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Martin S. Lederman

INTRODUCTION

Almost every member of Congress voted to approve the Religious Freedom Restoration Act of 1993 (RFRA),¹ a bill endorsed by an unprecedented coalition of dozens of religious and civil rights organizations spanning the political and ideological spectrum.² President Clinton quipped at the signing ceremony that perhaps only divine intervention could explain such an unusual meeting of the minds: the establishment of “new trust” across otherwise irreconcilable “ideological and religious lines,” he remarked, “shows . . . that the power of God is such that, even in the legislative process, miracles can happen.”³

The RFRA consensus was especially “miraculous” because the legislation addressed a deeply divisive question: whether and under what circumstances religious objectors should be exempt from generally applicable laws. RFRA’s supporters, both within and outside Congress, would surely have had sharp disagreements about many specific claims for religious exemptions to

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1. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb *et seq.*).
 2. The House approved RFRA by voice vote without opposition, and only three Senators opposed the legislation. *See* 139 Cong. Rec. 26416 (1993) (Senate); 139 Cong. Rec. 27239-41 (1993) (House). The “Coalition for the Free Exercise of Religion” that lobbied in support of RFRA included 66 organizations, ranging from the Christian Legal Society, the Episcopal Church, and the National Association of Evangelicals to the American Civil Liberties Union, the American Humanist Association and Americans United for Separation of Church and State. *See* BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY, THE RELIGIOUS FREEDOM RESTORATION ACT: 20 YEARS OF PROTECTING OUR FIRST FREEDOM 6, <http://bjconline.org/wp-content/uploads/2014/04/RFRA-Book-FINAL.pdf> [<http://perma.cc/J9QY-K98F>] (reproducing a Letter from Oliver S. Thomas, Coalition Chair, to a Senator, October 20, 1993) (listing organizations).
 3. Remarks on Signing the Religious Freedom Restoration Act of 1993, 1 PUB. PAPERS 2000 (Nov. 16, 1993).

particular laws. Yet they coalesced around RFRA, which circumvented such disagreements at the retail level by codifying a “cross-cutting” statutory standard that judges would be required to apply to an undifferentiated and unknown array of future claims for exemptions to every generally applicable law in the land.

RFRA’s operative language provides that if application of a law or regulation to a person “substantially burdens” her exercise of religion, the government must exempt that person from operation of the law, unless the government can demonstrate that denying such an exemption is the “least restrictive means” of furthering a “compelling governmental interest.”⁴ Congress concluded that this “test,” “set forth in prior Federal court rulings”⁵—including the Supreme Court’s Free Exercise Clause decisions in *Sherbert v. Verner*⁶ and *Wisconsin v. Yoder*,⁷ both of which RFRA invokes by name⁸—“is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.”⁹

In 1997, the Supreme Court held that Congress did not have constitutional authority to impose RFRA as a limit on state and local laws.¹⁰ RFRA continues to apply to all federal law, however. And in 2000 the same wide-ranging coalition of religious and civil rights groups reunited with President Clinton to help secure enactment of the Religious Land Use and Institutionalized Persons Act (RLUIPA),¹¹ which applies the RFRA “test” to two discrete areas of state law: land use regulation, and the treatment of prisoners and other persons confined in state-operated institutions. More than twenty states have also enacted their own “mini-RFRAs” that require religious exemptions to state and local laws under certain circumstances—sometimes using language similar or identical to that found in the federal RFRA.¹² In yet other states, similar

4. 42 U.S.C. § 2000bb-1(a)-(b).

5. *Id.* § 2000bb-1(a)(5).

6. 374 U.S. 398 (1963).

7. 406 U.S. 205 (1972).

8. 42 U.S.C. § 2000bb(b)(1).

9. *Id.* § 2000bb(a)(5).

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

11. Pub. L. No. 106-274, 114 Stat. 804 (2000) (principally codified at 42 U.S.C. §§ 2000cc *et seq.*).

12. See generally Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466, 476-79 & 477 n.67 (2010); *State Religious Freedom Restoration Acts*, NAT’L CONF. STATE LEGIS. (Oct. 15, 2015), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx> [<http://perma.cc/NG2L-XM9E>].

religious exemption tests apply by virtue of judicial construction of state constitutions.¹³

The broad, bipartisan consensus in favor of such “general,” cross-cutting religious accommodation statutes has persisted throughout the past generation.¹⁴ Yet the RFRA coalition is now fraying at the seams and is in danger of permanent disintegration. The immediate source of the schism is clear—namely, the recent RFRA challenges to the so-called “contraception mandate.” In those cases, dozens of employers and universities have claimed that RFRA entitles them to exemptions from the regulatory requirement, under the “preventive health services” provision of the Affordable Care Act,¹⁵ that employee and student health insurance plans reimburse plan beneficiaries for the costs of most methods of contraception.¹⁶

In *Burwell v. Hobby Lobby Stores, Inc.*,¹⁷ the Supreme Court held that several closely held for-profit corporations were entitled to a RFRA exemption from that regulation because the executive agencies had at least one “less restrictive” way to further the government’s compelling interest in ensuring that the companies’ female employees (and employee dependents) would have affordable access to effective contraception. The agencies had not demonstrated, the Court reasoned, why they could not make available to those for-profit employers the same “accommodation” that the agencies had offered to religious nonprofit organizations. Pursuant to that accommodation, the insurance company that administers the plan reimburses beneficiaries for the costs of contraception, without any payment, administration, or other involvement by the objecting employer.¹⁸

13. See Kara Loewentheil, *The Satanic Temple, Scott Walker, and Contraception: A Partial Account of Hobby Lobby’s Implications for State Law*, 9 HARV. L. & POL’Y REV. 89, 104-05 n.75 (2015).

14. To cite only the latest example, a wide array of amici, including many of the members of the “Coalition for the Free Exercise of Religion” and the federal government, filed in support of a Muslim prisoner’s RLUIPA challenge to a state prison regulation in *Holt v. Hobbs*, 135 S. Ct. 853 (2015). See *Holt v. Hobbs*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/holt-v-hobbs> [<http://perma.cc/YLB2-FJ8X>] (listing amici and linking to briefs).

15. 42 U.S.C. § 300gg–13.

16. See, e.g., 45 C.F.R. § 147.130(a)(1)(iv) (incorporating “guidelines supported by the Health Resources and Services Administration,” which in turn include all FDA-approved contraceptive methods, as prescribed by a health care provider, other than condoms and vasectomies, see 77 Fed. Reg. 8725 (Feb. 15, 2012)); see also Marty Lederman, *Compendium of posts on Hobby Lobby, Zubik, and related cases*, BALKINIZATION (Nov. 8, 2015), <http://balkin.blogspot.com/2014/02/compendium-of-posts-on-hobby-lobby-and.html> [<http://perma.cc/5DQQ-LR6K>] (linking to dozens of posts about various aspects of the RFRA cases seeking exemptions from the contraception regulation).

17. 134 S. Ct. 2751 (2014).

18. See *id.* at 2759–60, 2782; see also 45 C.F.R. § 147.131(c)–(f) (providing the accommodation for religious nonprofit organizations).

In its current Term, the Supreme Court is considering consolidated cases brought by thirty-seven *nonprofit* organizations.¹⁹ Those plaintiffs allege that RFRA entitles them to an exemption from even the regulatory accommodation, so that neither the organizations themselves, nor the insurance companies that administer the employee and student health insurance plans, would provide contraception coverage to female beneficiaries. If the Court accepts these organizations' RFRA arguments, many thousands of their employees, dependents, and students—unlike nearly all other women in the United States—would not be reimbursed for the costs of contraception, which would, in turn, result in many more unintended pregnancies.²⁰

The current tensions within the old free-exercise coalition are not, however, solely a function of the RFRA claims involving the contraception regulation. As Douglas NeJaime and Reva Siegel elaborate in *Conscience Wars*,²¹ there is widespread fear in some quarters—and presumably hope in others—that such claims might become a template for similar claims, pursuant to federal or state RFRA or analogous state constitutional provisions, for religious exemptions from laws that prohibit discrimination in employment, or in the provision of public accommodations, on the basis of sexual orientation.

Such fears might not be warranted. Because there are not yet many such antidiscrimination laws in force, post-*Hobby Lobby* RFRA claims asserting a religious right to discriminate have been rare, and none has yet succeeded.²² Nor is it likely that courts will adjudicate many such claims in the near future: once such antidiscrimination laws do attract enough public support to be enacted, very few businesses will be willing to publicly seek the legal right not to serve same-sex couples—a sure ticket to financial ruin. And in the unusual cases that do proceed to litigation, odds are that few (if any) courts will permit

19. The lead case is *Zubik v. Burwell*, No. 14-1418. See Marty Lederman, *Unpacking the Forthcoming RFRA Challenges to the Government's Accommodation (with Emphasis on Self-Insured Plans)*, BALKINIZATION (July 18, 2014), <http://balkin.blogspot.com/2014/07/unpacking-forthcoming-rfra-challenges.html> [<http://perma.cc/5GZG-ZNJT>] (identifying the disparate ways in which the regulation would affect the thirty-seven distinct petitioners).

20. See Brief of the Guttmacher Institute and Professor Sara Rosenbaum as Amici Curiae in Support of the Government, *Zubik v. Burwell*, Nos. 14-1418 et al. (Feb. 17, 2016).

21. Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2561-63 (2015).

22. One such case is currently pending before the Washington Supreme Court: A florist who refuses to provide flowers for a same-sex wedding has invoked, *inter alia*, the religious freedom provision of the Washington Constitution's Declaration of Rights as a defense to application of state antidiscrimination laws. See Brief of Appellants at 32-36, *State v. Arlene's Flowers, Inc.*, No. 91615-2 (Wash. Oct. 16, 2015), <http://www.adfmedia.org/files/ArlenesOpeningBrief.pdf> [<http://perma.cc/J3W4-LR93>].

retail establishments to exclude same-sex couples, or allow employers to discriminate against them.²³

Nevertheless, the prospect of such claims for exemptions from antidiscrimination laws is undeniably the genesis of recent efforts by some state legislators to enact or strengthen their local RFRAs. Yet those efforts, too, have been unavailing, largely because politicians of both parties realize how devastating such enactments would be to the economic well-being of enterprises in their states.²⁴ Moreover, given the current, inexorable increase in public support for same-sex equality norms, it is almost certain that when legislatures enact new antidiscrimination statutes, they will not include robust, statute-specific religious exemptions within those laws,²⁵ nor enact separate laws designed to provide robust religious exemptions to the antidiscrimination rules.²⁶

If this legislative trend continues, then the *existing* federal and state RFRAs will become virtually the whole game—the only possible sources for religious exceptions to such new antidiscrimination norms.

Even so, the prospect of such future RFRA litigation hardly explains why many people and organizations who once supported—and who generally continue to support—RFRA, RLUIPA, and similar accommodation laws are becoming increasingly wary of such cross-cutting religious liberty protections. After all, as I explain below, for more than seventy years courts have virtually

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23. See generally Ira C. Lupu, *Moving Targets: Obergefell, Hobby Lobby, and the Future of LGBT Rights*, 7 ALA. C.R. & C.L. L. REV. 1, 15-24, 67-73 (2015). If any such suits were to meet with success, they would most likely be those brought by nonprofit employers seeking to deny employment benefits to employees' same-sex spouses. I am not aware of any such claims yet, however.
 24. See Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 631-38 (2015) (describing recent efforts in Arizona, Mississippi, Georgia, Indiana, Oklahoma and Arkansas); see also Marty Lederman, *Hobby Lobby Part XI—Governor Brewer's Veto in Arizona . . . and Hobby Lobby* (Mar. 12, 2014), <http://balkin.blogspot.com/2014/03/hobby-lobby-part-xi-governor-brewers.html> [<http://perma.cc/6BWM-2XWW>]; Alan Blinder and Campbell Robertson, *Conservative Lawmakers Push New Legal Protections for Opponents of Gay Rights*, N.Y. TIMES (Mar. 3, 2016), <http://www.nytimes.com/2016/03/04/us/gay-rights-religious-freedom-legislation-states.html> [<http://perma.cc/HKG2-Y9FG>] (quoting Douglas Laycock as saying that such new proposed state RFRAs “have become politically toxic”).
 25. For example, when the federal Non-Discrimination in Employment Act is reintroduced in a future Congress, it almost surely will not include the broad religious exemption found in earlier versions of the legislation. See Ed O’Keefe, *Gay Rights Groups Withdraw Support of ENDA after Hobby Lobby Decision*, WASH. POST (July 8, 2014), <http://www.washingtonpost.com/news/post-politics/wp/2014/07/08/gay-rights-group-withdrawing-support-of-enda-after-hobby-lobby-decision/> [<http://perma.cc/CNR4-BMQV>].
 26. See, e.g., Blinder and Robertson, *supra* note 24 (reporting that Republican officials and business interests are strongly resisting a new round of proposed legal protections for opponents of gay rights).

always rejected claims for religious exemptions in commercial settings, even when they have purported to apply a “compelling interest”/“least restrictive means” test of the sort found in RFRA.²⁷ If that decades-old trend were to continue, there would be no cause for alarm.

All of a sudden, however, there is a very real chance, in the forthcoming cases involving nonprofits’ RFRA challenges to the contraception regulation accommodation, that the Supreme Court might depart sharply from that historical norm, and transform RFRA into a much more robust engine of religious exemptions to commercial regulations. What brought us to this point? Who, if anyone, has betrayed the common ground on which the RFRA consensus was so carefully constructed—and how have they done so? Those important questions lurk just beneath the surface of Douglas NeJaime and Reva Siegel’s timely and provocative *Conscience Wars*.

I. WHAT’S SO NEW ABOUT THE NEW COMPLICITY CLAIMS?

NeJaime and Siegel richly detail two important aspects of the recent accommodation claims—characteristics they describe as novel, potentially destabilizing, and, perhaps, reasons to be wary of the requested exemptions.

First, they emphasize a formal feature of the recent claims: the way in which the plaintiffs characterize how the challenged laws “substantially burden” their exercise of religion. Virtually all of the plaintiffs in the contraception and discrimination cases assert that the state would require them to facilitate immoral conduct—to be complicit in others’ wrongdoing—in a way their religion allegedly prohibits. These sorts of claims, by their very nature, label other private parties “as sinners in ways that can stigmatize and demean.”²⁸ The employer plaintiffs in *Hobby Lobby* and *Zubik*, for instance, assert that the ACA regulation would compel their forbidden complicity in employees’ sinful use of contraception (or sinful engagement in nonprocreative sex).²⁹ Similarly, the bakery or bed-and-breakfast owner who wishes to turn away same-sex couples claims an exemption on the ground that she is religiously forbidden from abetting the sin of same-sex marriage or sexual activity.

NeJaime and Siegel are right that this is a distinctive feature of the recent controversial RFRA claims. Yet, contrary to their suggestion, such claims are not novel, nor are they discordant with Congress’s design in enacting RFRA. Several of the Supreme Court’s Free Exercise decisions between 1963 and 1990,

27. See *infra* notes 105-108 and accompanying text.

28. NeJaime & Siegel, *supra* note 21, at 2576.

29. See, e.g., Brief for Respondents at 9-10, 34-36, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354); Brief for Petitioners in Nos. 15-35, et al. at 51-53, *East Texas Baptist Univ. v. Burwell*, No. 15-35 (Jan. 4, 2016) [hereinafter *ETBU Pet. Br.*].

which RFRA effectively incorporated,³⁰ involved complicity claims, or were otherwise predicated upon an asserted religious injunction to be dissociated from the sins of others.³¹

Regardless of whether such claims are especially new, NeJaime and Siegel appear to be concerned that courts adjudicating RFRA claims might not recognize, or sufficiently account for, the distinct dignitary harms that are inflicted when claimants in effect accuse others of acting immorally. They are appropriately careful, however, to clarify that what troubles them is not the mere fact of the religious objector's disapprobation³²—something that would be apparent even if the court *denied* the religious exemption³³—but, rather, the prospect that the state itself would, by conferring the exemption, “express[] the message that contraception [or other third-party conduct] is sinful.”³⁴

Whether the state expresses such a message will depend, of course, “on the way the government structures the accommodation.”³⁵ It is difficult to imagine a RFRA case, however, in which this concern would determine the outcome.

Most importantly, in some cases a state agency might be able to craft a substitution “work-around” in order to both grant the requested religious accommodation and prevent any harm to third parties. The federal agencies’ accommodation to the contraception regulation, in which a non-objecting

30. See *infra* Part III.

31. In *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), for example, a corporation’s principal owner argued that federal law requiring his barbecue restaurants to serve black customers violated his free exercise rights by requiring him to be complicit in sin: based upon his reading of the Old Testament, he “believe[d] as a matter of religious faith” that such service would be a “contribution” to “racial intermixing,” and would thereby “contravene[] the will of God.” *Piggie Park*, Pet. App. 21a (Second Amended Answer, Sixth Defense), *id.* at 126a (testimony of L. Maurice Bessinger). (In a single terse sentence, the Court unanimously held that this free exercise argument was “so patently frivolous” that it would “manifestly inequitable” not to reward attorneys’ fees to the parties challenging the discrimination. 390 U.S. at 402 n.5.) See also, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 580-81 (1983) (university sought to sustain its prohibition on interracial student dating, without losing federal tax benefits, because “sponsors of the University genuinely believe[d] that the Bible forbids interracial dating and marriage”); *United States v. Lee*, 455 U.S. 252, 255 & n.3 (1982); *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 710-12 (1981).

32. NeJaime & Siegel, *supra* note 21, at 2575 n.243 (“Business owners with religious objections to same-sex marriage who serve customers in compliance with antidiscrimination laws are still free to voice their objections to same-sex marriage.”).

33. See also Sherif Girgis, *Nervous Victors, Illiberal Measures: A Response to Douglas NeJaime and Reva Siegel*, 125 YALE L.J. F. 399, 406 (2016) (noting that religious exercise, including worship and proselytization, frequently subjects nonbelievers to moral stigma).

34. NeJaime & Siegel, *supra* note 21, at 2583 n.275.

35. *Id.*; see also *id.* at 2586 (suggesting that the state should find “ways to accommodate religious persons without giving *legal sanction* to their view that other law-abiding citizens are sinning” (emphasis added)).

insurance company does what the objecting religious employer wishes to avoid, is an accommodation of this sort. So, too, is a recent North Carolina law that gives an individual magistrate the right to categorically recuse from performing marriages for a six-month period “based upon any sincerely held religious objection,” but that also requires the chief district court judge to “ensure that all individuals issued a marriage license seeking to be married before a magistrate may marry,” and requires the Administrative Office of the Courts to ensure that a substitute magistrate is available to perform marriages in a hypothetical jurisdiction where all the magistrates have recused.³⁶

Where the state fashions such an accommodation, its manifest judgment about the underlying legal norm (e.g., that women should have ready access to affordable contraception, or that same-sex couples should not be subject to discrimination) puts the state itself *at odds* with the religious objectors on the question of whether the third party’s conduct is moral or sinful. In such cases, the state has not embraced or ratified the objectors’ view about sinful conduct; it has, instead, navigated a way to respect the conscience of the objector while also ensuring that the law continues to work as designed, without compromising the rights of third parties. These are, in effect, “win/win” solutions of the sort the Court in *Hobby Lobby* hoped it had fashioned under RFRA.³⁷

In other situations, however, where such a work-around is not available, recognizing a complicity-based RFRA claim would deny third parties a public benefit, or equal access to “public establishments.”³⁸ In those cases, the material harms themselves, together with the “stigmatizing injury” that “surely accompanies” an exclusion in the public accommodation setting,³⁹ will be more than sufficient to justify denying the RFRA exemption.⁴⁰ Accordingly, any additional harm associated with the implication of *sinful* conduct will virtually never affect how courts decide such cases. A court that has already denied the RFRA exemption based upon material harm to third parties, and/or the dignitary harm caused by the exclusion itself, will not need to fall back on the distinct harm associated with the taint of “immoral” conduct. And if, by contrast, a judge is determined (improperly) to grant a RFRA exemption despite the material or dignitary harm to third parties, it is hard to imagine

36. N.C. GEN. STATUTES § 51-5.5(a), (c).

37. See 134 S. Ct. at 2760 (“The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing.”).

38. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964).

39. *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984) (quoting *Heart of Atlanta Motel*, 379 U.S. at 250).

40. See *infra* notes 109-111 and accompanying text.

that the implied accusation of sin would affect that judge's disposition. In all events, the objectors' allegation of immoral conduct is unlikely to be determinative of the RFRA claim.

The more significant component of NeJaime and Siegel's critique is their demonstration that the new complicity claims receive much different, and more sophisticated, support than religious exemption claims have ever before enjoyed. Historically, claims for exemption from commercial regulations were idiosyncratic, brought intermittently by plaintiffs who rarely engendered sustained assistance or political support. By contrast, dozens of plaintiffs, including major corporations, reputable and well-established educational institutions (including the University of Notre Dame and Catholic University), and even some Roman Catholic archdioceses, have raised RFRA claims in the contraception cases.

As NeJaime and Siegel describe the phenomenon, mobilized groups, together with public officials and important figures in the broader movement opposing same-sex marriage and contraceptive rights, have collectively encouraged and organized the new complicity claims, and have retained a sophisticated cadre of attorneys to litigate them, all in the service of a broader political and moral agenda. On this view, a principal objective of the complicity claims is not to promote pluralism, or to "turn down the temperature" by carving out discrete enclaves where religious objectors can quietly preserve remnants of the old moral order,⁴¹ but instead to foment continued opposition to the new moral norms, so as to "enable the conflict to persist in a new, revitalized form," and possibly even to lay the groundwork for a restoration of the recently vanquished traditional norms as part of the formal state legal order.⁴²

NeJaime and Siegel's descriptive account is compelling. It is not entirely clear, however, what (if anything) follows from it in terms of how administrators and judges ought to treat the exemption claims themselves.

41. See, e.g., *Gonzales v. O Centro Espirita Benificente Uniao do Vegetal*, 546 U.S. 418, 432 (2006) (granting RFRA exemption to the Controlled Substances Act where the government had failed to demonstrate that the "circumscribed, sacramental use of hoasca" by a 130-member Christian Spiritist sect would result in the harms ordinarily associated with the use of hallucinogens).

42. NeJaime & Siegel, *supra* note 21, at 2563. As Sam Bagenstos similarly observes, such claims for exemption might be part of a strategic retreat to more politically congenial ground from which to resist or partially roll back the new norms. See Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1219, 1233, 1239-40 (2014); see also William P. Marshall, *Bad Statutes Make Bad Law: Burwell v. Hobby Lobby*, 2014 SUP. CT. REV. 71, 122 ("RFRA claims can be used for immediate political effect such as weakening the political viability of a challenged provision. A judicial determination that a law offends religious principle sends a negative message about that law, particularly when the determination is that the law transgresses the beliefs of a mainstream religion.").

Another commenter in this symposium, Douglas Laycock, reads NeJaime and Siegel to be arguing that the state has an independent “compelling governmental interest” in denying exemptions in order to preserve the newly emergent moral code against efforts to sustain the political conflict.⁴³ I am not sure NeJaime and Siegel mean to advance such a bold idea—certainly, they do not do so directly.⁴⁴

In any event, such a suggestion would fall on deaf ears: no state would ever argue, in an actual case, that it has a legitimate, let alone a compelling, interest in suppressing a political debate that might threaten to alter the existing legal regime. After all, presumably there was nothing problematic, from the state’s point of view, when the former political minority spent decades fighting to upend the then-majoritarian views limiting access to contraception and marriage equality. So why should the state’s posture toward the revanchist strategy by the old guard be any different? Indeed, when a period of intense moral contestation culminates in adoption of the newly emergent majority norms as part of the state’s fundamental legal code, the suppression of alternative constitutional narratives can be a deeply unfortunate collateral cost of an evolution that is otherwise grounds for celebration.⁴⁵ It would therefore be troublesome, at the very least, for the state to assert that such suppression of the once-dominant perspective—or the cessation of a principled public debate that only recently shifted in valence—is itself a compelling government interest that might independently justify denial of what would otherwise be a valid RFRA claim. I do not read NeJaime and Siegel to be suggesting otherwise.

Nonetheless, NeJaime and Siegel’s descriptive account is important for another reason: The historical and institutional context they describe helps to explain a feature of the new RFRA claims that NeJaime and Siegel do not emphasize, but that is, I think, the principal source of the emerging tensions in the old RFRA coalition. Precisely because so much is at stake in the new complicity claims, beyond simply the ability of a handful of religious believers to carve out a private space in which they can freely practice their religion, the proponents of the new complicity claims have engaged in a concerted and sophisticated effort to have the courts untether the *substance* of RFRA analysis

43. Douglas Laycock, *Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Siegel*, 125 *YALE L.J. F.* 369, 371 (2016).

44. Laycock fixes on one sentence in their article that could be read to suggest such a view: “If granting a religious accommodation would harm those protected by the antidiscrimination law *or* undermine societal values and goals the statute promotes, then unencumbered enforcement of the statute is the least restrictive means of achieving the government’s compelling ends.” *Id.* (quoting NeJaime & Siegel, *supra* note 21, at 2581 (emphasis added by Laycock)). Laycock reads this sentence to suggest that the state should have a compelling interest in denying exemptions even if no one would “actually be harmed,” so long as the “religious exemptions might help sustain a political argument over government policy.” *Id.*

45. See Robert M. Cover, *Nomos and Narrative*, 97 *HARV. L. REV.* 4 (1983).

from its grounding in the Supreme Court's historical jurisprudence of religious exemptions. As I explain in the remainder of this essay, this novel initiative, if successful, would have a dramatic and unprecedented impact on the law of religious accommodations.

II. THE DOCTRINAL INNOVATIONS OF THE NEW RFRA COMPLICITY CLAIMS

The proponents of the new exemptions have consistently made two noteworthy arguments that could, in combination, induce the Supreme Court to fundamentally transform the jurisprudence of religious exemptions.

A. *Deference to Complicity-Based Theories of Substantial Burden*

First, in order to establish that the contraceptive coverage rule substantially burdens their religious exercise, the RFRA claimants have exploited the Supreme Court's traditional, and understandable, reluctance to evaluate believers' assertions of what constitutes religiously prohibited complicity in another's wrongful conduct. The Court credited the plaintiffs' complicity arguments in *Hobby Lobby*, for instance. Invoking pre-RFRA Free Exercise doctrine, the majority explained that because "courts must not presume to determine . . . the plausibility of a religious claim,"⁴⁶ the judiciary's "narrow function . . . in this context" is solely "to determine whether the line the plaintiff has drawn reflects 'an honest conviction.'"⁴⁷

It is not as obvious as the Court made it sound that such complicity assessments—which generally do not depend upon biblical injunction or received truth, nor require "scriptural interpretation"⁴⁸—are invariably the sorts of religious claims that civil authorities are incapable of assessing. But that is a topic for another day. For present purposes, the significant point is that the Justices appear to be deeply reluctant to interrogate such claims. The RFRA claimants' very framing of their alleged religious obligations therefore might be sufficient to clear the RFRA hurdle of showing a "substantial burden" on their exercise of religion.⁴⁹

46. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014) (quoting *Employment Div., Dep't of Human Resources of Ore. v. Smith*, 494 U.S. 872, 887 (1990)).

47. *Id.* at 2779 (quoting *Thomas v. Review Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 716 (1981)).

48. *Thomas*, 450 U.S. at 716.

49. *But see* Brief for the Respondents at 41-53, *Zubik v. Burwell*, Nos. 14-1418, et al. (Feb. 10, 2016) (arguing that petitioners have not established a substantial burden as a matter of law, even assuming the substance of their complicity claims); Brief of Baptist Joint Committee

This in turn shifts virtually all of the doctrinal action to the “back end” of RFRA—to the government’s burden of showing that denial of the religious exemption is the “least restrictive means” of furthering compelling state interests.⁵⁰ It is with respect to that question that the recent claimants have urged the Supreme Court to fundamentally alter how it assesses RFRA claims, in a manner that would upend the compromise of 1993 and deviate from the consistent judicial practice of the past half-century.

B. Treating RFRA’s “Compelling Interest” / “Least Restrictive Means” Test as “Exceptionally Demanding”

In *Hobby Lobby*, the religious claimants argued that RFRA’s “compelling interest” / “least restrictive means” test “is ‘the most demanding test known to constitutional law.’”⁵¹ Justice Alito, author of the majority opinion, appeared to agree: the government’s burden, he wrote, is “exceptionally demanding.”⁵² Most alarmingly, Justice Alito went so far as to suggest that if Congress might conceivably appropriate new funds to compensate for the harms that a religious exemption would visit upon third parties, the possibility of such a new appropriations statute—no matter how unlikely—could be “a viable alternative,” and thus a less restrictive means of advancing the government’s interests, thereby requiring conferral of the RFRA exemptions.⁵³

The Court did not hold either of these things.⁵⁴ But the petitioners in the current nonprofit cases are now urging the Court to do so⁵⁵—a prospect that could have a dramatic impact on the ability of the government to deny RFRA

for Religious Liberty as Amicus Curiae in Support of Respondents at 7-26, *Zubik v. Burwell*, Nos. 14-1418, et al. (Feb. 17, 2016) (same).

50. See Brief of Amici Curiae Scholars of Religious Liberty Sarah Barringer Gordon, R. Kent Greenawalt, Martin S. Lederman, Ira C. Lupu, and Robert W. Tuttle in Support of Respondents at 23-24, *Zubik v. Burwell*, Nos. 14-1418, et al. (Feb. 17, 2016) [hereinafter *Zubik Religious Liberty Scholars Br.*]; see also *Hernandez v. Commissioner*, 490 U.S. 680, 700 (1989) (reasoning that the more capacious the theory of religious burden, the more “powerful” is the Government’s interest in avoiding religious exemptions).
51. Brief of Respondents at 44, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997)).
52. 134 S. Ct. at 2780 (quoting *City of Boerne*, 521 U.S. at 532).
53. *Id.* at 2780.
54. In a footnote, Justice Alito wrote that “[f]or present purposes, it is unnecessary to adjudicate th[e] dispute” about whether RFRA established a new, much more searching, form of a “least restrictive means” test. *Id.* at 2678 n.18. And although it granted the requested RFRA exemptions, the Court ultimately did not “rely on the option of a new, government-funded program in order to conclude that the HHS regulations fail the least-restrictive-means test.” *Id.* at 2781-82; see also *id.* at 2786 (Kennedy, J., concurring) (stressing that the Court had not decided that question).
55. See, e.g., *ETBU Pet. Br.*, *supra* note 29, at 72-74.

exemptions that would harm third parties or otherwise frustrate compelling government interests. It is therefore important to explain why Justice Alito's assumptions about what Congress did when it enacted RFRA are fundamentally mistaken.

III. WHAT DID RFRA "RESTORE"?

RFRA was a legislative response to the Supreme Court's 1990 decision in *Employment Division v. Smith*.⁵⁶ In *Smith*, the Court "virtually eliminated the [constitutional] requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion"⁵⁷—something the Court had insisted upon in a series of Free Exercise Clause cases over the previous thirty years. According to Congress, in those earlier Free Exercise cases the Court had applied "a workable test for striking sensible balances between religious liberty and competing prior governmental interests."⁵⁸ Accordingly, it enacted RFRA to "restore," as a statutory mandate, that "compelling interest test."⁵⁹

In *Hobby Lobby*, however, Justice Alito tentatively endorsed an assumption the Court had made in a much earlier case—namely, that "RFRA's 'least restrictive means requirement was not used in the pre-*Smith* jurisprudence RFRA purported to codify."⁶⁰ "On this understanding of our pre-*Smith* cases," wrote Justice Alito, "RFRA did more than merely restore the balancing test used in the *Sherbert* line of [Free Exercise] cases; it provided even broader protection for religious liberty than was available under those decisions."⁶¹

Which is it? Did RFRA restore a test that the Court had applied before *Smith*, or did Congress impose a new obligation on the government that provides much more robust protection for religious exemptions than the Court did before 1990? In order to answer that question, it is necessary to examine how the RFRA consensus in Congress almost broke apart in the early 1990s, and how it was salvaged.

Virtually all members of Congress agreed that Congress should enact a law that would effectively "correct" what they saw as the Court's mistake in *Smith*, by restoring the substance of the Court's pre-*Smith* jurisprudence. There was one big problem, however. The actual language the sponsors settled upon to describe the government's burden—to show that denial of a religious

56. 494 U.S. 872 (1990).

57. 42 U.S.C. § 2000bb(a)(4).

58. *Id.* § 2000bb(a)(5).

59. *Id.* § 2000bb(b)(1).

60. 134 S. Ct. at 2761 n.3 (quoting *City of Boerne*, 521 U.S. at 509).

61. *Id.* (emphasis added).

exemption “is the least restrictive means of furthering [a] compelling governmental interest”⁶²—had the potential, if read literally, to be much more restrictive than anything the Court had insisted upon in its pre-*Smith* jurisprudence, including, especially, a series of cases in the 1980s in which the Court had repeatedly rejected religious exemptions to federal laws. The prospect that the courts might construe RFRA to require exemptions that would have been denied before *Smith* threatened to tear apart the delicate congressional consensus.

Just as reproductive rights are at the heart of the current RFRA disputes, so, too, were they the sticking point during the negotiation of RFRA in the early 1990s. The concern at that earlier time, however, was not that religious objectors might use RFRA to interfere with reproductive rights, but precisely the opposite: many Catholic legislators and organizations, including most importantly the U.S. Conference of Catholic Bishops, opposed RFRA because they feared that, as originally drafted, it might compel exemptions to abortion restrictions for women who claimed they were religiously motivated to choose abortion.⁶³ Although the idea might appear far-fetched in retrospect, the prospect that RFRA would become the engine of abortion rights dominated the legislative debates, and prevented enactment of the bill for almost two years.⁶⁴

Indeed, the abortion-related concerns were so pronounced that leading House Republican sponsors Paul Henry and Henry Hyde withdrew their support for RFRA.⁶⁵ As Representative Hyde would later recount, the test prescribed in the bill “was of particular concern to me in the area of abortion rights.”⁶⁶ Under settled pre-*Smith* law, Hyde explained, there was no prospect of successful RFRA claims for exemptions to abortion restrictions; yet “[a] major issue of contention in the 102d Congress was whether the bill was a true restoration of the law as it existed prior to *Smith* or whether it sought to impose a more stringent statutory standard.”⁶⁷

62. *Id.* § 2000bb-1(1)-(2).

63. See, e.g., *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary*, 102d Cong., 100, 106-110 (1992) [hereinafter 1992 Senate Hearing] <http://www.justice.gov/sites/default/files/jmd/legacy/2014/02/13/hear-j-102-82-1992.pdf> [<http://perma.cc/8G2H-8KEW>] (testimony and statement of Mark E. Chopko, General Counsel, U.S. Catholic Conference); *id.* at 203-40 (testimony and statement of James Bopp, Jr., General Counsel, National Right to Life Committee, Inc.).

64. See S. REP. No. 103-111, at 12 (1993) (“There has been much debate about this act’s relevance to the issue of abortion.”); Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 231-34, 236-38 (1994) (recounting the legislative deliberations about abortion).

65. *Id.* at 237.

66. 139 CONG. REC. 9682 (1993).

67. *Id.*

In order to bridge the abortion divide, RFRA proponents changed the bill, prior to its reintroduction in the 103d Congress, to “make clear that the statutory standard of the Religious Freedom Restoration Act is the same free exercise standard that was applied by the U.S. Supreme Court prior to *Smith*.”⁶⁸ As so amended, it became clear that “the Religious Freedom Act is not seeking to impose a new and strengthened compelling State interest standard, but is seeking to replicate, by statute, the same free exercise test that was applied prior to *Smith*.”⁶⁹ In particular, as Representative Hyde explained, “[t]he bill now clearly imposes a statutory standard that is to be interpreted as incorporating all Federal court cases prior to *Smith*.”⁷⁰

According to Douglas Laycock and Oliver Thomas—both of whom were deeply involved in the efforts of the Coalition for the Free Exercise of Religion to secure passage of the bill—what finally sealed the deal, and guaranteed Representative Hyde’s endorsement, was language the sponsors added to the committee reports.⁷¹ That crucial addition expressly made it “absolutely clear” that RFRA “does not expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with free exercise jurisprudence, including Supreme Court jurisprudence, under the compelling governmental interest test prior to *Smith*.”⁷²

This report language, “agreed to by all of the bill’s lead sponsors,”⁷³ finally broke the logjam. Representative Hyde, the Catholic Bishops, and other abortion opponents were mollified precisely because there was universal recognition that the pre-1990 “free exercise jurisprudence” that RFRA would incorporate had rarely afforded claimants the “ability . . . to obtain relief”⁷⁴ in any contexts that members of the legislative consensus would strongly oppose. And that was so because the results of the Court’s pre-*Smith* Free

68. *Id.* Most importantly, the formal legislative findings were rewritten to clarify that “the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.” 42 U.S.C. § 2000bb(a)(5) (emphasis added). See Ira C. Lupu, *Of Time and the RFRA: A Lawyer’s Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 196-97 & n.97 (1995). In addition, an earlier iteration of RFRA would have required the government to show that denial of an exemption was “essential to” a compelling government interest, see H.R. 2797, 102d Cong. § 3(b) (1991), but RFRA as enacted requires the government to show instead that such a denial would be “in furtherance” of a compelling interest, see 42 U.S.C. § 2000bb-1(b).

69. 139 CONG. REC. 9682 (1993) (remarks of Rep. Hyde).

70. *Id.*

71. Laycock & Thomas, *supra* note 64, at 237-38.

72. H.R. REP. NO. 103-88, at 8 (1993); accord S. REP. NO. 103-111, at 12 (1993) (materially indistinguishable language).

73. Laycock & Thomas, *supra* note 64, at 237.

74. H.R. REP. 103-88, at 8.

Exercise cases hardly reflected a searching judicial review of state justifications for denying religious exemptions: the government almost always prevailed, notwithstanding the Court’s use of the language of so-called “strict scrutiny.”⁷⁵

The eleventh-hour report language, which confirmed “the purpose of [RFRA] . . . to ‘turn the clock back’ to the day before *Smith* was decided,”⁷⁶ had the additional virtue of accurately reflecting the original impetus for the legislative initiative that led to RFRA. “[T]he purpose of this act,” according to the Senate Report, was “only to overturn the Supreme Court’s decision in *Smith*”⁷⁷—not to challenge the manner in which the Court had applied the “compelling interest”/“least restrictive means” test in the cases preceding *Smith*. Those decisions, unlike *Smith*, did not prompt any congressional “restoration” movement. And so, for example, the lead House sponsor of the bill explained that RFRA would “simply restore the legal standard for protecting religious freedom *that worked so well for more than a generation.*”⁷⁸

If all of this is true, why did Justice Alito, in *Hobby Lobby*, describe RFRA’s test as “exceptionally demanding,”⁷⁹ and why did he assume that “RFRA did more than merely restore the balancing test used in the *Sherbert* line of [Free Exercise] cases” by “provid[ing] even broader protection for religious liberty than was available under those decisions”?⁸⁰

Justice Alito’s mistakes had their genesis in earlier dicta of the Court in *City of Boerne v. Flores*,⁸¹ a RFRA case in which it appears the Justices were misled by the parties’ briefing. The petitioner, City of Boerne, represented to the Court that “the least restrictive means test has not been a staple of [the Court’s pre-*Smith*] free exercise doctrine,”⁸² and “marks a sea change from prior free exercise law.”⁸³ Perhaps for tactical reasons, neither the respondent (the Archbishop of San Antonio) nor the United States took issue with this

75. See *Smith*, 494 U.S. at 883; see also Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1110 (1990) (“At the Supreme Court level, the free exercise compelling interest test was a Potemkin doctrine.”); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1247 (1994) (describing the pre-*Smith* doctrine as “strict in theory but feeble in fact”); Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 756 (1992) (describing it as “strict in theory, but ever-so-gentle in fact”).

76. H.R. REP. 103-88, at 14-15 (statement of Reps. Hyde, Sensenbrenner, McCollum, Coble, Canady, Inglis, and Goodlatte).

77. S. REP. 103-111, at 12 (emphasis added).

78. 137 CONG. REC. 17036 (1991) (remarks of Rep. Solarz).

79. 134 S. Ct. at 2780.

80. *Id.* at 2761 n.3.

81. 521 U.S. 507 (1997).

82. Brief for Petitioner at 17, *City of Boerne v. Flores*, 521 U.S. 507 (1997) (No. 95-2074).

83. *Id.* at 22; see also *id.* (“[T]he most oppressive aspect of RFRA for governments—the least restrictive means test—is a virtual novelty in the free exercise arena.”).

mischaracterization; indeed, they did not even discuss the least restrictive means test in their briefs or at oral argument. Not surprisingly, then, the *City of Boerne* Court came close to adopting the city's (mis)reading: Justice Kennedy's majority opinion assumed that the least restrictive means requirement "was not used in the pre-*Smith* jurisprudence RFRA purported to codify"⁸⁴; and it described that test as "stringent"—"the most demanding test known to constitutional law."⁸⁵ Seventeen years later, Justice Alito, citing *City of Boerne*, reiterated these mistaken assumptions in the Court's opinion in *Hobby Lobby*.

In fact, a "least restrictive means test" *had* been a staple of the Court's pre-*Smith* Free Exercise doctrine. In *Thomas v. Review Board*, for instance, Chief Justice Burger wrote that "[t]he state may justify an inroad on religious liberty by showing that it is the *least restrictive means* of achieving some compelling state interest."⁸⁶ The Court used the same or equivalent expressions of the constitutional test in cases both before and after *Thomas*.⁸⁷ Indeed, by time of *Smith*, that formulation had become so well-established that Justice O'Connor described the Court as having "consistently" applied a least restrictive means test,⁸⁸ and Justice Blackmun referred to it as "a consistent and exacting standard" that the Court had "over the years painstakingly . . . developed."⁸⁹

This doctrinal feature was not a secret to Congress as it deliberated upon RFRA. The chief House sponsor, a leading academic expert on the law of religious liberty, and the Congressional Research Service all informed the legislators that the "less restrictive means" component of RFRA derived from

84. 521 U.S. at 535.

85. 521 U.S. at 533, 534. The Court left open the possibility, however, that "RFRA would be interpreted in effect to mandate some lesser test." *Id.* at 534.

86. 450 U.S. 707, 718 (1981) (emphasis added).

87. See, e.g., *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) (plurality opinion) ("[I]f the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance *unless the State may accomplish its purpose by means which do not impose such a burden.*" (emphasis added)); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963) ("[I]t would plainly be incumbent upon the [government] to demonstrate that no alternative forms of regulation would combat [the problem] without infringing First Amendment rights."); *United States v. Lee*, 455 U.S. 252, 257 (1982) ("The state may justify a limitation on religious liberty by showing that it is *essential* to accomplish an overriding governmental interest." (emphasis added)); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) ("The interests asserted by petitioners cannot be accommodated with [the government's] compelling governmental interest . . . , and no 'less restrictive means' . . . are available to achieve the governmental interest" (quoting *Thomas*, 450 U.S. at 718)).

88. 494 U.S. at 899 (O'Connor, J., concurring); see also *Bowen v. Roy*, 476 U.S. 693, 728 (1986) (O'Connor, J., concurring in part and dissenting in part).

89. *Smith*, 494 U.S. at 907 (Blackmun, J., dissenting).

the Court’s pre-*Smith* doctrine.⁹⁰ Thus, as the House Report explained, it was “the Committee’s expectation that the courts will look to free exercise of religion cases decided prior to *Smith* for guidance in determining whether or not . . . the least restrictive means have been employed in furthering a compelling governmental interest.”⁹¹

IV. HOW TO APPLY RFRA’S “LEAST RESTRICTIVE MEANS” TEST

But how can that be? If the Court rarely ruled in favor of religious exemptions before *Smith*, how could it possibly have been applying a “least restrictive means” test?

The key to understanding this apparent conundrum is to recognize that not all “compelling interest”/“least restrictive means” tests are created alike.⁹² In particular, there is an important difference between the rigorous scrutiny the Court usually applies when evaluating a statute that is specifically aimed at restricting constitutionally protected conduct (or status), and the heightened, but less severe, scrutiny the Court sometimes uses to assess whether the state can justify *incidental* burdens on protected conduct.

The first, more familiar variant of “strict” scrutiny establishes a presumption that the statute itself is facially invalid, precisely because the legislature has targeted constitutionally protected activity or status. The Court deploys this approach, for example, when a statute regulates expression on the basis of its content,⁹³ discriminates on the basis of race,⁹⁴ or where the “object

90. See, e.g., *Religious Freedom Restoration Act of 1991: Hearing on H.R. 2797 Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 102d Cong. 121 (1992) (written statement of Rep. Solarz); *id.* at 342 (written statement of Douglas Laycock, Professor of Law, University of Texas); 1992 Senate Hearing, *supra* note 80, at 78–79 (written statement of Prof. Laycock); DAVID M. ACKERMAN, CONG. RESEARCH SERV., LTR92-639, THE RELIGIOUS FREEDOM RESTORATION ACT AND THE RELIGIOUS FREEDOM ACT: A LEGAL ANALYSIS 6 (1992).

91. H.R. Rep. 103-88, at 6-7. There is one respect in which RFRA *was* designed to alter the pre-*Smith* doctrinal status quo: Congress intended that the courts would apply “compelling interest”/“least restrictive means” test in contexts where the Supreme Court had previously applied a more deferential standard—namely, in the so-called state “enclaves” of prisons and the military. See S. REP. 103-111, at 9-12 (explaining the intent to apply a more stringent standard than what the Court had applied in *O’Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (prisons), and in *Goldman v. Weinberger*, 475 U.S. 503 (1986) (military)); H.R. REP. 103-88, at 7-8 (same).

92. See generally Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006).

93. See, e.g., *Ashcroft v. ACLU*, 542 U.S. 656, 665-66 (2004); *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 815 (2000).

94. See, e.g., *Fisher v. Univ. of Texas*, 133 S. Ct. 2411, 2419 (2013).

of a law is to infringe upon or restrict practices *because of* their religious motivation.”⁹⁵ Such a law will survive the Court’s “strict scrutiny” “only in rare cases.”⁹⁶ In such contexts, the “narrow tailoring” or “least restrictive means” component of the doctrinal test asks, in effect, whether the state could have furthered its compelling interests *without* targeting, such as by using race-neutral, content-neutral, or religion-neutral criteria. If the answer is “yes,” then the legislature typically must start from scratch and consider such neutral alternative means of advancing its interests.

By contrast, when a statute does *not* single out a protected activity or status, it is presumptively (and facially) constitutional. Even so, in some such cases the Court has applied a form of heightened scrutiny, including a “narrow tailoring” or “less restrictive means” requirement, to evaluate the constitutionality of the law’s *incidental* impact on protected activity *in particular applications*.⁹⁷ For example, that is how the Court has sometimes analyzed antidiscrimination laws that incidentally limit the right of “expressive association,”⁹⁸ and laws regulating conduct (such as public nudity or burning draft cards) that incidentally burden expressive activity.⁹⁹

Most importantly for present purposes, it is also how the Court analyzed incidental burdens on religious exercise in the decades before *Smith*. In these cases, the *terms* of the Court’s heightened scrutiny test were similar to the language the Court uses when assessing facial challenges to targeting legislation, but the Court’s manner of applying the test was very different – and much more permissive.¹⁰⁰ And it was this more forgiving version of heightened scrutiny that Congress incorporated into RFRA.

As cases both before and after *Smith* demonstrate, RFRA’s “compelling interest”/“least restrictive means” test is by no means toothless. Most importantly, the government must show that the state’s conferral of a religious exemption *in the discrete setting of the particular claimants* (and any others similarly situated) would actually undermine the interests underlying the generally applicable law. The government may not simply rely upon “broadly formulated interests justifying the general applicability of government

95. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (emphasis added).

96. *Id.* at 546.

97. See Fallon, *supra* note 92, at 1318-20.

98. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-20 (1984).

99. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 571-72 (1991) (plurality opinion); *United States v. O’Brien*, 391 U.S. 367, 381-82 (1968).

100. See *infra* notes 105-108, 117-120 and accompanying text.

mandates”; instead, it must demonstrate the “harm of granting specific exemptions to particular religious claimants.”¹⁰¹

Moreover, even when a state can show that religious exemptions might have an impact on its compelling interests, if many other jurisdictions have avoided those harms by using other means *even while conferring* such exemptions, the challenged state “must, at a minimum, offer persuasive reasons why it believes that it must take a different course.”¹⁰² And if the government administrators already have other, obvious alternative means of dealing with the asserted problems, they must grant the religious exemption and use those alternative means unless they can show that doing so would threaten additional harms or material costs.¹⁰³

Nevertheless, in the context of assessing incidental burdens on religious exercise, the Court has never applied the “compelling interest”/“least restrictive means” test with remotely the same degree of scrutiny or skepticism as when the Court confronts a law that targets constitutionally protected rights. Rather, as the Court stated in *Yoder*, the *de facto* inquiry under the pre-*Smith* Free Exercise cases—now incorporated into RFRA—is a more context-sensitive, pragmatic assessment of whether the neutral regulation “in its application . . . *unduly* burdens the free exercise of religion.”¹⁰⁴

Two aspects of this version of the “least restrictive means” test are especially germane to the current RFRA disputes. First, both before and after *Smith*, the Court has denied religious exemptions where they would impose harms on third parties. Second, the Court has never required the government to adopt a proposed alternative means of furthering its compelling interests if it would require enactment of a new statute—especially an additional appropriation—in order to ameliorate the impact of religious exemptions on compelling government interests.

101. *O Centro*, 546 U.S. at 431; *see also* *Zubik Religious Liberty Scholars Br.*, *supra* note 50, at 19–20, 21 n.13 (explaining how the failure to meet this burden required the conferral of religious exemptions in *O Centro* and *Yoder*).

102. *Holt*, 135 S. Ct. at 866; *see also, e.g., Sherbert*, 374 U.S. at 407 & n.7.

103. *See, e.g., Holt*, 135 S. Ct. at 864 (Arkansas Department of Correction had “failed to prove that it could not adopt the less restrictive alternative of having the prisoner run a comb through his beard” to find hidden weapons).

104. 406 U.S. at 220 (emphasis added); *accord* *United States v. Lee*, 455 U.S. 252, 259 (1982) (describing the “inquiry” as whether the religious accommodation, for the claimant and similarly situated objectors, “will unduly interfere with fulfillment of the governmental interest”). State and lower federal courts have long interpreted and implemented the pre-*Smith* Free Exercise test, as well as RFRA, RLUIPA, and their state-law counterparts, in accord with this pragmatic understanding of the Supreme Court’s pre-*Smith* jurisprudence. *See* Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GEN. 35, 50–53, 54–66 (2015).

These limitations explain why, for many decades before *Smith*, the Court never recognized religious exemptions to generally applicable laws regulating the commercial sphere, even where the Court purported to apply a demanding “substantial burden”/“compelling interest” test. The Court rejected such claims at least ten times between 1944 and 1990, in cases involving many different sorts of commercial regulation, including child protection laws¹⁰⁵; wage and hour legislation¹⁰⁶; Sunday closing laws¹⁰⁷; and tax obligations.¹⁰⁸

A. *Third-Party Burdens*

In commercial settings, recognizing a religious exemption would typically require third parties (customers, employees, and/or competitors) to bear burdens in the service of another’s religion, which would violate one of the central tenets of the First Amendment, namely, that nonbelievers should not be compelled to subsidize, or suffer in the service of, the religious commitments of others: “It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support . . . religion or its exercise.”¹⁰⁹ Indeed, where religious exemptions impose significant costs upon

105. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

106. *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290 (1985).

107. *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Gallagher v. Crown Kosher Super Market of Mass., Inc.*, 366 U.S. 617 (1961).

108. *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378 (1990); *Hernandez v. Commissioner*, 490 U.S. 680 (1989); *Covenant Community Church v. Lowe*, 475 U.S. 1078 (1986) (dismissing appeal for want of substantial federal question); *United States v. Lee*, 455 U.S. 252 (1982).

The votes in these cases were rarely even close. With the exception of the “Sunday closing” cases (which were colored by a dubious legislative preference for the traditional Christian day of rest), it was rare for even a single Justice to support a religious exemption. Justice Murphy would have granted the exemption in *Prince*, but only because he concluded that the case did *not* involve commercial activity. 321 U.S. at 171 (Murphy, J., dissenting).

109. *Lee v. Weisman*, 505 U.S. 577, 587 (1992); *see also Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1984) (describing as a “fundamental principle of the Religion Clauses” that “[t]he First Amendment gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities” (quoting *Otten v. Baltimore & Ohio R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953) (L. Hand, J.))). Douglas Laycock is of course correct that “[m]ost exercises of constitutional rights inflict costs on others.” Laycock, *supra* note 43, at 379. There is, for instance, no independent constitutional imperative that private individuals not bear the costs of others’ speech, or that application of the Fourth and Fifth Amendments to protect a criminal defendant must not impose harms on members of the public. Indeed, such third-party harms are ubiquitous when those other constitutional rights are vindicated. But that is decidedly not true with respect to religious exercise, where it has long been a constitutional tenet that an individual who does not share another’s belief in God should not have to pay a cost so that the believer can follow what she believes to be God’s dictates. *Cf.* JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS ¶ 3 (1785), *reprinted in* *Everson v. Board of Ed. of Ewing*, 330 U.S.

third parties, they can raise serious Establishment Clause concerns.¹¹⁰ For these reasons, the state has a compelling interest in denying exemptions that pose a risk of third-party harms.

The Court's rejection of claims for religious exemptions to antidiscrimination laws nicely illustrates that when a religious accommodation would harm the civil rights of third parties—even a relatively small group of third parties—the government is not required to grant the exemption. In *Bob Jones University v. United States*, for example, the Court held that the Internal Revenue Service's refusal to grant tax-exempt status to private schools that practiced racial discrimination was necessary to further the government's compelling interest in eradicating race discrimination, even though the effect of the requested exemption would only have been felt by the relatively small number of African American students who would choose to attend the small handful of the nation's schools of higher education that had retained discriminatory practices.¹¹¹

1, 64, 65-66 (1947) (remonstrating that the government in a free society may not “force a citizen to contribute three pence only of his property for the support of any one establishment” of religion).

110. See, e.g., *Estate of Thornton*, 472 U.S. at 709-10 (holding that a religious accommodation statute was unconstitutional in part because it “would cause the employer substantial economic burdens or . . . require the imposition of significant burdens on other employees required to work in place of the Sabbath observers”); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 15 (1989) (plurality opinion) (characterizing religious exemptions that “burden[] non-beneficiaries markedly” as “unjustifiable awards of assistance to religious organizations”). *But cf.* *Corporation for Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (holding that the exemption to Title VII's prohibition against employment discrimination on the basis of religion, permitting religious organizations to prefer employment of coreligionists, was constitutional as applied to a church's discharge of a gymnasium building engineer).
111. 461 U.S. at 603-04; see also *Zubik Religious Liberty Scholars Br.*, *supra* note 50, at 25-27 (discussing *Bob Jones*); *id.* at 17-18 (discussing the distinction between *Braunfeld* and *Sherbert* in terms of the risk of third-party harms in the earlier case). Petitioners in the pending *Zubik* case therefore are mistaken when they argue that the government must demonstrate *how many* plan beneficiaries would take advantage of subsidized contraception if the organizations' RFRA exemptions were denied. See Reply Brief for Petitioners in Nos. 14-1418 et al. at 32-33, *Zubik v. Burwell*, No. 14-1418 (Mar. 11, 2016). The United States has a compelling interest in ensuring that the women covered by the plans in question are not denied access to cost-free coverage, whether they number in the tens or hundreds of thousands (as the government estimates), or “merely” hundreds. What is more, to the extent petitioners were correct that some of the women in question would not use contraception, or would not seek reimbursement for it, in those cases the petitioners' “complicity in sin” theory of substantial burden would be inapposite.

B. The Prospect of Further Legislation as a “Less Restrictive Means”

In *Hobby Lobby*, Justice Alito suggested that applying a law to religious objectors cannot be the “least restrictive” means of advancing compelling government interest if the legislature might in theory appropriate additional funds to further those interests.¹¹² Likewise, the petitioners in the current *Zubik* litigation, invoking cases challenging the facial validity of content-discriminatory speech restrictions, argue that the Court “routinely identifies options that would require congressional action as feasible less restrictive means.”¹¹³ They thus insist that RFRA entitles them to an exemption from the agencies’ accommodation because Congress could, for example, enact a new law allowing their employees to purchase a subsidized, second insurance plan on an insurance exchange.¹¹⁴

It is true that RFRA and RLUIPA “may in some circumstances require the Government to expend additional funds to accommodate citizens’ religious beliefs.”¹¹⁵ For example, if the executive branch already has access to appropriated funds that it could lawfully use to ameliorate third-party harms, it might have to use those funds to do so, all else being equal.¹¹⁶ It is another thing entirely, however, to suggest that the theoretical prospect of a new appropriations statute is a “less restrictive means” for purposes of the RFRA inquiry.

Inquiring about the prospect of alternative legislative action makes perfect sense when the Court applies its more familiar form of “strict scrutiny,” such as in assessing the constitutionality of a content-based federal speech restriction. In such cases, the operative question is whether Congress could have addressed its interests by *enacting a different, content-neutral law*. If the Court concludes that such a neutral law would have sufficed as a “less restrictive” means of dealing with the problem, the Court typically declares that the challenged law is facially invalid—in which case the legislature, if it wishes to address the problem, must go back to the drawing board.

^{112.} 134 S. Ct. at 2780–81.

^{113.} See *ETBU* Pet. Br., *supra* note 29, at 74 (citing *Ashcroft v. ACLU*, 542 U.S. 656, 669 (2004); *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 815 (2000)); see also Brief for Petitioners in Nos. 14–1418, et al. at 81, *Zubik v. Burwell*, No. 14–1418 (Jan. 4, 2016).

^{114.} *ETBU* Pet. Br., *supra* note 29, at 73–74.

^{115.} 134 S. Ct. at 2781. RLUIPA expressly provides that “this chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.” 42 U.S.C. § 2000cc–3(c).

^{116.} Indeed, as part of the contraception accommodation itself, the agencies use their existing authority to reduce user fees in order to reimburse third-party administrators of self-insured employee health plans for the costs of contraception coverage. 29 C.F.R. § 2590.715–2713A(b)(3); 45 C.F.R. § 156.50(d); see *Hobby Lobby*, 134 S. Ct. at 2763 n.8.

By contrast, when it comes to a facially valid law of general applicability, such as the contraceptive regulation, religious objectors of many kinds might, over the years, seek exemptions. At those later times (and there could be many of them), Congress and/or the President might be hostile or indifferent to the compelling interests underlying the original law—interests that the courts applying RFRA are required to account for. But even if the later-in-time executive and legislature do care about those state interests, they will invariably have more pressing legislative agendas, and will lack the incentives and/or political capital to pass legislation to pay for the costs of all and sundry requested RFRA exemptions down through the years. It therefore would make little sense to view the mere fact that future legislatures have the authority to enact such piecemeal “RFRA fixes” as establishing a “less restrictive” alternative that requires religious exemptions that will, in fact, undermine the state’s compelling interests.

This is hardly a “radically revisionist account of RFRA.”¹¹⁷ It is, instead, consistent with the outcomes of the Court’s pre-*Smith* Free Exercise cases and with its decisions under RFRA and RLUIPA. In every case in which the Court has recognized a religious exemption (such as *Sherbert*, *Yoder*, *O Centro*, and *Holt*), no further legislation was necessary to empower the state executive to implement that exemption. By contrast, the Court has never granted an exemption on the grounds that theoretical supplemental legislation might ameliorate the harm to state interests.

United States v. Lee is illustrative. Lee, an employer and member of the Old Order Amish, believed it was sinful for his employees, all of whom were also his co-religionists, to accept government aid. He therefore sought an exemption from the requirement to remit Social Security taxes for his employees because it was religiously impermissible for him to contribute to such a redistribution scheme. The Court unanimously denied the exemption, nominally on the ground that universal participation was “essential” to advancing the government’s interest in the fiscal vitality of the Social Security system.¹¹⁸ As Justice Stevens pointed out, however, that was patently not the case. Congress had *already* exempted other religious employers, and “it would be a relatively simple matter,” Stevens explained, for Congress to extend its exemption, without any harm to the system, to a discrete religious community with its own welfare system, if the employees in question forfeited their right to collect benefits.¹¹⁹ Indeed, several years later, *Congress enacted that very*

¹¹⁷. *Eternal Word Television Network, Inc. v. Secretary of the United States Dep’t of Health and Human Servs.*, 2016 WL 659222, at *53 (11th Cir. 2016) (Tjoflat, J., dissenting).

¹¹⁸. 455 U.S. 252, 257–58 (1982).

¹¹⁹. *Id.* at 262 (Stevens, J., concurring). Within the Court, there was at least some recognition that Chief Justice Burger’s draft majority opinion did not adequately engage with the points Justice Stevens was raising, and with the difference between Lee’s requested

religious exemption.¹²⁰ The Court in *Lee*, however, did not consider the hypothetical possibility of such a tailored congressional accommodation to be a relevant “less restrictive means,” even though such an alternative certainly could have been – and was – imagined.

That disposition in *Lee* made a great deal of sense. When conferral of a religious exemption would undermine a compelling government interest, such as avoiding harm to third parties, a subsequent legislature will often, in theory, be able to cure the problem with a statutory “fix,” especially a new appropriation. As Justice Ginsburg asked in her *Hobby Lobby* dissent, however, “where is the stopping point to the ‘let the government pay’ alternative?”¹²¹ If a new appropriations law were deemed a “less restrictive” alternative, then the government would virtually always have to afford exemptions, no matter how severe the harm to government interests, simply because Congress could in theory ameliorate the harm through additional taxing and spending.

That does not describe the Court’s pre-*Smith* jurisprudence of “less restrictive means,” and it cannot be what Congress intended when it enacted RFRA.¹²² Indeed, the very prospect, or possibility, of such a regime undoubtedly would have doomed any prospect of RFRA’s enactment.

CONCLUSION

Nothing in the Court’s actual disposition of *Hobby Lobby* is inconsistent with this understanding of RFRA and the pre-*Smith* jurisprudence that it incorporates. Indeed, the majority opinion expressly recognized that “cost may

accommodation and a run-of-the-mill religious objection to paying income taxes. See Memorandum from Frank Holleman, Law Clerk, to Justice Blackmun, re: No. 80-767, *United States v. Lee*, at 3 (Dec. 3, 1981) (on file with the Library of Congress) (Harry A. Blackmun Papers, box 343, folder 80-767) (Justice Blackmun making “check mark” marginal notation to law clerk’s observation that “it would be a much more honest opinion if the Court admitted that the Amish have a stronger case than do tax protestors who object to paying income taxes for a government service without providing the government service themselves”); see also Memorandum from Frank Holleman, Law Clerk, to Justice Blackmun, re: No. 80-767, *United States v. Lee*, at 2 (Jan. 15, 1982) (on file with the Library of Congress) (Harry A. Blackmun Papers, box 343, folder 80-767) (noting that “Justice Stevens makes two valid points,” including that “Lee’s argument is stronger than the Chief Justice admits”).

120. See Pub. L. No. 100-647, 102 Stat. 3781 (1988) (codified at 26 U.S.C. § 3127).

121. *Hobby Lobby*, 134 S. Ct. at 2802 (Ginsburg, J., dissenting).

122. Cf. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 94 (Cal. 2004) (rejecting the argument that the California Legislature could more widely exempt employers from a contraception coverage requirement without increasing the number of affected women by providing public funding of contraceptives for the employees of exempted employers, even though the legislature had considered such a provision in an earlier version of the WCEA: “Catholic Charities points to no authority requiring the state to subsidize private religious practices.”).

be an important factor in the least-restrictive-means analysis,” and that “in applying RFRA ‘courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.’”¹²³

It therefore remains an open question whether the Court will transform RFRA into “a bold initiative departing from, rather than restoring, pre-*Smith* jurisprudence”¹²⁴—a “Religious Freedom Revolution Act,” as it were.¹²⁵ If the Court takes that step, as some components of the old RFRA coalition are urging it to do, that would be a sharp and alarming break with the past—an outcome difficult to reconcile with the notion that the Court “must . . . respect the role of the Legislature, and take care not to undo what it has done.”¹²⁶ “A fair reading of legislation demands a fair understanding of the legislative plan.”¹²⁷ In the case of RFRA, that legislative plan was to restore, rather than to radically transform, the law of religious accommodations.

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123. *Hobby Lobby*, 134 S. Ct. at 2781 & n.37 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)); see also *id.* at 2786-87 (Kennedy, J., concurring) (explaining that the state may not permit religious exercise to “unduly restrict other persons, such as employees, in protecting their own interests” that “the law deems compelling”); *id.* at 2801 (Ginsburg, J., dissenting).

124. *Id.* at 2791-92 (Ginsburg, J., dissenting).

125. See *Eternal Word Television Network*, 2016 WL 659222, at *50 (Tjoflat, J., dissenting) (describing RFRA as a “mighty bulwark, entrenching against Government incursion the freedom of religious liberty throughout the United States Code”).

126. *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015).

127. *Id.*