HOBBY LOBBY, RFRA, AND FAMILY BURDENS

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I. INTRODUCTION

In *Burwell v. Hobby Lobby Stores, Incorporated*,[1] the United States Supreme Court held that the Religious Freedom Restoration Act[2] ("RFRA") sometimes requires for-profit corporations to be afforded exemptions if following federal law would have forced those corporations to violate their sincerely-held religious convictions. Whether exemptions are required in particular cases will depend upon a number of factors, including the degree to which following the law would compromise the company's beliefs[3] and the degree to which granting an exemption would undercut compelling state interests.[4] Because courts are ill-suited to make judgments about whether religious beliefs are burdened by particular practices and, if so, the degree to which the challenged practices burden beliefs, the current interpretation of RFRA coupled with the Court's *Hobby Lobby* opinion is likely to lead to similar cases being decided differently.[5] As a result, the current approach is unsustainable and will likely be modified by

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

[2] Religious Freedom Restoration Act, 42 U.S.C.A. § 2000bb, 107 Stat. 1488 (1993).

[3] *See id.* § 2000bb–1(a) ("Government shall not substantially burden a person's exercise of religion.").

[4] *Id.* § 2000bb–1 (b) ("Government may substantially burden a person's exercise of religion only if it 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.").

[5] *Cf.* Keirsten G. Anderson, *Protecting Unmarried Cohabitants from the Religious Freedom Restoration Act*, 31 VAL. U. L. REV. 1017, 1036 (1997) ("RFRA is not expected to provide guidance for consistent decisions.").

Congress or the courts. In the interim, however, we can expect attempts by many corporations to shift responsibility for family obligations to a variety of parties with varying degrees of success.

Part II of this article discusses RFRA, focusing on the great deference accorded to those claiming that federal law imposes a substantial burden upon their religious beliefs and practices. Part III discusses *Hobby Lobby* and its implications. The article concludes that the current unsustainable approach is likely to lead to an even greater number of relevantly similar cases being decided differently in the short run and a resolution that is likely to satisfy neither the religious nor the non-religious in the long run.

II. RFRA'S GENESIS

In *Employment Division v. Smith*,[6] the Court held that neutral and generally applicable laws burdening religious practice do not trigger strict scrutiny. Congress reacted by passing the Religious Freedom Restoration Act,[7] which requires courts to closely examine legislation burdening free exercise. While that law does not bind state governments, it does bind the federal government, which means that RFRA potentially impacts many laws affecting individuals' daily lives.[8]

A. Smith

To understand the controversy surrounding the meaning and application of the Religious Freedom Restoration Act, it is helpful to begin with *Employment Division v. Smith*,[9] which offered a less than robust interpretation of free exercise protections.[10] At issue was whether free exercise guarantees were violated when two drug counselors were denied unemployment compensation after having been fired for their sacramental use of peyote.[11] The *Smith* Court held that

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[6] Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).

[7] 42 U.S.C.A. § 2000bb (1993).

[8] *See* Susan A. Berson, *The Taxation of Tort Damage Awards and Settlements: When Recovering More for a Client May Result in Less*, J. KAN. B. ASS'N, 21, 22 n.27 (June 2009) (discussing "various federal civil rights statutes, including Fair Housing, Fair Labor Standards and Employment Retirement Income Security Act").

[9] *Smith*, 494 U.S. at 872.

[10] Paul Benjamin Linton, *Religious Freedom Claims and Defenses under State Constitutions*, 7 U. ST. THOMAS J.L. & PUB. POL'Y 103, 106 (2013) ("To many, both at the time and since, *Employment Division v. Smith* represented a marked retreat from the Court's former free exercise jurisprudence.").

[11] *Smith*, 494 U.S. at 874 ("Respondents Alfred Smith and Galen Black . . . were fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both are members.").

those guarantees were not violated.[12]

The *Smith* Court explained that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[13] While some past decisions suggested a different rule, the Court explained that the "only decisions in which [it has] held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections . . . ."[14] A case involving free exercise rights in addition to other constitutional protections might qualify as a "hybrid situation."[15] For example, the Court interpreted *Wisconsin v. Yoder*[16] as involving both free exercise and "the right of parents . . . to direct the education of their children."[17]

Yet the announced rule, even when including the hybrid exception, did not account for the past free exercise jurisprudence in that free exercise guarantees sometimes required exemptions even when no hybrid rights were at issue. For example, in *Sherbert v. Verner*,[18] the Court held that unemployment compensation had to be accorded to an individual who could not work on Saturdays for religious reasons.[19]

It was not as if the *Smith* Court overlooked *Sherbert*; on the contrary, the Court expressly acknowledged that "[u]nder the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest."[20] Further, the Court admitted that application of that test in three different cases resulted in the "invalidat[ion] [of] state unemployment compensation rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his relig-

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[12] *Id.* at 890 ("Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug.").

[13] *Id.* at 879 (citing United States v. Lee, 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring)).

[14] *Id.* at 881.

[15] *Id.* at 882. *But see* Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1122 (1990) ("Why isn't *Smith* itself a "hybrid" case? . . . Smith and Black could have made a colorable claim under the Free Speech Clause that the prohibition of peyote use interfered with their ability to communicate this message.").

[16] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[17] *Smith*, 494 U.S. at 881 (citing *Yoder*, 406 U.S. at 205).

[18] Sherbert v. Verner, 374 U.S. 398 (1963).

[19] *See id.* at 410 ("Our holding today is only that South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest.").

[20] *Smith*, 494 U.S. at 883 (citing *Sherbert*, 374 U.S. at 402–03).

ion."[21] The Court, however, did not view these applications of *Sherbert* as providing the appropriate framework for analyzing free exercise cases as a general matter.[22] Instead, the Court implied that this set of cases represented a limited, anomalous exception to the announced rule; after all, the Court had "never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation."[23]

The Court's point that the only successful non-hybrid free exercise challenges had involved unemployment compensation was surprising for at least two distinct reasons. First, *Smith* was merely arguing that the *Sherbert* test was applicable.[24] Even if many of the cases in which the test was triggered had not resulted in a victory for those claiming the exemption,[25] that would not somehow establish the inapplicability of the test.[26] As Justice O'Connor noted in her concurrence in the judgment, "it is surely unusual to judge the vitality of a constitutional doctrine by looking to the win-loss record of the plaintiffs who happen to come before [the Court]."[27]

The Court's focus on the unemployment compensation exception[28] was surprising for yet another reason—the claim at issue in *Smith* also involved unemployment compensation.[29] Thus, it might seem that the facts of this case would

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[21] *Id.* (first citing *Sherbert*, 374 U.S. 398 (1963); then citing Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707 (1981); and then citing Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136 (1987)).

[22] Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 58 (2011) ("Before the Court's decision in *Smith*, free exercise cases had been handled under a strict scrutiny framework. . . . Any burden on religious exercise had to be justified by the government demonstrating a compelling interest pursued by the least restrictive means. *Smith* changed that, saying that burdens on religious exercise required no justification as long as they were neutral and generally applicable.").

[23] *Smith*, 494 U.S. at 883.

[24] *Id.* at 882–83 ("Respondents argue that even though exemption from generally applicable criminal laws need not automatically be extended to religiously motivated actors, at least the claim for a religious exemption must be evaluated under the balancing test set forth in Sherbert v. Verner, 374 U.S. 398 (1963).").

[25] *Id.* at 883 ("Although we have sometimes purported to apply the *Sherbert* test in contexts other than that, we have always found the test satisfied.").

[26] *Cf. id.* at 896–97 (O'Connor, J., concurring) ("That we rejected the free exercise claims in those cases hardly calls into question the applicability of First Amendment doctrine in the first place.").

[27] *Id.* at 897.

[28] *Cf.* Health Servs. Div., Health & Env't Dep't of State of N.M. v. Temple Baptist Church, 814 P.2d 130, 135 (N.M. App. 1991) (discussing the "unemployment compensation claim exception to the limitations on the free exercise clause"). *See also* Chris Day, *Employment Division v. Smith: Free Exercise Clause Loses Balance on Peyote*, 43 BAYLOR L. REV. 577, 577 n.4 (1991) ("The Court did enumerate two narrow exceptions: 1) cases in the area of unemployment compensation and 2) hybrid free exercise situations.").

[29] *Smith*, 494 U.S. at 874 ("This case requires us to decide whether the Free Exercise

trigger strict scrutiny, even assuming that the Court was correct that most cases implicating free exercise should not trigger that protective test.[30] The Court distinguished the facts of this unemployment compensation challenge from the others because in this case, unlike the others, a neutral and generally applicable criminal law had been broken.[31] Because Smith and Black had committed a crime, the Court held the denial of unemployment compensation benefits constitutional.[32]

Smith was a controversial decision.[33] Some have roundly criticized it,[34] while others have supported it.[35] In any event, Congress rejected the Court's analysis of the Constitution's weak protections of free exercise[36] and passed RFRA in response.[37]

Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.").

[30] *See* James D. Gordon, III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91, 114 (1991) ("The Court . . . distinguished another line of cases as relating to unemployment compensation systems that examine individual reasons for applicants' conduct, when in fact *Smith* itself was such a case.").

[31] *Cf. Smith*, 494 U.S. at 884 ("Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law.").

[32] *Id.* at 890 ("Because respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug.").

[33] *See* Timothy E. Flanigan, *Smith and Lemon: Carried About with Every Wind of Doctrine*, 1994 PUB. INT. L. REV. 75, 75 (1994) ("The most important and controversial decision in recent years was *Employment Division v. Smith*.").

[34] *See* Gordon, *supra* note 30, at 114 ("The Court wanted to reach its result in the worst way, and it succeeded."); McConnell, *supra* note 15, at 1120 (suggesting that the Court's "use of precedent is troubling, bordering on the shocking").

[35] Roger Clegg, *God, Judge, Principal, Student*, NEXUS 51, 55 (2000) ("*Smith v. Employment Services* may have been rightly decided"); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 308 (1991) ("I defend *Smith's* rejection of the constitutionally compelled free exercise exemption.").

[36] *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2571, 2760 (2014) ("Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty. RFRA's enactment came three years after this Court's decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), which largely repudiated the method of analyzing free-exercise claims that had been used in cases like *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).").

[37] City of Boerne v. Flores, 521 U.S. 507, 512 (1997) ("Congress enacted RFRA in direct response to the Court's decision in Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).").

B. *RFRA*

The Religious Freedom Restoration Act provides:

(a) Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).[38]

(b) Government may substantially burden a person's exercise of religion only if it 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.[39]

In *City of Boerne v. Flores*,[40] the Supreme Court described the "[s]weeping coverage" of the Act as enacted,[41] which "displac[ed] laws and prohibit[ed] official actions of almost every description and regardless of subject matter."[42] The *Boerne* Court noted that "RFRA's restrictions apply to every agency and official of the Federal, State, and local Governments."[43] Further, "RFRA applies to all federal and state law, statutory or otherwise, whether adopted before or after its enactment."[44] Finally, "RFRA has no termination date or termination mechanism."[45]

The Court may have been strategic when interpreting the Act so broadly. Such an overbroad statute[46] could more credibly be struck down on federalism grounds,[47] even if the fatal flaw in RFRA (even when construed more narrowly) was its attempt to legislatively overrule *Smith*.[48] Or, the Court may have believed that the best interpretation of RFRA was the broad interpretation offered, even though that understanding of the Act posed serious constitutional difficulties.[49] In any event, RFRA as interpreted by the Court imposed severe

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[38] Religious Freedom Restoration Act, 107 Stat 1488, 42 U.S.C.A. § 2000bb–3 (1993).

[39] *Id.*

[40] *Boerne*, 521 U.S. at 507.

[41] *Id.* at 508.

[42] *Id.* at 509.

[43] *Id.* at 532 (citing 42 U.S.C. § 2000bb–2(1)).

[44] *Id.* (citing 42 U.S.C. § 2000bb–3(a)).

[45] *Id.*

[46] *Id.* ("RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.").

[47] Aurora R. Bearse, Note, *RFRA: Is It Necessary? Is It Proper?*, 50 RUTGERS L. REV. 1045, 1066 (1998) ("The Supreme Court has ruled that principles of federalism necessitated striking down RFRA's application to the states.").

[48] *See* Richard H. Seamon, *Slaying the Dying Dragon of State Sovereignty A Review of Narrowing the Nation's Power: The Supreme Court Sides with the States, by John T. Noonan, Jr.*, 66 U. PITT. L. REV. 321, 331 (2004) ("[T]he Court in *Boerne* was arguably overreacting to Congress's disagreement with the Court's decision in *Smith*.").

[49] Frank B. Cross, *The Justices of Strategy A Review of the Choices Justices Make, by Lee Epstein and Jack Knight* (Congressional Quarterly Press, 1998), 48 DUKE L.J. 511, 542–43

constraints on the ability of governments to legislate without affording religious exemptions.

The *Boerne* Court noted that "[i]f an objector can show a substantial burden on his free exercise, the State must demonstrate a compelling governmental interest and show that the law is the least restrictive means of furthering its interest."[50] Yet, that point alone does not establish that RFRA would severely limit the ability to legislate—if it were extremely difficult to establish that a neutral law imposed a burden on free exercise, then RFRA's protections would not often be triggered.[51] The Court noted, however, that "[c]laims that a law substantially burdens someone's exercise of religion will often be difficult to contest,"[52] which suggests that there might be many such claims. The Court continued, "It is a reality of the modern regulatory state that numerous state laws . . . impose a substantial burden on a large class of individuals,"[53] even though "the persons affected [may not] have been burdened any more than other citizens, let alone burdened because of their religious beliefs."[54] Because "RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance,"[55] the Court struck it down,[56] at least as applied to the states.

Yet, the Court's decision to strike down the RFRA as applied to the states did not mean that the law was unconstitutional as a general matter. The Court explained in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegeta* (UDV)[57] that the "Religious Freedom Restoration Act of 1993 . . . prohibits the Federal Government from substantially burdening a person's exercise of religion, unless the Government 'demonstrates that application of the burden to the person' represents the least restrictive means of advancing a compelling interest."[58]

At issue in *Gonzales* was the United States Customs Service's confiscation

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(1998) ("Yet the Court struck down the law. The apparent reason was that the Court genuinely cared about the legal issues.").

[50] *Boerne*, 521 U.S. at 5–34.

[51] *Cf.* Marci A. Hamilton, *RLUIPA Is A Bridge Too Far: Inconvenience Is Not Discrimination*, 39 FORDHAM URB. L.J. 959, 972 (2012) (Prior to "2000, the vast majority of First Amendment-based free exercise cases had held that cost and/or inconvenience are insufficient to prove substantial burden.").

[52] *Boerne*, 521 U.S. at 534 (citing Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 887 (1990)).

[53] *Id.* at 535.

[54] *Id.*

[55] *Id.* at 536.

[56] *Id.* ("The judgment of the Court of Appeals sustaining the Act's constitutionality is reversed.").

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

[58] *Id.* at 423 (citing 42 U.S.C. § 2000bb–1(b)).

of hoasca,[59] a tea used as part of a religious ceremony.[60] The tea was made from two plants, one a hallucinogen and the other acting to enhance the hallucinogen's effects.[61] The hallucinogen was listed in Schedule 1 of the Controlled Substances Act.[62]

Schedule 1 substances have "'a high potential for abuse,' 'no currently accepted medical use in treatment in the United States,' and 'a lack of accepted safety for use . . . under medical supervision.'"[63] The Government argued that the utter dangerousness of these substances meant there was "no need to assess the particulars of the UDV's use or weigh the impact of an exemption for that specific use, because the Controlled Substances Act serves a compelling purpose and simply admits of no exceptions."[64] But the Court rejected the Government's position, explaining that "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened."[65] While admitting that "Schedule I substances such as DMT [dimethyltryptamine] are exceptionally dangerous,"[66] the Court noted the lack of any "indication that Congress, in classifying DMT, considered the harms posed by the particular use at issue here—the circumscribed, sacramental use of *hoasca* by the UDV."[67]

The *Gonzalez* opinion is important both because it applied RFRA to federal law, thereby indicating that RFRA was constitutional at least in that context,[68] and because it required that the Government establish how "application of the burden to the person"[69] would be necessary to promote compelling state interests.[70] Federal law impacts many areas of individuals' lives,[71] and for some,

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[59] *Id.* at 425 ("In 1999, United States Customs inspectors intercepted a shipment to the American UDV containing three drums of *hoasca*.").

[60] *Id.* (describing *hoasca* as "a sacramental tea").

[61] *Id.* ("One of the plants, *psychotria viridis,* contains dimethyltryptamine (DMT), a hallucinogen whose effects are enhanced by alkaloids from the other plant, *banisteriopsis caapi*.").

[62] *See id.* ("DMT, as well as 'any material, compound, mixture, or preparation, which contains any quantity of [DMT], is listed in Schedule I of the Controlled Substances Act. § 812(c), Schedule I(c).").

[63] *Id.* at 430 (citing 21 U.S.C. § 812(b)(1) (2012)).

[64] *Id.*

[65] *Id.* at 430–31 (citing 42 U.S.C. § 2000bb–1(b) (1993)).

[66] *Id.* at 432 (citing Touby v. United States, 500 U.S. 160, 162 (1991)).

[67] *Id.*

[68] *Statutory Exemptions*, 120 HARV. L. REV. 341, 343 (2006) ("[I]n *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, the question of RFRA's constitutionality as applied to the federal government was, at least tacitly, resolved. The Court applied the compelling interest test mandated by RFRA to dismiss the Government's argument that the Controlled Substances Act (CSA) admitted of no exceptions, religious or otherwise.").

[69] Religious Freedom Restoration Act, 107 Stat 1488, 42 U.S.C.A. § 2000bb-3b (2000).

[70] Amit Shah, *The Impact of Gonzales v. O Centro Espirita Beneficente Uniao Do Vege-*

religion governs most or all aspects of life.[72] Challenges to a federal law's failure to include an RFRA-required exemption should be expected to arise in a variety of areas. Further, because the Government must show why the refusal to accord an exemption to this particular individual is narrowly tailored to promote compelling interests,[73] one would expect the Government to have difficulty meeting this requirement in many instances.[74]

The *Boerne* Court noted that "[i]t is a reality of the modern regulatory state that numerous state laws . . . impose a substantial burden on a large class of

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tal, 546 U.S. 418 (2006), 10 RUTGERS J. L. & RELIGION 4, 12 (2008) ("The Court specifically indicated that the Government must show with specific particularity how even strong governmental interests would be harmed by allowing an exemption.").

[71] *See, e.g.*, John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. CHI. L. REV. 13, 19 (1992) (discussing "a vast expansion of the federal government's power to regulate the lives of individual citizens").

[72] Richard H. Jones, *Concerning Secularists' Proposed Restrictions on the Role of Religion in American Politics*, 8 BYU J. PUB. L. 343, 346 (1994) ("[R]eligion is comprehensive in the sense that all aspects of one's life are related in one degree or another to this fundamental framework."); Steven C. Seeger, *Restoring Rights to Rites: The Religious Motivation Test and the Religious Freedom Restoration Act*, 95 MICH. L. REV. 1472, 1502 n.153 (1997) ("Some religious plaintiffs might claim . . . that most everything they do is 'motivated' by religion in a very real sense.").

[73] Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418 (2006); Aaron D. Bieber, *Constitutional Law-the Supreme Court Can't Have It Both Ways Under RFRA: The Tale of Two Compelling Interest Tests*, 7 WYO. L. REV. 225, 244–45 (2007) ("RFRA and its strict scrutiny test required the government to demonstrate that the compelling interest test is satisfied by applying the challenged law 'to the person,' the particular claimant, whose sincere exercise of religion is being substantially burdened."); Jonathan T. Tan, *Nonprofit Organizations, For-Profit Corporations, and the HHS Mandate: Why the Mandate Does Not Satisfy RFRA's Requirements*, 47 U. RICH. L. REV. 1301, 1333 (2013) ("Under RFRA, a law is invalid if it imposes a substantial burden on a person's exercise of religion and the government fails to prove that it is the least restrictive means of furthering a compelling government interest."); Edward J.W. Blatnik, *No RFRA Allowed: The Status of the Religious Freedom Restoration Act's Federal Application in the Wake of City of Boerne v. Flores*, 98 COLUM. L. REV. 1410, 1449 (1998) ("RFRA, in particular, assigns courts the duty of determining whether the claimant's religious exercise has been substantially burdened, and, if so, whether the government has a compelling interest for applying the law in question to this person, and, even if so, whether it has chosen the least restrictive means of doing so.").

[74] Noah Butsch Baron, *"There Can Be No Assumption . . .": Taking Seriously Challenges to Polygamy Bans in Light of Developments in Religious Freedom Jurisprudence*, 16 GEO. J. GENDER & L. 323, 341 (2015) ("[T]he application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened . . . is significantly more difficult to meet, and would require an individualized analysis for each claim brought under RFRA.") (quoting Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 420 (2006)).

individuals,"[75] even though "the persons affected [may not] have been burdened any more than other citizens, let alone burdened because of their religious beliefs."[76] Yet, the same point might be made about federal law, i.e., that many federal laws incidentally impose substantial burdens on a large class of individuals. But that means that many exemptions to federal laws and regulations will have to be accorded unless RFRA's reach is limited in some way. The *Boerne* Court's point about the difficulties posed by RFRA for state law in the modern regulatory state applies equally to federal law as well.

III. *HOBBY LOBBY* AND RFRA'S REACH

The Court demarcated RFRA's reach in *Boerne* and *Gonzales*, making clear that the law applies to federal but not state law. Separate issues, however, involve who the law is designed to protect, e.g., natural persons versus corporations, and what the Government must show to avoid having to grant an RFRA exemption where RFRA protections have been triggered. The Court addressed those questions in *Burwell v. Hobby Lobby Stores, Incorporated*.[77]

A. *Which Persons Can Invoke RFRA Protections?*

The *Hobby Lobby* Court addressed whether RFRA prohibits the United States Department of Health and Human Services ("HHS") from requiring "three closely held corporations [to] provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners."[78] The Court focused on whether the Act covered closely held for-profit corporations[79] and whether the Act's protections were triggered by the requirement that HHS sought to impose.[80]

RFRA provides that unless a narrow exception has been met, the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."[81] Because the Act did not address who qualified as a "person,"[82] the Court "look[ed] to the Dictionary Act, which [it] must consult '[i]n determining the meaning of any Act of Con-

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[75] City of Boerne v. Flores, 521 U.S. 507, 535 (1997).

[76] *Id.*

[77] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

[78] *Id.* at 2759.

[79] *Id.* at 2767 ("The first question that we must address is whether this provision applies to regulations that govern the activities of for-profit corporations like Hobby Lobby, Conestoga, and Mardel.").

[80] *Id.* at 2775 ("Because RFRA applies in these cases, we must next ask whether the HHS contraceptive mandate 'substantially burden[s]' the exercise of religion.") (citing 42 U.S.C. § 2000bb–1(a)).

[81] Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. § 2000bb–3(b) (2012).

[82] *Hobby Lobby*, 134 S. Ct. at 2768 ("RFRA itself does not define the term 'person.'").

gress, unless the context indicates otherwise.'"[83] The Court saw "nothing in RFRA that suggests a congressional intent to depart from the Dictionary Act definition,"[84] and the Dictionary Act includes a variety of types of entities as persons: "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[85] While statutes are sometimes limited in focus to natural persons,[86] the Court explained that "[n]o known understanding of the term 'person' includes some but not all corporations."[87] In particular, the Court was incredulous that the term might be thought to include natural persons and nonprofit corporations, but not for-profit corporations.[88]

The Court held that RFRA applied to closely held for-profit corporations.[89] In dissent, Justice Ginsburg argued that the same reasoning would establish that publicly traded corporations are also persons for RFRA purposes.[90] The Court did not deny that RFRA applied to publicly traded corporations, instead offering the consolation that "it seems unlikely that the sort of corporate giants to which HHS refers [IBM or General Electric] will often assert RFRA claims."[91] After all, "the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable."[92]

Yet, the Court's assurance that publicly traded corporations will not often seek RFRA exemptions is not particularly comforting. The Court is implicitly recognizing that RFRA also applies to publicly traded corporations, which means that large corporations affecting the lives of many customers and employees may be able to invoke RFRA protections and adversely impact countless individuals.[93] Further, the consolation offered by the Court that such corporations are unlikely to be run under one particular set of religious beliefs does

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[83] *Id.* at 2768 (citing 1 U.S.C. § 1 (2012)).

[84] *Id.*

[85] *Id.* (citing 1 U.S.C. § 1 (2012)).

[86] *Id.* at 2769 ("The term 'person' . . . sometimes is limited to natural persons.").

[87] *Id.*

[88] *Id.* ("[N]o conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations.").

[89] *Id.* at 2775 ("[W]e hold that a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with RFRA.").

[90] *See id.* at 2797 (Ginsburg, J., dissenting) ("Although the Court attempts to cabin its language to closely held corporations, its logic extends to corporations of any size, public or private.").

[91] *Id.* at 2774.

[92] *Id.*

[93] *Cf.* Int'l Ass'n of Machinists & Aerospace Workers v. Fed. Election Comm'n, 678 F.2d 1092, 1105 (D.C. Cir.) *aff'd sub nom.* Int'l Ass'n of Machinists & Aerospace Workers v. Fed. Election Comm'n, 459 U.S. 983 (1982) (noting at the time that there were "1420 major corporations in the nation each with 2,500 or more employees").

not provide much of a safeguard. While the shareholders of the respective closely held corporations asking for the exemption in *Hobby Lobby* all shared many of the same values,[94] there is no requirement that everyone share the same values before RFRA protections are triggered.[95]

Consider the *Hobby Lobby* Court's focus, which was not on the whole set of religious values embraced by the shareholders, but on one in particular—whether the challenged requirement might "result in the destruction of an embryo."[96] Shareholders might disagree about a variety of issues so that the corporation would not be run in accord with one set of values. Nonetheless, there might be one value that individuals of several faiths share, which would mean that the corporation could seek the RFRA exemption insofar as that value was implicated, even if there was no agreement about other values. For example, historically, people of a variety of faiths opposed interracial marriage.[97] Thus, even if the Court is correct that large corporations would be unlikely to be run according to one religious code, that would not preclude such corporations from seeking RFRA exemptions.

Even if shareholders (of differing religious backgrounds) were to agree that a particular practice would contravene their sincerely held religious beliefs, the Government could still seek to establish that the refusal to accord an exemption was narrowly tailored to promote compelling state interests.[98] Thus, a universal shareholder agreement about one issue would not guarantee that the exemption would have to be accorded.[99] In such a case, however, the Government would still have to pass a very difficult test to justify its refusal to grant the exemp-

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[94] *See Hobby Lobby*, 134 S. Ct. at 2764 ("Norman and Elizabeth Hahn and their three sons are devout members of the Mennonite Church, a Christian denomination."); *id.* at 2765 ("David and Barbara Green and their three children are Christians who own and operate two family businesses."); *id.* at 2766 ("Each family member has signed a pledge to run the businesses in accordance with the family's religious beliefs and to use the family assets to support Christian ministries.") (citing Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1122 (10th Cir. 2013)).

[95] *See infra* notes 96–104 and accompanying text.

[96] *Hobby Lobby*, 134 S. Ct. at 2775.

[97] James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 HARV. C.R.-C.L. L. REV. 99, 102 (2015) ("[R]eligious objections to interracial marriage were pervasive at the time—as reflected in the statements of politicians, preachers, and jurists, as well as in public opinion polls.").

[98] *Cf. Hobby Lobby*, 134 S. Ct. at 2783 ("The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.").

[99] *See* RFRA 42 U.S.C.A. § 2000bb–1(b) ("Government may substantially burden a person's exercise of religion only if it 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.").

tion.[100]

Suppose there is no universal shareholder agreement about all religious values, or even about one value. Nevertheless, RFRA protections might be triggered.[101] In *Hobby Lobby*, the Court did not even explore what percentage of those objecting to being forced to engage in a practice had to do so for religious reasons.[102] Thus, suppose that some shareholders have a sincere religious objection to paying for certain services, such as birth control, while others (not sharing that view) nonetheless welcome having the costs at issue shifted to another payer.[103] A majority of shareholders might approve of a particular policy, e.g., shifting the costs of insurance to some third party, even though relatively few shareholders have religious objections to providing that insurance. Given the diversity of religious beliefs in the United States,[104] it would not be difficult to find someone who has a sincere religious objection to any number of practices.[105] and the Court did not discuss the number or percentage of shareholders that must have religious objections to the practice at issue to trigger RFRA protections.[106]

Who can seek an exemption under RFRA? That is unclear, although the Court is well aware that companies' owners have religious differences of opinion with or without RFRA.[107] How should such religious disputes within corporations be resolved? The Court noted in *Hobby Lobby* that "[s]tate corporate law provides a ready means for resolving any conflicts by, for example, dictating how a corporation can establish its governing structure."[108] But the Court's reference to state corporation law helps illustrate why the Court was engaging

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[100] *See Hobby Lobby*, 134 S. Ct. at 2780 ("The least-restrictive-means standard is exceptionally demanding.") (citing City of Boerne v. Flores, 521 U.S. 507, 532 (1997)).

[101] *See id.* at 2774—75 ("The owners of closely held corporations may—and sometimes do—disagree about the conduct of business.").

[102] There was no need to discuss this in the case because the respective family members seemed to share the same religious values. *See supra* note 94.

[103] *Cf. Hobby Lobby*, 134 S. Ct. at 2780 ("The most straightforward way of doing this 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.").

[104] *See* Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 186 (2002) ("The range of religious beliefs throughout the United States is extraordinarily broad.").

[105] *Cf.* Braunfeld v. Brown, 366 U.S. 599, 606 (1961) ("[W]e are a cosmopolitan nation made up of people of almost every conceivable religious preference.").

[106] *Cf.* Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After Hobby Lobby*, 67 STAN. L. REV. ONLINE 59, 65–66 (2014) ("If publicly traded or nonuniform corporations raise RFRA claims, courts will face unique questions about how to weigh their religious sincerity.").

[107] *Hobby Lobby*, 134 S. Ct. at 2775 ("[E]ven if RFRA did not exist, the owners of a company might well have a dispute relating to religion.").

[108] *Id.* at 2775.

in misdirection when pointing to the very low probability that all shareholders would subscribe to the same religious tenets. If the practice deemed to contravene religious principles were something that fell with ordinary business operations, that practice would not be subject to shareholder control, e.g., through a proxy fight,[109] but, instead, would be left to those who manage the company.[110]

Suppose that the matter at issue was not something mundane that should be left to management, but instead viewed as involving a significant policy that should be subject to shareholder direction,[111] e.g., whether shareholders should be allowed to include within proxy materials a resolution that a company not discriminate on the basis of sexual orientation.[112] Even when federal law is interpreted to require a proxy vote[113] on certain matters "that raise significant social policy issues,"[114] a separate question is whether that law itself is subject to a required RFRA exemption, since the failure to afford an exemption might burden management's religious beliefs and practices.[115] Would such a burden be substantial and thus trigger RFRA guarantees? That would have to be worked out in the courts, although the *Hobby Lobby* Court did not set a particularly high bar when discussing what would qualify as a substantial burden.[116]

B. *What Qualifies as a Substantial Burden?*

Once holding that RFRA applied to closely held for-profit corporations, the Court had to determine whether requiring those corporations to "provide health-insurance coverage for methods of contraception that violate the sincere-

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[109] *See* Joseph A. Roy, *Non-Traditional Activism: Using Shareholder Proposals to Urge LGBT Non-Discrimination Protection*, 74 BROOK. L. REV. 1513, 1520 (2009) ("The ordinary business operations exclusion expressly clarifies that the board of directors controls matters relating to a company's ordinary business operations about which shareholders should have no say, even through a shareholder proposal.").

[110] *See* Shireen B. Rahnema, *The SEC's Reversal of Cracker Barrel: A Return to Uncertainty*, 7 U. MIAMI BUS. L. REV. 273, 285 (1999) ("The policy underlying the ordinary business exception is to confine the resolution of everyday problems to the managers since it is impractical for shareholders to decide how to solve such problems.").

[111] *See* Margaret V. Sach, *Social Proposals Under Rule 14a-8: A Fall-Back Remedy in an Era of Congressional Inaction*, 2 UC IRVINE L. REV. 931, 936 (2012) ("The idea is to distinguish between items that are 'mundane in nature,' which ought to remain within management's exclusive province, from those with 'significant policy, economic, or other implications' on which shareholders should be entitled to speak.").

[112] *Cf.* Amendments to Rules on S'holder Proposals, Release No. 23200 (May 21, 1998), 1998 WL 254809, at *4 ("[W]e have gained a better understanding of the depth of interest among shareholders in having an opportunity to express their views to company management on employment-related proposals that raise sufficiently significant social policy issues.").

[113] *Id.* (discussing the "return to a to a case-by-case analytical approach").

[114] *Id.*

[115] *See infra* Part III.B discussing what would constitute a substantial burden.

[116] *See infra* Part III.B.

ly held religious beliefs of the companies' owners"[117] sufficed to meet the threshold requirement that their free exercise rights were "substantially burden[ed]."[118] HHS had argued "that the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo) [was] simply too attenuated" to constitute a substantial burden.[119]

The Court rejected HHS's contention, instead deferring to the corporations' claim that the burden imposed was substantial.[120] These "companies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial."[121] Thus, the Court suggested that the corporation's sincere beliefs that a particular practice imposed a substantial burden may itself have been enough to establish that the burden had been met.[122]

That said, the Court did not simply announce that deference was required and then say nothing else. Instead, the Court offered some reasons to believe that the burdens imposed were indeed substantial.[123] The Court noted that the corporate owners "have a sincere religious belief that life begins at conception."[124] Because of those beliefs, the owners "object[ed] on religious grounds to providing health insurance that covers methods of birth control that, as HHS acknowledges, . . . *may* result in the destruction of an embryo."[125] The Court then explained that by requiring these "companies to arrange for such coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs."[126] But this is a very forgiving test—if an individual is required to do something that might contravene that individual's faith, then her religious beliefs have been substantially burdened as long as she believes that burden substantial.

This deferential approach towards what constitutes a substantial burden might have important implications. For example, individuals might seek an RFRA exemption to paying taxes that supported practices contravening their faith.[127] The *Hobby Lobby* Court sought to forestall an onslaught on the tax system, noting that it would be "untenable to allow individuals to seek exemp-

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[117] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014).

[118] *See* 42 U.S.C. § 2000bb–1(a) (1993).

[119] *Hobby Lobby*, 134 S. Ct. at 2777.

[120] *See id.* at 2779.

[121] *Id.*

[122] *See id.*

[123] *See infra* notes 125—27 and accompanying text.

[124] *Hobby Lobby*, 134 S. Ct. at 2775.

[125] *Id.* (emphasis added) (citing Brief for HHS in No. 13–354, at 9, n.4).

[126] *Id.*

[127] *Id.* at 2784.

tions from taxes based on religious objections to particular Government expenditures."[128] After all, suppose everyone did that—"[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief."[129]

The *Hobby Lobby* Court was correct that systemic difficulties would be created if exemptions to the tax code were recognized.[130] But the same point might have been made about recognizing exemptions to providing insurance for healthcare—if enough entities assert religious objections to providing insurance, then the cost-shifting might become too onerous.[131] The Court's method of distinguishing between taxes and healthcare insurance was not persuasive because the rationale endorsed to protect tax collection would also seem to militate in favor of refusing to afford exemptions to for-profit corporations objecting to paying for healthcare insurance.[132]

The Court's reasoning was disappointing for an additional reason, namely, that it seemed to involve application of the wrong test. On its face, RFRA does not allow for the kind of aggregation employed by the Court, i.e., looking at what would happen if everyone sought an analogous exemption.[133] If the Government could justify refusing this person an exemption[134] by appealing to the bad effects that might result by granting the exemption to other people, RFRA's focus on the importance of the Government's denying *this person* an exemption would be undermined.[135]

RFRA on its face requires an individualized assessment because the Government must "demonstrate[ ] that application of the burden *to the person*"[136]

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[128] *Id.*

[129] *Id.* (citing United States v. Lee, 455 U.S. 252, 260 (1981))).

[130] *See supra* notes 127–129 and accompanying text.

[131] *See Hobby Lobby*, 134 S. Ct. at 2802 (Ginsburg, J., dissenting) ("And where is the stopping point to the 'let the government pay' alternative?").

[132] *Id.*

[133] *Cf.* Wickard v. Filburn, 317 U.S. 111, 127–28 (1942) ("That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.").

[134] *See* Blatnik, *supra* note 73, at 1449 ("RFRA, in particular, assigns courts the duty of determining . . . whether the government has a compelling interest for applying the law in question to this person.").

[135] *Cf.* Nicholas Nugent, *Toward a RFRA that Works*, 61 VAND. L. REV. 1027, 1060 (2008) ("RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened."). *See* Bieber, *supra* note 73, at 244–45 ("RFRA and its strict scrutiny test required the government to demonstrate that the compelling interest test is satisfied by applying the challenged law 'to the person,' the particular claimant, whose sincere exercise of religion is being substantially burdened.").

[136] Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. § 2000bb–3(b) (2012) (emphasis added).

passes strict scrutiny. But arguing that dire results would occur if everyone pursued a particular option does not establish that the government has a compelling interest at stake in denying the exemption to the particular person seeking it, much less that the exemption's denial is the least restrictive means of protecting or promoting that interest.[137]

Consider the very case cited by the *Hobby Lobby* Court[138]—*United States v. Lee*[139]—to support the contention that no exemptions will be accorded to those with religious objections to paying certain taxes.[140] At issue in *Lee* was an Amish employer's refusal to contribute to Social Security for his Amish employees based on his sincere religious objections.[141] The Court did not question whether the Amish had sincere religious objections to participating in Social Security—the Court "accept[ed] appellee's contention that both payment and receipt of social security benefits is forbidden by the Amish faith."[142] Basically, the "Amish believe that there is a religiously based obligation to provide for their fellow members the kind of assistance contemplated by the social security system."[143]

In rejecting Lee's free exercise claim, the Court reasoned that the "obligation to pay the social security tax initially is not fundamentally different from the obligation to pay income taxes."[144] Were the Court to have held that the exemption had to be granted, the floodgates might have been opened.[145] The Court noted, "If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax."[146]

In his concurring opinion, Justice Stevens explained, "As a matter of fiscal policy, an enlarged exemption probably would benefit the social security system because the nonpayment of these taxes by the Amish would be more than offset by the elimination of their right to collect benefits."[147] This exemption

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[137] *Cf. infra* notes 148–50 (discussing Justice Stevens' *Lee* concurrence in which he explained that permitting the exemption in that particular case would have been beneficial rather than harmful).

[138] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2784 (2014).

[139] United States v. Lee, 455 U.S. 252 (1981).

[140] *See Hobby Lobby*, 134 S. Ct. at 2784.

[141] *Lee*, 455 U.S. at 254 ("Appellee, a member of the Old Order Amish, . . . employed several other Amish . . . . He failed to file the quarterly social security tax returns required of employers, withhold social security tax from his employees, or pay the employer's share of social security taxes.").

[142] *Id.* at 257.

[143] *Id.*

[144] *Id.* at 260.

[145] *See id.*

[146] *Id.*

[147] *Id.* at 262 (Stevens, J., concurring).

request had to be rejected because of the other requests that would be made.[148] The Court explained that it "rejects the particular claim of this appellee, not because it presents any special problems, but rather because of the risk that a myriad of other claims would be too difficult to process."[149]

Congress had already exempted the Amish self-employed from paying into the Social Security system,[150] and it would have been relatively easy to have enlarged the exemption to include Amish employers employing Amish employees.[151] But the *Lee* Court declined to do so, reasoning that Congress had already "accommodated, to the extent compatible with a comprehensive national program, the practices of those who believe it a violation of their faith to participate in the social security system."[152]

There is no small irony in the *Hobby Lobby* Court's discussion of *Lee*. The *Lee* Court deferred to Congress's judgment about where the relevant line should be drawn—exempting the Amish self-employed from paying into Social Security, but refusing to expand the exemption to include Amish employers with Amish employees.[153] In contrast, the *Hobby Lobby* Court rejected the compromise Congress had made when exempting non-profit but not for-profit corporations from the insurance requirement.[154] Instead, the *Hobby Lobby* Court expanded the exemption to include for-profit corporations as well.[155]

The *Hobby Lobby* Court suggested that the federal government had imposed a substantial burden on religious liberty when it required corporations to pay for insurance covering procedures that corporate shareholders/officers might find religiously objectionable.[156] Because the substantial burden requirement had been met, the Government had to demonstrate why refusing the exemption was the least restrictive means to promoting the Government's compelling interest.[157]

The Court does not now treat what *might* happen as having such constitu-

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148 *See id.*

149 *Id.*

150 *Id.* at 261 ("Congress drew a line in § 1402(g), exempting the self-employed Amish but not all persons working for an Amish employer.").

151 *Id.* at 262 (Stevens, J., concurring) (citing 26 U.S.C. § 1402(g)) ("Congress already has granted the Amish a limited exemption from social security taxes. . . . As a matter of administration, it would be a relatively simple matter to extend the exemption to the taxes involved in this case.").

152 *Id.* at 260.

153 *See supra* notes 150–52 and accompanying text.

154 *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2782 (2014) ("HHS has already established an accommodation for nonprofit organizations with religious objections.").

155 *See id.* at 2785 ("The contraceptive mandate, as applied to closely held corporations, violates RFRA.").

156 *Hobby Lobby*, 134 S. Ct. at 2779.

157 *See id.*

tional significance in other contexts implicating religion.[158] For example, in *Mitchell v. Helms*,[159] the Court considered whether Establishment Clause guarantees had been violated when federal funds were distributed to religious schools to purchase *inter alia* "computers, and computer software, and also slide and movie projectors, overhead projectors, television sets, tape recorders, VCR's, projection screens, laboratory equipment, maps, globes, filmstrips, slides, and cassette recordings."[160] One of the difficulties was that the items purchased with federal monies were being used for religious indoctrination.[161] While Justice O'Connor rejected in her concurrence in the judgment that "actual diversion of government aid to religious indoctrination is consistent with the Establishment Clause,"[162] she reasoned that the actual diversion in the case at issue had been *de minimis* and thus was not constitutionally significant.[163]

The *Mitchell* plurality offered a different approach.[164] "So long as the governmental aid is not itself 'unsuitable for use in the public schools because of religious content,' and eligibility for aid is determined in a constitutionally permissible manner, any use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern."[165] Instead, the indoctrination would be attributed to the private party.[166] Thus, because the government was not distributing sectarian materials to schools, but instead something with no particular religious significance (money), the government did not violate Establishment Clause guarantees.[167]

How would the *Mitchell* plurality's approach work in the *Hobby Lobby* context? First, because the insurance might not in fact have been used to cause death post-conception, it is not even clear that the relevant guarantees would be triggered—the mere possibility that monies would be used in a non-approved

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[158] *See infra* notes 160—67 and accompanying text.

[159] 530 U.S. 793 (2000).

[160] *Id.* at 803.

[161] *See id.* at 909 (Souter, J., dissenting) ("[D]iscovery revealed that under Chapter 2, nonpublic schools requested and the government purchased at least 191 religious books with taxpayer funds."); *id.* at 910 (noting that the evidence "strongly suggests that film projectors and videotape machines purchased with public funds were used in religious indoctrination over a period of at least seven years").

[162] *Id.* at 840 (O'Connor, J., concurring).

[163] *See id.* at 861 (O'Connor, J., concurring) ("The limited evidence amassed by respondents during 4 years of discovery (which began approximately 15 years ago) is at best *de minimis* and therefore insufficient to affect the constitutional inquiry.").

[164] *See infra* note 167 and accompanying text.

[165] *Mitchell*, 530 U.S. at 820 (citing Bd. of Ed. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 245 (1968)).

[166] *See id.*

[167] *See* Mark Strasser, *Repudiating* Everson*: On Buses, Books, and Teaching Articles of Faith*, 78 MISS. L.J. 567, 630 (2009) ("According to the *Mitchell* plurality, the relevant Establishment Clause question is not about whether state funds are being used to promote sectarian objectives, but only about whether the aid itself has sectarian content.").

way would not suffice to trigger the relevant protections.[168]

Suppose that the insurance had *once* been used to acquire contraception that caused death post-conception. Even so, that single usage might be viewed as *de minimis* and also as not triggering the relevant protections.[169]

Suppose that the insurance purchased by the corporation had been used by many employees to acquire contraception that caused post-conception death. The decision (and the moral burden) would not be attributed to Hobby Lobby, but instead to the individual employee who chose to use the contraception in question.[170] Just as the alleged fault in *Mitchell* (promoting religion) was not attributed to the government and thus did not trigger the relevant protections, the alleged fault at issue in *Hobby Lobby* (causing the post-conception death of innocents) would be attributable to the employee rather than the employer, and thus would not trigger the relevant guarantees.

Hobby Lobby might claim that it would be religiously offensive to provide monies that would be used even indirectly to cause a death post-conception. But that might analogously mean that the corporation would have religious objections to employees using their wages to purchase spirits[171] or items preventing conception or birth.[172]

What should be said to the corporation that fears that its employees will use their earnings in objectionable ways?[173] After *Hobby Lobby*, it is no answer to say that it was the employee rather than the corporation who was purchasing the forbidden items. HHS argued that the link between Hobby Lobby and the use of the forbidden contraceptives was too attenuated,[174] but the Court disagreed.[175] The Court's deference to the corporation's beliefs suggests that as

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168 *Cf. supra* note 163 and accompanying text (discussing Justice O'Connor's view that it is important to demonstrate *actual* improper use).

169 *Cf. id.*

170 *See supra* note 167 and accompanying text.

171 *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2766 (2014) ("The businesses refuse to engage in profitable transactions that facilitate or promote alcohol use.").

172 *See* Sarah E. Bycott, *Controversy Aroused: North Carolina Mandates Insurance Coverage of Contraceptives in the Wake of Viagra*, 79 N.C. L. REV. 779, 807 n.161 (2001) (discussing "the view taken by some religions that any interference with conception is immoral").

173 *See* Thomas E. Rutledge, *A Corporation Has No Soul-the Business Entity Law Response to Challenges to the PPACA Contraceptive Mandate*, 5 WM. & MARY BUS. L. REV. 1, 49 n.220 (2014) ("If shareholders are permitted to object to the corporate group health insurance plan's coverage of goods and services they consider sinful, there is no clear reason those same shareholders cannot prevent the employees from using other compensation . . . to pay directly for contraceptives, alcoholic beverages . . . or tobacco.").

174 *See Hobby Lobby,* 134 S. Ct. at 2777 ("HHS's main argument (echoed by the principal dissent) is basically that the connection between what the objecting parties must do . . . and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated.").

175 *Id.* at 2779 ("[T]he Hahns and Greens and their companies sincerely believe that pro-

long as a corporation sincerely believes that its religious principles are contravened by an employee's use of her salary in a particular way, then any federal law that precludes the corporation from putting restrictions on how salaries are used might itself trigger RFRA protections.[176] A separate issue would be whether the state had a compelling interest in assuring that individuals could use their wages as they wished, e.g., to purchase alcohol or other items that might run afoul of religious restrictions.[177]

The Court's implicit approach to determining whether something constitutes a substantial burden on religion—does the believer (sincerely) claim that it constitutes such a burden?[178]—is quite forgiving.[179] In addition, the Court suggested yet another method by which to establish that a substantial burden had been imposed, namely, focusing on the penalty for non-compliance.[180]

The *Hobby Lobby* Court remarked that if the corporations "do not comply, they will pay a very heavy price—as much as $1.3 million per day, or about $475 million per year, in the case of one of the companies."[181] After noting the substantial financial penalty that would be imposed, the Court commented, "If these consequences do not amount to a substantial burden, it is hard to see what would."[182]

Yet, it is not at all clear that these consequences amount to a substantial burden on free exercise.[183] Consider a religious organization that is required to pay wages to its employees.[184] The money that is being spent on employees might be used in other ways that would promote the organization's religious values. Assume for purposes here that the Court (or perhaps the corporation itself) would reject that requiring a corporation to pay wages to its employees constitutes a substantial burden on free exercise, even though the money saved from not paying wages would otherwise be used to promote religious objec-

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viding the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken").

176 *See supra* note 122 and accompanying text (discussing the Court's deferential standard).

177 *See* DeHart v. Horn, 390 F.3d 262, 265 (3d Cir. 2004) ("According to DeHart's self-taught understanding of Buddhist religious texts, he is not permitted to eat any meat or dairy products, nor can he have foods containing 'pungent vegetables' such as onions, garlic, leeks, shallots and chives.").

178 *See supra* note 122.*supra* notes 121–22 and accompanying text.

179 *See supra* note 121–27.

180 *See Hobby Lobby*, 134 S. Ct. at 2759.

181 *Id.*

182 *Id.*

183 *See infra* notes 184–85 and accompanying text.

184 *Cf.* Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 306 (1985) ("The Foundation's commercial activities, undertaken with a 'common business purpose,' are not beyond the reach of the Fair Labor Standards Act because of the Foundation's religious character, and its associates are 'employees' within the meaning of the Act.").

tives.[185] Suppose, in addition, that a hefty fine was associated with the failure to observe the wage laws. The question would be whether this fine (which would be imposed on any similarly-sized employer failing to follow the law) would itself make the wage law at issue a substantial burden on religion, thereby triggering RFRA guarantees by transforming what would not have been a substantial burden on religion into one.

If the fine itself would be enough to trigger the relevant guarantees, then the only fines that could be imposed without triggering RFRA would be those that would not be particularly onerous and thus not burdensome to pay.[186] But such an approach would almost guarantee the inefficacy of federal law, at least as far as religious organizations were concerned.[187]

Suppose that the State knew that its imposition of non-onerous fines on corporations as a general matter would induce those corporations to violate the law. Rather than promote law-breaking, the state might try to impose more onerous penalties for violations of wage laws on those corporations that could not invoke RFRA protections (i.e., that could not claim that the onerous penalties for law-breaking constituted a substantial burden on religion).[188] This would at the very least create an appearance of favoritism of religion (because religious corporations would be subject to lesser penalties for the same crimes); whether such favoritism violated constitutional guarantees would be a separate matter.[189]

The Court's approach when evaluating what constitutes a substantial burden on religion is extremely deferential.[190] An entity need only sincerely claim that a law or regulation imposes a substantial religious burden to meet the relevant standard.[191] Even if an individual cannot claim that the religious burden is sub-

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[185] *Cf. id.* at 303 ("It is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights."). *But see* Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J. L. & GENDER 35, 92 (2015) ("All employers . . . may have financial incentives to raise RFRA objections to other regulation of the employment relationship, including wage and hour rules.").

[186] As to whether a fine was in fact burdensome, this would presumably be left up to the corporation to decide. *See supra* note 122.

[187] *Cf.* Patrick J. Devine, *The Draft Organization Sentencing Guidelines for Environmental Crimes*, 20 COLUM. J. ENVTL. L. 249, 257 (1995) (discussing organizations that treated fines as a cost of doing business).

[188] *See* Brittany Limes, *Peering into the Corporate Soul: Hobby Lobby Stores, Inc. v. Sebelius and How for-Profit Corporations Exercise Religion*, 91 DENV. U. L. REV. 661, 669 (2014) (discussing corporations that could not assert an RFRA exemption).

[189] *Cf.* Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 673 (1970) ("The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause.").

[190] *See supra* note 122.

[191] *See id.*

stantial, RFRA protections may nonetheless be triggered if the burden imposed for the failure to comply is itself viewed as too onerous.[192] But this very deferential standard almost invites corporations to seek RFRA exemptions to a variety of federal statutes.[193]

C. *Hobby Lobby's Application*

Corporations are subject to numerous federal laws, and *Hobby Lobby* creates a great deal of uncertainty with respect to the exemptions that must be accorded under RFRA. Consider the Family and Medical Leave Act ("FMLA"),[194] whose purposes include "entitl[ing] employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition."[195]

Suppose that a corporation has religious objections to aiding particular family members, for example, children who were produced through assisted reproductive technologies ("ART"), because the corporation believes that the use of such technologies is immoral.[196] Or, perhaps, the corporation has religious objections to divorce and believes that permitting an employee to take off time to care for his or her previously-divorced, current spouse would be contrary to religious teachings. Because FMLA requirements would in these cases contravene sincerely held religious beliefs, federal law would be imposing a substantial burden on the corporation's religious exercise.

Courts would have to address whether refusing to exempt such a corporation would be the least restrictive means to promote a compelling interest. Perhaps the burdens of caring for a sick family member could easily be shifted to a third party. Perhaps not. In any event, it would be unsurprising were the lower federal courts to disagree sharply about whether an exemption to the FMLA could be denied in cases in which recognition of the relationship might be thought to undermine sincerely held beliefs.[197]

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[192] *See supra* notes 181–82 and accompanying text.

[193] *Cf. supra* note 104 and accompanying text (suggesting that shifting costs onto a third party might be attractive because of increasing profitability).

[194] Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2012).

[195] *Id.* § 2601(b)(2).

[196] *See* Sandi Varnado, *Who's Your Daddy?: A Legitimate Question Given Louisiana's Lack of Legislation Governing Assisted Reproductive Technology*, 66 LA. L. REV. 609, 619 (2006) (discussing those who "feel strongly that ART is unnatural and possibly immoral").

[197] *Compare* Gilardi v. Sebelius, 926 F. Supp. 2d 273, 275 (D.D.C.) *aff'd in part, rev'd in part sub nom.* Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208 (D.C. Cir. 2013) *cert. granted, judgment vacated sub nom.* Gilardi v. Dep't of Health & Human Servs., 134 S. Ct. 2902 (2014) and *cert. denied sub nom.* Dep't of Health & Human Servs. v. Gilardi, 134 S. Ct. 2902 (2014) (holding that ACA did not impose a substantial burden on free exercise of religion), *with* Geneva Coll. v. Sebelius, 988 F. Supp. 2d 511, 514 (W.D. Pa. 2013) *rev'd sub nom.* Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs., 778 F.3d 422 (3d Cir. 2015) *cert. granted in part sub nom.* Zubik v. Burwell, 136 S. Ct. 444 (2015)

Other federal statutes create similar uncertainties. Consider the Employee Retirement Income Security Act of 1974 ("ERISA").[198] While the Act covers pension funds, it also covers other areas including health insurance.[199] Now that same-sex marriage is recognized in all fifty states,[200] a same-sex spouse would be recognized as a spouse under ERISA and would be entitled to all of the benefits due to different-sex spouses under that Act.[201] But assuming that recognition of a same-sex spouse would contravene a corporation's religious beliefs, that corporation might seek an RFRA exemption to ERISA (state law might already include a state RFRA exemption).[202]

In any of these cases, the corporation would have to establish that the federal requirement substantially burdened its religious beliefs.[203] But that would not be particularly difficult, either because of the penalty or because fulfillment of the requirement would contravene some religious belief.[204] The Government would then have to show that its refusal to grant an exemption would be the least restrictive means to promoting some compelling interest.[205]

The *Hobby Lobby* Court suggested that the Government could meet that burden in some cases.[206] For example, the Court suggested that the "Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are

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and *cert. granted sub nom.* Geneva Coll. v. Burwell, 136 S. Ct. 445 (2015) (holding that ACA imposed substantial burden on free exercise).

198 Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (2012).

199 Elaine Gareri Kenney, R.N., M.S., *For the Sake of Your Health: ERISA's Preemption Provisions, HMO Accountability, and Consumer Access to State Law Remedies*, 38 U.S.F. L. REV. 361, 362 (2004) ("Although most of ERISA's provisions govern the administration of employer-offered pension funds, it also regulates non-pension employee benefits such as disability and health insurance plans.").

200 *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

201 *See* U.S. DEP'T OF JUSTICE REPORT OUTLINING OBAMA ADMINISTRATION'S EFFORT TO IMPLEMENT FEDERAL BENEFITS TO SAME-SEX MARRIED COUPLES, Empl. Prac. Guide (CCH) (WL 6698935) ¶ 5417 (2014) (attachment describing Department of Labor "guidance provid[ing] that 'marriage' and 'spouse' include same-sex marriages and individuals in same-sex marriages, respectively, in cases when the marriage is recognized as a marriage under any state law, regardless of where the couple resides").

202 *See, e.g.*, MISS. CODE. ANN. § 11-61-1 (2015) (Mississippi Religious Freedom Restoration Act).

203 *See supra* Part III.B (discussing what would constitute a substantial burden on religious beliefs).

204 *See supra* Part III.B.

205 *Cf.* Burwell v. Hobby Lobby Stores Inc., 134 S. Ct. 2751, 2779 (2014) ("Since the HHS contraceptive mandate imposes a substantial burden on the exercise of religion, we must move on and decide whether HHS has shown that the mandate both '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'") (citing 42 U.S.C. § 2000bb–1(b)).

206 *See infra* note 208 and accompanying text.

precisely tailored to achieve that critical goal."[207] But it is simply unclear whether the Government has a similarly compelling interest in providing others an equal opportunity and whether prohibitions on others kinds of discrimination are sufficiently closely tailored to meet that critical goal.[208] The Court's discussion of why the tax system is immune to an RFRA challenge only makes matters more confusing, because the Court did not take seriously whether according an exemption to the particular person seeking it was the least restrictive means to promoting a compelling interest.[209]

The *Hobby Lobby* Court indicated that "the Government [should] 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."[210] At least one question remaining is whether the Government should foot the bill in other kinds of cases in which a corporation's religious principles would be undermined by paying for family members who did not fit the religiously approved family.[211]

Consider a corporation whose religious principles would be compromised by affording benefits to a particular child, e.g., because the child was a product of ART or, perhaps, was born into a non-marital family. Would the Government ever have a less than compelling interest in assuring that a child receives adequate benefits? While such a question might seem rhetorical, the Court might consider the free exercise analysis in *Bowen v. Roy*[212] to conclude, for example, that whether children received adequate benefits was not so important after all.[213]

Suppose that the courts were to say that the Government has a compelling interest in assuring that every child has adequate support.[214] A separate question would be whether the least restrictive means was being used. The *Hobby*

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[207] *See Hobby Lobby*, 134 S. Ct. at 2783.

[208] *Compare* Neil S. Siegel & Reva B. Siegel, *Compelling Interests and Contraception*, 47 CONN. L. REV. 1025 (2015) (arguing that the state has a compelling interest in preventing sex discrimination), *with* David E. Bernstein, *Sex Discrimination Laws Versus Civil Liberties*, 1999 U. CHI. LEGAL F. 133 (1999) (rejecting that the state has a compelling interest in preventing sex discrimination).

[209] *See supra* notes 121—38 and accompanying text.

[210] *Hobby Lobby*, 134 S. Ct. at 2780.

[211] *Cf. id.* at 2804 (Ginsburg, J., dissenting) ("And where is the stopping point to the 'let the government pay' alternative?").

[212] 476 U.S. 693 (1986).

[213] *See id.* at 712 (rejecting that parents who refused to provide a child's social security number for religious reasons were still entitled to receive AFDC benefits and concluding that Congress' refusal to grant appellees a special exemption does not violate the Free Exercise Clause).

[214] *Cf. Hobby Lobby*, 134 S. Ct. at 2780 ("We will assume that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA.").

Lobby Court made clear that the "least-restrictive-means standard is exceptionally demanding,"[215] and it would be unsurprising for the lower courts to reach very different conclusions about what would constitute the least restrictive means to assuring that children receive what they need.

IV. CONCLUSION

The *Smith* Court noted that "[i]f the 'compelling interest' test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded."[216] But "if 'compelling interest' really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test,"[217] i.e., unless they incorporate a religious exemption. However, incorporating religious exemptions in all of those federal laws potentially triggering RFRA would simply be unmanageable. "Any society adopting such a system would be courting anarchy, [and] . . . that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them."[218]

The Court's RFRA interpretation, in effect, is courting anarchy with respect to federal law. Either federal laws will have to include a whole host of exemptions because of the sincerely held beliefs of a religiously diverse population, or the courts will have to adopt unprincipled approaches in light of which some exemptions will be granted and others will not.

It is possible, perhaps because of some very unpopular exemptions, that the broad interpretation of RFRA offered in *Hobby Lobby* will be narrowed, either by Congress or through the courts. Such a narrowing might have its own difficulties. But the partisan divide in Congress[219] makes it unlikely that a principled legislative fix will be offered any time in the foreseeable future, which means that we can expect relevantly similar cases to be decided in very different ways in the circuits for a long time to come. Further, the United States Supreme Court has made matters in this area more confusing rather than less, which does not inspire confidence that the Court will offer a helpful way out of the mess that it has had a hand in creating. In short, the current unsustainable approach is likely to become even more confusing and confused, and neither Congress nor the federal courts will likely be able to offer an approach that provides reasonable protections to both the religious and the non-religious. No one should be pleased about the recent turn in the jurisprudence, which almost guarantees unequal application and the imposition of undeserved burdens.

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[215] *Id.* (citing City of Boerne v. Flores, 521 U.S. 512, 532 (1997)).

[216] Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

[217] *Id.*

[218] *Id.*

[219] *See Why and How Congress Must Act to Protect Access to Early Voting*, 128 HARV. L. REV. 1228, 1247 (2015) (noting "the current partisan divide in Congress").