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IS HOBBY LOBBY WORSE FOR RELIGIOUS LIBERTY THAN SMITH?

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Imagine a world where religious people are a kind of aristocratic elite who are entitled to injure non-adherents with impunity – a world which would "permit every citizen to become a law unto himself."[1] *Employment Division v. Smith* declared that "courting anarchy" in this manner was a conclusive reason to hold that there is no constitutional right to religious exemptions from laws of general applicability.[2] The *Hobby Lobby* decision (by some of the same judges!)[3] threatens to bring that world into being.

The Court's implausibly broad reading of the Religious Freedom Restoration Act is strange when juxtaposed with its unwillingness to extend any *constitutional* protection to burdens on religion. The Court is apparently daunted by the counter-majoritarian difficulty when it is asked to accommodate religion under the Free Exercise Clause, but it feels free to run wild when it construes a mere statute.

Smith has been denounced as reflecting a callous indifference to religious liberty.[4] But it now is clear that the decision was not at all the

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Part III of this paper is adapted from (and a few other parts of the paper draw from) Frederick Mark Gedicks, *One Cheer for Hobby Lobby: Improbable Alternatives, Truly Strict Scrutiny, and Employee Burdens*, 38 Harv. J.L. & Gender 153 (2015). Prof. Koppelman found Prof. Gedicks's argument convincing, and they both had some thoughts about its broader implications. Thanks to Bob Bennett, Simon Lazarus, and Micah Schwartzman for comments and to Tom Berg for helpful conversations.

1. *Employment Division v. Smith*, 494 U.S. 872, 879 (1990), quoting Reynolds v. United States, 98 U.S. 145, 166-67 (1879). Regimes of religious exemptions "on demand" are becoming less hypothetical all the time. *See, e.g.*, H.B. 322 Religious Liberty Recognition & Protection Bill, 2015 Leg., Gen'l Sess. (Utah Feb. 11, 2015) (providing religious exemptions to private parties and government officials from most state laws), http://le.utah.gov/~2015/bills/static/HB0322.html.

2. *Id.* at 888.

3. Justice Scalia authored *Smith*, and Justice Kennedy joined his opinion.

4. See Richard W. Garnett, The Political (and Other) Safeguards of Religious Freedom, 32 Cardozo L. Rev. 1815, 1815-16 (2011)(collecting denunciations).

product of an undervaluing of religious freedom, but only of an institutionally-based concern with vesting too much unaccountable power in judges.[5] Some of the same judges who were in the majority in *Smith*, notably Antonin Scalia, have been quite receptive to legislatively crafted religious accommodations, and they have even been willing to construct judicially crafted exemptions pursuant to statutory authorization. *Hobby Lobby* is an example: the Court fashioned a new exemption for for-profit businesses that had religious objections to providing insurance for "emergency contraception," even though that exemption had not been requested by any of the parties.[6]

Until *Hobby Lobby*, it appeared that a new regime was coming into existence in which courts would accommodate religious liberty when that could reasonably be done without impairing legitimate state purposes. The Court has now abruptly lurched into an entirely different regime, one Congress never intended, in which religion will almost always be accommodated, even if the consequence is serious injury to non-adherents, so long as there is some *imaginable* less restrictive means for protecting those adherents – and regardless of whether that means is likely to materialize or not.

The Court is evidently keen to protect religious liberty, but this reading of the law is a disaster for religious liberty. Religious liberty, according to the Court's reasoning, could sometimes mean the right to impose severe burdens on those who do not share one's religious views. If this is now to be the authoritative meaning of that liberty, then the longstanding, broad consensus that has historically supported it will inevitably collapse.

I. RFRA BEFORE HOBBY LOBBY

Federal and state legislatures responded to *Smith* by attempting to reverse it by statute. Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA), which provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[7]

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5. See id. at 1820-21.

6. Burwell v. Hobby Lobby, 134 S.Ct. 2751, 281-83 (2014) (holding that government must extend to closely held business corporations a regulatory accommodation promulgated for religious nonprofit organizations).

7. 42 U. S. C. §§2000bb–1(a), (b). One aspect of *Hobby Lobby*'s creative misinterpretation of the statute we shall not examine here is its nullification of the explicit statutory requirement that the burden be "substantial." See Frederick Mark Gedicks, RFRA Exemptions and "Substantial" Burdens: A Theory of Justiciability (unpub. ms. dated Jan. 24, 2015).

RFRA was invalidated by the Supreme Court as applied to state and local government (on states' rights grounds),[8] but continues to apply to federal action.[9] Similar protections against state law are given by the federal Religious Land Use and Institutionalized Persons Act (RLUIPA) and by many state constitutions and state Religious Freedom Restoration Acts.[10]

Why would a legislature want to give religion this kind of special treatment?

Religious liberty in the United States encompasses action as well as thought. The First Amendment protects "the free exercise of religion." Quakers' and Mennonites' objections to participation in war have been accommodated since Colonial times. Sacramental wine was permitted during Prohibition. Today the Catholic Church is exempted from employment discrimination laws when it denies ordination to women. The question of religious accommodation arises in cases where a law can allow some exceptions without undermining its purposes. Many laws, such as military conscription, taxes, environmental regulations, and drug laws will accomplish their ends even if there is some deviation from the norm they set forth, so long as that deviation does not become too great. In the context of such laws, special treatment is sometimes appropriate. Ideally, the law would accommodate all deep and valuable commitments, but since that is not an administrable legal category, religion is an appropriate proxy category for the law to rely upon.[11]

The right to religious accommodation is, however, a peculiar kind of right. It is sometimes suggested that rights are necessarily trumps against the ordinary weighing of costs and benefits.[12] But a right to free exercise, if it includes any right to accommodation, can only be a right to a certain kind of weighing, in which religion is treated as a good that should be allowed to be pursued unless the marginal cost is too high.[13] The right is a right to have that marginal cost considered in individual cases – a favor that is not done

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

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

10. For a survey, see Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 Harv. L. Rev. 155, 211-12 & nn.368-73 (2004).

11. See Andrew Koppelman, *Proxy Wars: Religion, the Law, and Special Accommodation*, Commonweal (forthcoming 2015); Andrew Koppelman, *"Religion" as a Bundle of Legal Proxies: Reply to Micah Schwartzman*, 51 San Diego L. Rev. 1079 (2014); Andrew Koppelman, *Religion's Specialized Specialness*, 79 U. Chi. L. Rev. Dialogue 71 (2013), lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/Dialogue/Koppelman%20Online.pdf.

12. The classic citation is Ronald Dworkin, *Rights as Trumps*, in Theories of Rights 153 (Jeremy Waldron ed. 1984).

13. See Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 Wash. U. L. Q. 919, 968-70 (2004).

for most of those who object to obeying particular laws.[14]

The argument for giving these judgments to the judiciary is that courts hear cases one at a time and so are confronted, as legislatures are not, with concrete situations. Courts are also committed to treat like cases alike. Legislatures often overlook the impact of rules on minority religious groups.

If those groups are able to go to court, even with the support of a rule as vague as the so-called "compelling interest" test, they will sometimes prevail.[15] Sometimes, but not always. Whatever its formal expression, the scrutiny given to religiously burdensome government actions prior to *Smith* was deferential.[16] Beginning with the birth of the free exercise exemption regime in 1963 and running to its general demise in 1990,[17] the Court considered at least fourteen exemption claims under the Free Exercise Clause, but granted only five (four of which involved denial of unemployment compensation benefits).[18] At the time when the Court first

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14. *See, e.g.*, Gonzalez v. O Centro Espirita Beneficiente Uniao Do Vegetal, 546 U.S. 418, 430-31 (2006) (holding that Government must show not only that it has a compelling interest in applying a law to the particular religious claimant, and not merely that its interest is compelling in the abstract).

15. Before *Smith*, 494 U.S. 872 (1990), held that there is no right to religious exemptions from laws of general applicability, free exercise claims had a success rate of 39.5%. Afterward, that success rate dropped to 28.4%. More importantly, the number of filed claims plunged after *Smith*, from 310 decided in the nine-and-a-quarter years before the decision to thirty-eight in the three-and-a-half years after it. Under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, which temporarily (until the Supreme Court struck it down in *City of Boerne v. Flores*, 521 U.S. 507 (1997)) restored the "compelling interest" test as applied to state laws, success rates rose to 45.2% and the number of filed claims in that three-year period rose to 114, perhaps in response to the strong legislative signal that courts should take religious impact very seriously. See Amy Adamczyk, John Wibraniec, & Roger Finke, *Religious Regulation and the Courts: Documenting the Effects of* Smith *and RFRA*, 46 J. Church & State 237, 250 tbl. 1 (2004).

16. *See, e.g.*, Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1271, 1312 (2007) (concluding that the pre-*Smith* free exercise cases are examples of the weakest version of strict scrutiny, which "amounts to little more than weighted balancing, with the scales tipped slightly to favor the protected right"); Stephen Pepper, *The Conundrum of the Free Exercise Clause: Some Reflections on Recent Cases*, 9 N. KY. L. REV. 265, 289 (1982) (describing pre-*Smith* scrutiny as asking whether there is "a real, tangible . . . non-speculative, non-trivial injury to a legitimate, substantial state interest"); *see also* James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91, 102 (1991) ("[S]ometimes the government wins and sometimes the claimant wins.").

17. *See Smith*, 494 U.S. 872; Sherbert v. Verner, 374 U.S. 398 (1963).

18. *Compare* Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378 (1990) (denying religious organization exemption from state taxes on sales of Bibles and other religious literature); Hernandez v. Comm'r, 490 U.S. 680 (1989) (denying taxpayers exemption from limit on tax deduction for donations to their church); Lyng v. NW. Indian Cemetery Prot. Ass'n, 485 U.S. 439 (1988) (denying Native American claimants relief from government construction of road on government property deemed sacred by claimants); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (denying Muslim prison inmates exemption necessary for them to meet in weekly congregational service); Bowen v. Roy, 476 U.S. 693 (1986) (denying federal welfare benefits applicant exemption from requirement that he obtain and furnish a social security number for his daughter); Goldman v. Weinberger, 475 U.S. 503 (1986) (denying orthodox Jewish military

used the term, "strict scrutiny" referred merely to cost/benefit balancing, not an automatic presumption of invalidity.[19] One study has reported that between 1980 and 1990 the federal appellate courts rejected an astounding 87% of free exercise exemption claims.[20] Even under RFRA and its successor statute, the Religious Land Use and Incarcerated Persons Act, the federal courts ruled against the claimants over 70% of the time prior to *Hobby Lobby*.[21]

Even given this limited role for the courts, there are legitimate reasons to worry about the judiciary engaging in this kind of prudential balancing as a matter of constitutional right. Any answer the courts arrive at will depend on a prediction about the effects of accommodation – for example, whether it is safe to let Sikh boys carry ceremonial daggers in school, or whether children are harmed by allowing them to miss two years of high school for religious reasons. If the prediction turns out to be wrong, it will be hard for a court to say that the meaning of the Constitution has changed.

The regime that RFRA aimed to restore was one in which courts are instructed by legislatures to balance on a case-by-case basis, but the results that courts reach can be revisited and overridden by legislatures – and so it answers the concern about unaccountable judicial power that played such a prominent role in *Smith*. Eugene Volokh has observed that this result plays to the strengths of both courts and legislatures. Courts get to decide, in the first instance, what to do in concrete instances of hardship, but the ultimate

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officer exemption from uniform requirement that would preclude him from wearing yarmulke); Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985) (denying religious organization exemption from minimum wage and reporting provisions of Fair Labor Standards Act); United States v. Lee, 455 U.S. 252 (1982) (denying Amish employer exemption from requirement that he pay social security taxes on employees); Gillette v. United States, 401 U.S. 437 (1971) (denying claimant who religiously objected to "unjust" war rather than all wars exemption from draft), *with* Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829 (1989) (granting unemployment compensation benefits to appellant who refused to work on Sundays at a temporary retail position due to his sincerely held religious beliefs even though he was not a member of a recognized religion); Hobbie v. Unemp't Appeals Comm'n of Fla., 480 U.S. 136 (1987) (granting unemployment compensation benefits to appellant who refused to work on her Sabbath); Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707 (1981) (granting unemployment compensation benefits to appellant who terminated his job because his religious beliefs forbade him from participating in the production of war materials); Sherbert v. Verner, 374 U.S. 398 (1963) (granting persons resigning or dismissed from employment for religiously motivated refusals to work on certain days or at certain duties held exempt from "availability for work" condition for receipt of unemployment benefits); Wisconsin v. Yoder, 406 U.S. 205 (1972) (granting Amish parents exemption from state law requiring school attendance to age sixteen).

19. Stephen Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEG. HIST. 355 (2006).

20. James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1416–17 (1992).

21. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 860, 861 (2006) (surveying fifty-four statutory and four constitutional cases between 1990 and 2003 that applied strict scrutiny to government denial of a religious exemption).

tough calls are governed by the political process. The result is not all that different from the common-law regimes that already govern issues of property, contract, and tort, where courts craft rules in response to specific disputes, but legislatures have the last word.[22]

Thus, when the Court construed RFRA to accommodate a tiny South American sect's use of hallucinogenic tea, and so to create an exemption from federal drug laws, it observed that "there is no indication that Congress, in classifying [the drug at issue], considered the harms posed by the particular use at issue here—the circumscribed, sacramental use by a small religious group."[23] It concluded that "Congress has determined that courts should strike sensible balances."[24]

The state mini-RFRAs have not fared so well. State courts have construed them so narrowly that they sometimes have no effect at all.[25] But the Supreme Court appeared determined to do just what Congress had told it to do—restore the modest balancing test used in the pre-*Smith* free-exercise cases. Until *Hobby Lobby*.

Congress passed the Religious Freedom Restoration Act precisely to *restore* the abandoned, deferential pre-*Smith* free exercise jurisprudence, as the original statute expressly provided,[26] and as its congressional proponents were at pains to assure RFRA skeptics.[27]

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22. Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. Rev. 1465 (1999).

23. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 432 (2006).

24. Id. at 439.

25. See Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. Rev. 466 (2010).

26. 42 U.S.C. § 2000bb(a)(5) ("[T]he compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."); id., § 2000bb(b)(1) (The purpose of RFRA is "to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972)"); *see* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006) (RFRA "adopted a statutory rule comparable to the constitutional rule rejected in Smith.").

27. *See, e.g.*, 103 CONG. REC. H2356 (daily ed., May 11, 1993), *archived at* http://perma.cc/B63K-AS4Z (describing one purpose of original RFRA bill H.R. 1306 as "to restore the compelling interest test as set forth in Federal court cases before *Employment Division of Oregon v. Smith*"); 103 CONG. REC. S14352 (daily ed., Oct. 26, 1993) (remarks of Sen. Kennedy, D-Mass.), *archived at* http://perma.cc/C5EW-6J7U ("The amendment we will offer today is intended to make it clear that the pre-*Smith* law is applied under the RFRA in determining whether Government action burden [sic] under the freedom of religion must meet the test."); 103 CONG. REC. S14468 (daily ed., Oct. 27, 1933) (remarks of Sen. Feingold, D-Wis.), *archived at* http://perma.cc/C5EW-6J7U ("For nearly 20 years the compelling interest standard has proved to be sufficiently flexible to strike an appropriate balance between the free exercise of religion and the functions of Government . . . ."); *see also* H.R. Rep. No. 103-88, 103rd Cong (1993) ("[T]he [compelling-interest] test generally should not be construed more stringently or more leniently than it was prior to *Smith*."); S. Rep. No. 103-111, 103rd Cong. 9 (1993) (same).

Michael Paulsen has argued that the best reading of RFRA's legislative history is that Congress intended to restore only *Sherbert* and *Yoder*, the so-called "high-water mark" of

II. WHAT HOBBY LOBBY DID

RFRA's name and legislative history notwithstanding, the Court has severed the statute from its pre-*Smith* antecedents. It rejected the argument that RFRA "did no more than codify this Court's pre-*Smith* Free Exercise Clause precedents."[28] It thereby converted RFRA from the statutory restoration of an even-handed balancing test into a doctrinal revolution that has vested in federal judges the authority to craft a wholly new and demanding religious exemption jurisprudence.[29]

In some ways, *Hobby Lobby* was very good news for the women who would have been deprived of contraception by their employers' choices.[30] Hobby Lobby claimed, and many lower federal courts agreed, that the government's interest in guaranteeing cost-free access to contraceptives was not compelling. Some of those courts said that religious liberty could not be

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religious accommodation in the pre-*Smith* era, and to reject the other less protective pre-*Smith* decisions. Michael Stokes Paulsen, *A RFRA Runs through It: Religious Freedom and the U.S. Code*, 56 MONTANA L. REV. 249, 284 (1995) ("So far as RFRA is concerned, it is as if *Lee*, *Goldman*, *Roy*, and *Hernandez* were never decided. The slate has been wiped clean (except, of course, for *Sherbert* and *Yoder*.")).

Professor Paulsen's reading of RFRA's text and legislative history largely rests on unsupported assertions about political horse-trading within the House and Senate, *see id.* at 285-91, and does not discuss the last-minute amendment limiting RFRA to the accommodation of "substantial" burdens on religious exercise—offered on the Senate floor by RFRA's principal co-sponsors to secure its passage, 139 CONG. REC. S14352-68 (Oct. 26, 1993); *id.* at S14461-68 (Oct. 27, 1993); *see* Gedicks, *supra* note 7, [Pt. I - "Origins of RFRA's 'Substantial' Burden"](documenting and discussing the substantive significance of this amendment).

Perhaps most important, Paulsen ignores the significance of third-party burdens in analyzing the leading third-party burden case, United States v. Lee, 455 U.S. 252 (1982). Paulsen, *supra,* at 266-67 (arguing that the accommodation denied in *Lee*, which would have exempted an Amish employer from paying Social Security taxes on employees, was indistinguishable from an existing statutory accommodation exempting the self-employed from paying social security taxes on themselves); *id.* at 289 ("It is difficult to square *Lee* with *Yoder* in any principled way.").

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

29. Others have noted this before us. *See, e.g.*, Micah Schwartzman, *What Did RFRA Restore?*, Berkley Center Religious Freedom Project, Sept. 11, 2014, http://berkleycenter.georgetown.edu/cornerstone/hobby-lobby-the-ruling-and-its-implications-for-religious-freedom/responses/what-did-rfra-restore; Marty Lederman, *Hobby Lobby Part XVIII—The one (potentially) momentous aspect of Hobby Lobby: Untethering RFRA from free exercise doctrine*, July 6, 2014, Balkinization, http://balkin.blogspot.com/2014/07/hobby-lobby-part-xviii-one-potentially.html; Micah Schwartzman et al., *The New Law of Religion: Hobby Lobby Rewrites Religious-Freedom Law in Ways that Ignore Everything that Came Before*, SLATE (July 3, 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/07/after_hobby_lobby_there_is_only_rfra_and_that_s_all_you_need.html, *archived at* http://perma.cc/QAR5-368V.

30. One of us emphasized the good news immediately after the decision in Andrew Koppelman, *The Hobby Lobby Decision Was a Victory for Women's Rights*, New Republic Online, June 30, 2014, http://www.newrepublic.com/article/118488/hobby-lobby-decision-was-victory-womens-rights. This averted the immediate danger that we called attention to in Frederick Mark Gedicks and Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 Vanderbilt L. Rev. En Banc 51 (2014), http://www.vanderbiltlawreview.org/content/articles/2014/03/Gedicks-and-Koppelman_Invisible-Women.pdf.

outweighed by a vague, generalized interest in "the promotion of public health."[31] One court was clueless enough to conceptualize the problem as one of determining the harm to the *government* if the exemption is granted.[32] In those now superseded decisions, the upshot was that women who worked for those employers – a *lot* of women; Hobby Lobby has over 20,000 full time employees – got no coverage.

Women take account of costs when deciding whether to use contraceptives.[33] Had Hobby Lobby been granted the exemption it sought, thousands of women would have incurred significant out-of-pocket costs or forgone altogether the contraceptives Hobby Lobby refused to cover if they could not afford to pay for them.[34] For women who need a particular contraception option at a particular time, this loss of coverage is a discrete, focused, and significant harm, especially in emergencies entailing the risk of pregnancy from coerced sex.

In addition, there are numerous health-related and economic repercussions associated with the failure to make available the full range of contraception. For example, pregnancy may be dangerous for women with serious medical conditions, such as pulmonary hypertension, cyanotic heart disease, and Marfan Syndrome.[35] The lives of women suffering from these conditions literally depends on their access to the contraception most effective for them. Similarly, "there are demonstrated preventive health benefits from contraceptives relating to conditions other than pregnancy[,]" which include the prevention of certain cancers, menstrual disorders, and acne.[36] Again, proper treatment of women suffering from these conditions depends their access to particular forms of contraception.

The use of contraceptives also reduces the risk of unintended pregnancies, which comprise nearly half of all pregnancies in the United States.[37] Women with unintended pregnancies are less likely to receive timely prenatal care, and are more likely to smoke, consume alcohol, become depressed, experience domestic violence during pregnancy, and

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31. E.g., Newland v. Sebelius, 881 F. Supp. 2d 1287, 1297 (D. Colo. 2012).

32. Monaghan v. Sebelius, 931 F.Supp.2d 794, 809 (E.D.Mich. 2013).

33. *See* Melissa S. Kearney & Phillip B. Levine, *Subsidized Contraception, Fertility, and Sexual Behavior*, 91 REV. OF ECON. & STAT. 137 (2009) (decreasing the cost of contraceptives leads to a higher usage rate which, in turn, decreases the rate of unintended pregnancies).

34. A 2007 study found that 52 percent of women (compared with only 39 percent of men) failed to fill a prescription, missed a recommended test or treatment, or did not schedule a necessary specialist appointment because of cost. Sheila D. Rustgi et al., *Women at Risk: Why Many Women Are Forgoing Needed Health Care*, THE COMMONWEALTH FUND, May 2009, at 3.

35. Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* 103–104 (2011) ("IOM Rep."); Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 79,870, 39,872 (July 2, 2013).

36. 78 Fed. Reg. at 39,872; IOM Rep. at 107.

37. IOM Rep. at 102–03.

terminate their pregnancies by abortion.[38] Finally, unintended pregnancies prevent women from participating in labor and employment markets on an equal basis with men.[39]

The Court deflected one of Hobby Lobby's principal claims by assuming, without deciding, that the government's interest was compelling. Doubtless some members of the five-judge majority disagreed with that, but Anthony Kennedy's separate concurrence signaled pretty clearly that he thought so, and Ruth Ginsburg's dissent, for four justices, was even clearer. That's a majority of the Justices. So what could have been a disaster for women's equality suddenly became a victory.

Having assumed a compelling interest, the Court moved on to least-restrictive burden. It noted that the Obama Administration had crafted a clever solution for religious nonprofits. Those companies' insurers were required to provide contraception in separate policies, for free – something the insurers were happy to do, because even expensive contraception for all covered women is cheaper than childbirth for a few. The Court's decision essentially required that the same accommodation be extended to religious for-profit employers. The Administration is working on new regulations in order to provide the coverage. The women will probably get their contraceptive coverage – though as we explain below, that is not as certain as the Court evidently thought.

But note the role of contingency and luck in this outcome.

Suppose that the accommodation in question were not one that could be promulgated by regulation, or that there had been an administration in power less concerned about delivering contraceptive services to women. Then the consequence of accommodating Hobby Lobby would have been that these women would not receive their contraception coverage for the indefinite future.[40] The possibility that they might receive the coverage through some imagined, hypothetical statute would have been enough under the Court's analysis to deprive them of their statutory entitlement. The Court's interpretation of RFRA would then have effectively empowered

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38. *Id.*; *see also* 78 Fed. Reg. at 39,872.

39. *See* Jennifer J. Frost & Laura Duberstein Lindberg, *Reasons for Using Contraception: Perspectives of US Women Seeking Care at Specialized Family Planning Clinics*, 87 CONTRACEPTION 465, 465 (2012) ("Economic analyses have found clear associations between the availability and diffusion of oral contraceptives particularly among young women, and increases in U.S. women's education, labor force participation, and average earnings, coupled with a narrowing in the wage gap between women and men.").

40. In fact, these women still have not received the mandated coverage. Hobby Lobby's health plan has presumably not offered coverage for the contraceptives to which it objects since June 27, 2013, when the Tenth Circuit issued the injunction (ultimately affirmed by the Supreme Court) relieving Hobby Lobby of its obligation to provide emergency contraception under the mandate. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751 (2014).

Hobby Lobby to cut off access to contraceptives to its female employees indefinitely.

The key passage of the Court's decision declared that the "most straightforward way" of providing coverage "would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections."[41] The Court rejected the claim that "RFRA cannot be used to require creation of entirely new programs."[42] Although "[w]e do not doubt that cost may be an important factor in the least-restrictive-means analysis," it observed that "the cost of providing the forms of contraceptives at issue in these cases (if not all FDA-approved contraceptives) would be minor when compared with the overall cost of ACA," which is "more than $1.3 trillion through the next decade."[43]

The less restrictive alternative that the Court proposes here – but did not have to reach, because of the accident that there was another program already in existence that it could rely on – *is one that could not possibly be enacted*, now or perhaps ever.

Justice Kennedy left considerable doubt whether he was prepared to follow the Court's least restrictive means dictum. He was skeptical about "imposition of a whole new program or burden on the Government."[44] In *Hobby Lobby*, he declared, there happened to be "an existing, recognized, workable, and already-implemented framework"[45] for accommodating the religious objection. This fact "might well suffice to distinguish the instant cases from many others in which it is more difficult and expensive to accommodate a governmental program to countless religious claims based on an alleged statutory right of free exercise."[46] On the other hand, he joined the majority opinion in full, and he did not make clear in his concurrence whether the "difficulty" that he would consider in deciding whether a less-restrictive alternative is "available" would include political

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

42. *Id.* at 2781, quoting Brief for HHS in 13–354, at 15. The Court also noted that "drawing the line between the 'creation of an entirely new program' and the modification of an existing program (which RFRA surely allows) would be fraught with problems." The same judges had however drawn exactly that line in making the Affordable Care Act's Medicaid expansion optional for the states, thereby depriving millions of people of health insurance. *See,* Andrew Koppelman, THE TOUGH LUCK CONSTITUTION AND THE ASSAULT ON HEALTH CARE REFORM 122-29 (2013).

43. Hobby Lobby, 134 S. Ct. 2781. This calculation makes even a multi-million dollar program look like a trivial burden on the government. It is not clear why the entire ACA budget is the denominator in terms of which costs are to be calculated. If the determinative number is the entire set of conceivable government resources, then why not the whole federal budget, or the gross national product of the United States?

44. *Id.* at 2786. (Kennedy, J., dissenting).

45. *Id.*

46. *Id.* at 2787.

difficulty. Also, when the deciding vote in a Supreme Court decision is cast by a Justice approaching his eighties, it is wise to consider carefully what the other four judges are proposing.

Let us consider, then, the political difficulties presented in *Hobby Lobby*.

III. THE POLITICS OF CONTRACEPTION

The *Hobby* Lobby majority suggested in dicta that RFRA requires the government to pursue direct distribution or funding of disputed contraceptives as a less restrictive alternative to imposition of the Mandate on objecting employers.[47] In the majority's view, the Mandate failed strict scrutiny under RFRA even though it was assumed to further compelling government interests in promoting women's health and reducing gender disparities in healthcare costs, because direct government supply of the contraceptives would afford the same access to contraceptives as the Mandate without infringing on Hobby Lobby's religious anti-contraception beliefs.[48] The majority found it unnecessary to hold that government distribution was required, however, because of the existence of the religious nonprofit "accommodation." This accommodation excuses from the Mandate those religious nonprofit employers not already categorically exempted as churches or religious congregations, such as religiously affiliated hospitals, universities, and social service organizations.[49] The accommodation requires the employer to complete and sign a government form that lists the religiously objectionable contraceptives that its health plan will not cover, and then to send the form to its third-party health insurer or, if self-insured, to its plan administrator.[50] The employer's health plan is then relieved of the obligation to cover the contraceptives to which it objects, which are instead supplied by the insurer or plan administrator at no additional cost to employees, dependents, or the objecting employer.[51]

Rather than finding that the government was required to supply objectionable contraceptives directly, therefore, the Court held that it could

47. *Id.* at 2800–02.

48. *Id.*

49. 45 C.F.R. § 147.131(a)–(b) (2013).

50. 45 C.F.R. § 147.131(b)(4)–(c)(1) (2013). Such organizations may also apparently obtain the exemption by advising the government of its religious objections by letter. *See,* Wheaton Coll. v. Burwell, 134 S. Ct. 2806, 2807 (2014).

51. 45 C.F.R. § 147.131(c) (2013). In accordance with the Court's suggestion, the government recently initiated a rulemaking procedure designed to extend the religious nonprofit exemption to closely held for-profit corporations that object to the Mandate. *See,* Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51118 (proposed Aug. 27, 2014) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147). Self-insured employers fund their own insurance plans, but rarely pay claims or otherwise administer the plans themselves, contracting instead with the third-party insurance company to act as the "plan administrator" for the employer.

extend the religious nonprofit accommodation to closely held for-profit employers who religiously object to the Mandate, as a less restrictive alternative to imposing the Mandate on such employers.[52]

A critical premise of the majority opinion, therefore, is that all female employees and dependents of Hobby Lobby would in fact receive the mandated contraception coverage if the government were to pursue either direct government funding of contraceptives to which employers object, or extension of the religious nonprofit accommodation to closely held for-profit businesses.[53] In either event, the majority flatly declared, "[t]he effect of the HHS-created accommodation on the women employed by Hobby Lobby . . . would be precisely zero," since "these women would still be entitled to all FDA-approved contraceptives without cost-sharing.[54]

As so often happens when the Court describes aspects of the world with which it is not familiar, this proposition is true only in theory, and probably false in fact.

The Accommodation Is Not Costless

Supplying contraceptives is thought to be cost-neutral to third-party insurers who sell health plans paid for with employer premiums, because the costs such insurers incur in providing free contraceptives are almost certainly equal to or less than the prenatal and childbirth expenses they avoid by facilitating the increased use of contraception.[55] This is not the case, however, for plan administrators who operate health plans for self-insured employers; in that case the benefit of childbirth expenses avoided by contraceptives accrues to the employer who funds the plan rather than the administrator who runs it. Administrators will thus incur additional

52. Hobby Lobby, 134 S.Ct. at 2803–06.

53. The Court reasoned that extension of the religious nonprofit accommodation to closely held for-profit businesses does not impinge on the plaintiff's religious belief that providing insurance coverage violates their religion, and it serves HHS's stated interests equally well. *Hobby Lobby*, 134 S. Ct. at 2782–83 ("The principal dissent identifies no reason why this accommodation would fail to protect the asserted needs of women as effectively as the contraception mandate, and there is none. Under the accommodation, the plaintiffs' female employees would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives, and they would continue to 'face minimal logistical and administrative obstacles,' because their employers' insurers would be responsible for providing information and coverage.")(quoting *id.* at 2802 (Ginsburg, J., dissenting)); *accord, Wheaton College v. Burwell*, 134 S. Ct. 2807 (2014) ("Nothing in this interim order affects the ability of the applicant's employees and students to obtain, without cost, the full range of FDA approved contraceptives.").

54. Hobby Lobby, 134 S. Ct. at 2760.

55. Studies have consistently shown that an insurer's cost of covering contraceptives in a health insurance plan is equal to or less than the cost of the prenatal care and childbirths that effective use of contraception avoids. *See,* Frederick Mark Gedicks, WITH RELIGIOUS LIBERTY FOR ALL: A *DEFENSE OF THE AFFORDABLE CARE ACT'S CONTRACEPTION COVERAGE MANDATE*, 6 ADVANCE: J. ACS ISSUE GROUPS 135, 145 & n.7 (2012) (summarizing the argument and data on cost neutrality).

operating costs from providing contraceptives in the place of objecting employers, costs that will not be offset by the realization of savings elsewhere.[56]

Accordingly, the Mandate originally allowed administrators of self-insured plans funded by objecting religious nonprofit employers to claim a credit against the tax paid by administrators and other insurers on individual policies sold on the healthcare.gov and the various state exchanges, equal to the additional costs they will incur from providing no-cost contraception to the employees and dependents of such employers.[57] In other words, the contraceptives supplied under the accommodation by plan administrators of self-insured plans are paid for by the government through a "tax-expenditure"—lower revenues from the tax credit that would otherwise have gone to fund aspects of the ACA or other government operations.[58]

Extending the Accommodation to For-Profits Is Likely to Require More Funding

The use of tax expenditures to fund the accommodation was not originally thought to raise significant problems, because it was not expected to require significant government funding. Religious nonprofit employers and employees constitute a very small part of the national economy, so the number of claimants was expected to be correspondingly small. The percentage of persons employed by all nonprofit businesses is substantially less than 15% of total employment in the United States,[59] and religious nonprofit businesses and their employees constitute only a small percentage

56. *See,* Frederick Mark Gedicks & Rebecca G. Van Tassell, RFRA EXEMPTIONS FROM THE CONTRACEPTION MANDATE: AN UNCONSTITUTIONAL ACCOMMODATION OF RELIGION, 49 HARV. C.R.-C.L. L. REV. 343, 352 (2014).

57. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39870, 39882-86 (July 2, 2013) (to be codified at 26. C.F.R. pt. 54; 29 C.F.R. pts. 2510, 2590; 45 C.F.R. pts. 147, 156).

58. "Tax expenditures" are "revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income . . . ." STAFF OF JT. COMM. ON TAXATION, 113TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2014-2018, at 2 (Comm. Print 2014)

59. *See, e.g.*, U.S. CENSUS BUREAU, STATISTICS OF U.S. BUSINESSES, NAICS SECTORS, LEGAL FORM OF ORGANIZATION (LFO) (2011), https://www.census.gov/econ/susb/ (on this page, click on "U.S., NAICS sectors, legal form of organization (LFO)" under the "U.S. and States" list to view cited statistics) (estimating that 15 million or 13.3% of the total 2010 workforce of approximately 113 million persons were employed by nonprofit organizations); Lester M. Salamon et al., *Holding the Fort: Nonprofit Employment During a Decade of Turmoil*, 39 JOHNS HOPKINS NONPROFIT BULL. 1, 2 (2012) (reporting that in 2010, nonprofit organizations accounted for 10.1% of private employment in the United States, amounting to 10.7 million employees); Molly F. Sherlock & Jane G. Gravelle, Cong. Research Serv., R40919, AN OVERVIEW OF THE CHARITABLE AND NONPROFIT SECTOR 4 (2009), http://perma.cc/U2EY-DU7B (estimating nonprofit employment at approximately 10% of the total workforce).

of all nonprofit businesses and employees.[60]

Hobby Lobby upended this expectation. Closely held for-profit businesses constitute about 90% of all employers in the United States,[61] and employ between one-half and four-fifths of all employees.[62] Thus, extending the religious nonprofit accommodation to closely held for-profit businesses, as the Court suggested and the administration proposed in the wake of *Hobby Lobby*,[63] will expand the universe of potential religious claimants and affected employees from a very small to a quite large percentage of all employers and employees.

In light of this dramatic expansion of potential RFRA claimants and negatively affected employees, it can no longer be assumed that the required funding will be minimal or otherwise insignificant—to the contrary, it is likely to require additional funds. Self-insured businesses tend to be large operations with tens of thousands of employees and covered dependents—Hobby Lobby funds a self-insured plan, for example, which covers more than 20,000 employees, plus their covered dependents; the cost to Hobby Lobby's plan administrator of supplying free contraception to its female employees and covered female dependents will be significant,

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60. Figures showing the proportion of religious nonprofits to all nonprofit businesses are difficult to find. In the healthcare industry, however, religious nonprofit businesses—e.g., religiously affiliated hospitals—constitute approximately 14% of all nonprofit healthcare businesses. AM. CIVIL LIBERTIES UNION, MISCARRIAGE OF MEDICINE: THE GROWTH OF CATHOLIC HOSPITALS AND THE THREAT OF REPRODUCTIVE HEALTH CARE (2013), http://perma.cc/5YVN-A2EF. It seems reasonable to assume that the proportion of all religious nonprofit businesses to all nonprofit businesses is comparable.

61. There are approximately 7 million incorporated businesses in the United States, Venky Nagar et al., *Governance Problems in Closely Held Corporations* 1 (Oct. 2009) (unpublished manuscript), http://perma.cc/386F-SCQ7, of which 90% are thought to be closely held; *see also* Jillian Berman, *The Hobby Lobby Decision Could Affect Millions of Workers,* HUFFINGTON POST (June 30, 2014), http://www.huffingtonpost.com/2014/06/30/hobby-lobby-closely-held_n_5545064.html, *archived at* http://perma.cc/99X9-U4JP; Aaron Blake, *A LOT of People Could be Affected by the Supreme Court's Birth Control Decision—Theoretically*, WASH. POST: THE FIX BLOG (June 30, 2014), http://www.washingtonpost.com/blogs/the-fix/wp/2014/06/30/a-lot-of-people-could-be-affected-by-the-supreme-courts-birth-control-decision/, *archived at* http://perma.cc/N3JR-5PAS; Allison Griswold, *How Many People Could the* Hobby Lobby *Ruling Affect?*, SLATE (June 30, 2014), http://www.slate.com/blogs/moneybox/2014/06/30/hobby_lobby_supreme_court_ruling_how_many_people_work_at_closely_held_corporations.html, *archived at* http://perma.cc/ASN9-JXB7.

62. *Compare* Venky Nagar et al., Governance Problems in Closely Held Corporations 1 (Oct 2009) (unpublished ms.), http://oerna,cc/386F-SCQ7 (estimating that closely held corporations employ 52% of workforce) *with* Jillian Berman, *The Hobby Lobby Decision Could Affect Millions of* Workers, HUFFINGTON POST (June 30 2014), http://www.huffingtonpost.com/2014/06/30/hobby-lobby-closely-held_n_5545064.html (reporting estimate that such corporations employ 79% of workforce).

63. *See,* Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51118 (proposed Aug. 27, 2014) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147).

especially if, as might be expected, they choose IUDs.[64]

No one knows how many of these businesses would exercise the option created by the Supreme Court. The number might be very small. It might be very large.

In short, expansion of the religious nonprofit accommodation to closely held corporations might not be feasible without a substantial increase in government spending. Assertions by RFRA supporters that extending the accommodation to closely held for-profit business corporations will "cost the government nothing to implement" are simply wrong.[65]

Congress Is Unlikely to Approve Contraception Funding

Funding for either a substantially larger exchange-tax credit or direct government funding for contraception is not politically viable, and it is disingenuous to suggest otherwise. Religious and political conservatives have been trying to defund federal contraception-coverage programs since the Reagan administration,[66] with considerable success: Title X funding, for example, has been cut nearly in half in real terms since inception of the program in 1974.[67] Many of the same persons and groups are also actively

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64. While among the most cost-effective and reliable contraceptives, IUDs have high up-front costs ranging from $500 to $800, in addition to one or more examination fees, which can range from $75 to $250. *Birth Control*, PLANNED PARENTHOOD, <http://www.plannedparenthood.org/healthtopics/birth-control-4211.htm>.

65. *See, e.g.*, Marc DeGirolami, *The Deeper Meaning in the* Hobby Lobby *Opinion*, LIBRARY OF LAW AND LIBERTY (July 1, 2014), http://www.libertylawsite.org/2014/07/01/the-deeper-meaning-in-the-hobby-lobby-opinion/, *archived at* http://perma.cc/3JA8-3A2B.

66. *See, e.g.*, Vicki Evans, *Taxpayer Funding and Planned Parenthood*, U.S. CONF. CATHOLIC BISHOPS BLOG (Apr. 1, 2011), http://www.usccb.org/issues-and-action/human-life-anddignity/abortion/taxpayer-funding-and-planned-parenthood.cfm, http://perma.cc/Y54N-CCWL (arguing in support of proposed defunding of Title X); Pam Belluck & Emily Ramshaw, *Women in Texas Losing Options for Health Care in Abortion Fight*, N.Y. TIMES, Mar. 7, 2012, http://perma.cc/LP4S-FVAK (reporting that all four candidates then remaining in the 2012 Republic primary, including Mitt Romney and Rick Santorum, favored defunding Title X and eliminating Planned Parenthood access to federal funds); Erik Eckholm, *Planned Parenthood Financing Is Caught in Budget Feud*, N.Y. TIMES, Feb. 17, 2011, http://perma.cc/MB9Z-AXBE (reporting that the Republican-controlled House passed a bill to entirely defund Title X); NAT'L FAMILY PLAN'G & REPROD. HLTH. ASS'N, THE TURNING POINT: FEDERAL LEGISLATIVE AND REGULATORY ACTION ON SEXUAL AND REPRODUCTIVE HEALTH IN 2012 6–11 (2012), http://perma.cc/H95Q-KV96 (reporting Republican efforts to entirely defund Title X, and eventual cuts to Title X funding); PLANNED PARENTHOOD, TITLE X: AMERICA'S FAMILY PLANNING PROGRAM, http://perma.cc/WX95-ZYN5; Sarah Kliff, *Romney Takes on Family Planning*, WASH. POST: WONKBLOG (Nov. 4, 2011), http://www.washingtonpost.com/blogs/wonkblog/post/romney-takes-on-family-planning/2011/11/04/gIQAQBcrmM_blog.html, http://perma.cc/5JSY-BTTW (reporting that during the 2012 Republican primary Mitt Romney proposed to eliminate Title X funding).

67. *See, e.g.*, *Titl X: America's Family Planning Program*, PLANNED PARENTHOOD ADVOCATES OF VA, INC. (2004), http://www.ppav.org/title_x_america_s_family_planning_program (noting that as of February 2001, Title X funding had been reduced to 60% of its inflation-adjusted 1974 funding).Title X of

committed to defunding the entire ACA,[68] and filed amicus briefs in support of Hobby Lobby's argument that for-profit businesses are entitled to a RFRA exemption from the Mandate under RFRA.[69] These persons and groups are unlikely to increase funding for Title X, to replace funds lost by significantly increased claims of the exchange tax credit, or to fund any other government program designed to supply free contraceptives to female employees and dependents of for-profit employers exempted from the Mandate. Unsurprisingly, the aftermath of *Hobby Lobby* has seen no letup in conservative efforts to defund Title X and the ACA, and to block or reduce direct government supply of contraceptives.[70] No conservative person or organization has stepped up to endorse an increase in Title X or other government funding of contraception to fill the potentially large contraception coverage gap created by opening the religious nonprofit accommodation to closely held secular for-profits, and religious conservatives continue to attack the nonprofit accommodation itself.[71]

Nor could existing programs fill the gap at their current funding level. Title X, for example, does not cover all forms of contraception. The supply

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the Public Health Service Act provides funding for a limited amount of contraceptives to lower-income women at little or no cost, through family planning organizations like Planned Parenthood. U.S. Dept. Health & Human Services, Title X Family Planning, http://perma.cc/77YA-X8MP.

68. *See, e.g.*, Lori Montgomery & Philip Rucker, *House Passes GOP Spending Plan that Defunds Obamacare*, WASH. POST, Sept. 20, 2013, http://perma.cc/KS9G-ZXHZ.

69. Amici filing briefs in support of *Burwell v. Hobby Lobby, Inc.,* were overwhelmingly composed of Republican members of Congress who are publicly committed to repealing or defunding the ACA (e.g., Senators Ted Cruz (R-Tex.), Lindsay Graham (R-S.C.), Orin Hatch (R-Utah), Mike Lee (R-Utah), Mitch McConnell (R-Ky.), and David Vitter (R-La.)); Roman Catholic, evangelical Protestant, and other religiously conservative clerics, leaders, scholars, and organizations (e.g., Prof. Gerard V. Bradley, the Family Research Council, Prof. Richard Garnett, Dr. Robert George, the National Association of Evangelicals, Dr. Daniel Philpott, the Southern Baptist Seminary, The Church of Jesus Christ of Latter-day Saints, the U.S. Conference of Catholic Bishops, and Dr. Christopher Wolfe); politically conservative think tanks and public interest firms (e.g., the Cato Institute, the Heritage Foundation, the Pacific Legal Foundation, and the Rutherford Institute); *see, generally, Burwell v. Hobby Lobby Stores, Inc.*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/sebelius-v-hobby-lobby-stores-inc/, *archived at* http://perma.cc/E7EB-3QVY (providing links to, inter alia, all amicus briefs filed in support of *Burwell v. Hobby Lobby, Inc.,* and other linked cases).

70. *Cf.*, *Republicans Block Bill to Restore Contraception*, N.Y. TIMES, July 16, 2014, http://perma.cc/ZFC6-WZAU (successful filibuster of Senate bill supported by 53 Democrats and three Republicans that would have expressly excepted contraception mandate from RFRA).

71. *See,* Thomas C. Berg, *RFRA Worked in Hobby Lobby; What's Next?*, CORNERSTONE BLOG (July 2, 2014), http://berkleycenter.georgetown.edu/cornerstone/hobby-lobby-the-ruling-and-its-implications-for-religious-freedom/responses/rfra-worked-in-hobby-lobby-what-s-next, *archived at* http://perma.cc/FC4P-X7R4 (observing that some religious nonprofits continue to attack the legality of the accommodation); Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 39 HARV. J.L. & GENDER 35, 91 (2015) [flagging this citation, and the quotation, to be fixed at time of publication] ("Hobby Lobby and others are highly likely to litigate under RFRA against [extension of the religious nonprofit accommodation to closely held for-profits] if it is ultimately provided. They are likely to assert that they are substantially burdened by any arrangement that makes them cooperate . . . in the provision of coverage.")

of contraceptives its limited funding permits is similarly limited as it serves only lower-income women—and, as we have indicated, Hobby Lobby's social conservative allies have been trying to eliminate it altogether.[72] If the healthcare plans of Hobby Lobby and other closely held for-profit businesses were exempted from the Mandate on the theory that their employees and covered dependents could obtain disputed contraceptives from family planning organizations receiving Title X grants, it is doubtful that such organizations could pick up the slack without a significant and politically improbable increase in Title X funding and expansion of eligibility requirements.

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If direct government contraception coverage or extension of the existing religious nonprofit accommodation requires additional funding that is unlikely to be approved, then it cannot reasonably be maintained that either of these alternatives is truly "available."[73] The political realities blocking government funding of contraception serve as stark reminders that whatever lawyers or judges might conjure up as hypothetical alternatives, in the real world where women actually live an increase in Title X or accommodation funding or the creation of any other such program to fill the gap caused by RFRA exemptions is politically dead on arrival in Congress. RFRA exemptions for religiously objecting employers therefore threaten to force female employees and the covered female dependents of all employees to pay out of pocket for something that the government has compelling interests in making available through employer health plans at no additional cost. The "alternative" to the Mandate proposed by the *Hobby Lobby* majority exists only in the imaginations of the Justices who suggested it,[74] and risks leaving the government unable to advance its admittedly compelling goals of protecting women's health and reducing gender disparities in healthcare costs whenever government funding is required.

IV. THE LEAST RESTRICTIVE MEANS POSSIBLE

Smith and *Hobby Lobby* together show that the Court is far more

72. Rachel Benson Gold, *Title X: Three Decades of Accomplishment*, 4 GUTTMACHER REP. ON PUB. POL'Y 1 (2001), http://perma.cc/H3CB-LJNH.

73. *Cf. Hobby Lobby*, 134 S.Ct. at 2802 n.26 (Ginsburg, J., dissenting) (noting that "in context of First Amendment Speech Clause challenge to a content-based speech restriction, courts must determine 'whether the challenged regulation is the least restrictive means among *available*, effective alternatives'") (quoting Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 666 (2004)) (emphasis in original).

74. *See* Lupu, *supra* note #, at 89 ("It is unlikely in the extreme that Congress will pay for the various contraceptives to which Hobby Lobby and other firms object on religious grounds, so this alternative may somehow be theoretically adequate but politically impossible.").

aggressive in accommodating religion as a matter of statutory interpretation than it has been as a constitutional matter. The theoretical possibility of legislative overruling – and of a legislatively crafted less restrictive alternative - evidently becomes a license for aggressive judicial policymaking.

Another innovation of *Hobby Lobby* was the Court's embrace of a less restrictive alternative that was not proposed by the party seeking the exemption. Hobby Lobby didn't care at all about women's access to emergency contraception, and was untroubled that the RFRA exemption it sought would wholly deny them this coverage.[75] The Court devised its solution on its own. The upshot is that now, when government resists a religious exemption claim, it will not be enough for it to show that the alternatives proposed by the claimant are not feasible. It will need to rebut every imaginable alternative.[76] As the Court insisted, "If a less restrictive means is available for the Government to achieve its goals, the Government must use it."[77]

Justice Joseph Story, defending the Supreme Court's holding that Congress has a broad choice of means for carrying out its enumerated powers,[78] observed that if a specific exercise of power had to be *absolutely* necessary, then some powers could not be exercised at all. One could always imagine an alternative to whatever the government elects to do.[79]

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75. *See, e.g.*, Transcript of Oral Argument, at 40, 84, 86, Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751 (2014) (Nos. 13-354 & -356) (suggestions of counsel at oral argument that women could obtain the coverage denied by Hobby Lobby from a new government program or Title X).

76. Justice Sotomayor writes, in the more recent religious liberty case of Holt v. Hobbs, that the Court has not said that "officials must refute every conceivable option." On the contrary, "the government need not 'do the impossible—refute each and every conceivable alternative regulation scheme' but need only 'refute the alternative schemes offered by the challenger.'" Holt v. Hobbs, 2015 WL 232143 (Sotomayor, J., concurring)(quoting U.S. v. Wilgus, 638 F.3d 1274, 1289 (10th Cir. 2011). Her reading of present law may be too charitable.

77. Holt v. Hobbs, supra, quoting U.S. v. Playboy Entertainment Group Inc., 529 U.S. 803, 815 (2000).

78. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

79. Story wrote:

> It will be found, that the operations of the government, upon any of its powers, will rarely admit of a rigid demonstration of the necessity (in this strict sense) of the particular means. In most cases, various systems or means may be resorted to, to attain the same end; and yet, with respect to each, it may be argued, that it is not constitutional, because it is not indispensable; and the end may be obtained by other means. The consequence of such reasoning would be, that, as no means could be shown to be constitutional, none could be adopted. For instance, congress possess the power to make war, and to raise armies, and incidentally to erect fortifications, and purchase cannon and ammunition, and other munitions of war. But war may be carried on without fortifications, cannon, and ammunition. No particular kind of arms can be shown to be absolutely necessary; because various sorts of arms of different convenience, power, and utility are, or may be resorted to by different nations. What then becomes of the power?

Similarly, when government burdens religion, it will often be possible to imagine a less restrictive means for accomplishing what government wants, particularly if that means involves spending money. Even a religious group that routinely steals money from nonadherents will at least be able to argue that government could compensate its victims, and if the group is small and only steals small sums, it can also argue that the cost of doing so will not be exorbitant. More realistically, this analysis suggests that in *United States v. Lee*, the Court should have found that it was a less restrictive alternative for the government to pay the social security taxes of the objecting Amish employer—the cost of doing so for the small number of employees involved was miniscule compare to the vast amount collected and disbursed annually by the Social Security Administration.

Because the alternative that is the basis for religious accommodation need not be politically feasible, the consequence of this new interpretation of the statute will be that in practice, RFRA exemptions will sometimes impose severe costs upon identifiable and discrete third parties. We have argued elsewhere that a law that does this violates the Establishment Clause.[80]

It is also pertinent that the people who will be harmed by this interpretation of RFRA are politically powerless minorities. When an accommodation is deemed not to be the least restrictive means, and some group is consequently harmed, they will ask the legislature for relief. The legislature will act or it won't. The class of RFRA victims will be those who do not have enough political power to persuade the legislature to expend whatever resources are necessary to enact the alternative hypothesized by the court. Some of those people, like the women in *Hobby Lobby*, will be people whose needs are urgent enough to qualify as compelling government interests. The Court assumed that those interests are compelling, but left to the contingencies of politics the question whether those needs *would in fact be met*. Had those women found an administration in power that was less solicitous of their needs – say, one that, like Hobby Lobby and its social conservative allies, regarded those needs as illegitimate - then they would have been out of luck. The consequence is not merely that abstract compelling interests will be neglected. It is that the needs of real people needs will be neglected. RFRA, as construed by the Court, is an injury-generating machine that will produce a class of persons who are harmed, perhaps severely harmed, in order to accommodate the religious

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Joseph Story, Commentaries on the Constitution, § 1240.

80. Frederick Mark Gedicks and Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 Vanderbilt L. Rev. En Banc 51 (2014), http://www.vanderbiltlawreview.org/content/articles/2014/03/Gedicks-and-Koppelman_Invisible-Women.pdf; *see also* Frederick Mark Gedicks & Rebecca Van Tassell, *supra* note 56

scruples of another, more favored class.

This is a different effect than is usually associated with the less restrictive means test. That test will sometimes prevent the government from doing what it is trying to do, but the costs are usually spread across all of society or a very large group;[81] they are rarely concentrated on a few people in the way that the costs of a religious employer exemption can be concentrated on its nonadherent employees. When the compelling interest test is applied to suspect classifications, or to laws that infringe on fundamental rights, the interest being pursued is often an interest shared by the majority of citizens. Minorities get the same benefits – for example, the guarantee that health insurance policies will cover basic needs such as contraception – as the majority that wants them for itself. Justice Scalia has declared that what keeps government action within "reasonable and humane limits" is "the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me."[82] John Hart Ely put the same thought this way: equal protection works by "tying the interests of those without political power to the interests of those with it," forbidding representatives from "sever[ing] a majority coalition's interests from those of various minorities."[83] RFRA, as construed by the Court, accomplishes that severing. Had the Obama Administration not acted, the affected women were too small a group to secure political relief. And that would have been that.

The suspect-classification doctrine exists in order to bar government from pursuing illegitimate purposes, such as the oppression of racial minorities.[84] Thwarting those purposes has no social cost that is worth

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81. Religious and other nonprofit tax exemptions work in this manner; while they marginally increase the tax liability of individuals and for-profit businesses, the increase is spread across taxpayers in the entire jurisdiction, and thus is relatively small. *Cf.* Frederick Mark Gedicks & Andrew Koppelman, *The Costs of the Public Good of Religion Should Be Borne by the Public*, 67 VAND. L. REV. EN BANC 185, 186-87 (distinguishing a taking of property with fair compensation paid by tax dollars, from a taking without compensation, whose costs are entirely absorbed by the expropriated landowner).

82. Cruzan v. Director, Missouri Dept of Health, 497 U.S. 261, 300 (1990)(Scalia, J., concurring). On the other hand, he has never endorsed any doctrinal device for operationalizing this requirement: if Equal Protection prohibits racial classifications (which Scalia would bar) and nothing else, then the majority can impose nearly anything it likes on you and me. On the limitations of Scalia's Equal Protection jurisprudence, see Andrew Koppelman, *Why Scalia should have voted to overturn DOMA*, 108 Nw. U. L. Rev. Colloquy 131, 146-152 (2013), http://www.law.northwestern.edu/lawreview/colloquy/2013/12/LRColl2013n12Koppelman.pdf.

83. John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 82-83 (1980).

84. The Court has repeatedly explained: the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

City of Richmond v. Croson, 488 U.S. 469, 493 (1989). *See also* Johnson v. California, 543 U.S. 499, 506 (2005) (quoting *Croson*, 488 U.S. at 493); Grutter v. Bollinger, 539 U.S. 306, 326

counting.[85] Infringements of fundamental rights are generally suffered by unpopular minorities as well: opinions that most people revile are the ones most likely to be censored. In both these areas, the deployment of the doctrine will sometimes thwart the government completely from doing what it wants to do, but the cost of blocking the government is unlikely to be concentrated on powerless minorities. Maybe the state won't be able to devise another way to pursue whatever goal it was pursuing, but this inaction is unlikely to be attributable to the powerlessness of some minority. *Hobby Lobby* introduces a deployment of the least restrictive means test that predictably leaves minorities vulnerable in precisely this way.

The argument we have just set forth invites the objection that the Court lacks the institutional means to predict the likelihood of political resistance to any particular suggested less restrictive means.[86] One response is that the Justices do not hesitate to make such predictions when it suits their purposes. In its first review of the ACA, for example, the Court held that the ACA's threat to deprive states of existing Medicaid funding if they did not participate in the proposed Medicaid expansion exceeded Congress's spending power.[87] Justice Ginsburg argued that this elevated form over substance, because this condition was functionally equivalent to Congress's repealing the existing Medicaid program, and then reenacting it with the Medicaid expansion folded in—an action unquestionably within the limits of the Spending Clause.[88] Three Justices dismissed this argument out of hand, pointing to the doubtful political viability of repealing and reenacting Medicaid.[89]

(2003) (same); Adarand v. Pena, 515 U.S. 200, 225 (1995) (same). With affirmative action, too, the Court's use of least restrictive means analysis shows that the court regards some goals of government, such as the prevention of all-black elementary schools, to be not worth pursuing at all. See Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007).

85. See Andrew Koppelman, Antidiscrimination Law and Social Equality 13-56 (1996).

86. This objection was raised in conversation by Prof. Thomas Berg.

87. National Fed. Indep. Businesses v. Sebelius, 132 S.Ct. 2566, 2636-39 (2012) (plurality opinion of Roberts, C.J. joined by Breyer & Kagan, JJ.); *id.* at 2662-62 (joint dissent of Scalia, Kennedy, Thomas & Alito, JJ.).

88. 132 S.Ct. at 2636 (Ginsburg, J., concurring in part, concurring in the judgment in part & dissenting in part).

89. 132 S.Ct. at 2606 n.14 (plurality opinion) (emphasis added & internal citations deleted):

> Justice Ginsburg suggests that the States can have no objection to the Medicaid expansion, because "Congress could have repealed Medicaid [and t]hereafter . . . could have enacted Medicaid II, a new program combining the pre–2010 coverage with the expanded coverage required by the ACA." But it would certainly not be that easy. Practical constraints would plainly inhibit, if not preclude, the Federal Government from repealing the existing program and putting every feature of Medicaid on the table for *political* reconsideration. Such a massive undertaking would hardly be "ritualistic."

In a conversation with Prof. Koppelman, former Senate Majority Leader Tom Daschle suggested that if Congress, tried to reenact Medicaid in the way that Justice Ginsburg suggested,

But even if the objection is sound, the Court should not remain oblivious to the problem of the "politically improbable" least restrictive means. Pre-RFRA free exercise law avoided the difficulty by not invoking a less restrictive means that would have demanded new legislative action to avoid third—party burdens. A *per se* rule against such a demand would avoid the problem without requiring courts to make these difficult political judgments.

V. "STATUTORY INTERPRETATION" AS A RATIONALIZATION FOR OLIGARCHY

Perhaps it is because *Hobby Lobby* is a statutory interpretation case that in it the Court abandons the judicial restraint that guided its constitutional interpretation in *Smith*. The situation created by the Court's creative and surprising reinterpretation of RFRA invites comparison with the Court's deployment of the category of "traditional governmental functions." The Court experimented with that category as the basis for a constitutional rule restraining the imposition of federal law on the states: these functions were immune from federal regulations such as the minimum wage.[90] The rule eventually was abandoned as "unsound in principle and unworkable in practice," because the rule invited the judiciary "to make decisions about which state policies it favors and which ones it dislikes."[91] But it later revived it as a presumption of statutory interpretation: federal statutes will not be construed to alter the "usual constitutional balance between the States and the Federal Government" unless Congress's intention is "unmistakably clear in the language of the statute."[92] This presumption has then been applied retroactively to statutes which were enacted before the Court announced it.

The rule of *Gregory* is one of a number of techniques of statutory distortion that the Court has deployed in recent years. These include wrenching terms out of context in order to contradict the statute's purpose, relying on presumptions that are so strong that they defeat express statutory language, aggressive use of preemption doctrine to defeat state regulatory laws that Congress had no intention of disturbing, devising new interpretive approaches and applying them retroactively to laws already in existence, and minimizing the effect of corrective legislation that overrides the Court's misinterpretations.[93] *Hobby Lobby* is best understood as standing in this

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some members of Congress would reopen the question of how the funds are allocated, generating huge political difficulties. *See* Koppelman, The Tough Luck Constitution and the Assault on Health Care Reform, at 168 n. 22.

90. National League of Cities v. Usery, 426 U.S. 833 (1976).

91. Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 546 (1985).

92. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

93. Simon Lazarus, *Stripping the Gears of National Government: Justice Stevens's Stand*

tradition, using vague legislative language as an opportunity to craft a new statutory scheme that is radically at variance with what Congress had in mind.

This pattern sheds important light on the ongoing debate about whether legislative history is a legitimate source of law in statutory interpretation. A legal movement led by Justice Scalia, called "the new textualism," professes that judges should be guided solely by the meaning of the language of the Constitution and statutes when they were laid down.[94]

In interpreting statutes, Scalia rejects the use of legislative history because it is manipulable – like "entering a crowded cocktail party and looking over the heads of the guests for one's friends."[95] There will always be so many bits of legislative history that one can cherrypick the results that one likes, and individual legislators can insert statements into the record declaring intentions that were never agreed to by Congress as a whole or the President. This objection imagines a particularly gullible use of legislative history, in which such statements are given the same weight as a conference committee report. The solution is a mighty broad one: excluding *all* information about the legislative history.

If – it is a big if – the purpose of the new textualism is to limit judicial discretion, then it is a failure. In practice, when freed from the need to pay any attention to what Congress was actually trying to do, the Court has been empowered to manipulate a law's language to reach politically congenial results. The fewer the sources of law, the more ambiguity and therefore the more discretion. It is like keeping a bouncer outside the cocktail party to keep out anybody one prefers not to chat with.

Legislative history in practice *constrains* judges. A survey of more than thirty years of Supreme Court labor law opinions found that when legislative history was relied upon, judges were more likely to vote against their ideological preferences – with Democrat-appointed judges voting in favor of employer interests, and Republican-appointed judges voting in favor of worker interests. Since Scalia joined the Court, the diminishing reliance on legislative history has been accompanied by increasingly pro-employer results.[96]

Hobby Lobby is an illustration of this new empowerment of judges. It

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Against Judicial Subversion of Progressive Laws and Lawmaking, 106 Nw. U. L. Rev. 769 (2012).

94. See William N. Eskridge Jr., *The New Textualism*, 37 UCLA L. Rev. 621 (1990).

95. Antonin Scalia and Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 377 (2012).

96. James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 Berkeley J. Emp. & Lab. L. 117 (2008). For elaboration on the weaknesses of the new textualism, see William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 Colum. L. Rev. 531 (2013).

doesn't even make sense at the level of textualism. As noted earlier, legislative findings in the text of RFRA make clear that its purpose is to restore the pre-*Smith* balancing test. But *Hobby Lobby* is radically at odds with this statutory statement of purpose. It reaches a result that would have astonished Congress.

If legislative history is in fact a constraint upon judges, then the campaign to ignore legislative history can be understood as a prescription for liberating judges from it. The removal of this source of law introduces ambiguity into areas of law where there otherwise would be none. Judges are then free to resolve such ambiguities in politically congenial ways. They are more likely to defy Congress's obvious intentions when they have reason to be confident that Congress will not be able to intervene.[97] And they accomplish this by a technique that is paraded as evidence of their superior virtue and restraint.[98]

CONCLUSION

If government refusals to accommodate are viewed with the kind of skepticism that the Court displays in *Hobby Lobby*, then claims of accommodation will nearly always be supported by some imaginable less restrictive means, even if its enactment is politically impossible. The consequence in practice will be an interpretation of religious liberty in which adherents get to harm nonadherents, in which some are force to pay for the religious exercise of others. Religious liberty here would mean the right to impose your religion on other people who don't share your views.

This activism sits uneasily beside the conspicuous judicial restraint of *Smith*. The Court can, and sometimes does, say that its interpretation of a statute is vindicated by the fact that Congress has let its decision stand. But changing statutory law isn't easy. The Court craves democratic legitimation, but evidently bogus legitimation will do.

One of the principal attractions of the idea of religious liberty has always been that the exercise of one person's religion doesn't hurt anyone else. In Thomas Jefferson's classic formulation: "it does me no injury for my neighbour to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg."[99] But paying for contraceptives that should be

97. See Paul Stancil, *Congressional Silence and the Statutory Interpretation Game*, 54 WM. & MARY L. REV. 1251, 1263–65, 1324, 1332–36 (2013) (arguing that the Supreme Court will often take advantage of the high transaction costs of enacting federal legislation to engage in self-interested or aggressive interpretations of federal statutes without fear of congressional override).

98. On Scalia's uses of this rhetorical move, see Andrew Koppelman, *Passive Aggressive: Scalia and Garner on Interpretation*, 41 Boundary 2: an international journal of literature and culture 227 (Summer 2014).

99. Thomas Jefferson, *Notes on the State of Virginia*, in Writings 285 (Merrill D. Peterson ed., 1984).

covered by insurance is exactly like having one's pocket picked, while involuntary pregnancy is worse than a broken leg.

The Court evidently thinks that it is helping the cause of religious liberty by construing RFRA very broadly. It may have lost sight of the fact that RFRA is a *statutory* accommodation, and *Hobby Lobby* is a mere *statutory* interpretation that Congress has the power to undo. The existence and vitality of RFRA—and other statutory accommodations of religion—ultimately depends on the sufferance of Congress and the voters who elect it. How likely is it that those voters will support religious claims that manifestly hurt innocent people, or pay in perpetuity to subsidize religious practices they do not share and may find politically or morally repugnant? Religion has been a great force for good in the world,[100] but it is hard to see that when this is its most prominent manifestation. If this is the official meaning of religious liberty, than the broad acceptance of religious liberty will fade.

100. See Andrew Koppelman, Defending American Religious Neutrality 120-130 (2013); Andrew Koppelman, *Naked Strong Evaluation*, 56 Dissent 105 (Winter 2009)