nationalism and Evangelical Republicanism. Fourth, I argue that the prevalence and strength of the Evangelical-Republican partisan identity, the pluralistic-Democratic partisan identity, and the current antagonism between these partisan teams can explain other recent, contentious religious freedom lawsuits and will likely continue to lead to contentious lawsuits concerning religious freedom until the partisan dynamics in the United States change.

A. Hobby Lobby and the Green Family

The Green family includes, among others, David Green, the founder of Hobby Lobby, his wife Barbara, and their three children, Steve (Hobby Lobby's CEO), Mart (Hobby Lobby's Chief Strategic Officer), and Darsee (Hobby Lobby's Creative Director).¹³⁴ David Green opened his first retail craft supply store in 1972. By 2012, the family owned over 500 superstores and was ranked 79 on Forbes list of richest Americans.¹³⁵ David Green, the son of a minister, has spent his life as a dedicated Christian, a commitment he shares with his wife and children.¹³⁶ In speaking about his fortune, Green has stated, "I don't care if you're in business or out of business, God owns it. . . . How do I separate it? . . . You can't have a belief system on Sunday and not live it the other six days."¹³⁷

The Green family has used their faith as a guide for their charitable giving. Brian Solomon, who interviewed David Green for *Forbes*, called Green "the largest individual donor to evangelical causes in America."¹³⁸ Solomon writes of Green's charitable giving:

In the U.S. Green's wealth produces the physical underpinnings of dozens of churches and Christian universities. It began in 1999, with a former V.A. hospital building in Little Rock, Ark. that he purchased for \$600,000 and converted into a church. Green has since spent over \$300 million donating about 50 properties. The word is out: Ministries approach him constantly with proposals for their new church or Christian community center – only one in ten is chosen. He won't help them unless they pass a doctrinal vetting process, which includes questions about the Virgin Birth.¹³⁹

Green's life seems centered on his Christian faith and his desire to act in accordance with the dictates of God's will, which he believes is revealed through the Bible.¹⁴⁰ Green has stated that "I want to

134. CANDIDA R. MOSS & JOEL S. BADEN, *BIBLE NATION: THE UNITED STATES OF HOBBY LOBBY* 7 (2017).

135. *Id.* at 3.

136. *Id.* at 2-7.

137. Brian Solomon, *Meet David Green: Hobby Lobby's Biblical Billionaire*, *FORBES* (Sept. 18, 2012, 7:51 AM), <https://www.forbes.com/sites/briansolomon/2012/09/18/david-green-the-biblical-billionaire-backing-the-evangelical-movement/?sh=540dca915807>.

138. *Id.*

139. *Id.*

140. *Id.* (stating of the Bible, "This isn't just some book that someone made up It's God, it's history, and we want to show that").

know that I have affected people for eternity. I believe I am. I believe once someone knows Christ as their personal savior, I've affected eternity. I matter 10 billion years from now."¹⁴¹

In addition to charitable giving to Evangelical causes, the Greens and Hobby Lobby have also donated generously to Republican politicians and organizations that promote conservative political legislation and policy. For example, Eli Clifton, reporting for *Salon*, points out that "Hobby Lobby-related contributions were the single largest source of tax-deductible donations" to the National Christian Charitable Foundation at "approximately \$383.785 million in 2009 grant revenue."¹⁴² The National Christian Charitable Foundation, in turn, has provided substantial grants to organizations like the conservative lobbying group, Center for Arizona Policy, and the conservative advocacy and impact litigation group, Alliance Defending Freedom.¹⁴³

The Green family was also active in supporting conservative Republican politicians during the 2016 U.S. presidential primary. In 2015, Hobby Lobby donated \$10,000 to a super PAC supporting Marco Rubio, another \$10,000 to a super PAC supporting Mike Huckabee, and \$20,000 to a super PAC supporting Ben Carson. In addition, both David and Barbara Green each gave the maximum personal donation of \$2,700 to the campaigns of Ben Carson and Carly Fiorina.¹⁴⁴ Even though none of the candidates David and Barbara Green provided financial support to early on gained the 2016 Republican nomination for president, that didn't stop David Green from later throwing his weight behind Donald Trump's bid for president.

In September 2016, David Green published an op-ed endorsing Donald Trump for President in *USA Today*. The piece was titled "One Judge Away from Losing Religious Liberty: Hobby Lobby CEO" and featured the tagline "Donald Trump is our only hope for

141. *Id.*

142. Eli Clifton, *Hobby Lobby's Secret Agenda: How It's Quietly Funding a Vast Right-Wing Movement*, SALON (Mar. 27, 2014, 11:45 AM), https://www.salon.com/2014/03/27/hobby_lobbys_secret_agenda_how_its_secretly_funding_a_vast_right_wing_movement/.

143. *See id.*; Howard Fischer, *Cathi Herrod at Helm of Conservative Center for Arizona Policy, Guiding Lawmakers*, ARIZ. DAILY SUN (Mar. 2, 2014), https://azdailysun.com/news/local/state-and-regional/cathi-herrod-at-helm-of-conservative-center-for-arizona-policy/article_fabe26a2-a1ba-11e3-9a43-0019bb2963f4.html.

144. Pema Levy, *Hobby Lobby Is Backing a Surprising Candidate for President*, MOTHER JONES (Feb. 8, 2016), <https://www.motherjones.com/politics/2016/02/hobby-lobbys-donation-marco-rubio-contraceptives/>.

a Supreme Court that will protect freedom of religion.”¹⁴⁵ In closing the piece, Green wrote:

Donald Trump has been steadfast in expressing his commitment to uphold the Constitution, and his list of possible Supreme Court nominees inspires confidence that there is hope in my future—and in my grandchildren’s future—for a country that will value those most fundamental rights.

America’s foundation of religious liberty is already at risk. With Hillary Clinton as president, our foundation will surely crumble. For Americans who value freedom of religion, we must elect a president who will support a Supreme Court that upholds not only this freedom, but all that have emanated from it. That president is Donald Trump.¹⁴⁶

These remarks highlight the Evangelical-Republican fusion in David Green’s social identity. The Greens have also made public statements that reveal the fusion between their Evangelical Christianity and their Christian nationalism. For example, the Green family attracted considerable attention when on July 4, 2021, Hobby Lobby took out a full-page newspaper ad in newspapers across the country. The two largest pieces of text on the ad state “ONE NATION UNDER GOD” and “BLESSED IS THE NATION WHOSE GOD IS THE LORD – PSALM 33:12.”¹⁴⁷ The bulk of the ad contains a series of quotations commonly used by those who advocate the view that the United States is a Christian nation, but at the bottom the ad states, “If you would like to know Jesus as Lord and Savior, visit Need Him Ministry” along with the website address.¹⁴⁸ The ad oscillates between promoting the Christian-nationalist worldview common among white conservative

145. David Green, *One Judge Away from Losing Religious Liberty: Hobby Lobby CEO*, USA TODAY (Sept. 1, 2016, 6:10 AM), <https://www.usatoday.com/story/opinion/2016/09/01/hobby-lobby-religious-freedom-liberty-obamacare-christian-david-green/89597214/?hootPostID=2a2ad7db1f58238473e45a4280959e65&fbclid=IwAR1xHEL3IUOhxjDLCPm7HciMOOcyc5a3IXoMj0h8t1AakgCOcww3wVdfpTc>.

146. *Id.*

147. *One Nation Under God*, HOBBY LOBBY (July 4, 2021), <https://imgprd19.hobbylobby.com/sys-master/root/hf8/he3/h00/9996280201246/21-0843-2021-IDMA-DownloadablePDF.pdf>; see also Emily Wood, *Hobby Lobby Under Fire for July 4th Ad Promoting ‘One Nation Under God’*; Franklin Graham Defends, CHRISTIAN POST (July 6, 2021), <https://www.christianpost.com/news/hobby-lobby-under-fire-for-july-4th-newspaper-ad-promoting-god.html>.

148. *One Nation Under God*, *supra* note 147.

Evangelical Republicans and providing an evangelistic message rooted in American Evangelical theology.

B. Religious Conviction and Partisan Politics in Burwell v. Hobby Lobby

With this context about the Greens' commitments and worldview in mind, let's return to examine their stated religious objections in *Hobby Lobby*. As discussed in Part II, based on their brief filed with the Supreme Court, the Greens appear to believe the following:

- (i) Abortion is morally wrong.
- (ii) Preventing a human embryo from implanting in the uterus is a type of abortion.
- (iii) Certain types of contraception (Plan B, Ella, and IUDs) can be used to prevent a human embryo from implanting in a uterus.
- (iv) Providing health insurance for items that could be used to prevent a human embryo from implanting in a uterus makes one morally complicit in the practice of preventing human embryos from implanting in uteruses.

The melding of white Evangelicalism with Republican politics seems to serve as a but-for cause for the Greens' acceptance of each of these claims. The Evangelical Protestantism of David and Barbara Green's childhoods was not particularly concerned with the morality of abortion.¹⁴⁹ It wasn't until Christian political operatives chose to make abortion a wedge issue in building a conservative Christian-Republican coalition that abortion became a central moral issue.¹⁵⁰ Thus, this political coalition building seems to be a but-for cause of belief (i) listed above, with the increased polarization that has occurred on the issue of abortion between the partisan teams functioning as a but-for cause for belief (ii).

We can see the work of Evangelical-Republican partisanship in a different way by asking why the Greens believe (iii)—that emergency contraception and IUDs can be used to prevent a human embryo from implanting in a uterus—when so many scientists and

149. Bouie, *supra* note 122.

150. BALMER, *supra* note 121, at 5–24.

medical doctors have concluded otherwise.¹⁵¹ Despite the mounting scientific evidence to the contrary, in his 2016 op-ed in support of Donald Trump for President, David Green still stated that Plan B, Ella, and IUDs “can take effect after conception.”¹⁵² Presumably, Green’s confidence in his views about how emergency contraception and IUDs work comes either from not knowing about or from rejecting the contrary claims made by scientists and physicians.

Whether it is lack of knowledge about, or rejection of, the contrary claims, Evangelical-Republican partisanship likely is playing a causal role here, too. Professor C. Thi Nguyen has distinguished two different types of social structures that can “reinforce ideological separation.”¹⁵³ The first—the “epistemic bubble”—is a “social epistemic structure in which some relevant voices have been excluded through omission.”¹⁵⁴ Evidence suggests that the United States’ partisan teams find themselves in epistemic bubbles as a result of self-sorting into like-minded enclaves.¹⁵⁵ Thus, the Greens’ operation in an Evangelical-Republican epistemic bubble may have kept them unaware of scientific and medical evidence against their empirical claim about how emergency contraception and IUDs work.

The second structure Nguyen identifies—the “echo chamber”—is “a social epistemic structure in which other relevant voices have been actively discredited.”¹⁵⁶ While epistemic bubbles separate *what information is received*, echo chambers separate groups based on *who is trusted*. There is also evidence that many Evangelical-Republican partisans operate in echo chambers where the voices of scientists are among those that are actively discredited, leading partisans to downgrade their trust in the

151. See, e.g., Brief for the Physicians for Reproductive Health et al., *supra* note 23; Gregory M. Lipper, *Zubik v. Burwell, Part 3: Birth Control Is Not Abortion*, BILL OF HEALTH (Mar. 19, 2016), <https://blog.petrieflom.law.harvard.edu/2016/03/19/zubik-v-burwell-part-3-birth-control-is-not-abortion/>.

152. Green, *supra* note 145.

153. C. Thi Nguyen, *Echo Chambers and Epistemic Bubbles*, 17 *EPISTEME* 141, 141 (2020).

154. *Id.* at 142. This is similar to what Eli Pariser calls the “filter bubble.” ELI PARISER, *THE FILTER BUBBLE: HOW THE NEW PERSONALIZED WEB IS CHANGING WHAT WE READ AND HOW WE THINK* (2011).

155. See generally YOCHAI BENKLER, ROBERT FARIS & HAL ROBERTS, *NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS* (2018) (identifying one media ecosphere spanning from the center right to the far left, and a second separate media ecosphere consistent on the far right).

156. Nguyen, *supra* note 153, at 142.

epistemic authority of scientists, at least when scientists offer claims that undermine partisan narratives.¹⁵⁷ Thus, what seems more likely is that the Greens have downgraded the epistemic authority of the physicians and scientists claiming that emergency contraception and IUDs don't prevent implantation of fertilized eggs in the uterus. This might be due to the Greens assigning a low level of epistemic authority to the relevant physicians and scientists or due to the Greens using other cognitive processes, such as confirmation bias, that tend to be operative during partisan assessment of evidence.¹⁵⁸ Regardless of the exact mechanism, the Greens' objection to providing an employee health insurance plan that allows for employees to get emergency contraception or IUDs relies on empirical beliefs about how these forms of contraception work. The Greens likely would not hold these beliefs with the confidence that they do but for the social epistemic dynamics created by the United States' mega-identity partisanship.

Finally, there is the Greens' belief that providing an employee health insurance plan that covered emergency contraception and IUDs would make them complicit in an employee's possible decision to use emergency contraception or an IUD in a way the Greens consider morally objectionable. Assuming the Greens are sincere, why is it that they have developed this very particular view about moral complicity when, presumably, they do not have such deep qualms about moral complicity in a variety of other similar circumstances? For example, why do the Greens not seem to believe they are morally complicit in "the practice of preventing human embryos from implanting in uteruses" when they contribute financially to mutual funds with holdings in the companies that produce these contraceptives?¹⁵⁹ Or why do the Greens not seem to believe they are morally complicit in the practice when they

157. See, e.g., BENKLER, FARIS & ROBERTS, *supra* note 155, at 219–21; JAMIESON & CAPPELLA, *supra* note 132, at 57–66; Ridgely, *supra* note 132, at 17–21; Cary Funk, Meg Hefferon, Brian Kennedy & Courtney Johnson, *Trust and Mistrust in Americans' Views of Scientific Experts*, PEW RSCH. CTR. (Aug. 2, 2019), <https://www.pewresearch.org/science/2019/08/02/trust-and-mistrust-in-americans-views-of-scientific-experts/>; Naomi Oreskes, *The Reason Some Republicans Mistrust Science: Their Leaders Tell Them To*, SCI. AM. (June 1, 2021), <https://www.scientificamerican.com/article/the-reason-some-republicans-mistrust-science-their-leaders-tell-them-to/>.

158. See, e.g., Bharath Chandra Talluri, Anne E. Urai, Konstantinos Tsetsos, Marius Usher & Tobias H. Donner, *Confirmation Bias Through Selective Overweighting of Choice-Consistent Evidence*, 28 CURRENT BIOLOGY 3128, 3128–35 (2018).

159. *Supra* text accompanying note 15.

provide salaries to employees who might use their earnings to buy these same forms of contraception?¹⁶⁰ There is a way in which the specific and limited nature of their conviction seems far too politically convenient. No wonder critics have been suspicious that the Greens' stated religious convictions were insincere. Still, there is another way to explain the political convenience of the Greens' religious objections—namely, they were primed by their political community to develop this specific conviction over others, and because their political community is so intertwined with their religious community, the political impetus for their convictions went largely unnoticed and unfelt. Such an explanation helps explain how this politically salient conviction aligns with the Greens' sincere commitment to their Christian faith.

160. Cf. Nomi Maya Stolzenberg, *It's About Money: The Fundamental Contradiction of Hobby Lobby*, 88 S. CAL. L. REV. 727, 755 (2015) ("A considerable part of the appeal of the case for exemptions from the contraceptive mandate derives from the selective application of the doctrine of facilitation Implicitly, if not explicitly, the case has been framed in a way that suggests that other modes of conveying resources to employees exist—paying them wages, for example, or paying taxes that are used by the government to provide them with coverage—that are not equally facilitative of the very same conduct (using contraception).").

C. Comparing the Explanations of the Greens' Purported Religious Convictions

It will be useful to reexamine the evidence offered for the insincerity of the Greens and other plaintiffs' religious claims in Part II and to ask whether the account offered above can just as successfully explain the data. I will argue that it can. In Part II, we canvassed the following considerations put forward as reasons to think that the Greens and other plaintiffs were insincere in their stated religious objections to the contraceptive coverage mandate:

- (1) The Greens and many other plaintiffs had previously covered in their employee health insurance plans some or all of the contraceptives they now objected to covering under the ACA.
- (2) The Greens were financially invested through their employee retirement program in companies that produced the objected-to forms of contraception.
- (3) The Greens disregarded scientific evidence suggesting that the objected-to contraceptives did not prevent implantation of a fertilized egg in the uterus.
- (4) The Greens and other plaintiffs appealed to attenuated claims.
- (5) Many plaintiffs "refused to take yes for an answer."
- (6) Plaintiffs treated similar accommodations differently when they were offered by courts versus when they were offered by the Obama administration.
- (7) Religious and political opposition to the Obama administration had created political and legal opposition to the contraceptive mandate.

Regarding (1), while previous insurance coverage of the contraceptives is indeed compatible with insincerity, it is also compatible with a newly acquired conviction, or with newly acquired depth to the conviction. Constant discussion of the ACA and its provisions by right-wing media could easily have primed Evangelical-Republican partisans to reflect on the nature of contraception and to associate support for emergency contraception and IUDs with a vilified political outgroup. This association, in turn, could have spurred a new or greater commitment to opposing emergency contraception and IUDs.

Thus, (1) can be explained as a newly altered conviction rather than as an insincere conviction.

Relatedly, the lack of conviction about (2)—contributing financially to investment funds that include suppliers of emergency contraception and IUDs—can be explained by a *lack* of priming about this issue. In contrast to insurance plans, right-wing media criticism of the ACA would not have caused Evangelical-Republican partisans to reflect on things like financial contributions to employee retirement programs. Thus, such partisans would not have been prompted to develop new or stronger convictions on the matter. One might still accuse the Greens of being inconsistent, but this kind of inconsistency is compatible with sincerity.

The alternative explanation for (3)—empirical beliefs about the way emergency contraceptives and IUDs work—was covered earlier. The epistemic bubbles and echo chambers that many Evangelical Republicans operate in offer a plausible explanation of how the Greens could sincerely either disregard or fail to learn about the contrary claims of many scientists and physicians. This does not mean that their actions are epistemically defensible. But one can be completely sincere even while engaging in objectionable epistemic practices.

A similar line of argument can be used to respond to all the additional considerations put forward as evidence of the plaintiffs' insincerity. While the claims of the Greens and many other plaintiffs were indeed highly attenuated, the motivated reasoning that leads partisans to see the actions of outgroup members as iniquitous can help explain why the plaintiffs forged these attenuated connections. Similarly, this can explain why they "refused to take yes for an answer," at least when that yes came from the Obama administration, which many Evangelical-Republican partisans had already deemed as an adversary to their way of life. This too can explain why plaintiffs have treated similar accommodations differently when they were offered by courts versus when they were offered by the Obama administration. Their reactions were filtered by seeing the Obama administration as part of their outgroup in a way that they did not see the courts. Thus, on my account, as on Lipper's, (7)—that religious and political opposition to the Obama administration had created political opposition to the contraceptive mandate—plays an important role

in explaining the plaintiffs' behavior.¹⁶¹ But on my account, which emphasizes the influence that conservative politics has had on conservative Christian religious conviction in the United States during the last half century, it merely shows that the plaintiffs' sincere religious convictions were likely substantially shaped by conservative politics as opposed to showing that those convictions are insincere.

While my view is importantly different than the views espoused by the critics discussed in Part II, I should also note an important commonality. Like the critics, I think the evidence suggests that the plaintiffs' objections to the contraceptive coverage requirement were driven largely by partisan Republican politics. Where I disagree with the critics is over what the implications of this are for the sincerity of the plaintiffs' convictions. Given the enmeshed nature of white conservative Christianity—especially Evangelicalism—with conservative politics in the United States, that the plaintiffs' convictions were driven by conservative political partisanship is compatible with them operating, at least from the partisan plaintiffs' internal perspective, as perfectly sincere religious convictions.

D. Political Partisanship and Religious Freedom Litigation

Despite offering an account which explains how the Greens' and other contraceptive coverage mandate plaintiffs' religious convictions could be sincere, I do not conclude that all is well. On the contrary, I take this state of affairs posited on my account to be harmful to religious liberty, civil rights, and American democracy. This is because the social and political dynamics that may have spurred conservative partisans to object to the contraceptive mandate through religious freedom lawsuits seem to have generated a pattern of such cases, including those where plaintiffs have argued they have a religious right to reject providing goods or services for same-sex weddings.¹⁶² Note that many of those cases also rely on subjective judgments about the conditions under which

161. Lipper 2016, *supra* note 38 (arguing that those who filed lawsuits against the contraceptive mandate were motivated by political ideology rather than sincere religious belief).

162. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018); *Elane Photography, LLC v. Willock*, 284 P.3d 428 (N.M. Ct. App. 2012); *Brush & Nib Studios, LC v. City of Phoenix*, 448 P.3d 890 (Ariz. 2019); *State v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017).

a third party would become morally complicit in the acts of others. For example, Jack Phillips refuses to make and sell cakes that are to be used by the customers to celebrate same-sex weddings on the grounds that doing so would make him “implicitly complicit” in violation of his religion.¹⁶³ In an article in the *Tennessee Journal of Law and Policy*, Joshua Craddock includes “[f]lorists, bakers, wedding photographers, and other artistic professionals who object to participating in same-sex ceremonies” as among those who believe that such commercial provision of goods and services “would make them complicit with sin.”¹⁶⁴ Personal decisions about what actions do or do not make one complicit in another’s purported moral wrongdoing have turned out to be highly responsive to partisan political conflicts for at least some Evangelical-Republican partisans.¹⁶⁵

Given the othering, aversion, and moralizing inherent in political sectarianism, I suspect that until either the social and political dynamics or the religious freedom laws in the United States change, religious freedom lawsuits will continue to become an epicenter for partisan ideological battles, regardless of how conciliatory the position of those viewed by Evangelical-Republican partisans as outgroup opponents is. Relatedly, as pluralist-Democratic partisans continue to dissociate with conservative Christianity and organized religion, members of that partisan camp may continue to have a harder and harder time understanding the perspective of, or sympathizing with concerns about violations of, religious conviction voiced by members of the

163. Erwin Chemerinsky, *Not a Masterpiece: The Supreme Court’s Decision in Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 43 HUM. RTS. MAG., Oct. 20, 2018, at 12, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/not-a-masterpiece/.

164. Joshua J. Craddock, *The Case for Complicity-Based Religious Accommodations*, 12 TENN. J.L. & POL’Y, 233, 258–60 (2018).

165. There are important distinctions that can be made across these cases about the nature of the purported complicity. For example, in *Hobby Lobby*, the Greens seem primarily worried that they would be complicit in wrongdoing via financial support for a practice, whereas in most cases involving religious objections to providing goods or services for same-sex weddings, the plaintiffs seem primarily worried about symbolic support or implicit endorsement that would make the plaintiffs complicit in wrongdoing. For a useful discussion of the distinction between material support and symbolic support, see Stolzenberg, *supra* note 160, at 744–49. Despite this distinction, I think these cases are united under the heading of “religious objections” to being made complicit in behavior viewed as morally wrong.

Republican partisan team.¹⁶⁶ Such a cycle is a losing situation for religious liberty, for American democracy, and for each of us.

Thus, we are in need of a remedy, but it is not immediately obvious what the appropriate remedy is. If the problem were that plaintiffs like the Greens were insincere, at least one potential remedy seems readily identifiable: challenge their claims to sincerity, examine the evidence, and be unafraid to conclude that the stated religious belief is insincere when that is what the evidence shows. But if my theory is correct—that the issue is not political ideology masquerading as religious conviction but rather a deep conflation between political ideology and religious conviction on the Christian right—then this remedy will not solve the problem. The issue is not that the convictions are insincere. It is that linking Christian conviction to partisan politics has created a social atmosphere that will consistently invite the formation and strengthening of religious conviction in opposition to policy goals put forward by the Democrats who are viewed by Evangelical Republicans as members of the partisan opposition.

For example, in 2020, what initially seemed like a thoroughly nonpartisan issue—responding to the coronavirus pandemic—quickly devolved into not only a politically partisan issue, but a religiously partisan issue. Many conservative Christians developed narratives that incorporated elements of Christian nationalism, conservative Republicanism, and Evangelicalism to ground religious opposition to ostensibly non-religious and non-partisan directives to do things like wear masks and practice social distancing.¹⁶⁷ Given how quickly and how significantly an initially nonpartisan issue like responding to a pandemic generated seemingly novel convictions, is it any wonder that the same thing has happened in connection with “culture war” issues like providing contraception or goods and services for same-sex weddings?

In the remainder of the paper, I start from the assumption that a perpetual cycle of court battles over the nature of religious

166. See, e.g., MARGOLIS, *supra* note 92, at 123 (finding that although “Democrats do not have a knee-jerk reaction against religion, or even the mixing of religion and politics[.] . . . when the religious message was linked to a conservative policy position that stood in contrast to many Democrats’ political values that Democrats reacted by distancing themselves from religion.”). Such distance may make thinking about matters empathetically from the perspective of the religious plaintiffs more difficult.

167. See, e.g., Leslie Dorrrough Smith, *Why Masks Are a Religious Issue*, THE CONVERSATION (Sept. 4, 2020, 8:26 AM), <https://theconversation.com/why-masks-are-a-religious-issue-144391>.

freedom as one of the primary fronts in partisan political jockeying is something that ought to be avoided. The question then becomes if there is a way to break, or at least weaken, this cycle of new convictions and lawsuits developed in response to partisan politics in a manner that respects religious liberty as well as the other rights and values often at play in contemporary religious free exercise cases.

V. RELIGIOUS CONVICTIONS IN BALANCE

I have argued that the inconsistent behavior exhibited by many plaintiffs in the contraceptive mandate lawsuits can be explained not by insincerity but by the influence that Republican politics has had in shaping religious convictions for many on the Christian right. One might accept my explanation and still think that such political origins taint a religious conviction such that courts should not recognize it as a sincere religious conviction. One might argue that while such a conviction may be *sincere*, that it is no longer *religious*. One might argue instead that such a conviction is something like a sincere partisan conviction.

While I have some sympathy for this line of reasoning (at least philosophically), I think it would be a bad line of reasoning for courts to adopt. It is true that, on my account, convictions like those of the Greens in *Hobby Lobby* are not *merely* religious convictions because of the erosion of the line between religion and politics for Evangelical-Republican partisans like the Greens. But that does not mean they are not religious convictions at all. Rather, the issue is that it is impossible to say to what extent the convictions are religious versus partisan. In fact, on my account, there would seem to be no fact of the matter. If this is correct, courts would be given an impossible task in being asked to sort out the extent to which convictions like the Greens' in *Hobby Lobby* are religious versus political. This seems like a recipe for overly subjective judicial decision-making and for continuing to make religious freedom lawsuits a locus of partisan sparring.

Still, the sorts of behavioral inconsistencies of plaintiffs like the Greens identified in Part II seem like they should be relevant in assessing purported religious convictions. But in what way? I suggest that rather than viewing such inconsistencies as evidence of insincerity, they should be treated as evidence about how strong or central the conviction is for the religious believer. This evidence is at best defeasible, given that one can behave in a manner

inconsistent with even strong convictions. Still, such inconsistency can reasonably be taken as reason to doubt the strength or centrality of a conviction.

Currently, there is no natural place under either RFRA or First Amendment jurisprudence to factor in the strength or the centrality of a religious conviction, but I will argue this in fact reveals deeper flaws with what I call the “checklist approach” that occurs under both *Employment Division v. Smith* and RFRA. Appealing to scholarship by Professor Mary Ann Glendon and Professor Jamal Greene, I will examine the idea that we would be better off employing a balancing approach for the protection of religious freedom alongside other rights and values. Such an approach comes with its own risks and flaws, but it may still be preferable to current models, which have helped facilitate a continual cycle of partisanship-induced religious freedom lawsuits.

To restate: my central suggestions in this Part are that (1) courts should use the kinds of criticisms of the Greens reviewed in Part II to assess how strong or central a religious conviction is to a religious plaintiff, (2) courts cannot currently do this successfully under *Smith* or RFRA but could do this successfully under a balancing test approach to religious freedom, and (3) thus, we have some reason to think that adopting a balancing test approach to religious freedom would be a good thing for religious freedom and for American democracy.

A. The Centrality of a Religious Conviction

I first need to provide more information about what I mean by the strength or centrality of a conviction for a religious believer. Practically speaking, some religious beliefs and practices matter more to adherents than others. Certain tenets may be treated as central to a religion, while others are treated as peripheral or secondary. Similarly, certain practices may be treated as central to a religion, while others are treated as peripheral or secondary. Importantly, these are orderings made by religious traditions or by individual religious adherents themselves, not outsiders. Thus, in suggesting that courts look for evidence of how strong or central a religious conviction or practice is, I am *not* suggesting that courts use their own judgments about the importance of a conviction or practice. Rather, I am suggesting that courts include evidence about how religious adherents themselves treat a conviction or practice in assessing how strong or central a religious conviction or practice is

to the relevant religious adherents. The procedure here could be as simple as taking plaintiffs at their word about the centrality of their religious convictions unless the evidence provides strong reason to doubt the accuracy of the plaintiff's testimony.

Using the language of "attenuation," both HHS and the primary dissent in *Hobby Lobby* appeared willing to make this kind of assessment about the centrality of Hobby Lobby's stated religious objection to providing contraceptive coverage in employee health insurance plans.¹⁶⁸ In its petitioner's brief, HHS argued as follows:

Respondents' RFRA claim also fails because the particular burden about which they complain is too attenuated to qualify as "substantial" within the meaning of the statute. A group health plan "covers many medical services, not just contraception." The decision as to which specific "services will be used is left to the employee and her doctor." "No individual decision by an employee and her physician—be it to use contraception, treat an infection, or have a hip replaced—is in any meaningful sense [her employer's] decision or action."

The connection to the corporate owners is more attenuated still. The Greens are, "in both law and fact, separated by multiple steps from both the coverage that the company health plan provides and from the decisions that individual employees make in consultation with their physicians as to what covered services they will use." "RFRA does not protect against the slight burden on religious exercise that arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one's own."¹⁶⁹

Justice Ruth Bader Ginsburg, writing in dissent and joined by Justices Breyer, Sotomayor, and Kagan, accepted this argument, writing that "[u]ndertaking the inquiry that the Court forgoes, I would conclude that the connection between the families' religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial."¹⁷⁰

But the majority of the justices in *Hobby Lobby* viewed things differently. Writing for the majority, Justice Samuel Alito responded:

168. Petition for a Writ of Certiorari at 26–27, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (No. 13-354), 2013 WL 5290575.

169. *Id.* (alteration in original) (citations omitted).

170. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 760 (2014) (Ginsburg, J., dissenting).

HHS argues that the connection between what the objecting parties must do and the end that they find to be morally wrong is too attenuated because it is the employee who will choose the coverage and contraceptive method she uses. But RFRA's question is whether the mandate imposes a substantial burden on the objecting parties' ability to conduct business in accordance with *their religious beliefs*. The belief of the Hahns and Greens implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is immoral for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another. It is not for the Court to say that the religious beliefs of the plaintiffs are mistaken or unreasonable.¹⁷¹

The majority and HHS represent two different ways of conceptualizing the scope of a religious conviction.

Implicit in HHS's assessment of the Greens' convictions is a relational picture of how the Greens' purported convictions hang together, with some convictions at the core and others at the periphery. HHS seems to accept that the Greens have strong religious objections to abortion and to the use of contraceptives that they consider "abortifacients." But they then conceptualize the Greens' additional objections as distant from these core convictions. If we analogize religious convictions to a tree, the Greens' conviction that abortion is morally wrong might be a larger branch closer to the tree's trunk, while the view that one would be morally complicit in wrongdoing if one provided others with the option of using certain forms of contraception would be a much smaller, newer, and thinner branch, significantly farther from the tree's trunk. HHS's view—later adopted by the dissenting justices—appears to be that in assessing how substantial a burden on religion would be, one should take into account the centrality of any violated convictions. The further from the center the conviction is on the tree of belief, so to speak, the less substantial the burden.

In contrast, the majority in *Hobby Lobby* seems to treat all stated religious convictions as on one level. There is no relational ordering of the convictions. For the majority, religious convictions are better analogized to a grocery list. Each item on the list stands on its own. All items on the list have equal status, which is provided by the fact that the religious adherent has put the item on their list.

171. *Id.* at 685–86 (majority opinion).

These differing conceptions of religious conviction give rise to different interpretations of what constitutes a substantial religious burden. For HHS and the dissent, centrality of the conviction is a factor in assessing whether the burden is substantial. It is not a factor for the majority, who assess the substance of the burden primarily in terms of what refusing to compromise on their conviction would cost the plaintiffs.¹⁷² Given the process by which RFRA protects religious free exercise, I think there is sense and merit in both interpretations of what constitutes a substantial burden on religion. But taking a step back, one might have concerns with the general framework RFRA provides for deciding religious free exercise cases. The specific concern I have in mind is one that one might also have about the Court's First Amendment free exercise jurisprudence under *Employment Division v. Smith*.¹⁷³ The concern is that both frameworks encourage a categorical approach to rights recognition rather than a holistic balancing approach of the various rights, duties, and values that may be involved in a given religious free exercise case. Because of these categorical approaches, there is no obvious way in which to weigh the centrality of a religious conviction with other relevant interests.

B. Smith and RFRA as Categorical Checklist Approaches

Before proceeding, it is worth expanding on the ways in which RFRA and *Smith* enact categorical rather than holistic approaches to religious free exercise jurisprudence. In order for plaintiffs to win a religious free exercise case under RFRA, all they need to show is that (1) government action has substantially burdened their free exercise of religion, and (2) that either (a) the government lacks a compelling interest for their action, or (b) that the government's action is not the least restrictive means by which to achieve a compelling interest.¹⁷⁴ Rather than a balancing test, RFRA enacts a series of override procedures. The government wins if the interest is compelling and the means employed to meet that interest is the

172. *Hobby Lobby*, 573 U.S. at 691 (“If the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price—as much as \$1.3 million per day, or about \$475 million per year, in the case of one of the companies. If these consequences do not amount to a substantial burden, it is hard to see what would.”)

173. See generally *Emp. Div., Dep’t of Hum. Res. of Or. v. Smith*, 494 U.S. 872 (1990).

174. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1; cf. *Sherbert v. Verner*, 374 U.S. 398, 406–07 (1963) (offering a similar procedure to the one adopted in RFRA).

least restrictive means for doing so. Otherwise, so long as there is a substantial burden to religion, the challenger wins.¹⁷⁵

Thus, the challenger and the government respectively are assessed for whether they check the right boxes. In the challenger's case the box to check is having a substantial burden on religious free exercise. In the government's case the boxes to check are having a compelling government interest and employing the least restrictive means for satisfying that interest. This checklist approach fails to ask questions about how the substantiveness of the burden to religious free exercise compares to the other rights, interests, and values at play.

Lest all blame be placed on Congress for enacting RFRA, it is worth noting that RFRA itself was a response to a categorical test put forward by the Court in *Smith*.¹⁷⁶ In *Smith*, the Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes) . . ."¹⁷⁷ The Court treats neutrality and general applicability as two distinct, yet interrelated criteria.¹⁷⁸ If "the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral . . ."¹⁷⁹ This extends to both "overt" and "masked" attempts at infringing religious practices.¹⁸⁰ If a law does not apply to everyone, or if it provides "a mechanism for individualized exemptions[,]" then it is not generally applicable.¹⁸¹ Like RFRA,

175. In *Smith*, the Court refers to the *Sherbert* test, upon which RFRA was based, as a "balancing test." *Smith*, 494 U.S. at 883. But this is only in the broad sense that it, in theory, allows for a balance between substantive burdens to religious free exercise against compelling government interests. But, in practice, this does not really seem like a balancing test in any real sense. If the compelling government interest is enacted by the least restrictive means, then *Sherbert* allows the burden on religious free exercise to remain no matter how significant the burden. Alternatively, if the compelling government interest is enacted by something less than the least restrictive means, the burden on religious free exercise will not be tolerated, no matter how significant the compelling interest.

176. 42 U.S.C. § 2000bb.

177. *Smith*, 494 U.S. at 879 (citing *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)) (internal quotation marks omitted).

178. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

179. *Id.* at 533.

180. *Id.* at 534.

181. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021) (citations omitted); see also *Smith*, 494 U.S. at 884; *Bowen, Sec'y of Health & Hum. Servs. v. Roy*, 476 U.S. 693, 708 (1986).

Smith employs a checklist approach. If the law in question is both neutral and of general applicability, then for purposes of the free exercise clause of the First Amendment, the law will be upheld as applied to the religious objector without undergoing a compelling interest analysis, “even if the law has the incidental effect of burdening a particular religious practice.”¹⁸²

RFRA and *Smith* lend themselves to complimentary concerns. Under RFRA, attenuated religious convictions resulting from partisan priming may receive protection at the expense of significant competing rights or third-party harms. Under *Smith*, government laws that lack a compelling interest may be upheld even if they create substantial burdens on religious free exercise, so long as the laws are neutral and of general applicability. Neither test allows for an explicit balancing of the religious freedom interests with the other interests implicated in the case.

C. *Balanced Religious Freedom Jurisprudence*

My critique of RFRA and *Smith* can be viewed as part of a much larger critique of how people in the United States think and talk about rights compared to those in other countries, especially European countries. This larger critique has been around for at least the last three decades and has been put forward by scholars on both the political right and left.¹⁸³ For example, Professor Mary Ann Glendon writes that “in its simple American form, the language of rights is the language of no compromise. The winner takes all and the loser has to get out of town. The conversation is over.”¹⁸⁴ She argues that, in the United States, “rights talk, in its

182. *Lukumi*, 508 U.S. at 531.

183. See, e.g., MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991); JAMAL GREENE, *HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART* (2021).

184. GLENDON, *supra* note 183, at 9. This is not to deny that even under balancing approaches there are winning and losing parties. But the nature of those wins and losses are different, at least in theory. A significant part of the difference concerns the broader social and political significance that people attach to the outcomes in these cases. The way we think and talk about cases, as a society, is influenced by the legal frameworks used to decide those cases. Under a categorical framework, the “win” in individual cases easily stops being about just a win or loss for a party in the case at hand. It instead becomes a win or loss for an entire political tribe via the expressive power of law. In adopting a balancing approach, courts may be better positioned to respectfully acknowledge the significant interests on both sides, even while they ultimately have to make a fact-based decision about who wins or loses in the particular case. Such a system may also make it easier to draw fact-responsive boundary lines across cases.

absoluteness, promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground.”¹⁸⁵ Glendon contrasts the “simplicity and assertiveness of our version of the discourse of rights” with the “continuing dialogue about freedom and responsibility that is taking place in several other liberal democracies.”¹⁸⁶

More recently, Professor Jamal Greene has raised similar worries, writing that “[w]here perceived as absolute, rights take poorly to conflict. When recognizing our neighbor’s rights necessarily extinguishes our own, a survival instinct kicks in. Our opponent in the rights conflict becomes not simply a fellow citizen who disagrees with us, but an enemy out to destroy us.”¹⁸⁷ In light of this, Greene argues that the best way to approach rights is to seek to mediate rights (as opposed to minimizing rights or discriminating between rights).¹⁸⁸ According to Greene, currently, U.S. courts engage rights on a discrimination model whereby they “recognize relatively few rights, but strongly.”¹⁸⁹ On the mediation model, courts “should instead recognize more rights, but weakly.”¹⁹⁰ Greene makes the case that the courts’ discrimination approach to rights has divided the United States and inflamed the culture wars, and that courts would be better off adopting the mediation approach, which is “about paying unwavering attention to the facts of the parties’ dispute” rather than determining which side does have a right and which side does not.¹⁹¹ What Greene calls the mediation approach is akin to what I mean to suggest when I advocate for a balancing approach to religious freedom rights.

Adopting a balancing approach to free exercise claims – a fact-intensive inquiry that seeks to account for not only how substantial any potential burdens on free exercise might be but also the other rights, values, and interests at play – would help address the sorts of worries about the U.S. approach to rights identified by Glendon

185. GLENDON, *supra* note 183, at 14.

186. *Id.* at 12.

187. GREENE, *supra* note 183, at xvii.

188. *Id.* at xvii–xviii.

189. *Id.* at xx.

190. *Id.* at xx, 114–64 (emphasis omitted).

191. *Id.* at xx, ch. 5–6.

and Greene.¹⁹² If such a balancing approach were to be adopted, the centrality of a religious conviction or practice to a religious adherent could serve as one factor in determining how substantial a burden on free exercise would be.

This sort of proposal is one that heretofore the Supreme Court has resisted. A paradigmatic expression of the Court's reservations about such a proposal can be found in *Smith*. Writing for the Court, Justice Antonin Scalia objects as follows:

It is no more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field, than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable "business of evaluating the relative merits of differing religious claims." As we reaffirmed only last Term, "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.¹⁹³

At least two points can be made in response to Scalia's concerns. First, the role that assessment of centrality would play on my proposal is slightly different than the role it would play under the hypothetical proposal Scalia considers. The order of operations Scalia criticizes (i.e., assess the religious belief/practice for centrality, and only if it is found central, conduct a compelling interest test) differs from a balancing test approach where both the significance of the government interest and the significance of the religious burden are balanced from start to finish.

Second, Scalia's reason for concluding that "it is not within the judicial ken to question the centrality of particular beliefs or practices to a faith" appears to be that "courts must not presume to determine the place of a particular belief in a religion or the

192. What I mean by a balancing test also has much in common with what is referred to in many European courts as "proportionality."

193. *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 886-87 (1990) (citations omitted).

plausibility of a religious claim.” But on my proposal, courts would *presume* no such thing. On my proposal, courts would not be superimposing their own conception of the centrality of a tenet or practice to a tradition, nor would they presume, without investigation, to be able to do so. Rather, courts would look at the evidence to determine how central the relevant religious adherents themselves seem to take the relevant tenet or practice to be. Just as the courts treat the question of the sincerity of a religious conviction as a matter of fact, so too courts could treat the question of the centrality of a religious conviction or practice for a religious adherent as a matter of fact.¹⁹⁴ In making this factual judgment, judges could appeal both to religious claimants’ statements about the centrality of the relevant religious conviction or practice and to other evidential markers of significance – such as whether or not the religious adherent’s actions suggest that the conviction is of significant importance to their religion. In a case like *Hobby Lobby*, past insurance coverage of the objected-to contraceptives and continual investment in the companies that produce the contraceptives could be two of many considerations taken into account in assessing the centrality of the conviction for the religious adherents.

Thus, I do not find Justice Scalia’s objections to employing a centrality assessment in free exercise cases persuasive. That said, I do recognize that there are significant reasonable worries one could have about my proposal. In particular, I worry that while my proposal could succeed in theory, the practical reality is that many judges themselves are sociopolitical partisans susceptible to the same kinds of cognitive distortions that other citizens are susceptible to. Such partisan loyalties may, despite a judge’s best intentions, make fair balancing difficult if not impossible. This is not a problem unique to my proposal, as the partisan alignment in cases like *Hobby Lobby* seems to suggest. This points to the fact that legal remedies alone cannot fully address the social and political issues generated by the echo chambers and hyper-partisanship present in the United States. The United States would benefit from

194. See *United States v. Seeger*, 380 U.S. 163, 185 (1965) (“[T]he threshold question of sincerity . . . is, of course, a question of fact . . .”); see also Ben Adams and Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After Hobby Lobby*, 67 *STANFORD L. REV.* (2014), <https://www.stanfordlawreview.org/online/questioning-sincerity-the-role-of-the-courts-after-hobby-lobby/>.

improved social epistemic practices and greater cross-cutting cleavages in our social order.

CONCLUSION

Cases like *Hobby Lobby*—where the line between the plaintiffs' religious convictions and political ideology is all but gone—can be understood as spillover effects of sociopolitical polarization in the United States. As long as such polarization dominated by negative partisanship continues, we should expect the religious convictions of some to continue to be primed in opposition to Democratic lawmaking efforts and religious freedom lawsuits to continue to function as an epicenter for partisan political fights. Such circumstances highlight weaknesses in the current categorical approaches to religious freedom under *Smith* and RFRA. But legal reform alone likely cannot solve all the problems here. Social reforms are needed as well.