My Religion, My Rules:

Examining the Impact of RFRA Laws on Individual Rights

October 22, 2015
The Albany Law Review presents:

My Religion, My Rules:
Examining the Impact of RFRA Laws on Individual Rights

October 22, 2015

Agenda

5:00 — 5:30pm  Registration, Dean Alexander Moot Courtroom

5:30 – 5:35pm  Introductory Remarks, Bryan Hum ’16
Executive Editor for Symposium, Volume 79

Alicia Ouellette, President and Dean
Albany Law School

5:35 – 6:00pm  Panelist Presentations

Cynthia Brown, Esq.
Congressional Research Service
Library of Congress

Professor Roderick M. Hills, Jr.
William T. Comfort, III Professor of Law
New York University School of Law

Louise Melling, Esq.
Deputy Legal Director
American Civil Liberties Union

Dr. Mark C. Modak-Truran
J. Will Young Professor of Law
Mississippi College School of Law

Alicia Ouellette ‘94
President and Dean
Albany Law School

6:00 – 6:50pm  Panel Discussion

Moderator:
Professor Vincent M. Bonventre
Albany Law School

6:50 – 7:00pm  Audience Q&A Session

7:15 — 8:30pm  Reception, East Foyer
My Religion, My Rules: Examining the Impact of RFRA Laws on Individual Rights

October 22, 2015

SPEAKER BIOGRAPHIES

VINCENT M. BONVENTRE clerked for Judges Matthew J. Jasen and Stewart F. Hancock Jr. of the New York State Court of Appeals. Professor Bonventre held a U.S. Supreme Court Judicial Fellowship and served in the U.S. Army Military Intelligence and Judge Advocate General's Corps. Professor Bonventre joined Albany Law School in 1990. He has taught as a visiting professor at Syracuse University College of Law and the Maxwell School of Public Affairs, and at Siena College. He is the author of "Streams of Tendency" on the New York Court: Ideological and Jurisprudential Patterns in the Judges' Voting and Opinions (W.S. Hein). Professor Bonventre has published numerous articles on judicial decision making, state constitutional law, criminal and civil rights, legal ethics, and the New York Court of Appeals. He is the founding editor-in-chief of Government, Law, & Policy Journal (New York State Bar Association); editor of State Constitutional Commentary; and director of The Center for Judicial Process. Prof Bonventre is also the author of New York Court Watcher, a blog devoted to commentary on developments at the Supreme Court, the New York Court of Appeals, and other state supreme courts nationwide. He is the founder and Director of the Center for Judicial Process. Professor Bonventre received a Ph.D. and M.A.P.A. from the University of Virginia, J.D. from Brooklyn Law School, and B.S. from Union College.

CYNTHIA BROWN, ESQ., is a legislative attorney for the American Law Division within the Congressional Research Service at the Library of Congress, where she advises Congress on issues related to religious freedom. In that role, she has provided nonpartisan written analyses and personal consultations to members of Congress and their staff on issues of First Amendment protections and statutory implications for religion that arise in the congressional agenda. Her work has examined religious objections to requirements under the Affordable Care Act; the ramifications of Burwell v. Hobby Lobby Stores, Inc. for statutory religious freedom protections; the potential impacts of federal recognition of same-sex marriage for religious objectors; and issues of civil rights related to religious discrimination. Ms. Brown also serves as an adjunct professor at George Washington University Law School.

RODERICK M. HILLS, JR. is the William T. Comfort, III Professor of Law at New York University School of Law. He teaches and writes about public law with a focus on the law governing the division of powers between central and sub-central governments. These areas include constitutional law, local government law, land use regulation, jurisdiction and conflicts of law, and education law. His publications have appeared in the Harvard Law Review, Pennsylvania Law Review, Michigan Law Review, Stanford Law Review, among other places. Professor Hills has been a cooperating counsel with the American Civil Liberties Union of Michigan and also files amicus briefs in cases.
focused on the autonomy of state and local governments and the protection of those governments’ powers from preemption. Professor Hills holds a bachelor’s and law degrees from Yale University. He served as a law clerk for Judge Patrick Higginbotham of the US Court of Appeals for the Fifth Circuit and previously taught at the University of Michigan Law School. He is a member of the state bar of New York and the US Supreme Court bar.

LOUISE MELLING, ESQ. is a Deputy Legal Director at the ACLU and the Director of its Center for Liberty, which encompasses the ACLU’s work on reproductive freedom; women’s rights; lesbian, gay, bisexual and transgender rights; and freedom of religion and belief. In this role, she leads the work of the ACLU to address the intersection of religious freedom and equal treatment, among other issues. Before becoming Deputy Legal Director, Ms. Melling was director of the ACLU Reproductive Freedom Project, in which capacity she oversaw nationwide litigation, communication research, public education campaigns and advocacy efforts in the state legislatures. Ms. Melling has been with the ACLU since 1992, serving in several roles before becoming the Director of the Reproductive Freedom Project in 2003, and most recently Deputy Legal Director. She is a 1987 graduate of Yale Law School. Ms. Melling is the author of several articles including Religious Refusals to Public Accommodations Laws: Four Reasons to Say No, 38 Harv. J. of Law & Gender (2015); Inconvenience or Indignity? Religious Exemptions to Public Accommodations Laws, 22 J. of Law & Pol'y 705 (2014) (co-authored with Martin Lim); and The Legal Education of Twenty Women, 40 Stan. L. Rev. 1299 (1998) (co-authored with Catherine Weiss).

DR. MARK C. MODAK-TRURAN is the J. Will Young Professor of Law at Mississippi College School of Law. He previously served as the 2014-2015 Research Fellow at the Center of Theological Inquiry (Princeton, NJ) for the Center’s Inquiry on Law and Religious Freedom. Dr. Modak-Truran received his M.A. and Ph.D. (Religious Ethics) from The University of Chicago and his J.D. from Northwestern University School of Law, where he was the Editor-in-Chief of the Northwestern Journal of International Law and Business. He has twice served as the Co-Chair of the Association of American Law School’s Section on Law and Religion (2009, 2002), and his research and writing focus on law and religion and legal theory.

DEAN ALICIA OUELLETTE ’94 serves as Albany Law School’s President and Dean. Dean Ouellette is also a Professor of Law at Albany Law School and a Professor of Bioethics in the Union Graduate College/Mt. Sinai School of Medicine Program in Bioethics. Prior to her appointment as President and Dean, she served as Associate Dean for Academic Affairs and Intellectual Life. Dean Ouellette’s research focuses on health law, disability rights, family law, children’s rights and human reproduction. Her book, Bioethics and Disability: Toward a Disability Conscious Bioethics, was published in 2011 by Cambridge University Press. She has authored numerous articles published in academic journals such as the American Journal of Law and Medicine, the Hastings Center Report, the American Journal of Bioethics, the Hastings Law Journal, the Indiana Law Journal and Oregon Law Review. Before joining the law faculty, Dean Ouellette served as an Assistant Solicitor General (“ASG”) in the Office of the New York
State Attorney General. As ASG, Dean Ouellette briefed and argued more than 100 appeals on issues ranging from termination of treatment for the terminally ill to the responsibility of gun manufacturers for injuries caused by handguns. Before that, Dean Ouellette worked in private practice and served as a confidential law clerk to Judge Howard A. Levine on the New York State Court of Appeals. She has continued her advocacy work in select cases and was lead counsel on the law professors’ brief submitted in support of same-sex couples who sought the right to marry in New York State. She received an A.B. from Hamilton College and a J.D. from Albany Law School, where she was Editor-in-Chief of the Albany Law Review.
**Burwell v. Hobby Lobby Stores, Inc.**

Supreme Court of the United States

March 25, 2014, Argued *; June 30, 2014, Decided

No. 13-354; 13-356

**Reporter**


**Notice:** The LEXIS pagination of this document is subject to change pending release of the final published version.

**Prior History:** [***1] ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT


**Disposition:** No. 13-354, 723 F.3d 1114, affirmed; No. 13-356, 724 F. 3d 377, reversed and remanded.

**Core Terms**

contraceptive, religious, corporations, for-profit, coverage, exercise of religion, employees, Lobby, accommodation, religious belief, exemption, cases, companies, services, requirements, regulations, preventive, least restrictive, compelling interest, religion-based, religion, free-exercise, sincerely, organizations, benefits, entities, Church, rights, religious liberty, nonprofit

**Case Summary**

**Procedural Posture**

Plaintiff owners of closely held corporations with sincere religious beliefs about contraception sued arguing that regulations requiring them to provide health insurance coverage for certain contraception violated the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C.S. § 2000bb et seq. The U.S. Court of Appeals for the Third and Tenth Circuits rendered opposite rulings regarding these claims. The U.S. Supreme Court granted certiorari.

**Overview**

The issue was whether the RFRA permitted the U.S. Department of Health and Human Services (HHS) to require that these corporations provide health insurance coverage for contraception that violated the sincerely held religious beliefs of the companies’ owners. The U.S. Supreme Court held that the regulations violated the RFRA, which prohibited the federal government from taking any action that substantially burdened the exercise of religion unless it constituted the least restrictive means of serving a compelling government interest. The Court rejected HHS’s argument that the owners of the companies forfeited all RFRA protection when they organized their businesses as corporations. The Court concluded that the challenged HHS regulations substantially burdened the exercise of religion because compliance was contrary to the owners’ religious objections to abortion and there was a heavy financial penalty for noncompliance. Assuming that the regulations served a compelling government interest, the Court found that they were not the least restrictive means of serving that interest because there were other ways to ensure that every woman had cost-free access to certain contraceptives.

**Outcome**

Decisions affirmed in part and reversed and remanded in part. 5-4 Decision; 1 Concurrence; 2 Dissents.


Reprinted with the permission of LexisNexis’
Act of 1993 (RFRA), 42 U.S.C.S. § 2000bb et seq., provides that government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability. 42 U.S.C.S. § 2000bb-1(a). The Act defines “government” to include any “department” or “agency” of the United States. 42 U.S.C.S. § 2000bb-2(1). If the government substantially burdens a person’s exercise of religion, under the Act that person is entitled to an exemption from the rule unless the government demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C.S. § 2000bb-1(b).

As enacted in 1993, the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C.S. § 2000bb et seq., applied to both the Federal Government and the States, but the constitutional authority invoked for regulating federal and state agencies differed. As applied to a federal agency, RFRA is based on the enumerated power that supports the particular agency’s work, but in attempting to regulate the States and their subdivisions, Congress relied on its power under U.S. Const. amend. 14, § 5 to enforce the First Amendment. In City of Boerne, however, the U.S. Supreme Court held that Congress had overstepped its § 5 authority because the stringent test RFRA demands far exceeded any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in Smith.


The Patient Protection and Affordable Care Act of 2010 (ACA) generally requires employers with 50 or more full-time employees to offer a group health plan or group health insurance coverage that provides minimum essential coverage. 26 U.S.C.S. § 5000A(f)(2); 26 U.S.C.S. §§ 4980H(a), (c)(2). Any covered employer that does not provide such coverage must pay a substantial price. Specifically, if a covered employer provides group health insurance but its plan fails to comply with ACA’s group-health-plan requirements, the employer may be required to pay $100 per day for each affected “individual.” 26 U.S.C.S. §§ 4980D(a)-(b). And if the employer decides to stop providing health insurance altogether and at least one full-time employee enrolls in a health plan and qualifies for a subsidy on one of the government-run ACA exchanges, the employer must pay $2,000 per year for each of its full-time employees. 26 U.S.C.S. §§ 4980H(a), (c)(1).

Unless an exception applies, the Patient Protection and Affordable Care Act of 2010 requires an employer’s group health plan or group-health-insurance coverage to furnish “preventive care and screenings” for women without “any cost sharing requirements. 42 U.S.C.S. § 300gg-13(a)(4).
Congress itself, however, did not specify what types of preventive care must be covered. Instead, Congress authorized the Health Resources and Services Administration, a component of Health Human Services, to make that important and sensitive decision.

Healthcare Law > Payment Systems > Insurance Coverage > General Overview

Public Health & Welfare Law > Healthcare > Maternity & Children

**HN6** The Health Resources and Services Administration promulgated the Women’s Preventive Services Guidelines. The Guidelines provide that nonexempt employers are generally required to provide coverage, without cost sharing for all Food and Drug Administration (FDA) approved contraceptive methods, sterilization procedures, and patient education and counseling. 77 Fed. Reg. 8725 (August 2011). Although many of the required, FDA-approved methods of contraception work by preventing the fertilization of an egg, four of those methods may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus.

Healthcare Law > Payment Systems > Insurance Coverage > General Overview

Public Health & Welfare Law > Healthcare > Maternity & Children

Tax Law > Federal Excise Taxes > General Overview

**HN7** Health and Human Services authorized the Health Resources and Services Administration (HRSA) to establish exemptions from the contraceptive mandate for “religious employers.” 45 C.F.R. § 147.131(a). That category encompasses churches, their integrated auxiliaries, and conventions or associations of churches, as well as the exclusively religious activities of any religious order. 45 C.F.R. § 147.131(a), 26 U.S.C.S. § 6033(a)(3)(A)(i), (iii). In its Guidelines, HRSA exempted these organizations from the requirement to cover contraceptive services.

Healthcare Law > Payment Systems > Insurance Coverage > General Overview

Public Health & Welfare Law > Healthcare > Maternity & Children

**HN8** Health and Human Services (HHS) has effectively exempted certain religious nonprofit organizations, described under HHS regulations as “eligible organizations,” from the contraceptive mandate. 45 C.F.R. § 147.131(b). An “eligible organization” means a nonprofit organization that holds itself out as a religious organization and opposes providing coverage for some or all of any contraceptive services required to be covered on account of religious objections. 45 C.F.R. § 147.131(b). To qualify for this accommodation, an employer must certify that it is such an organization. 45 C.F.R. § 147.131(b)(4). When a group-health-insurance issuer receives notice that one of its clients has invoked this provision, the issuer must then exclude contraceptive coverage from the employer’s plan and provide separate payments for contraceptive services for plan participants without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries. 45 C.F.R. § 147.131(c). Although this procedure requires the issuer to bear the cost of these services, HHS has determined that this obligation will not impose any net expense on insurers because its cost will be less than or equal to the cost savings resulting from the services. 78 Fed. Reg. 39877.

Civil Rights Law > Protection of Rights > Religious Freedom > Religious Freedom Restoration Act

**HN9** The Religious Freedom Restoration Act of 1993 prohibits the government from substantially burdening a person’s exercise of religion even if the burden results from a rule of general applicability unless the government demonstrates that application of the burden to the person — (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C.S. § 2000bb-1(a), (b).

Civil Rights Law > Protection of Rights > Religious Freedom > Religious Freedom Restoration Act

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

**HN10** The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C.S. § 2000bb et seq., was designed to provide very broad protection for religious liberty. By enacting RFRA, Congress went far beyond what the U.S. Supreme Court has held is constitutionally required.

Civil Rights Law > Protection of Rights > Religious Freedom > Religious Freedom Restoration Act

Governments > Legislation > Interpretation

**HN11** The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C.S. § 2000bb et seq., applies to “a person’s” exercise of religion, 42 U.S.C.S. §§ 2000bb-1(a), (b), and RFRA itself does not define the term “person.” Courts therefore look to the Dictionary Act, which they must consult in determining the meaning of any Act of

Reprinted with the permission of LexisNexis’
Congress, unless the context indicates otherwise. *1 U.S.C.S. § 1.* Under the Dictionary Act, the word “person” includes corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.

Governments > Legislation > Interpretation

**HN12** The term “person” sometimes encompasses artificial persons, as the Dictionary Act, *1 U.S.C.S. § 1,* instructs, and it sometimes is limited to natural persons. But no conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations. To give the same words a different meaning for each category would be to invent a statute rather than interpret one.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

**HN13** The “exercise of religion” involves not only belief and profession but the performance of, or abstention from, physical acts that are engaged in for religious reasons. Business practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within that definition. Thus, a law that operates so as to make the practice of religious beliefs more expensive in the context of business activities imposes a burden on the exercise of religion.

Business & Corporate Law > ... > Corporate Formation > Corporate Existence, Powers & Purpose > Valid Purposes

**HN14** Each American jurisdiction today either expressly or by implication authorizes corporations to be formed under its general corporation act for any lawful purpose or business.

Civil Rights Law > Protection of Rights > Religious Freedom > Religious Freedom Restoration Act

Governments > Legislation > Enactment

**HN15** Nothing in the text of Religious Freedom Restoration Act of 1993 (RFRA), *42 U.S.C.S. § 2000bb et seq.,* as originally enacted suggested that the statutory phrase “exercise of religion under the *First Amendment*” was meant to be tied to the U.S. Supreme Court’s pre-Smith interpretation of that Amendment. When first enacted, RFRA defined the “exercise of religion” to mean the exercise of religion under the *First Amendment* — not the exercise of religion as recognized only by then-existing Supreme Court precedents. *42 U.S.C.S. § 2000bb-2(4).* When Congress wants to link the meaning of a statutory provision to a body of the Supreme Court’s case law, it knows how to do so.

Civil Rights Law > Protection of Rights > Religious Freedom > Religious Freedom Restoration Act


Civil Rights Law > Protection of Rights > Religious Freedom > Religious Freedom Restoration Act


Civil Procedure > US Supreme Court Review > General Overview

**HN18** The U.S. Supreme Court does not generally entertain arguments that were not raised below and are not advanced in the Supreme Court by any party.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

**HN19** Repeatedly and in many different contexts, the U.S. Supreme Court has warned that courts must not presume to determine the plausibility of a religious claim.

Civil Rights Law > Protection of Rights > Religious Freedom > Religious Freedom Restoration Act

**HN20** The Religious Freedom Restoration Act of 1993, *42 U.S.C.S. § 2000bb et seq.,* 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 *42 U.S.C.S. § 2000bb-1(b).* This requires courts to look beyond broadly formulated interests and to scrutinize the asserted harm of granting specific exemptions to particular religious claimants.

Civil Rights Law > Protection of Rights > Religious Freedom > Religious Freedom Restoration Act

**HN21** The least-restrictive-means of furthering a compelling government interest standard is exceptionally demanding. *42 U.S.C.S. §§ 2000bb-1(a), (b)* requires the government to demonstrate that application of a substantial burden to the person is the least restrictive means of furthering a compelling governmental interest.
In applying the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C.S. § 2000bb et seq., courts must take adequate account of the burdens a requested accommodation may impose on non-beneficiaries. That consideration will often inform the analysis of the government’s compelling interest and the availability of a less restrictive means of advancing that interest. But it could not reasonably be maintained that any burden on religious exercise, no matter how onerous and no matter how readily the government interest could be achieved through alternative means, is permissible under RFRA so long as the relevant legal obligation requires the religious adherent to confer a benefit on third parties.

**Lawyers’ Edition Display**

**Decision**

[**675**] As applied to closely held corporations, HHS regulations--interpreting Patient Protection and Affordable Care Act of 2010 to require specified employers’ health plans to cover certain contraceptive methods--held to violate Religious Freedom Restoration Act of 1993 (42 U.S.C.S. § 2000bb et seq.).

**Summary**

**Procedural posture:** Plaintiff owners of closely held corporations with sincere religious beliefs about contraception sued arguing that regulations requiring them to provide health insurance coverage for certain contraception violated the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C.S. § 2000bb et seq. The U.S. Court of Appeals for the Third and Tenth Circuits rendered opposite rulings regarding these claims. The U.S. Supreme Court granted certiorari.

**Overview:** The issue was whether the RFRA permitted the U.S. Department of Health and Human Services (HHS) to require that these corporations provide health insurance coverage for certain contraception that violated the sincerely held religious beliefs of the companies’ owners. The U.S. Supreme Court held that the regulations violated the RFRA, which prohibited the federal government from taking any action that substantially burdened the exercise of religion unless it constituted the least restrictive means of serving a compelling government interest. The court rejected HHS’s argument that the owners of the companies forfeited all RFRA protection when they organized their businesses as corporations. The court concluded that the challenged HHS regulations substantially burdened the exercise of religion because compliance was contrary to the owners’ religious objections to abortion and there was a heavy financial penalty for noncompliance. Assuming that the regulations served a compelling government interest, the court found that they were not [**676**] the least restrictive means of serving that interest because there were other ways to ensure that every woman had cost-free access to certain contraceptives.

**Outcome:** Decisions affirmed in part and reversed and remanded in part. 5-4 Decision; 1 Concurrence; 2 Dissents.

**Headnotes**

**CIVIL RIGHTS §22 > RELIGIOUS FREEDOM RESTORATION ACT > Headnote:**

[**675**] In order to ensure broad protection for religious liberty, the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C.S. § 2000bb et seq., provides that government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability. 42 U.S.C.S. § 2000bb-1(a). The Act defines “government” to include any “department” or “agency” of the United States. 42 U.S.C.S. § 2000bb-2(1). If the government substantially burdens a person’s exercise of religion, under the Act that person is entitled to an exemption from the rule unless the government demonstrates that application of the burden to the person--(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C.S. § 2000bb-1(b). (Alito, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

[**676**] As enacted in 1993, the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C.S. § 2000bb et seq., applied to both the Federal Government and the states, but the constitutional authority invoked for regulating federal and state agencies differed. As applied to a federal agency, RFRA is based on the enumerated power that supports the particular agency’s work, but in attempting to regulate the states and their subdivisions, Congress relied on its power
under *U.S. Const. Amend. 14, § 5* to enforce the First Amendment. In City of Boerne, however, the U.S. Supreme Court held that Congress had overstepped its § 5 authority because the stringent test RFRA demands far exceeded any pattern or practice of unconstitutional conduct under the free exercise clause as interpreted in Smith. (Alito, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

**CIVIL RIGHTS §22 > CONGRESSIONAL POWERS -- RELIGIOUS FREEDOM > Headnote:**

*LeDHN*[3] [3]


**INSURANCE §306 > GROUP HEALTH -- EMPLOYER PLAN > Headnote:**

*LeDHN*[4] [4]

The Patient Protection and Affordable Care Act of 2010 (ACA) generally requires employers with 50 or more full-time employees to offer a group health plan or group health insurance coverage that provides minimum essential coverage. *26 U.S.C.S. § 5000A(f)(2); 26 U.S.C.S. §§4980H(a), (c)(2).* Any covered employer that does not provide such coverage must pay a substantial price. Specifically, if a covered employer provides group health insurance but its plan fails to comply with ACA’s group-health-plan requirements, the employer may be required to pay $100 per day for each affected “individual.”

*26 U.S.C.S. §§4980D(a)-(b).* And if the employer decides to stop providing health insurance altogether and at least one full-time employee enrolls in a health plan and qualifies for a subsidy on one of the government-run ACA exchanges, the employer must pay $2,000 per year for each of its full-time employees. *26 U.S.C.S. §§4980H(a), (c)(1).* (Alito, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

**INSURANCE §306 > EMPLOYER HEALTH PLAN -- CONTRACEPTION > Headnote:**

*LeDHN*[5] [5]

Unless an exception applies, the Patient Protection and Affordable Care Act of 2010 requires an employer’s group health plan or group-health-insurance coverage to furnish “preventive care and screenings” for women without “any cost sharing requirements. *42 U.S.C.S. § 300gg-13(a)(4).* Congress itself, however, did not specify what types of preventive care must be covered. Instead, Congress authorized the Health Resources and Services Administration, a component of Health and Human Services, to make that important and sensitive decision. (Alito, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

**INSURANCE §306 > EMPLOYER HEALTH PLAN -- CONTRACEPTION -- EXCEPTIONS > Headnote:**

*LeDHN*[6] [6]

The Health Resources and Services Administration promulgated the Women’s Preventive Services Guidelines. The Guidelines provide that nonexempt employers are generally required to provide coverage, without cost sharing for all Food and Drug Administration (FDA) approved contraceptive methods, sterilization procedures, and patient education and counseling. *77 Fed. Reg. 8725 (August 2011).* Although many of the required, FDA-approved methods of contraception work by preventing the fertilization of an egg, four of those methods may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus. (Alito, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

**INSURANCE §306 > EMPLOYER HEALTH PLAN -- CONTRACEPTION -- EXCEPTIONS > Headnote:**

*LeDHN*[7] [7]

Health and Human Services authorized the Health Resources and Services Administration (HRSA) to establish exemptions
from the contraceptive mandate for “religious employers.” 45 C.F.R. § 147.131(a). That category encompasses churches, their integrated auxiliaries, and conventions or associations of churches, as well as the exclusively religious activities of any religious order. 45 C.F.R. § 147.131(a). 26 U.S.C.S. § 6033(a)(3)(A)(i), (iii). In its Guidelines, HRSA exempted these organizations from the requirement to cover contraceptive services. (Alito, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

INSURANCE §306 > EMPLOYER HEALTH PLANS -- CONTRACEPTION -- RELIGIOUS NONPROFITS > Headnote:

LEdHN[8] [8]

Health and Human Services (HHS) has effectively exempted certain religious nonprofit organizations, described under HHS regulations as “eligible organizations,” from the contraceptive mandate. 45 C.F.R. § 147.131(b). An “eligible organization” means a nonprofit organization that holds itself out as a religious organization and opposes providing coverage for some or all of any contraceptive services required to be covered on account of religious objections. 45 C.F.R. § 147.131(b). To qualify for this accommodation, an employer must certify that it is such an organization. 45 C.F.R. § 147.131(b)(4). When a group-health-insurance issuer receives notice that one of its clients has invoked this provision, the issuer must then exclude contraceptive coverage from the employer’s plan and provide separate payments for contraceptive services for plan participants without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries. 45 C.F.R. § 147.131(c). Although this procedure requires the issuer to bear the cost of these services, HHS has determined that this obligation will not impose any net expense on issuers because its cost will be less than or equal to the cost savings resulting from the services. 78 Fed. Reg. 39877. (Alito, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

CIVIL RIGHTS §22 > RELIGIOUS FREEDOM RESTORATION ACT > Headnote:

LEdHN[10] [10]

The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C.S. § 2000bb et seq., was designed to provide very broad protection for religious liberty. By enacting RFRA, Congress went far beyond what the U.S. Supreme Court has held is constitutionally required. (Alito, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

CIVIL RIGHTS §22STATUTES §179.5 > RELIGIOUS FREEDOM RESTORATION ACT -- COVERED “PERSON” > Headnote:


STATUTES §179.5 > PERSON -- SCOPE OF TERM > Headnote:

LEdHN[12] [12]

The term “person” sometimes encompasses artificial persons, as the Dictionary Act, 1 U.S.C.S. § 1, instructs, and it sometimes is limited to natural persons. But no conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations. To give the same words a different meaning for each category would be to invent a statute rather than interpret one. (Alito, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

CIVIL RIGHTS §7.2 > EXERCISE OF RELIGION -- BUSINESS ACTIVITIES > Headnote:
The “exercise of religion” involves not only belief and profession but the performance of, or abstention from, physical acts that are engaged in for religious reasons. Business practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within that definition. Thus, a law that operates so as to make the practice of religious beliefs more expensive in the context of business activities imposes a burden on the exercise of religion. (Alito, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

CIVIL RIGHTS §22 > RELIGIOUS FREEDOM -- CORPORATION > Headnote:


CIVIL RIGHTS §22 > RELIGIOUS FREEDOM -- CORPORATIONS §5 > FORMATION > Headnote:

Each American jurisdiction today either expressly or by implication authorizes corporations to be formed under its general corporation act for any lawful purpose or business. (Alito, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

STATUTES §87 > CONSTRUCTION -- JUDICIAL PRECEDENTS > Headnote:

Nothing in the text of Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C.S. § 2000bb et seq., as originally enacted suggested that the statutory phrase “exercise of religion under the First Amendment” was meant to be tied to the U.S. Supreme Court’s pre-Smith interpretation of that Amendment. When first enacted, RFRA defined the “exercise of religion” to mean the exercise of religion under the First Amendment—not the exercise of religion as recognized only by then-existing Supreme Court precedents. 42 U.S.C.S. § 2000bb-2(d). When Congress wants to link the meaning of a statutory provision to a body of the Supreme Court’s case law, it knows how to do so. (Alito, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

CIVIL RIGHTS §22 > BURDEN ON RELIGION -- STATUTORY EXEMPTION > Headnote:

To qualify for Religious Freedom Restoration Act of 1993, 42 U.S.C.S. § 2000bb et seq., protection, an asserted belief must be “sincere”; a corporation’s pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail. (Alito, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

CIVIL RIGHTS §22 > RELIGIOUS FREEDOM -- CORPORATION > Headnote:


CIVIL RIGHTS §22 > RELIGIOUS FREEDOM -- CORPORATIONS §5 > FORMATION > Headnote:

Each American jurisdiction today either expressly or by implication authorizes corporations to be formed under its general corporation act for any lawful purpose or business. (Alito, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

STATUTES §87 > CONSTRUCTION -- JUDICIAL PRECEDENTS > Headnote:

Nothing in the text of Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C.S. § 2000bb et seq., as originally enacted suggested that the statutory phrase “exercise of religion under the First Amendment” was meant to be tied to the U.S. Supreme Court’s pre-Smith interpretation of that Amendment. When first enacted, RFRA defined the “exercise of religion” to mean the exercise of religion under the First Amendment—not the exercise of religion as recognized only by then-existing Supreme Court precedents. 42 U.S.C.S. § 2000bb-2(d). When Congress wants to link the meaning of a statutory provision to a body of the Supreme Court’s case law, it knows how to do so. (Alito, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

CIVIL RIGHTS §22 > BURDEN ON RELIGION -- STATUTORY EXEMPTION > Headnote:

To qualify for Religious Freedom Restoration Act of 1993, 42 U.S.C.S. § 2000bb et seq., protection, an asserted belief must be “sincere”; a corporation’s pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail. (Alito, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)
The least-restrictive-means of furthering a compelling government interest standard is exceptionally demanding. 42 U.S.C.S. §§ 2000bb-1(a), (b) requires the government to demonstrate that application of a substantial burden to the person is the least restrictive means of furthering a compelling governmental interest. (Alito, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

CIVIL RIGHTS §22 > RELIGIOUS FREEDOM – BURDENS

LedHN[22] [22]

In applying the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C.S. § 2000bb et seq., courts must take adequate account of the burdens a requested accommodation may impose on non-beneficiaries. That consideration will often inform the analysis of the government’s compelling interest and the availability of a less restrictive means of advancing that interest. But it could not reasonably be maintained that any burden on religious exercise, no matter how onerous and no matter how readily the government interest could be achieved through alternative means, is permissible under RFRA so long as the relevant legal obligation requires the religious adherent to confer a benefit on third parties. (Alito, J., joined by Roberts, Ch. J., and Scalia, Kennedy, and Thomas, JJ.)

Syllabus

The Religious Freedom Restoration Act of 1993 (RFRA) prohibits the “Government [from] substantially burden[ing] a person’s exercise of religion even if the burden results from a rule of general applicability” unless the Government “demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. §§2000bb-1(a), (b). As amended by the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), RFRA covers “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” §2000cc-5(7)(A).

At issue here are regulations promulgated by the Department of Health and Human Services (HHS) under the Patient Protection and Affordable Care Act of 2010 (ACA), which, as relevant here, requires [*682] specified employers’ group health plans to furnish “preventive care and screenings” for women without “any cost sharing requirements,” 42 U.S.C. §300gg-13(a)(4). [*682] Congress did not specify what types of preventive care must be covered; it authorized the Health Resources and Services Administration, a component of HHS, to decide. Ibid. Nonexempt employers are generally required to provide coverage for the 20 contraceptive methods approved by the Food and Drug Administration, including the 4 that may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus. Religious employers, such as churches, are exempt from this contraceptive mandate. HHS has also effectively exempted religious nonprofit organizations with religious objections to providing coverage for contraceptive services. Under this accommodation, the insurance issuer must exclude contraceptive coverage from the employer’s plan and provide plan participants with separate payments for contraceptive services without imposing any cost-sharing requirements on the employer, its insurance plan, or its employee beneficiaries.

In these cases, the owners of three closely held for-profit corporations have sincere Christian beliefs that life begins at conception and that it would violate their religion to facilitate access to contraceptive [*3] drugs or devices that operate after that point. In separate actions, they sued HHS and other federal officials and agencies (collectively HHS) under RFRA and the Free Exercise Clause, seeking to enjoin application of the contraceptive mandate insofar as it requires them to provide health coverage for the four objectionable contraceptives. In No. 13-356, the District Court denied the Hahns and their company—Conestoga Wood Specialties—a preliminary injunction. Affirming, the Third Circuit held that a for-profit corporation could not “engage in religious exercise” under RFRA or the First Amendment, and that the mandate imposed no requirements on the Hahns in their personal capacity. In No. 13-354, the Greens, their children, and their companies—Hobby Lobby Stores and Mardel—were also denied a preliminary injunction, but the Tenth Circuit reversed. It held that the Greens’ businesses are “persons” under RFRA, and that the corporations had established a likelihood of success on their RFRA claim because the contraceptive mandate substantially burdened their exercise of religion and HHS had not demonstrated a compelling interest in enforcing the mandate against them; in the alternative, the [*4] court held that HHS had not proved that the mandate was the “least restrictive means” of furthering a compelling governmental interest.

Held: As applied to closely held corporations, the HHS regulations imposing the contraceptive mandate violate RFRA. Pp. – . 189 L. Ed. 2d, at 694-714.

(a) RFRA applies to regulations that govern the activities of closely held for-profit corporations like Conestoga, Hobby

(1) HHS argues that the companies cannot sue because they are for-profit corporations, and that the owners cannot sue because the regulations apply only to the companies, but that would leave merchants with a difficult choice: give up the right to seek judicial protection of their religious liberty or forgo the benefits of operating RFRA’s text shows that Congress designed the statute to provide very broad protection for religious liberty and did not intend to put merchants to such a choice. It employed the familiar legal fiction of including corporations within RFRA’s definition of “persons,” but the purpose of extending rights to corporations is to protect the rights of people associated with the corporation, including shareholders, officers, and employees. Protecting [***683] the free-exercise rights of closely held corporations thus protects the religious liberty of the humans who own and control them. *Pp. ___ - ___, 189 L. Ed. 2d, at 694-696.*

(2) HHS and the dissent make several unpersuasive arguments. *Pp. ___ - ___, 189 L. Ed. 2d, at 696-703.*

(i) Nothing in RFRA suggests a congressional intent to depart from the Dictionary Act definition of “person,” which “include[s] corporations, . . . as well as individuals.” 1 U.S.C. §1. The Court has entertained RFRA and free-exercise claims brought by nonprofit corporations. See, e.g., *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 126 S. Ct. 1211, 163 L. Ed. 2d 1017. And HHS’s concession that a nonprofit corporation can be a “person” under RFRA effectively dispatches any argument that the term does not reach for-profit corporations; no conceivable definition of “person” includes natural persons and nonprofit corporations, but not for-profit corporations. *Pp. ___ - ___, 189 L. Ed. 2d, at 696-697.*

(ii) HHS and the dissent nonetheless argue that RFRA does not cover Conestoga, Hobby Lobby, and Mardel because they cannot “exercise . . . religion.” They offer no persuasive explanation for this conclusion. The corporate form alone cannot explain it because RFRA indisputably protects nonprofit corporations. And the profit-making [***684] objective of the corporations cannot explain it because the Court has entertained the free-exercise claims of individuals who were attempting to make a profit as retail merchants. *Braunfeld v. Brown*, 366 U.S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563. Business practices compelled or limited by the tenets of a religious doctrine fall comfortably within the understanding of the “exercise of religion” that this Court set out in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 877, 110 S. Ct. 1595, 108 L. Ed. 2d 876. Any suggestion that for-profit corporations are incapable of exercising religion because their purpose is simply to make money flies in the face of modern corporate law. States, including those in which the plaintiff corporations were incorporated, authorize corporations to pursue any lawful purpose or business, including the pursuit of profit in conformity with the owners’ religious principles. *Pp. ___ - ___, 189 L. Ed. 2d, at 697-700.*

(iii) Also flawed is the claim that RFRA offers no protection because it only codified pre-Smith *Free Exercise Clause* precedents, none of which squarely recognized free-exercise rights for for-profit corporations. First, nothing in RFRA as originally enacted suggested that its definition of “exercise of religion” was [***685] meant to be tied to pre-Smith interpretations of the *First Amendment*. Second, if RFRA’s original text were not clear enough, the RLUIPA amendment surely dispels any doubt that Congress intended to separate the definition [***686] of the phrase from that in *First Amendment* case law. Third, the pre-Smith case of *Gallagher v. Crown Kosher Super Market of Mass., Inc.*, 366 U.S. 617, 81 S. Ct. 1122, 6 L. Ed. 2d 536, suggests, if anything, that for-profit corporations can exercise religion. Finally, the results would be absurd if RFRA, a law enacted to provide very broad protection for religious liberty, merely restored this Court’s pre-Smith decisions in ossified form and restricted RFRA claims to plaintiffs who fell within a category of plaintiffs whose claims the Court had recognized before *Smith*. *Pp. ___ - ___, 189 L. Ed. 2d, at 700-702.*

(3) Finally, HHS contends that Congress could not have wanted RFRA to apply to for-profit corporations because of the difficulty of ascertaining the “beliefs” of large, publicly traded corporations, but HHS has not pointed to any example of a publicly traded corporation asserting RFRA rights, and numerous practical restraints would likely prevent that from occurring. HHS has also provided no evidence that the purported problem [***687] of determining the sincerity of an asserted religious belief moved Congress to exclude for-profit corporations from RFRA’s protection. That disputes among the owners of corporations might arise is not a problem unique to this context. State corporate law provides a ready means for resolving any conflicts by, for example, dictating how a corporation can establish its governing structure. Courts will turn to that structure and the underlying state law in resolving disputes. *Pp. ___ - ___, 189 L. Ed. 2d, at 702-703.*

(b) HHS’s contraceptive mandate substantially burdens the exercise of religion. *Pp. ___ - ___, 189 L. Ed. 2d, at 703-707.*
(1) It requires the Hahns and Greens to engage in conduct that seriously violates their sincere religious belief that life begins at conception. If they and their companies refuse to provide contraceptive coverage, they face severe economic consequences: about $475 million per year for Hobby Lobby, $33 million per year for Conestoga, and $15 million per year for Mardel. And if they drop coverage altogether, they could face penalties of roughly $26 million for Hobby Lobby, $1.8 million for Conestoga, and $800,000 for Mardel. Pp. ___ - ___, 189 L. Ed. 2d, at 704-705.

(2) Amici supporting HHS argue that the $2,000 per-employee penalty is less than the average cost of providing insurance, and therefore that dropping insurance coverage eliminates any substantial burden imposed by the mandate. HHS has never argued this and the Court does not know its position with respect to the argument. But even if the Court reached the argument, it would find it unpersuasive: It ignores the fact that the plaintiffs have religious reasons for providing health-insurance coverage for their employees, and it is far from clear that the net cost to the companies of providing insurance is more than the cost of dropping their insurance plans and paying the ACA penalty. Pp. ___ - ___, 189 L. Ed. 2d, at 704-705.

(3) HHS argues that the connection between what the objecting parties must do and the end that they find to be morally wrong is too attenuated because it is the employee who will choose the coverage and contraceptive method she uses. But RFRA’s question is whether the mandate imposes a substantial burden on the objecting parties’ ability to conduct business in accordance with their religious beliefs. The belief of the Hahns and Greens implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is immoral for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another. It is not for the Court to say that the religious beliefs of the plaintiffs are mistaken or unreasonable. In fact, this Court considered and rejected a nearly identical argument in Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707, 101 S. Ct. 1425, 67 L. Ed. 2d 624. The Court’s “narrow function . . . is to determine” whether the plaintiffs’ asserted religious belief reflects “an honest conviction,” id. at 716, 101 S. Ct. 1425, 67 L. Ed. 2d 624, and there is no dispute here that it does. Tilton v. Richardson, 403 U.S. 672, 689, 91 S. Ct. 2091, 29 L. Ed. 2d 790; and Board of Ed. of Central School Dist. No. 1 v. Allen, 392 U.S. 236, 248-249, 88 S. Ct. 1923, 20 L. Ed. 2d 1060, distinguished. Pp. ___ - ___, 189 L. Ed. 2d, at 705-707.

(c) The Court assumes that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is a compelling governmental interest, but the Government has failed to show that the contraceptive mandate is the least restrictive means of furthering that interest. Pp. ___ - ___, 189 L. Ed. 2d, at 707-714.

(1) The Court assumes that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA. Pp. ___ - ___, 189 L. Ed. 2d, at 708-709.

(2) The Government has failed to satisfy RFRA’s least-restrictive-means standard. HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion. The Government could, e.g., assume the cost of providing the four contraceptives to women unable to obtain coverage due to their employers’ religious objections. Or it could extend the accommodation that HHS has already established for religious nonprofit organizations to non-profit employers with religious objections to the contraceptive mandate. That accommodation does not impinge on the plaintiffs’ religious beliefs that providing insurance coverage for the contraceptives at issue here violates their religion and it still serves HHS’s stated interests. Pp. ___ - ___, 189 L. Ed. 2d, at 709-711.

(3) This decision concerns only the contraceptive mandate and should not be understood to hold that all insurance-coverage mandates, e.g., for vaccinations or blood transfusions, must necessarily fall if they conflict with an employer’s religious beliefs. Nor does it provide a shield for employers who might cloak illegal discrimination as a religious practice. United States v. Lee, 455 U.S. 252, 102 S. Ct. 1051, 71 L. Ed. 2d 127, which upheld the payment of Social Security taxes despite an employer’s religious objection, is not analogous. It turned primarily on the special problems associated with a national system of taxation; and if Lee were a RFRA case, the fundamental point would still be that there is no less restrictive alternative to the categorical requirement to pay taxes. Here, there is an alternative to the contraceptive mandate. Pp. ___ - ___, 189 L. Ed. 2d, at 711-714.

No. 13-354, 723 F. 3d 1114, affirmed; No. 13-356, 724 F. 3d 377, reversed and remanded.

Counsel: Paul D. Clement argued the cause for private parties.

Donald B. Verrilli, Jr. argued the cause for the federal government.

Judges: Alito, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Kennedy, and Thomas, JJ.,

Opinion by: ALITO

Opinion

[**2759] Justice Alito delivered the opinion of the Court.

We must decide in these cases whether the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U.S.C. §2000bb et seq., permits the United States Department of Health and Human Services (HHS) to demand that three closely held corporations provide health-insurance coverage for methods [***13] of contraception that violate the sincerely held religious beliefs of the companies’ owners. We hold that the regulations that impose this obligation violate RFRA, which prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest.

In holding that the HHS mandate is unlawful, we reject HHS’s argument that the owners of the companies forfeited all RFRA protection when they decided to organize their businesses as corporations rather than sole proprietorships or general partnerships. The plain terms of RFRA make it perfectly clear that Congress did not discriminate in this way against men and women who wish to run their businesses as for-profit corporations in the manner required by their religious beliefs.

Since RFRA applies in these cases, we must decide whether the challenged HHS regulations substantially burden the exercise of religion, and we hold that they do. The owners of the businesses have religious objections to abortion, and according to their religious beliefs the four contraceptive methods at issue are abortifacients. If the [***14] owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price—as much as $1.3 million per day, or about $475 million per year, in the case of one of the companies. If these consequences do not amount to a substantial burden, it is hard to see what would.

Under RFRA, a Government action that imposes a substantial burden on religious exercise must serve a compelling government interest, and we assume that the HHS regulations satisfy this requirement. But in order for the HHS mandate to be sustained, it must also constitute the least restrictive means of serving that interest, and the mandate plainly fails that test. There are other ways in which Congress or HHS could equally ensure that every woman has cost-free access to the particular contraceptives at issue here and, indeed, to all FDA-approved contraceptives.

In fact, HHS has already devised and implemented a system that seeks to respect the religious liberty of religious [***687] nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners [***15] have no religious objections to providing such coverage. The employees of these religious nonprofit corporations still have access to insurance coverage without cost sharing for all FDA-approved contraceptives; and according to HHS, this system imposes no net economic burden on the insurance companies that are required to provide or secure the coverage.

Although HHS has made this system available to religious nonprofits that have religious objections to the contraceptive mandate, HHS has provided no reason why the same system cannot be made available when the owners of for-profit corporations have similar religious objections. We therefore conclude that this system constitutes an alternative that achieves all of the Government’s aims while providing greater respect for religious liberty. And under RFRA, that conclusion means that enforcement of the [***2760] HHS contraceptive mandate against the objecting parties in these cases is unlawful.

As this description of our reasoning shows, our holding is very specific. We do not hold, as the principal dissent alleges, that for-profit corporations and other commercial enterprises can “opt out of any law (saving only tax laws) they judge incompatible [***16] with their sincerely held religious beliefs.” Post, at ___, 189 L. Ed. 2d, at 716 (opinion of Ginsburg, J.). Nor do we hold, as the dissent implies, that such corporations have free rein to take steps that impose “disadvantages . . . on others” or that require “the general public [to] pick up the tab.” Post, at ___, 189 L. Ed. 2d, at 716. And we certainly do not hold or suggest that “RFRA demands accommodation of a for-profit corporation’s religious beliefs no matter the impact that accommodation may have on . . . thousands of women employed by Hobby Lobby.” Post, at ___, 189 L. Ed. 2d, at
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.

I

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, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990); Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 876 (1963); Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972). In determining whether challenged government actions violated the Free Exercise Clause of the First Amendment, those decisions used a balancing test that took into account whether the challenged action imposed a substantial burden on the practice of religion, [*688] and if it did, whether it was needed to serve a compelling government interest. Applying this test, the Court held in Sherbert that an employee who was fired for refusing to work on her Sabbath could not be denied unemployment benefits. 374 U.S., at 408-409, 83 S. Ct. 1790, 10 L. Ed. 2d 965. And in Yoder, the Court held that Amish children could not be required to comply with a state law demanding that they remain in school until the age of 16 even though their religion required them to focus on uniquely Amish values and beliefs during their formative adolescent years. 406 U.S., at 210-211, 234-236, 92 S. Ct. 1526, 32 L. Ed. 2d 15.

In Smith, however, the Court rejected the "balancing test set forth in Sherbert." 494 U.S., at 883, 110 S. Ct. 1595, 108 L. Ed. 2d 876. Smith concerned two members of the Native American Church who were fired for [*18] ingesting peyote for sacramental purposes. When they sought unemployment benefits, the State of Oregon rejected their claims on the ground that consumption of peyote was a crime, but the Oregon Supreme Court, applying the Sherbert test, held that the denial of benefits violated the Free Exercise Clause. 494 U.S., at 875, 110 S. Ct. 1595, 108 L. Ed. 2d 876.

This Court then reversed, observing that use of the Sherbert test whenever a person objected on religious grounds to the enforcement of a generally applicable law "would open the prospect of constitutionally [*2761] required religious exemptions from civic obligations of almost every conceivable kind." 494 U.S., at 888, 110 S. Ct. 1595, 108 L. Ed. 2d 876. The Court therefore held that, under the First Amendment, "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." City of Boerne v. Flores, 521 U.S. 507, 514, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997).

Congress responded to Smith by enacting RFRA. "[L]aws [that are] 'neutral' toward religion," Congress found, "may burden religious exercise as surely as laws intended to interfere with religious exercise." 42 U.S.C. §2000bb(a)(2); see also §2000bb(a)(4). In order to ensure broad protection for religious liberty, [*19] RFRA provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." §2000bb-1(a). If the Government substantially burdens a person's exercise of religion, under the Act that person is entitled to an exemption from the rule unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." §2000bb-1(b). As enacted in 1993, RFRA applied to both the Federal Government [*18] and the States, but the constitutional [*20] authority invoked for regulating federal and state agencies differed. As applied to a federal agency, RFRA is based on the enumerated power that

---

1 See also post, at ___, 189 L. Ed. 2d at 720 (“The exemption sought by Hobby Lobby and Conestoga . . . would deny [their employees] access to contraceptive coverage that the ACA would otherwise secure”)

2 The Act defines “government” to include any “department” or “agency” of the United States. §2000bb-2(1).

3 In City of Boerne v. Flores, 521 U.S., 507, 117 S. Ct. 2157, 138 L. Ed, 2d 624 (1997), we wrote that RFRA’s "least restrictive means requirement was not used in the pre-Smith jurisprudence RFRA purported to codify." Id., at 509, 117 S. Ct. 2157, 138 L. Ed, 2d 624. On this understanding of our pre-Smith cases, RFRA did more than merely restore the balancing test used in the Sherbert line of cases; it provided even broader protection for religious liberty than was available under those decisions.
supports the particular agency’s work, 4 but in attempting to regulate the States and their subdivisions, Congress relied on its power under Section 5 of the Fourteenth Amendment to enforce the First Amendment. 521 U.S., at 516-517, 117 S. Ct. 2157, 138 L. Ed. 2d 624. In City of Boerne, however, we held that Congress had overstepped its Section 5 authority because “[t]he stringent test RFRA demands” “far exceed[ed] any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in Smith.” Id., at 533-53, 117 S. Ct. 2157, 138 L. Ed. 2d 624.

See also id., at 532, 117 S. Ct. 2157, 138 L. Ed. 2d 624.


And, what is **[2761] most relevant for present purposes, RLUIPA amended RFRA’s definition of the “exercise of religion.” See §2000bb-2(4) (importing RLUIPA definition). Before RLUIPA, RFRA’s definition made reference to the First Amendment. See §2000bb-2(4) (1994 ed.) (defining “exercise of religion” as “the exercise of religion under the First Amendment”). In RLUIPA, in an obvious *[2762] effort to effect a complete separation from First Amendment case law, Congress deleted the reference to the First Amendment and defined the “exercise of religion” to include “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” §2000cc-5(7)(A).

And Congress mandated that this concept “be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.” §2000cc-3(g). 5

B

At issue in these cases are HHS regulations promulgated under the Patient Protection and Affordable Care Act of 2010 (ACA), 124 Stat. 119. HN4 LEdHN

[4] ACA generally requires employers with 50 or more full-time employees to offer “a group health plan or group health insurance coverage” that provides “minimum essential coverage.” 26 U.S.C. §5000A(f)(2); §§4980H(a), (c)(2).

Any covered employer that does not provide such coverage must pay a substantial price. Specifically, if a covered employer provides group health insurance but its plan fails to comply with ACA’s group-health-plan requirements, the employer may be required [**690] to pay $100 per day for each affected “individual.” §§4980D(a)-(b). And if the employer decides to stop providing health insurance altogether and at least one full-time employee enrolls in a health plan and qualifies for a subsidy on one of the government-run ACA exchanges, the employer must pay $2,000 per [***23] year for each of its full-time employees. §§4980H(a), (c)(1).

HN5 LEdHN

[5] Unless an exception applies, ACA requires an employer’s group health plan or group-health-insurance coverage to furnish “preventive care and screenings” for women without “any cost sharing requirements.” 42 U.S.C. §300gg-13(a)(4). Congress itself, however, did not specify what types of preventive care must be covered. Instead, Congress authorized the Health Resources and Services Administration (HRSA), a component of HHS, to make that important and sensitive decision. Ibid. The HRSA in turn consulted the Institute of Medicine, a nonprofit group of volunteer advisers, in determining which preventive services to require. See 77 Fed. Reg. 8725-8726 (2012).

In August 2011, based on the Institute’s recommendations, HN6 LEdHN

[6] the HRSA promulgated the Women’s Preventive Services Guidelines. See id., at 8725-8726, and n. 1; online at http://hrsa.gov/womensguidelines (all Internet materials as visited June 26, 2014, and available in Clerk of Court’s case file). The Guidelines provide that nonexempt employers are generally required to provide “coverage, without cost sharing” for “[a]ll Food and Drug Administration [(FDA)] approved contraceptive [***24] methods, sterilization procedures, and patient education and counseling.” 77 Fed. Reg. 8725 (internal quotation marks omitted). Although many of the required, FDA-approved methods of contraception work by preventing the fertilization of an egg, four of those methods (those specifically at issue in these cases) may have the effect of preventing an already fertilized egg from [*2763] developing any further by inhibiting its attachment to the uterus. See

---

4 See, e.g., Hankins v. Lyght, 441 F. 3d 96, 108 (CA2 2006); Guam v. Guerrero, 290 F. 3d 1210, 1220 (CA9 2002).

5 The principal dissent appears to contend that this rule of construction should apply only when defining the “exercise of religion” in an RLUIPA case, but not in a RFRA case. See post, at ___, n. 10, 189 L. Ed. 2d, at 721. That argument is plainly wrong. Under this rule of construction, the phrase “exercise of religion,” as it appears in RLUIPA, must be interpreted [***22] broadly, and RFRA states that the same phrase, as used in RFRA, means “religious exercis[e] as defined in [RLUIPA].” 42 U.S.C. §2000bb-2(4). It necessarily follows that the “exercise of religion” under RFRA must be given the same broad meaning that applies under RLUIPA.
In its Guidelines, HRSA exempted these organizations from the requirement to cover contraceptive services. See http://hrsa.gov/womensguidelines.

In addition, HHS has effectively exempted certain religious nonprofit organizations, described under HHS regulations as “eligible organizations,” from the contraceptive mandate. See 45 CFR §147.131(b); 78 Fed. Reg. 39874 (2013). An “eligible organization” means a nonprofit organization that “holds itself out as a religious organization” and “opposes providing coverage for some or all of any contraceptive services required to be covered . . . on account of religious objections.” 45 CFR §147.131(b). To qualify for this accommodation, an employer must certify that it is such an organization. §147.131(b)(4). When a group-health-insurance issuer receives notice that one of its clients has invoked this provision, the issuer must then exclude contraceptive coverage from the employer’s plan and provide separate payments for contraceptive services for plan participants without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries. §147.131(c). Although this procedure requires the issuer to bear the cost of these services, HHS has determined that this obligation will not impose any net expense on issuers because its cost will be less than or equal to the cost savings resulting from the services. 78 Fed. Reg. 39877.

In addition to these exemptions for religious organizations, ACA exempts a great many employers from most of its coverage requirements. Employers providing “grandfathered health plans”—those that existed prior to March 23, 2010, and that have not made specified changes after that date—need not comply with many of the Act’s requirements, including the contraceptive mandate. 42 U.S.C. §§18011(a), (e). And employers with fewer than 50 employees are not required to provide health insurance at all. 26 U.S.C. §4980H(c)(2).

All told, the contraceptive mandate “presently does not apply to tens of millions of people.” 723 F. 3d 1114, 1143 (CA10 2013). This is attributable, in large part, to grandfathered health plans: Over one-third of the 149 million nonelderly people in America with employer-sponsored health plans were enrolled in grandfathered plans in 2013. Brief for HHS in No. 13-354, at 53; Kaiser Family Foundation & Health Research & Educational Trust, Employer Health Benefits, 2013 Annual

6 We will use “Brief for HHS” to refer to the Brief for Petitioners in No. 13-354 and the Brief for Respondents in No. 13-356. The federal parties are the Departments of HHS, Treasury, and Labor, and the Secretaries of those Departments.

7 Online at http://www.fda.gov/consumers/byaudience/forwomen/freepublications/ucm313215.htm. The owners of the companies involved in these cases and others who believe that life begins at conception regard these four methods as causing abortions, but federal regulations, which define pregnancy as beginning at implantation, see, e.g., 62 Fed. Reg. 8611 (1997); 45 CFR §46.202(f) (2013), do not so classify them.

8 In the case of self-insured religious organizations entitled to the accommodation, the third-party administrator of the organization must “provide or arrange payments for contraceptive services” for the organization’s employees without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries. 78 Fed. Reg. 39893 (to be codified in 26 CFR §54.9815-2713A(b)(2)). The regulations establish a mechanism for these third-party administrators to be compensated for their expenses by obtaining a reduction in the fee paid by insurers to participate in the federally facilitated exchanges. See 78 Fed. Reg. 39893 (to be codified in 26 CFR §54.9815-2713A(b)(3)). HHS believes that these fee reductions will not materially affect funding of the exchanges because “payments for contraceptive services will represent only a small portion of total [exchange] user fees.” 78 Fed. Reg. 39882.

9 In a separate challenge to this framework for religious nonprofit organizations, the Court recently ordered that, pending appeal, the eligible organizations be permitted to opt out of the contraceptive mandate by providing written notification of their objections to the Secretary of HHS, rather than to their insurance issuers or third-party administrators. See Little Sisters of the Poor v. Sebelius, 571 U.S. , 134 S. Ct. 1022, 187 L. Ed. 2d 867 (2014).
Survey 43, 221. 10 The count for employees working for firms that do not have to [***692] provide insurance at all because they employ fewer than 50 employees is 34 million workers. See The Whitehouse, Health Reform for Small Businesses: The Affordable Care Act Increases Choice and Saving Money for Small Businesses 1. 11

II

A

Norman and Elizabeth Hahn and their three sons are devout members of the Mennonite Church, a Christian denomination. The Mennonite Church opposes abortion and believes that “[t]he fetus in its earliest stages . . . shares humanity with those who conceived it.” 12

Fifty years ago, Norman Hahn started a wood-working business in his garage, and since then, this company, Conestoga Wood Specialties, has grown and now has 950 employees. Conestoga is organized under Pennsylvania law as a for-profit corporation. The Hahns exercise sole ownership of the closely held business; they control its board of directors and hold all of its voting shares. One of the Hahn sons serves as the president and CEO.

The Hahns believe that they are required to run their business “in accordance with their religious beliefs and moral principles.” 917 F. Supp. 2d 394, 402 (ED Pa. 2013). To that end, the company’s mission, as they see it, is to operate in a professional environment founded upon the [***30] highest ethical, moral, and Christian principles.” Ibid. (internal quotation marks omitted). The company’s “Vision and Values Statements” affirms that Conestoga endeavors to “ensur[e] a reasonable profit in [a] manner that reflects [the Hahns’] Christian heritage.” App. in No. 13-356, p. 94 (complaint).

As explained in Conestoga’s board-adopted Statement on the Sanctity of Human Life,” the Hahns believe that “human life begins at conception.” [***2765] 724 F. 3d 377, 382, and n. 5 (CA3 2013) (internal quotation marks omitted). It is therefore “against [their] moral conviction to be involved in the termination of human life” after conception, which they believe is a “sin against God to which they are held accountable.” Ibid. (internal quotation marks omitted). The Hahns have accordingly excluded from the group-health-insurance plan they offer to their employees certain contraceptive methods that they consider to be abortifacients. Id., at 382.

The Hahns and Conestoga sued HHS and other federal officials and agencies under RFRA and the Free Exercise Clause of the First Amendment, seeking to enjoin application of ACA’s contraceptive mandate insofar as it requires them to provide health-insurance [***31] coverage for four FDA-approved contraceptives that may operate after the fertilization of an egg. 13 These include two forms of [***693] emergency contraception commonly called “morning after” pills and two types of intrauterine devices. 14

In opposing the requirement to provide coverage for the contraceptives to which they object, the Hahns argued that “it is immoral and sinful for [them] to intentionally participate in, pay for, facilitate, or otherwise support these drugs.” Ibid. The District Court denied a preliminary injunction, see 917 F. Supp. 2d, at 419, and the Third Circuit affirmed in a divided opinion, holding that “for-profit, secular corporations cannot engage in religious exercise” within the meaning of RFRA or the First Amendment. 724 F. 3d, at 381. The Third Circuit also rejected the claims brought by the [***32] Hahns themselves because it concluded that the HHS “[m]andate does not impose any requirements on the Hahns” in their personal capacity. Id., at 389.

B

David and Barbara Green and their three children are Christians who own and operate two family businesses.

10 While the Government predicts that this number will decline over time, the total number of Americans working for employers to whom the contraceptive mandate does not apply is still substantial, and there is no legal requirement that grandfathered plans ever be phased out.


12 Mennonite Church USA, Statement on Abortion, online at http://www.mennoniteusa.org/resource-center/resources/statements-andresolutions/statement-on-abortion/.

13 The Hahns and Conestoga also claimed that the contraceptive mandate violates the Fifth Amendment and the Administrative Procedure Act, 5 U.S.C. 553, but those claims are not before us.

Forty-five years ago, David Green started an arts-and-crafts store that has grown into a nationwide chain called Hobby Lobby. There are now 500 Hobby Lobby stores, and the company has more than 13,000 employees. 723 F. 3d. at 1122. Hobby Lobby is organized as a for-profit corporation under Oklahoma law.

One of David’s sons started an affiliated business, Mardel, which operates 35 Christian bookstores and employs close to 400 people. Ibid. Mardel is also organized as a for-profit corporation under Oklahoma law.

Though these two businesses have expanded over the years, they remain closely held, and David, Barbara, and their children retain exclusive control of both companies. Ibid. David serves as the CEO of Hobby Lobby, and his three children serve as the president, vice president, and vice CEO. See Brief for Respondents in No. 13-354, p. 8. 15

Hobby Lobby’s statement of purpose commits the Greens to “[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles.” App. in No. 13-354, pp. 134-135 (complaint). 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. 723 F. 3d. at 1122. In accordance with those commitments, Hobby Lobby and Mardel stores close on Sundays, even though the Greens calculate that they lose millions in sales annually by doing so. Id., at 1122; App. in No. 13-354, at 136-137. The businesses refuse to engage in profitable transactions that facilitate or promote alcohol use; they contribute profits to Christian missionaries and ministries; and they buy hundreds of full-page newspaper ads inviting people to “know Jesus as Lord and Savior.” Ibid. (internal quotation marks omitted).

Like the Hahns, the Greens believe that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point. 723 F. 3d. at 1122. They specifically object to the four contraceptive methods as the Hahns and, like the Hahns, they have no objection to the other 16 FDA-approved methods of birth control. Id., at 1125. Although their group-health-insurance plan predates the enactment of ACA, it is not a grandfathered plan because Hobby Lobby elected not to retain grandfathered status before the contraceptive mandate was proposed. Id., at 1124.

The Greens, Hobby Lobby, and Mardel sued HHS and other federal agencies and officials to challenge the contraceptive mandate under RFRA and the Free Exercise Clause. 16 The District Court denied a preliminary injunction, see 870 F. Supp. 2d 1278 (WD Okla. 2012), and the plaintiffs appealed, moving for initial en banc consideration. The Tenth Circuit granted that motion and reversed in a divided opinion. Contrary to the conclusion of the Third Circuit, the Tenth Circuit held that the Greens’ two for-profit businesses are “persons” within the meaning of RFRA and therefore may bring suit under that law.

The court then held that the corporations had established a likelihood of success on their RFRA claim. 723 F. 3d. at 1140-1147. The court concluded that the contraceptive mandate substantially burdened the exercise of religion by requiring the companies to choose between “compromis[ing] their religious beliefs” and paying a heavy fee—either “close to $475 million more in taxes every year” if they simply refused to provide coverage for the contraceptives at issue, or “roughly $26 million annually if they “drop[ped] health-insurance benefits for all employees.” Id., at 1141.

The court next held that HHS had failed to demonstrate a compelling interest in enforcing the mandate against the Greens’ businesses and, in the alternative, that HHS had failed to prove that enforcement of the mandate was the “least restrictive means” of furthering the Government’s asserted interests. Id., at 1143-1144 (emphasis deleted; internal quotation marks omitted). After concluding that the companies had “demonstrated irreparable harm,” the court reversed and remanded for the District Court to consider the remaining factors of the preliminary-injunction test. Id., at 1147. 17

We granted certiorari. 571 U.S. ___, 134 S. Ct. 678, 187 L. Ed. 2d 544 (2013).

15 The Greens operate Hobby Lobby and Mardel through a management trust, of which each member of the family serves as trustee. 723 F. 3d 1114, 1122 (CA10 2013). The family provided that the trust would also be governed according to their religious principles. Ibid.

16 They also raised a claim under the Administrative Procedure Act. 5 U.S.C. §553.

17 Given its RFRA ruling, the court declined to address the plaintiffs’ free-exercise claim or the question whether the Greens could bring RFRA claims as individual owners of Hobby Lobby and Mardel. Four judges, however, concluded that the Greens could do so, see 723 F. 3d. at 1156 (Gorsuch, J., concurring); id., at 1184 (Matheson, J., concurring in part and dissenting in part), and three of those judges would have granted plaintiffs a preliminary injunction, see id., at 1156 (Gorsuch, J., concurring).
III

A

HN9 LEdHN[9] [9] RFRA prohibits the “Government [from] substantially burden[ing] a person’s exercise of religion even if the burden results from a rule of general applicability” unless the Government “demonstrates that application [***695] 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.” 42 U.S.C. §§2000bb-1(a), (b) (emphasis added). 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.

HHS contends that neither these [***37] companies nor their owners can even be heard under RFRA. According to HHS, the companies cannot sue because they seek to make a profit for their owners, and the owners cannot be heard because the regulations, at least as a formal matter, apply only to the companies and not to the owners as individuals. HHS’s argument would have dramatic consequences.

Consider this Court’s decision in Braunfeld v. Brown, 366 U.S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563 (1961) (plurality opinion). In that case, five Orthodox Jewish merchants who ran small retail businesses in Philadelphia challenged a Pennsylvania Sunday closing law as a violation of the Free Exercise Clause. Because of their faith, these merchants closed their shops on Saturday, and they argued that requiring them to remain shut on Sunday threatened them with financial ruin. The Court entertained their claim (although it ruled against them on the merits), and if a similar claim were raised today under RFRA against a jurisdiction still subject to the Act (for example, the District of Columbia, see 42 U.S.C. §2000bb-2(2)), the merchants would be entitled to be heard. According to HHS, however, if these merchants chose to incorporate their businesses—without in any way [***38] changing the size or nature of their businesses—they would forfeit all RFRA (and free-exercise) rights. HHS would put these merchants to a difficult choice: either give up the right to seek judicial protection of their religious liberty or forgo the benefits, available to their competitors, of operating as corporations.

As we have seen, HN10 LEdHN[10] [10] RFRA was designed to provide very broad protection for religious liberty. By enacting RFRA, Congress went far beyond what this Court has held is constitutionally required. 18 Is there any reason to think that the Congress that enacted such sweeping protection put small-business owners to the choice that HHS suggests? An examination of [*2768] RFRA’s text, to which we turn in the next part of this opinion, reveals that Congress did no such thing.

As we will show, Congress provided protection for people like the Hahns and Greens by employing a familiar legal fiction: It included corporations within RFRA’s definition of “persons.” But it is important to keep in mind that the purpose of this fiction is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends. An established [**696] body of law specifies the rights and obligations of the people (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people. For example, extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company. Protecting corporations from government seizure of their property without just compensation protects all those who have [***40] a stake in the corporations’ financial well-being. And protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.

In holding that Conestoga, as a “secular, for-profit corporation,” lacks RFRA protection, the Third Circuit wrote as follows:

“General business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors.” 724 F. 3d, at 385 (emphasis added).

All of this is true—but quite beside the point. Corporations, “separate and apart from” the human beings who own, run, and are employed by them, cannot do anything at all.

18 As discussed, n. 3, supra, in City of Boerne we stated that RFRA, by imposing a least-restrictive-means test, went beyond what was required by our pre-Smith decisions. Although the author of the principal dissent joined the Court’s opinion in City of Boerne, she now claims that the statement was incorrect. Post, at . 189 L. Ed. 2d, at 722. For present purposes, it is unnecessary to adjudicate this dispute. Even if RFRA simply restored the [***39] status quo ante, there is no reason to believe, as HHS and the dissent seem to suggest, that the law was meant to be limited to situations that fall squarely within the holdings of pre-Smith cases. See infra, at ___ - ___, 189 L. Ed. 2d, at 700-702.
B


Under [*41] the Dictionary Act, “the wor[d] ‘person’ . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” *Ibid.*; see *ECC v. AT&T Inc.*, 562 U.S. 397, 131 S. Ct. 1177, 1183, 179 L. Ed. 2d 132, 139 (2011) (“We have no doubt that ‘person,’ in a legal setting, often refers to artificial entities. The Dictionary Act makes that clear”). Thus, unless there is something about the RFRA context that “indicates otherwise,” the Dictionary Act provides a quick, clear, and affirmative answer to the question whether the companies involved in these cases may be heard.

We see nothing in RFRA that suggests a congressional intent to depart from the Dictionary Act definition, and HHS makes little effort to argue otherwise. We have entertained RFRA and free-exercise claims brought by nonprofit corporations, see *Gonzales v. O Centro Espiritu Beneficente Uniao do Vegetal*, 546 U.S. 418, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006) (RFRA); [*2769] *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. ___, 132 S. Ct. 694, 181 L. Ed. 2d 650 (2012) (Free Exercise); *Church of the Lukumi Babalu Ave., Inc. v. Hialeah*, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993) (Free Exercise), and HHS concedes that a nonprofit corporation can be a “person” within [*42] the meaning of [*697] RFRA. See Brief for HHS in No. 13-354, at 17; Reply Brief in No. 13-354, at 7-8. [*19]*

This concession effectively dispatches any argument that the term “person” as used in RFRA does not reach the closely held corporations involved in these cases. No known understanding of the term “person” includes *some* but not all corporations. *HNN2[12]* RFRA the term “person” sometimes encompasses artificial persons (as the Dictionary Act instructs), and it sometimes is limited to natural persons. But no conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations. [*20]* Cf. *Clark v. Martinez*, 543 U.S. 371, 378, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005) (“To give th[e] same words a different meaning for each category would be to invent a statute rather than interpret one”).

2

The principal argument advanced by HHS and the principal dissent regarding RFRA protection for Hobby Lobby, Conestoga, and Mardel focuses not on the statutory term “person,” but on the phrase “exercise of religion.” According to HHS and the dissent, these corporations are not protected by RFRA because they cannot exercise religion. Neither HHS nor the dissent, however, provides any persuasive explanation for this conclusion.

Is it because of the corporate form? The corporate form alone cannot provide the explanation because, as we have pointed out, HHS concedes that nonprofit corporations can be protected by RFRA. The dissent suggests that nonprofit corporations are special because furthering their religious “autonomy . . . often furthers individual religious freedom as well.” *Post, at ___, 189 L. Ed. 2d, at 724* (quoting *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 342, 107 S. Ct. 2862, 97 L. Ed. 2d 273 (1987) (Brennan, J., concurring in judgment)). But this principle applies equally to for-profit [*44] corporations: Furthering their religious freedom also “furthers individual religious freedom.” In these cases, for example, allowing Hobby Lobby, Conestoga, and Mardel to assert RFRA claims protects the religious liberty of the Greens and the Hahns. [*21]*

If the corporate form is not enough, what about the profit-making objective? In *Braunfeld*, 366 U.S. 599, 81 S. Ct. 19

[*19]* Cf. Brief for Federal Petitioners in *O Centro*, O. T. 2004, No. 04-1084, p. II (stating that the organizational respondent was “a New Mexico Corporation”); Brief for Federal Respondent in *Hosanna-Tabor*, O. T. 2011, No. 10-553, p. 3 (stating that the petitioner was an “ecclesiastical corporation”).

[*20]* Not only does the Government concede that the term “persons” in RFRA includes nonprofit corporations, it goes further [*43] and appears to concede that the term might also encompass other artificial entities, namely, general partnerships and unincorporated associations. See Brief for HHS in No. 13-354, at 28, 40.

[*21]* Although the principal dissent seems to think that Justice Brennan’s statement in *Amos* provides a ground for holding that for-profit corporations may not assert free-exercise claims, that was not Justice Brennan’s view. See *Gallagher v. Crown Kosher Super Market of Mass., Inc.*, 366 U.S. 617, 642, 81 S. Ct. 1122, 6 L. Ed. 2d 536 (1961) (dissenting opinion); *infra, at ___, 189 L. Ed. 2d, at 700-701.*
we entertained the free-exercise claims of individuals who were attempting to make a profit as retail merchants, and [**698] the Court never even hinted that this objective precluded their [**2770] claims. As the Court explained in a later case, *HN13 LedH[13]* [13] the “exercise of religion” involves “not only belief and profession but the performance of (or abstention from) physical acts” that are “engaged in for religious reasons.” *Smith*, 494 U.S., at 877, 110 S. Ct. 1595, 108 L. Ed. 2d 876. Business practices that are compelled or limited by the tenets of a religious [***45] doctrine fall comfortably within that definition. Thus, a law that “operates so as to make the practice of . . . religious beliefs more expensive” in the context of business activities imposes a burden on the exercise of religion. *Braunfeld*, supra, at 605, 81 S. Ct. 1144, 6 L. Ed. 2d 563; see *United States v. Lee*, 455 U.S. 252, 257, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982) (recognizing that “compulsory participation in the social security system interferes with [Amish employers’] free exercise rights”).

If, as *Braunfeld* recognized, a sole proprietorship that seeks to make a profit may assert a free-exercise claim, 22 why can’t Hobby Lobby, Conestoga, and Mardel do the same?

---

22 It is revealing that the principal dissent cannot even bring itself to acknowledge that *Braunfeld* was correct in entertaining the merchants’ claims. See *post, at ___, 189 L. Ed. 2d, at 726* (dismissing the relevance of *Braunfeld* in part because “[t]he free exercise claim asserted there was promptly rejected on the merits”).

23 See, e.g., *724 F. 3d, at 385* (“We do not see how a for-profit, ‘artificial being,’ . . . that was created to make money” could exercise religion); *Grote v. Sebelius*, 708 F. 3d 850, 857 (CA7 2013) (Rovner, J. dissenting) (“So far as it appears, the mission of Grote Industries, like that of any other for-profit, secular business, is to make money in the commercial sphere”); *Autocam Corp. v. Sebelius*, 730 F. 3d 618, 626 (CA7 2013) (“Congress did not intend to include corporations primarily organized for secular, profit-seeking purposes as ‘persons’ under RFRA”); see also *723 F. 3d, at 1171-1172* (Briscoe, C. J., dissenting) (“[T]he specific purpose for which [a corporation] is created matters greatly to how it will be categorized and treated under the law” and “it is undisputed that Hobby Lobby and Mardel are for-profit corporations focused on selling merchandise to consumers”). The principal dissent makes a similar point, stating that “[f]or-profit corporations are different from religious nonprofits in that they use labor to make a profit, rather than to perpetuate the religious values shared by a community of believers.” *Post, at ___, 189 L. Ed. 2d, at 726* (internal quotation marks omitted). [***48] The first half of this statement is a tautology; for-profit corporations do indeed differ from nonprofits insofar as they seek to make a profit for their owners, but the second part is factually untrue. As the activities of the for-profit corporations involved in these cases show, some for-profit corporations do seek “to perpetuate the religious values shared,” in these cases, by their owners. Conestoga’s Vision and Values Statement declares that the company is dedicated to operating “in [a] manner that reflects our Christian heritage and the highest ethical and moral principles of business.” App. in No. 13-356, p. 94. Similarly, Hobby Lobby’s statement of purpose proclaims that the company “is committed to . . . Honoring the Lord in all we do by operating . . . in a manner consistent with Biblical principles.” App. in No. 13-354, p. 135. The dissent also believes that history is not on our side because even Blackstone recognized the distinction between “ecclesiastical and lay” corporations. *Post, at ___, 189 L. Ed. 2d, at 726*. What Blackstone illustrates, however, is that dating back to 1765, there was no sharp divide among corporations in their capacity to exercise religion; Blackstone recognized that even [***49] what he termed “lay” corporations might serve “the promotion of piety.” 1 W. Blackstone, Commentaries on the Law of England 458-459 (1765). And whatever may have been the case at the time of Blackstone, modern corporate law (and the law of the States in which these three companies are incorporated) allows for-profit corporations to “perpetuat[e] religious values.”
why they may not further religious [*47] objectives as well.

HHS would draw a sharp line between nonprofit corporations (which, HHS concedes, are protected by RFRA) and for-profit corporations (which HHS would leave unprotected), but the actual picture is less clear-cut. Not all corporations that decline to organize as nonprofits do so in order to maximize profit. For example, organizations with religious and charitable aims might organize as for-profit corporations because of the potential advantages of that corporate form, such as the freedom to participate in lobbying for legislation or campaigning for political candidates who promote their religious or charitable goals.

In fact, recognizing the inherent compatibility between establishing a for-profit corporation and pursuing nonprofit goals, States have increasingly adopted laws formally recognizing hybrid corporate forms. Over [*50] half of the States, for instance, now recognize the “benefit corporation,” a dual-purpose entity that seeks to achieve both a benefit for the public and a profit for its owners.

In any event, the objectives that may properly be pursued by the companies in these cases are governed by the laws of the States in which they were incorporated—Pennsylvania [*700] and Oklahoma—and the laws of those States permit for-profit corporations to pursue “any lawful purpose” or “act,” including the pursuit of profit in conformity with the owners’ religious principles. 15 Pa. Cons. Stat. §1301 (2001) (“Corporations may be incorporated under [*2772] this subpart for any lawful purpose or purposes”); Okla. Stat., Tit. 18, §§1002, 1005 (West 2012) (“[E]very corporation, whether profit or not for profit” may “be incorporated or organized . . . to conduct or promote any lawful business or purposes”); see also §§1006(A)(3); Brief for State of Oklahoma as Amicus Curiae in No. 13-354.

3

HHS and the principal dissent make one additional argument in an effort to show that a for-profit corporation cannot engage in the “exercise of religion” [*52] within the meaning of RFRA: HHS argues that RFRA did no more than codify this Court’s pre-Smith Free Exercise Clause precedents, and because none of those cases squarely held that a for-profit corporation has free-exercise rights, RFRA does not confer such protection. This argument has many flaws.

First, HN15 LedHN[15] [*52] nothing in the text of RFRA as originally enacted suggested that the statutory phrase “exercise of religion under the First Amendment” was meant to be tied to this Court’s pre-Smith interpretation of that Amendment. When first enacted, RFRA defined the “exercise of religion” to mean “the exercise of religion under the First Amendment”—not the exercise of religion as recognized only by then-existing Supreme Court precedents. 42 U.S.C. §2000bb-2(4) (1994 ed.). When Congress wants to link the meaning of a statutory provision to a body of this Court’s case law, it knows how to do so. See, e.g., Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §2254(d)(1) (authorizing habeas relief from a state-court decision that “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States”).

Second, [*53] if the original text of RFRA was not clear enough on this point—and we think it was—the amendment of RFRA through RLUIPA surely dispels any doubt. That amendment deleted the prior reference to the First Amendment, see 42 U.S.C. §2000bb-2(4) (2000 ed.) (incorporating §2000cc-5), and neither HHS nor the principal dissent can explain why Congress did this if it wanted to tie RFRA coverage tightly to the specific holdings of our pre-Smith free-exercise cases. Moreover, as discussed, the amendment went further, providing that the exercise of religion “shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.” §2000cc-3(g). It is simply not possible to read these provisions as restricting the concept of the “exercise of religion” to those practices specifically addressed in our pre-Smith decisions.

24 See, e.g., M. Sanders, Joint Ventures Involving Tax-Exempt Organizations 555 (4th ed. 2013) (describing Google.org, which “advance[s] its charitable goals” while operating as a for-profit corporation to be able to “invest in for-profit endeavors, lobby for policies that support its philanthropic goals, and tap Google’s innovative technology and workforce” (internal quotation marks and alterations omitted)); cf. 26 CFR §1.501(c)(3)-1(c)(3).

25 See Benefit Corp Information Center, online at http://www.benefitcorp.net/state-by-state-legislative-status; e.g., Va. Code Ann. §§813.1-787, 13.1-626, 13.1-782 (Lexis 2011) (“A benefit corporation shall have as one of its purposes the purpose of creating a general public benefit,” and “may identify one or more specific public benefits that it is the purpose of the benefit corporation to create. . . . This purpose is in addition to . . .”) (“Specific public benefit’ means a benefit that serves one or more public welfare, religious, [*51] charitable, scientific, literary, or educational purposes, or other purpose or benefit beyond the strict interest of the shareholders of the benefit corporation . . . .”); S. C. Code Ann. §§33-38-300 (2012 Cum. Supp.), 33-3-101 (2006), 33-38-130 (2012 Cum. Supp.) (similar).
Finally, the results would be absurd if RFRA merely restored this Court’s pre-Smith decisions in ossified form and did not allow a plaintiff to raise a RFRA claim unless that plaintiff fell within a category of plaintiffs one of whom had brought a free-exercise claim that this Court entertained in the years before Smith. For example, we are not aware of any pre-Smith case in which this Court entertained a free-exercise claim brought by a resident noncitizen. Are such persons also beyond RFRA’s protective reach simply because the Court never addressed their rights before Smith?

Presumably in recognition of the weakness of this argument, both HHS and the principal dissent fall back on the broader contention that the Nation lacks a tradition of exempting for-profit corporations from generally applicable laws. By contrast, HHS contends, statutes like Title VII, 42 U.S.C. §2000e-19(A), expressly exempt churches and other nonprofit religious institutions but not for-profit corporations. See Brief for HHS in No. 13-356, p. 26. In making this argument, however, HHS did not call to our attention the fact that some federal statutes do exempt categories of entities that include for-profit corporations from laws that would otherwise require these entities to engage in activities to which they object on grounds of conscience. See, e.g., 42 U.S.C. §300a-7(b)(2); §238n(a). 27 If Title VII and similar laws show anything, [*702] it is that Congress speaks with specificity when it intends a religious accommodation not to extend to for-profit corporations.

4

Finally, HHS contends that Congress could not have wanted RFRA to apply to for-profit corporations [*58] because it is difficult as a practical matter to ascertain the sincere “beliefs” of a corporation. HHS goes so far as to raise the specter of “divisive, polarizing proxy battles over the

---

26 See Brief for Appellants in Gallagher, O. T. 1960 No. 11, pp. 16, 28-31 (arguing that corporation “has no ‘religious belief’ or ‘religious liberty,’ and had no standing in court to assert that its free exercise of religion was impaired”).

27 The principal dissent points out that “the exemption codified in §238n(a) was not enacted until three years after RFRA’s passage.” Post, at *15, 189 L. Ed. 2d, at 725. The dissent takes this to mean that RFRA did not, in fact, “ope[n][***57] all statutory schemes to religion-based challenges by for-profit corporations” because if it had “there would be no need for a statute-specific, post-RFRA exemption of this sort.” Ibid.

This argument fails to recognize that the protection provided by §238n(a) differs significantly from the protection provided by RFRA. Section 238n(a) flatly prohibits discrimination against a covered healthcare facility for refusing to engage in certain activities related to abortion. If a covered healthcare facility challenged such discrimination under RFRA, by contrast, the discrimination would be unlawful only if a court concluded, among other things, that there was a less restrictive means of achieving any compelling government interest.

In addition, the dissent’s argument proves too much. Section 238n(a) applies evenly to “any health care entity”—whether it is a religious nonprofit entity or a for-profit entity. There is no dispute that RFRA protects religious nonprofit corporations, so if §238n(a) were redundant as applied to for-profit corporations, it would be equally redundant as applied to nonprofits.
religious identity of large, publicly traded corporations such as IBM or General Electric.” Brief for HHS in No. 13-356, at 30.

These cases, however, do not involve publicly traded corporations, and it seems unlikely that the sort of corporate giants to which HHS refers will often assert RFRA claims. HHS has not pointed to any example of a publicly traded corporation asserting RFRA rights, and numerous practical restraints would likely prevent that from occurring. For example, 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. In any event, we have no occasion in these cases to consider RFRA’s applicability to such companies. The companies in the cases before us are closely held corporations, each owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs. 28

HHS has also provided no evidence that the purported problem of determining the sincerity of an asserted religious belief moved Congress to exclude for-profit corporations from RFRA’s protection. On the contrary, the scope of RLUIPA shows that Congress was confident of the ability of the federal courts to weed out insincere claims. RLUIPA applies to “institutionalized persons,” a category that consists primarily of prisoners, and by the time of RLUIPA’s enactment, the propensity of some prisoners to assert claims of dubious sincerity was well documented. 29 Nevertheless, after our decision in City of Boerne, Congress enacted RLUIPA to preserve the right of prisoners to raise religious liberty claims. If Congress thought that the federal courts were up to the job of dealing with insincere prisoner claims, there is no reason to believe [***703] that Congress limited RFRA’s reach out of concern for the seemingly less difficult task of doing the same in corporate cases. And [***60] if, as HHS seems to concede, Congress wanted RFRA to apply to nonprofit corporations, see, Reply Brief in No. 13-354, at 7-8, what reason is there to think that Congress believed that spotting insincere claims would be tougher in cases involving for-profits?

HHS and the principal dissent express concern about the possibility of disputes among the owners of corporations, but that is not a problem that arises because of RFRA or that is unique to this context. The owners of closely held corporations may—and sometimes do—disagree about [*2775] the conduct of business. 1 Treatise of the Law of Corporations §14:11. And even if RFRA did not exist, the owners of a company might well have a dispute relating to religion. For example, some might want a company’s stores to remain open on the Sabbath in order to make more money, and others might want the stores to close for religious reasons. State corporate law provides a ready means for resolving any conflicts by, for example, dictating [***61] how a corporation can establish its governing structure. See, e.g., ibid; id., §3:2; Del. Code Ann., Tit. 8, §351 (2011) (providing that certificate of incorporation may provide how “the business of the corporation shall be managed”). Courts will turn to that structure and the underlying state law in resolving disputes.

For all these reasons, we hold that HN17 LedHN[17] [17] a federal regulation’s restriction on the activities of a for-profit closely held corporation must comply with RFRA. 30

IV

28 HN16 LedHN[16] [16] To qualify for RFRA’s protection, an asserted [***59] belief must be “sincere”; a corporation’s pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail. Cf., e.g., United States v. Quaintance, 608 F. 3d 717, 718-719 (CA10 2010).


30 The principal dissent attaches significance to the fact that the “Senate voted down [a] so-called ‘conscience amendment,’ which would have enabled any employer or insurance provider to deny coverage based on its asserted religious beliefs or moral convictions.” Post, at ___, 189 L. Ed. 2d, at 719. The dissent would evidently glean from that vote an intent by the Senate to prohibit for-profit corporate employers from refusing to offer contraceptive coverage for religious reasons, regardless of whether the contraceptive mandate could pass muster under RFRA’s standards. But that is not the only plausible inference from the failed amendment—or even the most likely. For one thing, the text of the amendment was “written so broadly that it would [***62] allow any employer to deny any health service to any American for virtually any reason—not just for religious objections.” 158 Cong. Rec. S1165 (Mar. 1, 2012) (emphasis added). Moreover, the amendment would have authorized a blanket exemption for religious or moral objectors; it would not have subjected religious-based objections to the judicial scrutiny called for by RFRA, in which a court must consider not only the burden of a requirement on religious adherents, but also the government’s interest and how narrowly tailored the requirement is. It is thus perfectly reasonable to believe that the amendment was voted down because it extended more broadly than the pre-existing protections of RFRA.
Because RFRA applies in these cases, we must next ask whether the HHS contraceptive mandate “substantially burden[s]” the exercise of religion. 42 U.S.C. §2000bb-1(a). We have little trouble concluding that it does.

A

As we have noted, the Hahns and Greens have a sincere religious belief that life begins at conception. They therefore object on religious grounds to providing health insurance that covers methods of birth control that, as HHS acknowledges, see Brief for HHS in No. 13-354, at 9, n. 4, may result in the destruction of an embryo. By requiring the Hahns and Greens and their companies to arrange for such coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs.

If the Hahns and Greens and their companies do not yield to this demand, the economic consequences will be severe. If the companies continue to offer group health plans that do not cover the contraceptives at issue, they will be taxed $100 per day for each affected individual. 26 U.S.C. §4980D. For Hobby Lobby, the bill could amount to $1.3 million per day or about $475 million per year; for Conestoga, the assessment could be $90,000 per day or $33 million per year; and for Mardel, it could be $40,000 per day or about $15 million per year. These sums are surely substantial.

It is true that the plaintiffs could avoid these assessments by dropping insurance coverage altogether and thus forcing their employees to obtain health insurance on one of the exchanges established under ACA. But if at least one of their full-time employees were to qualify for a subsidy on one of the government-run exchanges, this course would also entail substantial economic consequences. The companies could face penalties of $2,000 per employee each year. §4980H. These penalties would amount to roughly $26 million for Hobby Lobby, $1.8 million for Conestoga, and $800,000 for Mardel.

B

Although these totals are high, amici supporting HHS have suggested that the $2,000 per-employee penalty is actually less than the average cost of providing health insurance, see Brief for Religious Organizations 22, and therefore, they claim, the companies could readily eliminate any substantial burden by forcing their employees to obtain insurance in the government exchanges. 78 Fed. Reg. 39882 (2013) (emphasis added). We do not generally entertain arguments that were not raised below and are not advanced in this Court by any party, see United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 60, n. 2, 101 S. Ct. 1559, 67 L. Ed. 2d 732 (1981); Bell v. Wolfish, 441 U.S. 520, 532, n. 13, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979); Knetsch v. United States, 364 U.S. 361, 370, 81 S. Ct. 132, 5 L. Ed. 2d 128, 1961 C.B. 34, 1961-1 C.B. 34 (1960), and there are strong reasons to adhere to that practice in these cases. HHS, which presumably could have compiled the relevant statistics, has never made this argument—not in its voluminous briefing or at oral argument in this Court nor, to our knowledge, in any of the numerous cases in which the issue now before us has been litigated around the country. As things now stand, we do not even know what the Government’s position might be with respect to these amici’s intensely empirical argument. 31 For this same reason, the plaintiffs have never had an opportunity to respond to this novel claim that—contrary to their longstanding practice and that of most large employers—they would be better off discarding their employer insurance plans altogether.

Even if we were to reach this argument, we would find it unpersuasive. As an initial matter, it entirely ignores the fact that the Hahns and Greens and their companies have religious reasons for providing health-insurance coverage for their employees. Before the advent of ACA, they were not legally compelled to provide insurance, but they nevertheless did so—in part, no doubt, for conventional business reasons, but also in part because their religious beliefs govern their relations with their employees. See App. to Pet. for Cert. in No. 13-356, p. 11g; App. in No. 13-354, at 139.

Putting aside the religious dimension of the decision to provide insurance, moreover, it is far from clear that the net cost to the companies of providing insurance is more than the cost of dropping their insurance plans and paying the ACA penalty. Health insurance is a benefit that employees value. If the companies simply eliminated that benefit and

And in any event, even if a rejected amendment to a bill could be relevant in other contexts, it surely cannot be relevant here, because any “Federal statutory law adopted after November 16, 1993 is subject to [RFRA] unless such law explicitly excludes such application by reference to [RFRA].” 42 U.S.C. §2000bb-3(b) (emphasis added). It is not plausible to find such an explicit reference in the meager legislative history on which the dissent relies.

31 Indeed, one of HHS’s stated reasons for establishing the religious accommodation was to “encourag[e] eligible organizations to continue to offer health coverage.” 78 Fed. Reg. 39882 (2013) (emphasis added).
forced employees to [*2777] purchase their own insurance on the exchanges, without offering additional compensation, it is predictable that the companies would face a competitive disadvantage in retaining and attracting skilled workers. See App. in No. 13-354, at 153.

The companies could attempt to make up for the elimination of a group health plan by increasing wages, but this would be costly. Group health [***67] insurance is generally less expensive than comparable individual coverage, so the amount of the salary increase needed to fully compensate for the termination of insurance coverage may well exceed the cost to the companies of providing the insurance. In addition, any salary increase would have to take into account the fact that employees must pay income taxes on wages but not on the value of employer-provided health insurance. 26 U.S.C. §106(a). Likewise, employers can deduct the cost of providing health insurance, see §162(a)(1), but apparently cannot deduct the amount of the penalty that they must pay if insurance is not provided; that difference also must be taken into account. Given these economic incentives, it is far from clear that it would be financially advantageous for an employer to drop coverage and pay the penalty. 32

In sum, we refuse to sustain the challenged regulations on the ground—never maintained by the Government—that dropping insurance coverage eliminates the substantial burden that the HHS mandate imposes. We doubt that the Congress that enacted RFRA—or, for that matter, ACA—would have believed it a tolerable result to put family-run businesses to the choice of violating their sincerely held religious beliefs or making all of their employees lose their existing healthcare plans.

C

In taking the position that the HHS mandate does not impose a substantial burden on the exercise of religion, HHS’s main argument (echoed by the [***706] principal dissent) is basically 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) is simply too attenuated. [***69] Brief for HHS in 13-354, pp. 31-34; post, at 153, 189 L. Ed. 2d, at 729. HHS and the dissent note that providing the coverage would not itself result in the destruction of an embryo; that would occur only if an employee chose to take advantage of the coverage and to use one of the four methods at issue. 33

[*2778] This argument dodges the question that RFRA presents (whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with their religious beliefs) and instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable). The Hahns and Greens believe that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage. This belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another. 34 Arrogating the authority to provide a binding national answer to this

---

32 Attempting to compensate for dropped insurance by raising wages would also present administrative difficulties. In order to provide full compensation for employees, the companies would have to calculate the value to employees of the convenience of retaining their employer-provided coverage and thus being spared the task of attempting to find and sign up [***68] for a comparable plan on an exchange. And because some but not all of the companies’ employees may qualify for subsidies on an exchange, it would be nearly impossible to calculate a salary increase that would accurately restore the status quo ante for all employees.

33 This argument is not easy to square with the position taken by HHS in providing exemptions from the contraceptive mandate for religious employers, such as churches, that have the very same religious objections as the Hahns and Greens and their companies. The connection between what these religious employers would be required to do if not exempted (provide insurance coverage for particular contraceptives) and the ultimate event that they find morally wrong (destruction of an embryo) is exactly the same. Nevertheless, as discussed, HHS and the Labor and Treasury Departments authorized the exemption from the contraceptive mandate of group health plans of certain religious employers, and later expanded the exemption to include certain nonprofit organizations with religious objections to contraceptive coverage. 78 Fed. Reg. 39871. When this was done, the Government made clear that its objective was [***70] to “protec[]l]” these religious objectors “from having to contract, arrange, pay, or refer for such coverage.” Ibid. Those exemptions would be hard to understand if the plaintiffs’ objections here were not substantial.

34 See, e.g., Oderberg, The Ethics of Co-operation in Wrongdoing, in Modern Moral Philosophy 203-228 (A. O’Hear ed. 2004); T. Higgins, Man as Man: The Science and Art of Ethics 353, 355 (1949) ("The general principles governing cooperation" in wrongdoing—i.e., “physical activity (or its omission) by which a person assists in the evil act of another who is the principal
religious and philosophical [***71] question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step. See, e.g., Smith, 494 U.S. at 887, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (HN19 LEdHN[19] [19] “Repeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim”); Hernandez v. Commissioner, 490 U.S. 680, 699, 109 S. Ct. 2136, 104 L. Ed. 2d 766 (1989); Presbyterian Church in United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 450, 89 S. Ct. 601, 21 L. Ed. 2d 658 (1969).

[**707] Moreover, in Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981), [***72] we considered and rejected an argument that is nearly identical to the one now urged by HHS and the dissent. In Thomas, a Jehovah’s Witness was initially employed making sheet steel for a variety of industrial uses, but he was later transferred to a job making turrets for tanks. Id., at 710, 101 S. Ct. 1425, 67 L. Ed. 2d 624. Because he objected on religious grounds to participating in the manufacture of weapons, he lost his job and sought unemployment compensation. Ruling against the employee, the state court had difficulty with the line that the employee drew between work that he found to be consistent with his religious beliefs (helping to manufacture steel that was used in making weapons) and work that he found morally objectionable (helping to make the weapons themselves). This Court, however, held that “it is not for us to say that the line he drew was an unreasonable one.” Id., at 715, 101 S. Ct. 1425, 67 L. Ed. 2d 624.

[***73] Similarly, in these cases, the Hahns and Greens and their 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. Instead, our “narrow function . . . in this context is to determine” whether the line drawn reflects “an honest conviction,” id., at 716, 101 S. Ct. 1425, 67 L. Ed. 2d 624, and there is no dispute that it does.

HHS nevertheless compares these cases to decisions in which we rejected the argument that the use of general tax revenue to subsidize the secular activities of religious institutions violated the Free Exercise Clause. See Tilton v. Richardson, 403 U.S. 672, 689, 91 S. Ct. 2091, 29 L. Ed. 2d 790 (1971) (plurality); Board of Ed. of Central School Dist. No. 1 v. Allen, 392 U.S. 236, 248-249, 88 S. Ct. 1923, 20 L. Ed. 2d 1060 (1968). But in those cases, while the subsidies were clearly contrary to the challengers’ views on a secular issue, namely, proper church-state relations, the challengers never articulated a religious objection to the subsidies. As we put it in Tilton, they were “unable to identify any coercion directed at the practice or exercise of their religious beliefs.” 403 U.S., at 689, 89 S. Ct. 2091, 29 L. Ed. 2d 790 (plurality opinion); see Allen, supra, at 249, 88 S. Ct. 1923, 20 L. Ed. 2d 1060 (“Alpappellants have not contended that the New York law in any way coerces them as individuals in the practice of their religion”). Here, in contrast, the plaintiffs do assert that funding the specific contraceptive methods at issue violates their religious beliefs, and HHS does not question their sincerity. Because the contraceptive mandate forces them to pay an enormous sum of money—as much as $475 million per year in the case of Hobby Lobby—if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs.

V

Since the HHS contraceptive mandate imposes a substantial burden on the exercise of religion, we must move [***74] 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.” 42 U.S.C. §2000bb-1(b).

A

HHS asserts that the contraceptive mandate serves a variety of important interests, but many of these are couched in very broad terms, such as promoting “public health” and “gender equality.” Brief for HHS in No. 13-354, at 46, 49. RFRA, however, contemplates a “more focused” inquiry: HN20 LEdHN[20] (20) It “requires the Government to demonstrate that the compelling interest test is satisfied through application of the [***75] challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened.” O Centro, 546 U.S., at 430-431, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (quoting §2000bb-1(b)). This requires us to “look[k] beyond broadly formulated interests” and to “scrutiniz[e] the asserted

agent”—“present troublesome difficulties in application”); 1 H. Davis, Moral and Pastoral Theology 341 (1935) (Cooperation occurs “when A helps B to accomplish an external act by an act that is not sinful, and without approving of what B does”).
harm of granting specific exemptions to particular religious claimants”—in other words, to look to the marginal interest in enforcing the contraceptive mandate in these cases. O Centro, supra, at 431, 126 S. Ct. 1211, 163 L. Ed. 2d 1017.

In addition to asserting these very broadly framed interests, HHS maintains that the mandate serves a compelling interest in ensuring that all women have access to all FDA-approved contraceptives without cost sharing. See Brief for HHS in No. 13-354, at 14-15, 49; see Brief for HHS in No. 13-356, at 10, 48. Under our [*2780] cases, women (and men) have a constitutional right to obtain contraceptives, see Griswold v. Connecticut, 381 U.S. 479, 485-486, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), and HHS tells us that “[s]tudies have demonstrated that even moderate copayments for preventive services can deter patients from receiving those services.” Brief for HHS in No. 13-354, at 50 (internal quotation marks omitted).

The objecting parties contend that HHS [***76] has not shown that the mandate serves a compelling government interest, and it is arguable that there are features of ACA that support that view. As we have noted, many employees—those covered by grandfathered plans and those who work for employers with fewer than 50 employees—may have no contraceptive coverage without cost sharing at all.

HHS responds that many legal requirements have exceptions and the existence of exceptions does not in itself indicate that the principal interest served by a law is not compelling. Even a compelling interest may be outweighed in some circumstances by another even weightier consideration. In these cases, however, the interest served by one of the biggest exceptions, the exception for grandfathered plans, is simply the interest of employers in avoiding the inconvenience of amending an existing plan. Grandfathered plans are required “to comply with a subset of the Affordable Care Act’s health reform provisions” that provide what HHS has described as “particularly significant protections.” 75 Fed. Reg. 34540 (2010). But the contraceptive mandate is expressly excluded from this subset. Ibid.

We find it unnecessary to adjudicate this issue. We will assume [***77] that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within [**709] the meaning of RFRA, and we will proceed to consider the final prong of the RFRA test, i.e., whether HHS has shown that the contraceptive mandate is “the least restrictive means of furthering that compelling governmental interest.” §2000bb-1(b)(2).

B

HN21 LedHN[21] [21] The least-restrictive-means standard is exceptionally demanding, see City of Boerne, 521 U.S., at 532, 117 S. Ct. 2157, 138 L. Ed. 2d 624, and it is not satisfied here. HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases. See §§2000bb-1(a), (b) (requiring the Government to “demonstrat[e] that application of [a substantial] burden to the person . . . is the least restrictive means of furthering [a] compelling governmental interest” (emphasis added)).

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. This would certainly be less [***78] restrictive of the plaintiffs’ religious liberty, and HHS has not shown, see §2000bb-1(b)(2), that this is not a viable alternative. HHS has not provided any estimate of the average cost per employee of providing access to these contraceptives, two of which, according to the FDA, are designed primarily for emergency use. See Birth Control: Medicines to Help You, online at http://www.fda.gov/forconsumers/byaudience/forwomen/freepublications/acm3132.

Nor has HHS provided any statistics regarding the number of employees who might be affected because they work for corporations like Hobby Lobby, Conestoga, and Mardel. Nor has HHS told us that it is unable to provide such [*2781] statistics. It seems likely, however, that the cost of providing the forms of contraceptives at issue in these cases (if not all FDA-approved contraceptives) would be minor when compared with the overall cost of ACA. According to one of the Congressional Budget Office’s most recent forecasts, ACA’s insurance-coverage provisions will cost the Federal Government more than $1.3 trillion through the next decade. See CBO, Updated Estimates of the Effects of the Insurance Coverage Provisions of the Affordable Care Act, [***79] April 2014, p. 2. 36 If, as HHS tells us, providing all women with cost-free access to all FDA-approved methods of contraception is a Government interest of the highest order, it is hard to understand HHS’s argument that it cannot be required under RFRA to pay anything in order to achieve this important goal.

HHS contends that RFRA does not permit us to take this option into account because “RFRA cannot be used to require creation of entirely new programs.” Brief for HHS

in 13-354, at 15. 37 But we see nothing in RFRA that supports this argument, and drawing the line between the “creation of an entirely new program” and the modification of an existing [*710] program (which RFRA surely allows) would be fraught with problems. We do not doubt that cost may be an important factor in the least-restrictive-means analysis, but both RFRA and its sister statute, RLUIPA, may in some circumstances require the Government to expend additional funds to accommodate citizens’ religious beliefs. Cf. §2000cc-3(c) (RLUIPA: “[T]his chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.”). [**80] HHS’s view that RFRA can never require the Government to spend even a small amount reflects a judgment about the importance of religious liberty that was not shared by the Congress that enacted that law.

In the end, however, we need not rely on the option of a new, government-funded [*2782] program in order [*82] to conclude that the HHS regulations fail the least-restrictive-means test. HHS itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptives methods that violate their religious beliefs. As we explained above, HHS has already established an accommodation for nonprofit organizations with religious objections. See supra, at ____, and nn. 8-9, 189 L. Ed. 2d, at 690-691. Under that accommodation, the organization can self-certify that it opposes providing coverage for particular contraceptive services. See 45 CFR §§147.131(b)(4), (c)(4); 26 CFR §§54.9815-2713A(a)(4), (b). If the organization makes such a certification, the organization’s insurance issuer or third-party administrator must “[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan” and “[p]rovide separate payments for any contraceptive services required to be covered” without imposing “any cost-sharing requirements . . . on the eligible organization, the group health plan, or plan participants or beneficiaries.” 45 CFR §147.131(c)(2); 26 CFR §54.9815-2713A(c)(2). 38

[**711] We do not decide today whether an approach of this type complies with RFRA for purposes of all religious claims. 39 At a minimum, however, it does not impinge on the plaintiffs’ religious belief that providing insurance coverage for the contraceptives at issue here violates their

37 In a related argument, HHS appears to maintain that a plaintiff cannot prevail on a RFRA claim that seeks an exemption from a legal obligation requiring the plaintiff to confer benefits on third parties. Nothing in the text of RFRA or its basic purposes supports giving the Government an entirely free hand to impose burdens on religious exercise so long as those burdens confer a benefit on other individuals. It is certainly true that HN22 LEDHN[22] [22] in applying RFRA “courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.” Cutter v. Wilkinson, 544 U.S. 709, 720, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005) (applying RLUIPA). That consideration will often inform the analysis of the Government’s compelling interest and the availability of a less restrictive means of advancing that interest. But it could not reasonably be maintained that any burden on religious exercise, no matter how onerous and no matter how readily the government interest could be achieved through alternative means, is [*81] permissible under RFRA so long as the relevant legal obligation requires the religious adherent to confer a benefit on third parties. Otherwise, for example, the Government could decide that all supermarkets must sell alcohol for the convenience of customers (and thereby exclude Muslims with religious objections from owning supermarkets), or it could decide that all restaurants must remain open on Saturdays to give employees an opportunity to earn tips (and thereby exclude Jews with religious objections from owning restaurants). By framing any Government regulation as benefiting a third party, the Government could turn all regulations into entitlements to which nobody could object on religious grounds, rendering RFRA meaningless. In any event, our decision in these cases need not result in any detrimental effect on any third party. As we explain, see infra, at ____, 189 L. Ed. 2d, at 710-711, the Government can readily arrange for other methods of providing contraceptives, without cost sharing, to employees who are unable to obtain them under their health-insurance plans due to their employers’ religious objections.

38 HHS has concluded that insurers [*83] that insure eligible employers opting out of the contraceptive mandate and that are required to pay for contraceptive coverage under the accommodation will not experience an increase in costs because the “costs of providing contraceptive coverage are balanced by cost savings from lower pregnancy-related costs and from improvements in women’s health.” 78 Fed. Reg. 39877. With respect to self-insured plans, the regulations establish a mechanism for the eligible employers’ third-party administrators to obtain a compensating reduction in the fee paid by insurers to participate in the federally facilitated exchanges. HHS believes that this system will not have a material effect on the funding of the exchanges because the “payments for contraceptive services will represent only a small portion of total [federally facilitated exchange] user fees.” Id., at 39882; see 26 CFR §§54.9815-2713A(b)(3).

39 See n. 9, supra.
religion, and it serves [***84] HHS’s stated interests equally well. 40

The principal dissent identifies no reason why this accommodation would fail to protect the asserted needs of women as effectively as the contraceptive mandate, and there is none. 41 Under the accommodation, the plaintiffs’ female employees would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives, and they would continue to “face minimal logistical and administrative obstacles,” post, at ___, 189 L. Ed. 2d, at 732 (internal quotation marks omitted), because their employers’ insurers would be responsible for providing information and coverage, see, e.g., 45 CFR §§147.131(c)-(d); cf. [*2783] 26 CFR §§54.9815-2713A(b), (d). Ironically, it is the dissent’s approach that would “[i]mped[e] women’s receipt of benefits by ‘requiring them to take steps to learn about, and to sign up for, a new government funded and administered health [***85] benefit,’” post, at ___, 189 L. Ed. 2d, at 732, because the dissent would effectively compel religious employers to drop health-insurance coverage altogether, leaving their employees to find individual plans on government-run exchanges or elsewhere. This is indeed “scarcely what Congress contemplated.” Ibid.

C

HHS and the principal dissent argue that a ruling in favor of the objecting parties in these cases will lead to a flood of religious objections regarding a wide variety of medical procedures and drugs, such as vaccinations and blood transfusions, but HHS has made no effort to substantiate this prediction. 42 HHS points to no evidence that insurance plans in existence [***86] prior to the enactment of ACA excluded coverage for such items. Nor has HHS provided evidence that any significant number of employers sought exemption, on religious grounds, from any of ACA’s coverage requirements other than the contraceptive mandate.

[**712] It is HHS’s apparent belief that no insurance-coverage mandate would violate RFRA—no matter how significantly it impinges on the religious liberties of employers—that would lead to intolerable consequences. Under HHS’s view, RFRA would permit the Government to require all employers to provide coverage for any medical procedure allowed by law in the jurisdiction in question—for instance, third-trimester abortions or assisted suicide. The owners of many closely held corporations could not in good conscience provide such coverage, and thus HHS would effectively exclude these people from full participation in the economic life of the Nation. RFRA was enacted to prevent such an outcome.

In any event, our decision in these cases is concerned solely with the contraceptive mandate. Our decision should not be understood [***87] to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer’s religious beliefs. Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means of providing them.

The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. See post, at ___, 189 L. Ed. 2d, at 734-735. Our decision today provides no such shield. 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.

HHS also raises for the first time in this Court the argument that applying the contraceptive mandate to for-profit employers with sincere religious objections is essential to the comprehensive health-insurance scheme that ACA establishes. HHS analogizes the contraceptive mandate to the requirement to pay Social Security taxes, which we upheld in Lee despite the religious [***88] objection of an employer, but these [*2784] cases are quite different. Our holding in Lee turned primarily on the special problems

40 The principal dissent faults us for being “noncommittal” in refusing to decide a case that is not before us here. Post, at ___, 189 L. Ed. 2d, at 733. The less restrictive approach we describe accommodates the religious beliefs asserted in these cases, and that is the only question we are permitted to address.

41 In the principal dissent’s view, the Government has not had a fair opportunity to address this accommodation, post, at ___, n. 27, 189 L. Ed. 2d, at 733, but the Government itself apparently believes that when it “provides an exception to a general rule for secular reasons (or for only certain religious reasons), [it] must explain why extending a comparable exception to a specific plaintiff for religious reasons would undermine its compelling interests.” Brief for the United States as Amicus Curiae in Holt v. Hobbs, No. 13-6827, p. 10, now pending before the Court.

42 Cf. 42 U.S.C. §1396a (Federal “program for distribution of pediatric vaccines” for some uninsured and underinsured children).
associated with a national system of taxation. We noted that “[t]he obligation to pay the social security tax initially is not fundamentally different from the obligation to pay income taxes.” 455 U.S., at 260, 102 S. Ct. 1051, 71 L. Ed. 2d 127. Based on that premise, we explained that it was untenable to allow individuals to seek exemptions from taxes based on religious objections to particular Government expenditures: “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.” Ibid. We observed 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.” Ibid.; see O Centro, 546 U.S., at 435, 126 S. Ct. 1211, 163 L. Ed. 2d 1017.

Lee was a free-exercise, not a RFRA, case, but if the issue in Lee were analyzed under the RFRA framework, the fundamental point would be that there simply is no less [***89] restrictive alternative to the categorical requirement to pay taxes. Because [***713] of the enormous variety of government expenditures funded by tax dollars, allowing taxpayers to withhold a portion of their tax obligations on religious grounds would lead to chaos. Recognizing exemptions from the contraceptive mandate is very different. ACA does not create a large national pool of tax revenue for use in purchasing healthcare coverage. Rather, individual employers like the plaintiffs purchase insurance for their employees. And contrary to the principal dissent’s characterization, the employers’ contributions do not necessarily funnel into “undifferentiated funds.” Post, at ___, 189 L. Ed. 2d, at 729. The accommodation established by HHS requires issuers to have a mechanism by which to “segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services.” 45 CFR §147.131(c)(2)(ii). Recognizing a religious accommodation under RFRA for particular coverage requirements, therefore, does not threaten the viability of ACA’s comprehensive scheme in the way that recognizing religious objections to particular expenditures from general tax revenues would. [***90] 43

In its final pages, the principal dissent reveals that its fundamental objection to the claims of the plaintiffs is an objection to RFRA itself. The dissent worries about forcing the federal courts to apply RFRA to a host of claims made by litigants seeking a religious exemption from generally [***91] applicable laws, and the dissent expresses a desire to keep the courts out of this business. See post, at ___, 189 L. Ed. 2d, at 734-736. In making this plea, the dissent reiterates a point made forcefully by the Court in Smith, 494 U.S., at 888-889, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (applying the Sherbert test to all free-exercise [**785] claims “would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind”). But Congress, in enacting RFRA, took the position 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). The wisdom of Congress’s judgment on this matter is not our concern. Our responsibility is to enforce RFRA as written, and under the standard that RFRA prescribes, the HHS contraceptive mandate is unlawful.

***

The contraceptive mandate, as applied to closely held corporations, violates RFRA. Our decision on that statutory question makes it unnecessary to reach the First Amendment claim raised by Conestoga and the Hahns.

[***714] The judgment of the Tenth Circuit in No. 13-354 is affirmed; the judgment of the Third [***92] Circuit in No. 13-356 is reversed, and that case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Concur by: KENNEDY

Concur

Justice Kennedy, concurring.

It seems to me appropriate, in joining the Court’s opinion, to add these few remarks. At the outset it should be said that the Court’s opinion does not have the breadth and sweep

43 HHS highlights certain statements in the opinion in Lee that it regards as supporting its position in these cases. In particular, HHS notes the statement that “[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.” 455 U.S., at 261, 102 S. Ct. 1051, 71 L. Ed. 2d 127; Lee was a free exercise, not a RFRA, case, and the statement to which HHS points, if taken at face value, is squarely inconsistent with the plain meaning of RFRA. Under RFRA, when followers of a particular religion choose to enter into commercial activity, the Government does not have a free hand in imposing obligations that substantially burden their exercise of religion. Rather, the Government can impose such a burden only if the strict RFRA test is met.
ascribed to it by the respectful and powerful dissent. The Court and the dissent disagree on the proper interpretation of the Religious Freedom and Restoration Act of 1993 (RFRA), but do agree on the purpose of that statute. 42 U.S.C. §2000bb et seq. It is to ensure that interests in religious freedom are protected. Ante, at ___ , 189 L. Ed. 2d. at 688-689; post, at ___, 189 L. Ed. 2d, at 720 (Ginsburg, J., dissenting).

In our constitutional tradition, freedom means that all persons have the right to believe or strive to believe in a divine creator and a divine law. For those who choose this course, free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts. Free exercise in this sense implicates more than just freedom of belief. See Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S. Ct. 900, 84 L. Ed. 1213 (1940). It means, too, the right to express those beliefs and to establish one’s religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community. But in a complex society and an era of pervasive governmental regulation, defining the proper realm for free exercise can be difficult. In these cases the plaintiffs deem it necessary to exercise their religious beliefs within the context of their own closely held, for-profit corporations. They claim protection under RFRA, the federal statute discussed with care and in detail in the Court’s opinion.

As the Court notes, under our precedents, RFRA imposes a “‘stringent test.’” Ante, at ___, 189 L. Ed. 2d, at 689 (quoting City of Boerne v. Flores, 521 U.S. 507, 533, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997)). The Government must demonstrate that the application of a substantial burden to a person’s exercise of religion “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” §2000bb-1(b).

As to RFRA’s first requirement, the Department of Health and Human Services (HHS) makes the case that the mandate serves the Government’s compelling interest in providing insurance coverage that is necessary to protect the health of female employees. Ante, at ___, 189 L. Ed. 2d, at 708; see, e.g., Brief for HHS in No. 13-354, pp. 14-15. There are many medical conditions for which pregnancy is contraindicated. See, e.g., id., at 47. It is important to confirm that a premise of the Court’s opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees. Ante, at ___, 189 L. Ed. 2d, at 708.

[**715] But the Government has not made the second showing required by RFRA, that the means it uses to regulate is the least restrictive way to further its interest. As the Court’s opinion explains, the record in these cases shows that there is an existing, recognized, workable, and already-implemented framework to provide coverage. That framework is one that HHS has itself devised, that the plaintiffs have not criticized with a specific objection that has been considered in detail by the courts in this litigation, and that is less restrictive than the means challenged by the plaintiffs in these cases, Ante, at ___, and n. 9, ___, 189 L. Ed. 2d, at 690-691, 710-711.

The means the Government chose is the imposition of a direct mandate on the employers in these cases. Ante, at ___, 189 L. Ed. 2d, at 690. But in other instances the Government has allowed the same contraception coverage in issue here to be provided to employees of nonprofit religious organizations, as an accommodation to the religious objections of those entities. See ante, at ___, and n. 9, ___, 189 L. Ed. 2d, at 690-691, 710-711. The accommodation works by requiring insurance companies to cover, without cost sharing, contraception coverage for female employees who wish it. That accommodation equally furthers the Government’s interest but does not impinge on the plaintiffs’ religious beliefs. See ante, at ___, 189 L. Ed. 2d, at 711.

On this record and as explained by the Court, the Government has not met its burden of showing that it cannot accommodate the plaintiffs’ similar religious objections under this established framework. RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation.

The parties who were the plaintiffs in the District Courts argue that the Government could pay for the methods that are found objectionable. Brief for Respondents in No. 13-354, p. 58. In discussing this alternative, the Court does not address whether the proper response to a legitimate claim for freedom in the health care arena is for the Government to create an additional program. Ante, at ___, 189 L. Ed. 2d, at 709-710. The Court properly does not resolve whether one freedom should be protected by creating incentives for additional government constraints. In these cases, it is the Court’s understanding that an accommodation may be made to the employers without imposition of a whole new program or burden on the Government. As the Court makes clear, this is not a case
where it can be established that it is difficult to accommodate the government’s interest, and in fact the mechanism for doing so is already in place. Ante, at ___, 189 L. Ed. 2d, at 710-711.

“The American community is today, as it long has been, a rich mosaic of religious faiths.” Town of Greece v. Galloway, 572 U.S. ___, 134 S. Ct. 1811, 1849, 188 L. Ed. 2d 835, 878 (2014) (Kagan, J., dissenting). Among the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that [*2787] same exercise unduly restrict other persons, such as employees, in protecting [*716] their [***97] own interests, interests the law deems compelling. In these cases the means to reconcile those two priorities are at hand in the existing accommodation the Government has designed, identified, and used for circumstances closely parallel to those presented here. RFRA requires the Government to use this less restrictive means. As the Court explains, this existing model, designed precisely for this problem, might well suffice to distinguish the instant cases from many others in which it is more difficult and expensive to accommodate a governmental program to countless religious claims based on an alleged statutory right of free exercise. Ante, at ___, 189 L. Ed. 2d, at 711-712.

For these reasons and others put forth by the Court, I join its opinion.

Dissent by: GINSBURG; KAGAN

Dissent

Justice Ginsburg, with whom Justice Sotomayor joins, and with whom Justice Breyer and Justice Kagan join as to all but Part III-C-1, dissenting.

In a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs. See ante, at ___, 189 L. Ed. 2d, at 694-714. Compelling governmental [***98] interests in uniform compliance with the law, and disadvantages that religion-based opt-outs impose on others, hold no sway, the Court decides, at least when there is a “less restrictive alternative.” And such an alternative, the Court suggests, there always will be whenever, in lieu of tolling an enterprise claiming a religion-based exemption, the government, i.e., the general public, can pick up the tab. See ante, at ___, 189 L. Ed. 2d, at 709-710. 1

The Court does not pretend [*2787] that the First Amendment’s Free Exercise Clause demands religion-based accommodations so extreme, for our decisions leave no doubt on that score. See infra, at ___, 189 L. Ed. 2d, at 719-720. Instead, the Court holds that Congress, in the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §2000bb et seq., dictated the extraordinary religion-based exemptions today’s decision endorses. In the Court’s view, RFRA demands accommodation of a for-profit corporation’s religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners’ religious faith—in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ. Persuaded that Congress enacted RFRA to serve a far less radical purpose, and mindful of the havoc the Court’s judgment can introduce, I dissent.

[***717] 1

“The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.” [*2788] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 856, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). Congress acted on that understanding when, as part of a nationwide insurance program intended to [***100] be comprehensive, it called for coverage of preventive care responsive to women’s needs. Carrying out Congress’ direction, the Department of Health and Human Services (HHS), in consultation with public health experts, promulgated regulations requiring group health plans to cover all forms of contraception approved by the Food and Drug Administration (FDA). The genesis of this coverage should enlighten the Court’s resolution of these cases.

1 The Court insists it has held none of these things, for another less restrictive alternative is at hand: extending an existing accommodation, currently limited to religious nonprofit organizations, to encompass commercial enterprises. See ante, at ___, 189 L. Ed. 2d, at 687. With that accommodation extended, the Court asserts, “women would still be entitled to all [Food and Drug Administration]-approved contraceptives without cost sharing.” Ante, at ___, 189 L. Ed. 2d, at 687. In the end, however, the Court is not so sure. In stark contrast to the Court’s initial emphasis on this accommodation, it ultimately declines to decide whether the highlighted accommodation is even lawful. See ante, at ___, 189 L. Ed. 2d, at 711 (“We do not decide today whether an approach of this type complies with RFRA . . . .”).

Reprinted with the permission of LexisNexis’
The Affordable Care Act (ACA), in its initial form, specified three categories of preventive care that health plans must cover at no added cost to the plan participant or beneficiary. \textsuperscript{2} Particular services were to be recommended by the U.S. Preventive Services Task Force, an independent panel of experts. The scheme had a large gap, however; it left out preventive services that “many women’s health advocates and medical professionals believe are critically important.” \cite{155 Cong. Rec. 28841 (2009) (statement of Sen. Boxer)}. To correct this oversight, Senator Barbara Mikulski introduced the \textit{Women’s Health Amendment}, which added to the ACA’s minimum coverage requirements a new category of preventive services specific to women’s health.

Women paid significantly more than men for preventive care, the amendment’s proponents noted; in fact, cost barriers operated to block many women from obtaining needed care at all. See, \textit{e.g.}, \textit{id.}, at 29070 (statement of Sen. Feinstein) (“Women of childbearing age spend 68 percent more in out-of-pocket health care costs than men.”); \textit{id.}, at 29302 (statement of Sen. Mikulski) (“copayments are [often] so high that [women] avoid getting [preventive and screening services] in the first place”). And increased access to contraceptive services, the sponsors comprehended, would yield important public health gains. See, \textit{e.g.}, \textit{id.}, at 29768 (statement of Sen. Durbin) (“This bill will expand health insurance \textsuperscript{[***102]} coverage to the vast majority of [the 17 million women of reproductive age in the United States who are uninsured] . . . . This expanded access will reduce unintended pregnancies.”).

As altered by the \textit{Women’s Health Amendment}’s passage, the ACA requires new insurance plans to include coverage without cost sharing of “such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [(HRSA)],” a unit of HHS. \cite{42 U.S.C. \$300gg-13(a)(1)} (2011) (hereinafter IOM Report). Thus charged, the HRSA developed \textsuperscript{[**718]} recommendations in consultation with the Institute of Medicine (IOM). See \textit{77 Fed. Reg. 8725-8726 (2012)}. \textsuperscript{3} The IOM convened a group of independent experts, including “specialists in disease prevention [and] women’s health”; those experts prepared a report \textsuperscript{[*2789]} evaluating the efficacy of a number of preventive services. IOM, \textit{Clinical Prevention Services for Women: Closing the Gaps 2} (2011) (hereinafter IOM Report). Consistent with the findings of “[n]umerous health professional associations” and other organizations, the IOM experts determined that preventive coverage should include the “full range” of FDA-approved contraceptive methods. \textsuperscript{[***103]} \textit{id.}, at 10. See also \textit{id.}, at 102-110.

In making that recommendation, the IOM’s report expressed concerns similar to those voiced by congressional proponents of the \textit{Women’s Health Amendment}. The report noted the disproportionate burden women carried for comprehensive health services and the adverse health consequences of excluding contraception from preventive care available to employees without cost sharing. See, \textit{e.g.}, \textit{id.}, at 19 (“[W]omen are consistently more likely than men to report a wide range of cost-related barriers to receiving . . . medical tests and treatments and to filling prescriptions for themselves and their families.”); \textit{id.}, at 103-104, 107 (pregnancy may be contraindicated for women with certain medical conditions, for example, some congenital heart diseases, pulmonary hypertension, and Marfan syndrome, and contraceptives may be used to reduce risk of endometrial cancer, among other serious medical conditions); \textsuperscript{[***104]} \textit{id.}, at 103 (women with unintended pregnancies are more likely to experience depression and anxiety, and their children face “increased odds of preterm birth and low birth weight”).

In line with the IOM’s suggestions, the HRSA adopted guidelines recommending coverage of “[a]ll [FDA-] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with

\textsuperscript{2} See \textit{42 U.S.C. \$300gg-13(a)(1)-(3)} \textsuperscript{[***101]} (group health plans must provide coverage, without cost sharing, for (1) certain “evidence-based items or services” recommended by the U.S. Preventive Services Task Force; (2) immunizations recommended by an advisory committee of the Centers for Disease Control and Prevention; and (3) “with respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by the Health Resources and Services Administration”).

\textsuperscript{3} The IOM is an arm of the National Academy of Sciences, an organization Congress established “for the explicit purpose of furnishing advice to the Government.” \textit{Public Citizen v. Department of Justice}, 491 U.S. 440, 460, n. 11, 109 S. Ct. 2558, 105 L. Ed. 2d 377 (1989) (internal quotation marks omitted).
reproductive capacity.” 4 Thereafter, HHS, the Department of Labor, and the Department of Treasury promulgated regulations requiring group health plans to include coverage of the contraceptive services recommended in the HRSA guidelines, subject to certain exceptions, described infra, at ___ , 189 L. Ed. 2d, at 730-731 . 5 This opinion refers to these regulations as the contraceptive coverage requirement.

B

While the Women’s Health Amendment succeeded, a countermove proved unavailing. The Senate voted down the so-called “conscience amendment,” which would have enabled any employer or insurance provider to deny coverage based on its asserted “religious beliefs or moral convictions.” 158 Cong. Rec. S539 (Feb. 9, 2012); see id. , at S1162-S1173 (Mar. 1, 2012) (debate and vote). 6 That amendment, Senator Mikulski observed, would have “put[ ] the personal opinion of employers and insurers over the practice of medicine.” Id. , at S1127 (Feb. 29, 2012). Rejecting the “conscience amendment,” Congress left health care decisions—including the choice among contraceptive methods—in the hands of women, with the aid of their health care providers.

II

Any First Amendment Free Exercise Clause claim Hobby Lobby or Conestoga 7 might assert is foreclosed by this Court’s decision in Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990). In Smith, two members of the Native American Church were dismissed from their jobs and denied unemployment benefits because they ingested peyote at, and as an essential element of, a religious ceremony. Oregon law forbade the consumption of peyote, and this Court, relying on that prohibition, rejected the employees’ claim that the denial of unemployment benefits violated their free exercise rights. The First Amendment is not offended, Smith held, when “prohibiting the exercise of religion . . . is not the object of governmental regulation but merely the incidental effect of a generally applicable and otherwise valid provision.” Id. , at 878, 110 S. Ct. 1595, 108 L. Ed. 2d 876; see id. , at 878-879, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (“an individual’s religious beliefs do not excise him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate”). The ACA’s contraceptive coverage requirement applies generally, it is “otherwise valid,” it trains on women’s well being, not on the exercise of religion, and any effect it has on such exercise is incidental.

Even if Smith did not control, the Free Exercise Clause would not require the exemption Hobby Lobby and Conestoga seek. Accommodations to religious beliefs or observances, the Court has clarified, must not significantly impinge on the interests of third parties. 8

The exemption sought by Hobby Lobby and Conestoga would override [**720] significant interests of the corporations’ employees and covered dependents. It would

---


7 As the Court explains, see ante, at ___ , 189 L. Ed. 2d, at 692-694, these cases arise from two separate lawsuits, one filed by Hobby Lobby, its affiliated business (Mardel), and the family that operates these businesses (the Greens); the other [*[**107]*] filed by Conestoga and the family that owns and controls that business (the Hahns). Unless otherwise specified, this opinion refers to the respective groups of plaintiffs as Hobby Lobby and Conestoga.

8 See Wisconsin v. Yoder, 406 U.S. 205, 230, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) (“This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred.”); Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 105 S. Ct. 2914, 86 L. Ed. 2d 557 (1985) (invalidating state statute requiring employers to accommodate an employee’s Sabbath observance where that statute failed to take into account the burden such an accommodation would impose on the employer or other employees). Notably, in construing the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §82000cc et seq., the Court has cautioned that “adequate account” must be taken of “the burdens [*[**108]*] a requested accommodation may impose on nonbeneficiaries.” Cutter v. Wilkinson, 544 U.S. 709, 720, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005); see id. , at 722, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (“an accommodation must be measured
deny legions of women who do not hold their employers’ beliefs access to contraceptive coverage that the ACA would otherwise secure. See Catholic Charities of Sacramento, Inc. v. Superior Court, 32 Cal. 4th 527, 565, 10 Cal. Rptr. 3d 283, 85 P. 3d 67, 93 (2004) (“We are unaware of any decision in which . . . [the U.S. Supreme Court] has exempted a religious objector from the operation of a neutral, generally applicable law despite the recognition that the requested [*2791] exemption would detrimentally affect the rights of third parties.”). In sum, with respect to free exercise claims no less than free speech claims, “[y]our right to swing your arms ends just where the other [*109] man’s nose begins.” Chafee, Freedom of Speech in War Time, 32 Harv. L. Rev. 932, 957 (1919).

III

A

Lacking a tenable claim under the Free Exercise Clause, Hobby Lobby and Conestoga rely on RFRA, a statute instructing that “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” unless the government shows that application of the burden is “the least restrictive means” to further a “compelling governmental interest.” 42 U.S.C. §2000bb-1(a), (b)(2). In RFRA, Congress “adopt[ed] a statutory rule comparable to the constitutional rule rejected in Smith.” Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006).

RFRA’s purpose is specific and written into the statute itself. The Act was crafted to “restore the compelling interest test as set forth in Sherbert v. Vernor, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 963 (1963) and Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened.” §2000bb(b)(1). 9 See also §2000bb(a)(5) (“[T]he compelling interest test as set forth in prior Federal court rulings is a workable test for [*110] striking sensible balances between religious liberty and competing prior governmental interests.”); ante, at ___, 189 L. Ed. 2d, at 713 (agreeing that the pre-Smith compelling interest test is “workable” and “strike[s] sensible balances”).

The legislative history is correspondingly emphatic on RFRA’s aim. See, e.g., S. Rep. No. 103-111, p. 12 (1993) (hereinafter Senate Report) (RFRA’s purpose was “only to overturn the Supreme Court’s decision in Smith,” not to “unsettle other areas of the law.”); 139 Cong. Rec. 26178 (1993) (statement of Sen. Kennedy) (RFRA was “designed to restore the compelling interest test for deciding free exercise claims.”). In line with this restorative purpose, Congress expected courts considering RFRA [*721] to “look to free exercise cases decided prior to Smith for guidance.” Senate Report 8. See also H. R. Rep. No. 103-88, pp. 6-7 (1993) (hereinafter [*111] House Report) (same). In short, the Act reinstates the law as it was prior to Smith, without “creat[ing] . . . new rights for any religious practice or for any potential litigant.” 139 Cong. Rec. 26178 (statement of Sen. Kennedy). Given the Act’s moderate purpose, it is hardly surprising that RFRA’s enactment in 1993 provoked little controversy. See Brief for Senator Murray et al. as Amici Curiae 8 (hereinafter Senators Brief) (RFRA was approved by a 97-to-3 vote in the Senate and a voice vote in the House of Representatives).

B

Despite these authoritative indications, the Court sees RFRA as a bold initiative departing from, rather than restoring, pre-Smith [*2792] jurisprudence. See ante, at ___, n. 3, ___, ___, ___, ___ - ___, 189 L. Ed. 2d, at 688, 689, 695, 700-701. To support its conception of RFRA as a measure detached from this Court’s decisions, one that sets a new course, the Court points first to the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §2000cc et seq., which altered RFRA’s definition of the term “exercise of religion.” RFRA, as originally enacted, defined that term to mean “the exercise of religion under the First Amendment to the Constitution.” §2000bb-14 (1994 ed.). See ante, at ___, 189 L. Ed. 2d, at 689. As [*112] amended by RLUIPA, RFRA’s definition now includes “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” §2000bb-14 (2012 ed.) (cross-referencing §2000cc-5), That definitional change, according to the Court, reflects “an obvious effort to effect a complete separation from First Amendment case law.” Ante, at ___, 189 L. Ed. 2d, at 689.

The Court’s reading is not plausible. RLUIPA’s alteration clarifies that courts should not question the centrality of a particular religious exercise. But the amendment in no way so that it does not override other significant interests”). A balanced approach is all the more in order when the Free Exercise Clause
suggests that Congress meant to expand the class of entities
calculated to mount religious accommodation claims, nor
does it relieve courts of the obligation to inquire whether a
government action substantially burdens a religious exercise.
\textbf{318} (CADC 2009) (Brown, J., concurring) ("There is no
doubt that RLUIPA's drafters, in changing the definition of
'exercise of religion,' wanted to broaden the scope of the
types of practices protected by RFRA, not increase
the universe of individuals protected by RFRA.").) H. R. Rep.
No. 106-219, p. 30 (1999). See also \textit{Gilardi v. United States
Dept. of Health and Human Servs.,} 733 F. 3d 1208, 1211, 407 U.S. App. D.C. 30 (CADC 2013) \textbf{[***113]} (RFRA, as
amended, "provides us with no helpful definition of 'exercise
of religion.'"); \textit{Henderson v. Kennedy,} 265 F. 3d 1072,
[RLUIPA] amendments did not alter RFRA's basic
prohibition that the '[g]overnment shall not substantially
burden a person's exercise of religion."). 10

Next, the Court highlights RFRA's requirement that the
government, if its action substantially burdens a person's
religious observance, must demonstrate \textbf{[***722]} that it
chose the least restrictive means for furthering a compelling
interest. "[B]y imposing a least-restrictive-means test," the
Court suggests, RFRA "went beyond what was required by
our pre-Smith decisions." \textit{Ante, at} \_\_\_, \textbf{n. 18, 189 L. Ed. 2d,
at 695} (citing \textit{City of Boerne v. Flores}, 521 U.S. 507, 117 S.
\textbf{Ct. 2157, 138 L. Ed. 2d 624} (1997)). \textbf{[***114]} See also \textit{ante,
at} \_\_\_, \textbf{n. 3, 189 L. Ed. 2d, at 688}. But as RFRA's statements
of purpose and legislative history make clear, Congress
intended only to restore, not to scrap or alter, the balancing
test as this Court had applied it pre-Smith. See \textit{supra, at
\_\_\_\_\_\_\_.}, \textbf{189 L. Ed. 2d, at 720}. See also Senate Report 9
(RFRA's "compelling interest test generally should not be
construed more stringently or more leniently than it was
prior to Smith."); House Report 7 (same).

The Congress that passed RFRA correctly read this Court's
pre-Smith case law as including within the "compelling
interest test" a "least restrictive means" requirement. See,
\textit{e.g.}, Senate Report 5 ("Where [a substantial] burden is
placed \textbf{[2793]} upon the free exercise of religion, the Court
ruled [in \textit{Sherbert}], the Government must demonstrate that
it is the least restrictive means to achieve a compelling
governmental interest.").) And the view that the pre-Smith
test included a "least restrictive means" requirement had
been aired in testimony before the Senate Judiciary
Committee by experts on religious freedom. See, \textit{e.g.},
Hearing on S. 2969 before the Senate Committee on the
Judiciary, 102d Cong., 2d Sess., 78-79 (1993) (statement of
Prof. Douglas Laycock).

Our decision in \textit{City of Boerne}, \textbf{[***115]} it is true, states that
the least restrictive means requirement "was not used in the
pre-Smith jurisprudence RFRA purported to codify." See
\textit{Ante, at} \_\_\_, \textbf{n. 18, 189 L. Ed. 2d, at 688, 695}. As
just indicated, however, that statement does not accurately
convey the Court's pre-Smith jurisprudence. See \textit{Sherbert,
374 U.S., at 407, 83 S. Ct. 1790, 10 L. Ed. 2d 963} ("[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."); \textit{Thomas v. Review Bd. of Indiana Employment
\textbf{2d 624} (1981) ("The state may justify an inroad on religious
liberty by showing that it is the least restrictive means of
achieving some compelling state interest.").) See also Berg,
The New Attacks on Religious Freedom Legislation and
("In Boerne, the Court erroneously said that the least
restrictive means test 'was not used in the pre-Smith
jurisprudence.'").) 11

\section{C}

With RFRA's restorative purpose in mind, I turn to the Act's
application to \textbf{[***23]} the instant lawsuits. That task, in
view of the positions taken by the Court, requires
consideration of several questions, each potentially
disposable of Hobby Lobby's and Conestoga's claims: Do
for-profit corporations rank among "person[s]" who
"exercise . . . religion"? Assuming that they do, does the
contraceptive coverage requirement "substantially burden"

---

\(10\) RLUIPA, the Court notes, includes a provision directing that "[t]his chapter [i.e., RLUIPA] shall be construed in favor of a broad
protection of religious exercise, to the maximum extent permitted by the terms of [the Act] and the Constitution." \textbf{42 U.S.C.
\textsection{2000cc-3(g)}; see \textit{ante, at} \_\_\_\_\_\_\_. \textbf{189 L. Ed. 2d, at 689, 700}. RFRA incorporates RLUIPA's definition of "exercise of religion,"
as RLUIPA does, but contains no omnibus rule of construction governing the statute in its entirety.

\(11\) The Court points out that I joined the majority opinion in \textit{City of Boerne} and did not then question the statement that "least restrictive means . . . was not used [pre-Smith]." \textit{Ante, at} \_\_\_, \textbf{n. 18, 189 L. Ed. 2d, at 695}. Concerning that observation, \textbf{[***116]} I remind my
colleagues of Justice Jackson's sage comment: "I see no reason why I should be consciously wrong today because I was unconsciously
(dissenting opinion).
their religious exercise? If so, is the requirement “in furtherance of a compelling government interest”? And last, does the requirement represent the least restrictive means for furthering that interest?

Misguided by its errant premise that RFRA moved beyond the pre-Smith case law, the Court falters at each step of its analysis.

RFRA’s compelling interest test, as noted, see supra, at ___110. L. Ed. 2d, at 720, applies to government actions that “substantially burden a person’s exercise of religion.” 12 U.S.C. §2000bb-1(a) (emphasis added). This reference, the Court submits, incorporates the definition of “person” found in the Dictionary Act, 1 U.S.C. §1, which extends to “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” See ante, at ___, 189 L. Ed. 2d, at 696-697. The Dictionary Act’s definition, however, controls only where “context” does not “indicate[ ] otherwise.” 8 L. Here, context does so indicate. RFRA speaks of “a person’s exercise of religion.” 42 U.S.C. §2000bb-1(a) (emphasis added). See also §§2000bb-2(4), *2794* 2000cc-5(7)(A). 12 Whether a corporation qualifies as a “person” capable of exercising religion is an inquiry one cannot answer without reference to the “full body” of pre-Smith “free-exercise caselaw.” Gilardi, 733 F. 3d, at 1212. There is in that case no support for the notion that free exercise rights pertain to for-profit corporations.

Until this litigation, no decision of this Court recognized a for-profit corporation’s qualification for a religious exemption from a generally applicable law, whether under the Free Exercise Clause or RFRA. 13 The absence of such precedent is just what one would expect, for the exercise of religion is characteristic of natural persons, not artificial legal entities. *2724* As Chief Justice Marshall observed nearly two centuries ago, a corporation is “an artificial being, invisible, intangible, and existing only in contemplation of law.” Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 4 Wheat. 518, 636, 4 L. Ed. 629 (1819). Corporations, Justice Stevens more recently reminded, “have no consciences, no beliefs, no feelings, no thoughts, no desires.” Citizens United v. Federal Election Comm’n, 558 U.S. 310, 466, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) (opinion concurring in part and dissenting *2119* in part).

The First Amendment’s free exercise protections, the Court has indeed recognized, shelter churches and other nonprofit religion-based organizations. 14 “For many individuals, religious activity derives meaning in large measure from participation in a larger religious community,” and “furtherance of the autonomy of religious organizations often furthers individual religious freedom *2120* as well.” Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 342, 107 S. Ct. 2862, 97 L. Ed. 2d 273 (1987) (Brennan, J., concurring in judgment). The Court’s “special solicitude to the rights of religious organizations,” *2795* Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. ___, ___, 132 S. Ct. 694, 706, 181 L. Ed. 2d 650, 664 (2012), however, is just that. No such solicitude is

---

12 As earlier explained, see supra, at ___110. L. Ed. 2d, at 721-722, RLUIPA’s amendment of the definition of “exercise of religion” does not bear the weight the Court places on it. Moreover, it is passing strange to attribute to RLUIPA any purpose to cover for-profit entities other than “religious assembl[ies] or institution[s].” 42 U.S.C. §2000cc(a)(1). But cf. ante, at ___, 189 L. Ed. 2d, at 700. That law applies to land-use regulation. §2000cc(a)(1). To permit commercial enterprises to challenge zoning and other land-use regulations under RLUIPA would “dramatically expand the statute’s reach” and deeply intrude on local prerogatives, contrary to Congress’ intent. Brief for National League of Cities et al. as Amici Curiae 26.

13 The Court regards Gallagher v. Crown Kosher Super Market of Mass., Inc., 366 U.S. 617, 81 S. Ct. 1122, 6 L. Ed. 2d 536 (1961), as “suggest[ing] . . . that for-profit corporations possess [free-exercise] rights.” Ante, at ___, 189 L. Ed. 2d, at 700-701. See also ante, at ___, n. 21, 189 L. Ed. 2d, at 697. The suggestion is barely there. True, one of the five challengers to the Sunday closing law assailed in Gallagher was a corporation owned by four Orthodox Jews. The other challengers were human individuals, not artificial, law-created entities, so there was no need to determine whether the corporation could institute the litigation. Accordingly, the plurality stated it could pretermit the question “whether appellees ha[d] standing” because Braunfield v. Brown, 366 U.S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563 (1961), which upheld a similar closing law, was fatal to their claim on the merits. 366 U.S., at 631, 81 S. Ct. 1144, 6 L. Ed. 2d 563.

traditional for commercial organizations. Indeed, until today, religious exemptions had never been extended to any entity operating in “the commercial, profit-making world.” Amos, 483 U.S., at 337, 107 S. Ct. 2862, 97 L. Ed. 2d 273.

The reason why is hardly obscure. Religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations. Workers who sustain the operations of those corporations commonly are not drawn from one religious community. Indeed, by law, no religion-based criterion can restrict the work force of for-profit corporations. See 42 U.S.C. §§2000e(b), 2000e-1(a), 2000e-2(a); cf. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 80-81, 97 S. Ct. 2264, 53 L. Ed. 2d 113 (1977) (Title VII requires reasonable accommodation of an employee’s religious exercise, but such accommodation must not come “at the expense of other[ employees]”).

In construing the RFRA, the Court relies on the Federal Religious Freedom Restoration Act of 1996, which was enacted to address perceived inadequacies in the Religious Freedom Restoration Act of 1993. Rescissions and Appropriations Act of 1996, 20 U.S.C. §281, at 174 (1999). The Court concedes that RFRA was intended to foster “religiously motivated” employee rights. See ante, at 724, 189 L. Ed. 2d, at 702 (emphasis added). Moreover, the exemption codified in §238n(a) was not enacted until three years after RFRA’s passage. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, §§2000e(a), 2000e-1(a), 2000e-2(a); Bridges v. Wixon, 326 U.S. 135, 148, 65 S. Ct. 1443, 89 L. Ed. 2103 (1945), and a fortiori, RFRA.

15 Typically, Congress has accorded to organizations religious in character religion-based exemptions from statutes of general application. E.g., 42 U.S.C. §2000e-1(a) (Title VII exemption from prohibition against employment discrimination based on religion for “a religious corporation, [***121] association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on . . . of its activities”); 42 U.S.C. §12113(d)(1) (parallel exemption in Americans With Disabilities Act of 1990). It can scarcely be maintained that RFRA enlarges these exemptions to allow Hobby Lobby and Conestoga to hire only persons who share the religious beliefs of the Greens or Hahns. Nor does the Court suggest otherwise. Cf. ante, at ___, 189 L. Ed. 2d, at 701.

The Court does not attempt to cover for-profit corporations, 42 U.S.C. §§300a-7(b)(2) and §§238n(a), and it seems inevitable that it interprets §238n(a) and §238n(b) as extending only to “religiously motivated” conduct, not to religious belief itself. See ante, at ___, 189 L. Ed. 2d, at 702. The Court’s inference is unwarranted. The exemptions the Court cites cover certain medical personnel who object to performing or assisting with abortions. Cf. ante, at ___, n. 27, 189 L. Ed. 2d, at 701 (“the protection provided by §238n(a) differs significantly from the protection provided by RFRA”). Notably, the Court does not assert that these exemptions have in fact been afforded to for-profit corporations. See §238n(c) [***122] (“health care entity” covered by exemption is a term defined to include “an individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions”); Tozzi, Whither Free Exercise: Employment Division v. Smith and the Rebirth of State Constitutional Free Exercise Clause Jurisprudence?, 48 J. Catholic Legal Studies 269, 296, n. 133 (2009) (“Catholic physicians, but not necessarily hospitals, . . . may be able to invoke [§238n(a)] . . . .”); cf. S. 137, 113th Cong., 1st Sess. (2013) (as introduced) (Abortion Non-Discrimination Act of 2013, which would amend the definition of “health care entity” in §238n to include “hospital[s],” “health insurance plan[s],” and other health care facilities). These provisions are revealing in a way that detracts from one of the Court’s main arguments. They show that Congress is not content to rest on the Dictionary Act when it wishes to ensure that particular entities are among those eligible for a religious accommodation.

Moreover, the exemption codified in §238n(a) was not enacted until three years after RFRA’s passage. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, §§515, 110 Stat. 1321-245. If, as the Court believes, RFRA opened all statutory schemes to religion-based challenges by for-profit corporations, there would be no need for a statute-specific, post-RFRA exemption of this sort.

16 That is not to say that a category of plaintiffs, such as resident aliens, may bring RFRA claims only if this Court expressly “addressed their [free-exercise] rights before Smith.” Ante, at ___, 189 L. Ed. 2d, at 701. Continuing with the Court’s example, resident aliens, unlike corporations, are flesh-and-blood individuals who plainly count as persons sheltered by the First Amendment, see United States v. Verdugo-Urquidez, 494 U.S. 259, 271, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990) (citing Bridges v. Wixon, 326 U.S. 135, 148, 65 S. Ct. 1443, 89 L. Ed. 2103 (1945)), and a fortiori, RFRA.

17 I part ways with Justice Kennedy on the context relevant here. He sees it as the employers’ “exercise of their religious beliefs within the context of their own closely held, for-profit corporations.” Ante, at ___, 189 L. Ed. 2d, at 714 (concurring opinion). See also ante, at ___, 189 L. Ed. 2d, at 711-712 (opinion of the Court) (similarly concentrating on religious faith of employers without reference to the different beliefs and liberty interests of employees). I see as the relevant context the employers’ asserted right to exercise religion within a nationwide program designed to protect against health hazards employees who do not subscribe to their employers’ religious beliefs.
likely would have been made in the legislation. See Whitman v. American Trucking Assns., Inc., 531 U.S. 457, 468, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001) (Congress does not “hide elephants in mouseholes”). The text of RFRA makes no such statement and the legislative history does not so much as mention for-profit corporations. See Hobby Lobby Stores, Inc. v. Sebelius, 723 F. 3d 1114, 1169 (CA10 2013) (Briscoe, C. J., concurring in part and dissenting in part) (legislative record lacks “any suggestion that Congress foresaw, let alone intended that, RFRA would cover for-profit corporations”). See also Senators Brief 10-13 (none of the cases cited in House or Senate Judiciary Committee reports accompanying RFRA, or mentioned during floor speeches, recognized the free exercise rights of for-profit corporations).

[*276] The Court notes that for-profit corporations may support charitable causes and use their funds for religious ends, and therefore questions the distinction between such corporations and religious nonprofit organizations. See ante, at ___ , 189 L. Ed. 2d, at 679-700. See also ante, at ___ , 189 L. Ed. 2d, at 715 (Kennedy, J., concurring) [***126] (criticizing the Government for “distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation”). 18

Again, the Court forgets that religious organizations exist to serve a community of believers. For-profit corporations do not fit that bill. Moreover, history is not on the Court’s side. Recognition of the discrete characters of “ecclesiastical and lay” corporations dates back to Blackstone, see 1 W. Blackstone, Commentaries on the Laws of England 458 (1765), and was reiterated by this Court centuries before the enactment of the Internal Revenue Code. See Terrett v. Taylor, 13 U.S. 43, 9 Cranch 43, 49, 3 L. Ed. 650 (1815) (describing religious corporations); Trustees of Dartmouth College, 17 U.S. 518, 4 Wheat., at 645, 4 L. Ed. 629 (discussing “eleemosynary” corporations, including those “created for the promotion of religion”). To reiterate, “for-profit [*2797] corporations are different from religious non-profits in that they use labor to make a profit, rather than to perpetuate [the] religious value[s] [shared by a community of believers].” Gilardi, 733 F. 3d, at 1242 (Edwards, J., concurring in part and dissenting in part) (emphasis [***127] deleted).

Citing Braunfeld v. Brown, 366 U.S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563 (1961), the Court questions why, if “a sole proprietorship that seeks to make a profit may assert a free-exercise claim, [Hobby Lobby and Conestoga] can’t . . . do the same?” Ante, at ___, 189 L. Ed. 2d, at 698 (footnote omitted). See also ante, at ___, 189 L. Ed. 2d, at 694-695. But even accepting, arguendo, the premise that unincorporated business enterprises may gain religious accommodations under the Free Exercise Clause, the Court’s conclusion is unsound. In a sole proprietorship, [***128] the business and its owner are one and the same. By incorporating a business, however, an individual separates herself from the entity and escapes personal responsibility for the entity’s obligations. One might ask why the separation should hold only when it serves the interest of those who control the corporation. In any event, Braunfeld is hardly impressive authority for the entitlement Hobby Lobby and Conestoga seek. The free exercise claim asserted there was promptly rejected on the merits.

[*277] The Court’s determination that RFRA extends to for-profit corporations is bound to have untoward effects. Although the Court attempts to cabin its language to closely held corporations, its logic extends to corporations of any size, public or private. 19 Little doubt that RFRA claims will proliferate, for the Court’s expansive notion of corporate personhood—combined with its other errors in construing RFRA—invites for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faith.

---

18 According to the Court, the Government “concedes” that “nonprofit corporation[s]” are protected by RFRA. Ante, at ___, 189 L. Ed. 2d, at 696. See also ante, at ___ , 189 L. Ed. 2d, at 697, 699, 703. That is not an accurate description of the Government’s position, which encompasses only “churches,” “religious institutions,” and “religious non-profits.” Brief for Respondents in No. 13-356, p. 28 (emphasis added). See also Reply Brief in No. 13-354, p. 8 (“RFRA incorporates the longstanding and common-sense distinction between religious organizations, which sometimes have been accorded accommodations under generally applicable laws in recognition of their accepted religious character, and for-profit corporations organized to do business in the commercial world.”).

19 The Court does not even begin to explain how one might go about ascertaining the religious scruples of a corporation where shares are sold to the public. No need to speculate [***129] on that, the Court says, for “it seems unlikely” that large corporations “will often assert RFRA claims.” Ante, at ___, 189 L. Ed. 2d, at 702. Perhaps so, but as Hobby Lobby’s case demonstrates, such claims are indeed pursued by large corporations, employing thousands of persons of different faiths, whose ownership is not diffuse. “Closely held” is not synonymous with “small.” Hobby Lobby is hardly the only enterprise of sizable scale that is family owned or closely held. For example, the family-owned candy giant Mars, Inc., takes in $33 billion in revenues and has some 72,000 employees, and closely held Cargill, Inc., takes in more than $136 billion in revenues and employs some 140,000 persons. See Forbes, America’s Largest Private Companies 2013, available at http://www.forbes.com/ largest-private-companies/.
Even if Hobby Lobby and Conestoga were deemed RFRA “person[s],” to gain an exemption, they must demonstrate that the contraceptive coverage requirement “substantially burden[s] [their] exercise of religion.” 42 U.S.C. §2000bb-1(a). Congress no doubt meant the modifier “substantially” to carry weight. In the original draft of RFRA, the word “burden” appeared unmodified. The word “substantially” was inserted pursuant to a clarifying amendment offered by Senators Kennedy and Hatch. See 139 Cong. Rec. 26180. In proposing the amendment, Senator Kennedy stated that RFRA, in accord with the Court’s pre-Smith case law, “does not require the Government to justify every action that has some effect on religious exercise.” Ibid.

The Court barely pauses to inquire whether any burden imposed by the contraceptive coverage requirement is substantial. Instead, it rests on the Greens’ and Hahns’ “belief[s] that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage.” Ante, at ___, 189 L. Ed. 2d, at 706.

I agree with the Court that the Green and Hahn families’ religious convictions regarding contraception are sincerely held. See Thomas, 450 U.S. at 715, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (courts are not to question where an individual “draws the line” in defining which practices run afoul of her religious beliefs). See also 42 U.S.C. §§2000bb-1(a), 2000bb-2(4), 2000cc-5(7)(A). But those beliefs, however deeply held, do not suffice to sustain a RFRA claim. RFRA, properly understood, distinguishes between “factual allegations that [plaintiffs’] beliefs are sincere and of a religious nature,” which a court must accept as true, and the “legal” conclusion that [plaintiffs’] religious exercise is substantially burdened,” an inquiry the court must undertake. Kaemmerling v. Lappin, 553 F. 3d 669, 679, 384 U.S. App. D.C. 240 (CADC 2008).

That distinction is a facet of the pre-Smith jurisprudence RFRA incorporates. Bowen v. Roy, 476 U.S. 693, 106 S. Ct. 2147, 90 L. Ed. 2d 735 (1986), is instructive. There, the Court rejected a free exercise challenge to the Government’s use of a Native American child’s Social Security number for purposes of administering benefit programs. Without questioning the sincerity of the father’s religious belief that “use of [his daughter’s Social Security] number may harm [her] spirit,” the Court concluded that the Government’s internal uses of that number “place[d] no restriction on what [the father] may believe or what he may do.” Id., at 699, 106 S. Ct. 2147, 90 L. Ed. 2d 735. Recognizing that the father’s “religious views may not accept” the position that the challenged uses concerned only the Government’s internal affairs, the Court explained that “for the adjudication of a constitutional claim, the Constitution, rather than an individual’s religion, must supply the frame of reference.” Id., at 700-701, n. 6, 106 S. Ct. 2147, 90 L. Ed. 2d 735. See also Hernandez v. Commissioner, 490 U.S. 680, 699, 109 S. Ct. 2136, 104 L. Ed. 2d 766 (1989) (distinguishing between, on the one hand, “question[s] of the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds,” and, on the other, “whether the alleged

Nor does the Court offer any instruction on how to resolve the disputes that may crop up among corporate owners over religious values and accommodations. The Court is satisfied that “[s]tate corporate law provides a ready means for resolving any conflicts.” ante, at ___, 189 L. Ed. 2d, at 706, but the authorities cited in support of that proposition are hardly helpful. See Del. Code Ann., Tit. 8, §351 (2011) (certificates of incorporation may specify how the business is managed); 1 J. Cox & T. Hazen, Treatise on the Law of Corporations §3:2 (3d ed. 2010) (section entitled “Selecting the state of incorporation”); id., §14:11 (observing that “[d]espite the frequency of dissension and deadlock in close corporations, in some states neither legislatures nor courts have provided satisfactory solutions”). And even if a dispute settlement mechanism is in place, how is the arbiter of a religion-based intracorporate controversy to resolve the disagreement, given this Court’s instruction that “courts have no business addressing [whether an asserted religious belief] is substantial,” ante, at ___, 189 L. Ed. 2d, at 706?

The Court dismisses the argument, advanced by some amici, that the $2,000-per-employee tax charged to certain employers that fail to provide health insurance is less than the average cost of offering health insurance, noting that the Government has not provided the statistics that could support such an argument. See ante, at ___, 189 L. Ed. 2d, at 704-705. The Court overlooks, however, that it is not the Government’s obligation to prove that an asserted burden is in substantial. Instead, it is incumbent upon plaintiffs to demonstrate, in support of a RFRA claim, the substantiality of the alleged burden.

The Court levels a criticism that is as wrongheaded as can be. In no way does the dissent “tell the plaintiffs that their beliefs are flawed.” Ante, at ___, 189 L. Ed. 2d, at 706. Right or wrong in this domain is a judgment no Member of this Court, or any civil court, is authorized or equipped to make. What the Court must decide is not “the plausibility of a religious claim,” ante, at ___, 189 L. Ed. 2d, at 706 (internal quotation marks omitted), but whether accommodating that claim risks depriving others of rights accorded them by the laws of the United States. See supra, at ___, 189 L. Ed. 2d, at 719-720; infra, at ___, 189 L. Ed. 2d, at 731.
burden imposed [by the challenged government action] is a substantial one”). Inattentive to this guidance, today’s decision elides entirely the distinction between the sincerity of a challenger’s religious belief and the substantiality of the burden placed on the challenger.

Undertaking the inquiry that the Court forgoes, I would conclude that the connection between the families’ religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial. The requirement carries no command that Hobby Lobby or Conestoga purchase or provide the contraceptives they find objectionable. Instead, it calls on the companies covered by the requirement to direct money into undifferentiated funds that finance a wide variety of benefits under comprehensive health plans. Those plans, in order to comply with the ACA, see supra, at ___ - ___, 189 L. Ed. 2d, at 717-718, must offer contraceptive coverage without cost sharing, just as they must cover an array of other preventive services.

Importantly, the decisions whether to claim benefits under the plans are made not by Hobby Lobby or Conestoga, but by the covered employees and dependents, in consultation with their health care providers. Should an employee of Hobby Lobby or Conestoga share the religious beliefs of the Greens and Hahns, she is of course under no compulsion to use the contraceptives in question. But “[n]o individual decision by an employee and her physician—be it to use contraception, treat an infection, or have a hip replaced—is in any meaningful sense [her employer’s] decision or action.” Grote v. Sebelius, 708 F. 3d 850, 865 (CA7 2013) (Rovner, J., dissenting). It is doubtful that Congress, when it specified that burdens must be “substantial[,]” had in mind a linkage thus interrupted by independent decisionmakers (the woman and her health counselor) standing between the challenged government action and the religious exercise claimed to be infringed. Any decision to use contraceptives made by a woman covered under Hobby Lobby’s or Conestoga’s plan will not be propelled by the Government, it will be the woman’s autonomous choice, informed by the physician she consults.

Even if one were to conclude that Hobby Lobby and Conestoga meet the substantial burden requirement, the Government has shown that the contraceptive coverage for which the ACA provides furthers compelling interests in public health and women’s well being. Those interests are concrete, specific, and demonstrated by a wealth of empirical evidence. To recapitulate, the mandated contraception coverage enables women to avoid the health problems unintended pregnancies may visit on them and their children. See IOM Report 102-107. The coverage helps safeguard the health of women for whom pregnancy may be hazardous, even life threatening. See Brief for American College of Obstetricians and Gynecologists et al. as Amici Curiae 14-15. And the mandate secures benefits wholly unrelated to pregnancy, preventing certain cancers, menstrual disorders, and pelvic pain. Brief for Ovarian Cancer National Alliance et al. as Amici Curiae 4, 6-7, 15-16; 78 Fed. Reg., 39872 (2013); IOM Report 107.

That Hobby Lobby and Conestoga resist coverage for only 4 of the 20 FDA-approved contraceptives does not lessen these compelling interests. Notably, the corporations exclude intrauterine devices (IUDs), devices significantly more effective, and significantly more expensive than other contraceptive methods. See id., at 105. Moreover, the Court’s reasoning appears to permit commercial enterprises like Hobby Lobby and Conestoga to exclude from their group health plans all forms of contraceptives. See Tr. of Oral Arg. 38-39 (counsel for Hobby Lobby acknowledged that his “argument . . . would apply just as well if the employer said ‘no contraceptives’” (internal quotation marks added)).

Perhaps the gravity of the interests at stake has led the Court to assume, for purposes of its RFRA analysis, that the compelling interest criterion is met in these cases. See ante, at ___, 189 L. Ed. 2d, at 708. It bears note in this regard that the cost of an IUD is nearly equivalent to a month’s full-time pay for workers earning the minimum wage, Brief for Guttmacher Institute et al. as Amici Curiae 16; that almost one-third of women would change their contraceptive method if costs were not a factor, Frost & Darroch, Factors Associated With Contraceptive Choice and

22 IUDs, which are among the most effective forms of contraception, generally cost women more than $1,000 when the expenses of the office visit and insertion procedure are taken into account. See Eisenberg, McNicholas, & Peipert, Cost as a Barrier to Long-Acting Reversible Contraceptive (LARC) Use in Adolescents, 52 J. Adolescent Health S59, S60 (2013). See also Winner et al., Effectiveness of Long-Acting Reversible Contraception, 366 New Eng. J. Medicine 1998, 1999 (2012).

23 Although the Court’s opinion makes this assumption grudgingly, see ante, at ___, 189 L. Ed. 2d, at 708-709, one Member of the majority recognizes, without reservation, that “the [contraceptive coverage] mandate serves the Government’s compelling interest in providing insurance coverage that is necessary to protect the health of female employees.” Ante, at ___, 189 L. Ed. 2d, at 714 (opinion of Kennedy, J.).
Inconsistent Method Use, United States, 2004, 40 Perspectives on Sexual & Reproductive Health 94, 98 (2008); and that only one-fourth of women who request an IUD actually have one inserted after finding out how expensive it would be, Gariepy, Simon, Patel, Creinin, & Schwarz, The Impact of Out-of-Pocket Expense on IUD Utilization Among Women With Private Insurance, 84 Contraception e39, e40 (2011). See also Eisenberg, supra, at S60 (recent study found that women who face out-of-pocket IUD costs in excess of $50 were “11-times less likely to obtain an IUD than women who had to pay less than $50”); Postlethwaite, Trussell, Zoolakis, Shabear, & Petitti, A Comparison of Contraceptive Procurement Pre- and Post-Benefit Change, 76 Contraception 360, 361-362 (2007) (when one health system eliminated patient cost sharing for IUDs, use of this form of contraception more than doubled).

Stepping back from its assumption that compelling interests support the contraceptive coverage requirement, the Court notes that small employers and grandfathered plans are not subject to the requirement. If there is a compelling interest in contraceptive coverage, the Court suggests, Congress would not have created these exclusions. See ante, at ___ - ___, 189 L. Ed. 2d, at 708-709.

Federal statues often include exemptions for small employers, and such provisions have never been held to undermine the interests served by these statutes. See, e.g., Family and Medical Leave Act of 1993, 29 U.S.C. §2611(4)(A)(i) (applicable to employers with 50 or more employees); Age Discrimination in Employment Act of 1967, 29 U.S.C. §630(b) (originally exempting employers with fewer than 50 employees, 81 Stat. 605, the statute now [*2801] governs employers with 20 or more employees); Americans With Disabilities Act, 42 U.S.C. §12111(5)(A) (applicable to employers with 15 or more [*3140] employees); Title VII, 42 U.S.C. §2000e(b) (originally exempting employers with fewer than 25 employees, see Arbaugh v. Y & H Corp., 546 U.S. 500, 505, n. 2, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006), the statute now governs employers with 15 or more employees).

[*731] The ACA’s grandfathering provision, 42 U.S.C. §18011, allows a phasing-in period for compliance with a number of the Act’s requirements (not just the contraceptive coverage or other preventive services provisions). Once specified changes are made, grandfathered status ceases. See 45 CFR §147.140(g). Hobby Lobby’s own situation is illustrative. By the time this litigation commenced, Hobby Lobby did not have grandfathered status. Asked why by the District Court, Hobby Lobby’s counsel explained that the “grandfathering requirements mean that you can’t make a whole menu of changes to your plan that involve things like the amount of co-pays, the amount of co-insurance, deductibles, that sort of thing.” App. in No. 13-354, pp. 39-40. Counsel acknowledged that, “just because of economic realities, our plan has to shift over time. I mean, insurance plans, as everyone knows, shift[t] over time.” Id., at 40. 24 The percentage of employees in grandfathered plans is steadily [*3141] declining, having dropped from 56% in 2011 to 48% in 2012 to 36% in 2013. Kaiser Family Foundation & Health Research & Educ. Trust, Employer Benefits 2013 Annual Survey 7, 196. In short, far from ranking as a categorical exemption, the grandfathering provision is “temporary, intended to be a means for gradually transitioning employers into mandatory coverage.” Gilardi, 733 F. 3d, at 1241 (Edwards, J., concurring in part and dissenting in part).

The Court ultimately acknowledges a critical point: RFRA’s application “must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.” Ante, at ___, n. 37, 189 L. Ed. 2d, at 709 (quoting Cutter v. Wilkinson, 544 U.S. 709, 720, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005); emphasis added). No tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation [*3142] would be harmful to others—here, the very persons the contraceptive coverage requirement was designed to protect. Cf. supra, at ___ - ___ , 189 L. Ed. 2d, at 719-720; Prince v. Massachusetts, 321 U.S. 158, 177, 64 S. Ct. 438, 88 L. Ed. 645 (1944) (Jackson, J., dissenting) (“[The] limitations which of necessity bound religious freedom . . . begin to operate whenever activities begin to affect or collide with liberties of others or of the public.”).

4

After assuming the existence of compelling government interests, the Court holds that the contraceptive coverage requirement fails to satisfy RFRA’s least restrictive means test. But the Government has shown that there is no less restrictive, equally effective means that would both (1) satisfy the challengers’ religious objections to providing insurance coverage for certain contraceptives (which they believe cause abortions); and (2) carry out the objective of

24 Hobby Lobby’s amicus National Religious Broadcasters similarly states that, “[g]iven the nature of employers’ needs to meet changing economic and staffing circumstances, and to adjust insurance coverage accordingly, the actual benefit of the ‘grandfather’ exclusion is de minimis and transitory at best.” Brief for National Religious Broadcasters as Amicus Curiae in No. 13-354, p. 28.
the ACA’s contraceptive coverage requirement, to ensure that women employees [*2802] receive, at no cost to them, the preventive care needed to safeguard their health and well being. A “least restrictive means” cannot require employees to relinquish benefits accorded them by federal law in order to ensure that [*732] their commercial employers can adhere unreservedly [*143] to their religious tenets. See supra, at , 189 L. Ed. 2d, at 719-720, 731. 25

Then let the government pay (rather than the employees who do not share their employer’s faith), the Court suggests. “The most straightforward [alternative],” the Court asserts, “would be for the Government to assume the cost of providing . . . contraceptives . . . to any women who are unable to obtain them under their health-insurance policies due to their employers’ religious objections.” Ante, at . The ACA, however, requires coverage of preventive services [*144] through the existing employer-based system of health insurance “so that [employees] face minimal logistical and administrative obstacles.” 78 Fed. Reg. 39888. Impeding women’s receipt of benefits “by requiring them to take steps to learn about, and to sign up for, a new [government funded and administered] health benefit” was scarcely what Congress contemplated. Ibid. Moreover, Title X of the Public Health Service Act, 42 U.S.C. §300 et seq., “is the nation’s only dedicated source of federal funding for safety net family planning services.” Brief for National Health Law Program et al. as Amici Curiae 23. “Safety net programs like Title X are not designed to absorb the unmet needs of . . . insured individuals.” Id., at 24. Note, too, that Congress declined to write into law the preferential treatment Hobby Lobby and Conestoga describe as a less restrictive alternative. See supra, at , 189 L. Ed. 2d, at 718.

And where is the stopping point to the “let the government pay” alternative? Suppose an employer’s sincerely held religious belief is offended by health coverage of vaccines, or paying the minimum wage, see Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 303, 105 S. Ct. 1953, 85 L. Ed. 2d 278 (1985), or according [*145] women equal pay for substantially similar work, see Dole v. Shenandoah Baptist Church, 899 F. 2d 1389, 1392 (CA4 1990)? Does it rank as a less restrictive alternative to require the government to provide the money or benefit to which the employer has a religion-based objection? 26 Because the Court cannot easily answer that question, it proposes something else: Extension to commercial enterprises of the accommodation already afforded to nonprofit religion-based organizations. See ante, at , 189 L. Ed. 2d, at 687, 690-691, 710-711. “At a minimum,” according to the Court, such an approach would not “impinge on [Hobby Lobby’s and Conestoga’s] religious belief.” Ante, [*733] at , 189 L. Ed. 2d, at 711. I have already discussed the “special solicitude” [*2803] generally accorded nonprofit religion-based organizations that exist to serve a community of believers, solicitude never before accorded to commercial enterprises comprising employees of diverse faiths. See supra, at , 189 L. Ed. 2d, at 723-725.

Ultimately, the Court hedges on its proposal to align for-profit enterprises with nonprofit religion-based organizations. “We do not decide today whether [the] approach [the opinion advances] complies with RFRA for purposes of all religious claims.” Ante, at , 189 L. Ed. 2d, at 716. Counsel for Hobby Lobby was similarly noncommittal. Asked at oral argument whether the Court-proposed alternative was acceptable, 27 counsel responded: “We haven’t been offered that accommodation, so we haven’t had to decide what kind of objection, if any, we would make to that.” Tr. of Oral Arg. 86-87.

---


26 Cf. Ashcroft v. American Civil Liberties Union, 542 U.S. 656, 666, 124 S. Ct. 2783, 159 L. Ed. 2d 690 (2004) (in context of First Amendment Speech Clause challenge to a content-based speech restriction, courts must determine “whether the challenged regulation is the least restrictive means among available, [*146] effective alternatives” (emphasis added)).

27 On brief, Hobby Lobby and Conestoga barely addressed the extension solution, which would bracket commercial enterprises with nonprofit religion-based organizations for religious accommodations purposes. The hesitation is understandable, for challenges to the adequacy of the accommodation accorded religious nonprofit organizations are currently sub judice. See, e.g., Little Sisters of the Poor Home for the Aged v. Sebelius, 6 F. Supp. 3d 1225, 2013 U.S. Dist. LEXIS 180867, 2013 WL 6839900 (Colo., Dec. 27, 2013), injunction pending appeal granted, 571 U.S., , 134 S. Ct. 1022, 187 L. Ed. 2d 867 (2014). At another point in today’s decision, the Court...
Conestoga suggests that, if its employees had to acquire and pay for the contraceptives (to which the corporation objects) on their own, a tax credit would qualify as a less restrictive alternative. See Brief for Petitioners in No. 13-356, p. 64. A tax credit, of course, is one variety of “let the government pay.” In addition to departing from the existing employer-based system of health insurance, Conestoga’s alternative would require a woman to reach into her own pocket in the first instance, and it would do nothing for the woman too poor to be aided by a tax credit.

In sum, in view of what Congress sought to accomplish, i.e., comprehensive preventive care for women furnished through employer-based health plans, none of the proffered alternatives would satisfactorily serve the compelling interests to which Congress responded.

IV

Among the pathmarking pre-Smith decisions RFRA preserved is United States v. Lee, 455 U.S. 252, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982). Lee, a sole proprietor engaged in farming and carpentry, was a member of the Old Order Amish. He sincerely believed that withholding Social Security taxes from his employees or paying the employer’s share of such taxes would violate the Amish faith. This Court held that, although the obligations imposed by the Social Security system conflicted with Lee’s religious beliefs, the burden was not unconstitutional. Id., at 260-261, 102 S. Ct. 1051, 71 L. Ed. 2d 127. See also id., at 258, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (recognizing the important governmental interest in providing a “nationwide . . . comprehensive insurance system with a variety of benefits available to all participants, with costs shared by employers and employees”). The Government urges that Lee should control the challenges brought by Hobby Lobby and Conestoga. See Brief for Respondents in No. 13-356, p. 18. In contrast, today’s Court dismisses Lee as a tax case. See ante, at ___, 189 L. Ed. 2d at 712. Indeed, it was a tax case and the Court in Lee homed in on “[t]he difficulty in attempting to accommodate religious beliefs in the area of taxation.” 455 U.S., at 259, 102 S. Ct. 1051, 71 L. Ed. 2d 127. The statutory scheme of employer-based comprehensive health coverage involved in these cases is surely binding on others engaged in the same trade or business as the corporate challengers here, Hobby Lobby and Conestoga. Further, the Court recognized in Lee that allowing a religion-based exemption to a commercial employer would “operate[e] to impose the employer’s religious faith on the employees.” Ibid. No doubt the Greens and Hahns and all who share their beliefs may decline to acquire for themselves the contraceptives in question. But that choice may not be imposed on employees who hold other beliefs. Working for Hobby Lobby or Conestoga, in other words, should not deprive employees of the preventive care available to workers at the shop next door, at least in the absence of directions from the Legislature or Administration to do so.

Why should decisions of this order be made by Congress or the regulatory authority, and not this Court? Hobby Lobby and Conestoga surely do not stand alone as commercial enterprises seeking exemptions from generally applicable laws on the basis of their religious beliefs. See, e.g.,

[***147] refuses to consider an argument neither “raised below [nor] advanced in this Court by any party,” giving Hobby Lobby and Conestoga “no opportunity to respond to [that] novel claim.” Ante, at ___, 189 L. Ed. 2d at 704. Yet the Court is content to decide this case (and this case only) on the ground that HHS could make an accommodation never suggested in the parties’ presentations. RFRA cannot sensibly be read to “requir[e] the government to . . . refute each and every conceivable alternative regulation.” United States v. Wilgus, 638 F. 3d 1274, 1289 (CA10 2011), especially where the alternative on which the Court seizes was not pressed by any challenger.

28 As a sole proprietor, Lee was subject to personal liability for violating the law of general application he opposed. His claim to a religion-based exemption would have been even thinner had he conducted his business as a corporation, thus avoiding personal liability.

29 Congress amended the Social Security Act in response to Lee. The amended statute permits Amish sole proprietors and partnerships (but not Amish-owned corporations) to obtain an exemption from the obligation to pay Social Security taxes only for employees who are co-religionists and who likewise seek an exemption and agree to give up their Social Security benefits. See 26 U.S.C. §3127(a)(2). Thus, employers with sincere religious beliefs have no right to a religion-based exemption that would deprive employees of Social Security benefits without the employee’s consent—an exemption analogous to the one Hobby Lobby and Conestoga seek here.

30 Cf. Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 299, 105 S. Ct. 1953, 85 L. Ed. 2d 278 (1985) (disallowing religion-based exemption that “would undoubtedly give [the commercial enterprise seeking the exemption] and similar organizations an advantage over their competitors”).
Newman v. Piggie Park Enterprises, Inc., 256 F. Supp. 941, 945 (SC 1966) (owner of restaurant chain refused to serve black patrons based on his religious beliefs opposing racial integration), aff’d in relevant part and rev’d in part on other grounds, 377 F. 2d 433 (CA4 1967), aff’d and modified on other grounds, 390 U.S. 400, 88 S. Ct. 733 [***735] 964, 19 L. Ed. 2d 1263 (1968); State by McClure v. Sports & Health Club, Inc., 370 N.W.2d 844, 847 (Minn. 1985) (born-again Christians who owned closely held, for-profit health clubs believed that the Bible proscribed hiring or retaining an “individual[ ] living with but not married to a person of the opposite sex,” “a young, single woman working without her father’s consent or a married woman working without her husband’s consent,” and any [*2805] person “antagonistic to the Bible,” including “fornicators and homosexuals” (internal quotation marks omitted)), appeal dismissed, 478 U.S. 1015, 106 S. Ct. 3315, 92 L. Ed. 2d 730 (1986); Elane Photography, LLC v. Willock, 2013-NMSC-040, ___ N. M. ___, 309 P. 3d 53 (for-profit photography business owned by a husband and wife refused to photograph a lesbian couple’s commitment ceremony based on the religious beliefs of the company’s owners), cert. denied, 572 U.S. ___, 134 S. Ct. 1787, 188 L. Ed. 2d 757 (2014) Would RFRA require exemptions in cases of this ilk? And if not, how does the Court divine which religious beliefs are worthy of accommodation, and which are not? Isn’t the Court disarmed from making such a judgment given its recognition that “courts must not presume to determine . . . the plausibility of a religious claim”? Ante, at ___, 189 L. Ed. 2d, at 706.

Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah’s Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and [*153] vaccinations (Christian Scientists, among others)? 31 According to counsel for Hobby Lobby, “each one of these cases . . . would have to be evaluated on its own . . . apply[ing] the compelling interest-least restrictive alternative test.” Tr. of Oral Arg. 6. Not much help there for the lower courts bound by today’s decision.

The Court, however, sees nothing to worry about. Today’s cases, the Court concludes, are “concerned solely with the contraceptive mandate. Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer’s religious beliefs. Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about [***154] the least restrictive means of providing them.” Ante, at ___, 189 L. Ed. 2d, at 712. But the Court has assumed, for RFRA purposes, that the interest in women’s health and well being is compelling and has come up with no means adequate to serve that interest, the one motivating Congress to adopt the Women’s Health Amendment.

There is an overriding interest, I believe, in keeping the courts “out of the business of evaluating the relative merits of differing religious claims,” [*736] Lee, 455 U.S., at 263, n. 2, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (Stevens, J., concurring in judgment), or the sincerity with which an asserted religious belief is held. Indeed, approving some religious claims while deeming others unworthy of accommodation could be “perceived as favoring one religion over another,” the very “risk the Establishment Clause was designed to preclude.” Ibid. The Court, I fear, has ventured into a minefield, cf. Spencer v. World Vision, Inc., 633 F. 3d 723, 730 (CA9 2010) (O’Scannlain, J., concurring), by its immediate reading of RFRA. I would confine religious exemptions under that Act to organizations formed “for a religious purpose,” “engage[d] primarily in carrying out that religious purpose,” and not “engaged . . . [*2806] substantially in the exchange [***155] of goods or services for money beyond nominal amounts.” See id., at 748 (Kleinfield, J., concurring).

***

For the reasons stated, I would reverse the judgment of the Court of Appeals for the Tenth Circuit and affirm the judgment of the Court of Appeals for the Third Circuit.

Justice Breyer and Justice Kagan, dissenting.

We agree with Justice Ginsburg that the plaintiffs’ challenge to the contraceptive coverage requirement fails on the merits. We need not and do not decide whether either for-profit corporations or their owners may bring claims under the Religious Freedom Restoration Act of 1993.

Accordingly, we join all but Part III-C-1 of Justice Ginsburg’s dissenting opinion.

References

(Matthew Bender) L Ed L Ed Index, Religious Freedom ... are applicable to [***156].
**Elane Photography, LLC v. Willock**

Supreme Court of New Mexico  
August 22, 2013, Filed  
Docket No. 33,687

**Reporter**  
2013-NMSC-040; 309 P.3d 53; 2013 N.M. LEXIS 284; 2013 WL 4478229

**ELANE PHOTOGRAPHY, LLC, Plaintiff-Petitioner, v. VANESSA WILLOCK, Defendant-Respondent.**

**Subsequent History:** Released for Publication September 24, 2013.  


**Core Terms**  
Photography, photographs, services, public accommodation, message, same-sex, sexual orientation, wedding, religious, exemptions, rights, couples, religion, argues, customers, discriminate, parade, cases, generally applicable, ceremony, military, antidiscrimination law, individuals, marriage, parties, accommodate, recruiters, violates, businesses, creative

**Case Summary**

**Overview**  
HOLDINGS: [1]-When a wedding photography business refused to photograph a same-sex commitment ceremony, it violated the New Mexico Human Rights Act, **N.M. Stat. Ann. §§ 28-1-1 to 28-1-13** (1969, as amended through 2007) (NMHRA); there is no basis to distinguish between basing discrimination on sexual orientation versus basing discrimination on the conduct of publicly committing to a person of the same sex; [2]-Requiring that the business not discriminate against same-sex commitment ceremonies did not violate its right under **U.S. Const. amend. 1** to refrain from speaking; [3]-Assuming the business had free exercise rights, they were not offended by enforcement of the NMHRA; [4]-The New Mexico Religious Freedom Restoration Act, **N.M. Stat. Ann. §§ 28-22-1 to 28-22-5** (2000) was inapplicable because the government was not a party.

**Outcome**  
Judgment affirmed.

**LexisNexis® Headnotes**

**Civil Rights Law > Protection of Rights > Public Facilities > Scope**


Civil Rights Law > Protection of Rights > Public Facilities > Scope

**HN2** A commercial photography business that offers its services to the public, thereby increasing its visibility to potential clients, is subject to the antidiscrimination provisions of the New Mexico Human Rights Act (NMHRA), **N.M. Stat. Ann. §§ 28-1-1 to -13** (1969, as amended through 2007), and must serve same-sex couples on the same basis that it serves opposite-sex couples.

Civil Rights Law > Protection of Rights > Public Facilities > Scope

**HN3** The New Mexico Human Rights Act (NMHRA), **N.M. Stat. Ann. §§ 28-1-1 to 28-1-13** (1969, as amended through 2007) does not violate free speech guarantees because the NMHRA does not compel a business to either speak a government-mandated message or to publish the speech of

Reprinted with the permission of LexisNexis’
another. The purpose of the NMHRA is to ensure that businesses offering services to the general public do not discriminate against protected classes of people, and U.S. Const. amend. I permits such regulation by states. Businesses that choose to be public accommodations must comply with the NMHRA, although such businesses retain their First Amendment rights to express their religious or political beliefs. They may, for example, post a disclaimer on their website or in their studio advertising that they oppose same-sex marriage but that they comply with applicable antidiscrimination laws.

Civil Rights Law > Protection of Rights > Public Facilities > General Overview
Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

HN4 The New Mexico Human Rights Act (NMHRA), N.M. Stat. Ann. §§ 28-1-1 to 28-1-13 (1969, as amended through 2007) is a neutral law of general applicability, and as such, it does not violate the Free Exercise Clause of U.S. Const. amend. I.

Civil Rights Law > Protection of Rights > Public Facilities > General Overview


Civil Rights Law > Protection of Rights > Public Facilities > General Overview


Civil Rights Law > Protection of Rights > Public Facilities > General Overview

HN7 “Public accommodation” is defined in the New Mexico Human Rights Act (NMHRA), N.M. Stat. Ann. §§ 28-1-1 to 28-1-13 (1969, as amended through 2007) as any establishment that provides or offers its services, facilities, accommodations or goods to the public, but does not include a bona fide private club or other place or establishment that is by its nature and use distinctly private. N.M. Stat. Ann. § 28-1-2(H).

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Rights Law > Protection of Rights > Public Facilities > General Overview

HN8 Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law.

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

HN9 On appeal, the court reviews a grant of summary judgment de novo.

Civil Rights Law > Protection of Rights > Public Facilities > Scope

HN10 See N.M. Stat. Ann. § 28-1-7(F)

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > General Overview

HN11 It is improper for the Supreme Court of New Mexico to consider any questions except those set forth in the petition for certiorari.

Civil Rights Law > Protection of Rights > Public Facilities > Scope


Civil Rights Law > General Overview

Civil Rights Law > Protection of Rights > Public Facilities > Scope

HN13 When a law prohibits discrimination on the basis of sexual orientation, that law similarly protects conduct that is inextricably tied to sexual orientation. There is no basis for distinguishing between discrimination based on sexual orientation and discrimination based on someone’s conduct of publicly committing to a person of the same sex. The court’s role is to determine and follow the intent of the Legislature, and the New Mexico Human Rights Act (NMHRA), N.M. Stat. Ann. §§ 28-1-1 to 28-1-13 (1969, as amended through 2007) evinces a clear intent to prevent discrimination as it is broadly defined in N.M. Stat. Ann. § 28-1-7(F).

Civil Rights Law > Protection of Rights > Public Facilities > Scope

Reprinted with the permission of LexisNexis’

Civil Rights Law > Protection of Rights > Public Facilities > Scope

The New Mexico Human Rights Act (NMHRA), *N.M. Stat. Ann. §§ 28-1-1 to 28-1-13* (1969, as amended through 2007) prohibits public accommodations from making any distinction in the services they offer to customers on the basis of protected classifications. *N.M. Stat. Ann. § 28-1-7(F).* The NMHRA does not permit businesses to offer a limited menu of goods or services to customers on the basis of a status that fits within one of the protected categories.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > General Overview

See *U.S. Const. amend. I.*

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Constitutional Law > Bill of Rights > State Application

The First Amendment freedoms of speech, assembly, and petition are protected by the Fourteenth Amendment from invasion by the States. The right to speak freely includes the right to refrain from speaking. The right of freedom of thought protected by *U.S. Const. amend. I* against state action includes both the right to speak freely and the right to refrain from speaking at all.

Civil Rights Law > Protection of Rights > Public Facilities > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

The New Mexico Human Rights Act (NMHRA), *N.M. Stat. Ann. §§ 28-1-1 to 28-1-13* (1969, as amended through 2007) does not require any affirmation of belief by regulated public accommodations; instead, it requires businesses that offer services to the public at large to provide those services without regard for race, sex, sexual orientation, or other protected classifications. *N.M. Stat. Ann. § 28-1-7(F).* The fact that these services may involve speech or other expressive services does not render the NMHRA unconstitutional.

Civil Rights Law > Protection of Rights > Public Facilities > General Overview

The United States Supreme Court has never found a compelled-speech violation arising from the application of antidiscrimination laws to a for-profit public accommodation. In fact, it has suggested that public accommodation laws are generally constitutional. Provisions like these are well within the State’s usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate *U.S. Const. amend. I* or *XIV.* The focal point of such statutes is rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds.

Civil Rights Law > Protection of Rights > Public Facilities > Scope


Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Expressive Conduct

While photography may be expressive for purposes of *U.S. Const. amend. I,* the operation of a photography business is not.

Civil Rights Law > Protection of Rights > Public Facilities > Scope

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

The allocation of work time is a matter of personal preference, not compelled speech, and it is not constitutionally protected. By their nature, laws prohibiting discrimination in public accommodations require businesses and their employees to spend time and energy serving customers whom they might prefer not to serve. These laws apply even when the businesses provide skillful or physically intimate services.

Civil Rights Law > Protection of Rights > Public Facilities > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

Antidiscrimination laws have been consistently upheld as constitutional. Public accommodations laws do not, as a general matter, violate *U.S. Const. amend. I* or *XIV.*
Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

**HN24** *U.S. Const. amend. I* does not exempt creative or expressive businesses from antidiscrimination laws.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

**HN25** See *U.S. Const. amend. I*.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

**HN26** 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). In order to state a valid free exercise claim under *U.S. Const. amend. I*, a party must show either (a) that the law in question is not a neutral law of general applicability or (b) that the challenge implicates both the Free Exercise Clause and an independent constitutional protection, or possibly (c) that the law operates in a context that lends itself to individualized government assessment of the reasons for the relevant conduct.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

**HN27** A law is not neutral under the Free Exercise Clause if its object is to infringe upon or restrict practices because of their religious motivation. It is not generally applicable if it imposes burdens only on conduct motivated by religious belief while permitting exceptions for secular conduct or for favored religions. These inquiries are related; improper intent can be inferred if the law was a religious gerrymander that burdened religion but exempted similar secular activity. If a law is neither neutral nor generally applicable, it must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. The compelling interest standard that the court applies once a law fails to meet the Smith requirements is not watered down but really means what it says.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

**HN28** Exemptions for religious organizations are common in a wide variety of laws, and they reflect the attempts of the Legislature to respect free exercise rights by reducing legal burdens on religion. The government may (and sometimes must) accommodate religious practices. Such exemptions are generally permissible.

Civil Procedure > Appeals > Appellate Briefs

**HN29** The court requires that the parties adequately brief all appellate issues to include an argument, the standard of review, and citations to authorities for each issue presented. To present an issue on appeal for review, an appellant must submit argument and authority as required by rule. The court will not review unclear arguments, or guess at what a party’s arguments might be.

Civil Rights Law > Protection of Rights > Religious Freedom > Religious Freedom Restoration Act

**HN30** See *N.M. Stat. Ann. § 28-22-3*.

Civil Rights Law > Protection of Rights > Religious Freedom > Religious Freedom Restoration Act

**HN31** See *N.M. Stat. Ann. § 28-22-2(A)*.

Civil Rights Law > Protection of Rights > Religious Freedom > Religious Freedom Restoration Act

**HN32** See *N.M. Stat. Ann. § 28-22-4(A)*.

Civil Rights Law > Protection of Rights > Religious Freedom > Religious Freedom Restoration Act


Civil Rights Law > Protection of Rights > Religious Freedom > Religious Freedom Restoration Act


Civil Rights Law > Protection of Rights > Religious Freedom > Religious Freedom Restoration Act

inapplicable to disputes in which a government agency is not a party.


Lopez, Sakura & Boyd, L.L.P., Julie Sakura, Santa Fe, NM; Sarah Steadman, Santa Fe, NM; Tobias Barrington Wolff, Philadelphia, PA, for Respondent.


Law Office of Michael J. Thomas, L.L.C., Michael J. Thomas, Las Cruces, NM; Eugene Volokh, Los Angeles, CA, for Amicus Curiae The Cato Institute.

Evie M. Jilek, Albuquerque, NM, for Amici Curiae Wedding Photographers.

Natalie A. Bruce, Albuquerque, NM; Steven H. Shiffrin, Ithaca, NY, for Amici Curiae Steven H. Shiffrin and Michael C. Dorf.

Sutin, Thayer & Browne, P.C., Kerry C. Kiernan, Lynn E. Mostoller, Albuquerque, NM, for Amicus Curiae New Mexico Small Businesses.

ACLU of New Mexico, Laura Louise Schauer Ives, Albuquerque, NM; LGBT & AIDS Project, ACLU Foundation, Joshua A. Block, New York, NY, for Amici Curiae American Civil Liberties Union Foundation and American Civil Liberties Union of New Mexico.


Opinion by: EDWARD L. CHÁVEZ

Opinion

[**58] CHÁVEZ, Justice.

[***2] By enacting HN1 the New Mexico Human Rights Act (NMHRA), NMSA 1978, §§ 28-1-1 to -13 (1969, as amended through 2007), the Legislature has made the policy decision to prohibit public accommodations from discriminating against people based on their sexual orientation. Elane Photography, which does not contest its public accommodation status under the NMHRA, offers wedding photography services to the general public and posts its photographs on a password-protected website for its customers. In this case, Elane Photography refused to photograph a commitment ceremony between two women. The questions presented are (1) whether Elane Photography violated the NMHRA when it refused to photograph the commitment ceremony, and if so, (2) whether this application of the NMHRA violates either the Free Speech or the Free Exercise Clause of the First Amendment to the United States Constitution, or (3) whether this application violates the New Mexico Religious Freedom Restoration Act (NMRFA), NMSA 1978, §§ 28-22-1 to -5 (2000).

[**2] First, we conclude that HN2 a commercial photography business that offers its services to the public, thereby increasing its visibility to potential clients, is subject to the antidiscrimination provisions of the NMHRA and must serve same-sex couples on the same basis that it serves opposite-sex couples. Therefore, when Elane Photography refused to photograph a same-sex commitment ceremony, it violated the NMHRA in the same way as if it had refused to photograph a wedding between people of different races.

[***3] Second, we conclude that HN3 the NMHRA does not violate free speech guarantees because the NMHRA does not compel Elane Photography to either speak a government-mandated message or to publish the speech of another. The purpose of the NMHRA is to ensure that businesses offering services to the general public do not discriminate against protected classes of people, and the United States Supreme Court has made it clear that the First Amendment permits such regulation by states. Businesses that choose to be public accommodations must comply with the NMHRA, although such businesses retain their First Amendment rights to express their religious or political beliefs. They may, for example, post a disclaimer on their website or in their studio advertising that they oppose same-sex marriage but that they comply with applicable antidiscrimination laws. We also hold that HN4 the NMHRA is a neutral law of general applicability, and as such, it does not violate the Free Exercise Clause of the First Amendment.

[***4] Finally, we hold that the NMRFA is inapplicable in this case because the government is not a party. For these reasons, we affirm the judgment of the Court of Appeals.
BACKGROUND

[5] **HN5** The NMHRA prohibits, among other things, discriminatory practices against certain defined classes of people. See § 28-1-7. In 2003, the NMHRA was amended to add “sexual orientation” as a class of persons protected from discriminatory treatment. 2003 N.M. Laws, ch. 383, § 2. “Sexual orientation” is defined in the NMHRA as **HN6** “heterosexuality, homosexuality or bisexuality, whether actual or perceived.” **Section 28-1-2(P).** In this case, we are concerned with discrimination [***5] by a public accommodation against a person because of that person’s real or perceived homosexuality—that person’s propensity to experience feelings of attraction and romantic love for other members of the same sex.

[6] **HN7** “Public accommodation” is defined in the NMHRA as “any establishment that provides or offers its services, facilities, accommodations or goods to the public, but does not include a bona fide private club or other place or establishment that is by its nature and use distinctly private.” **Section 28-1-2(H).** Thus, a business that elects not to offer its goods or services to the public is not subject to the NMHRA.

[7] Vanessa Willock contacted **Elane** Photography, LLC, by e-mail to inquire about **Elane** Photography’s services and to determine whether it would be available to photograph her commitment ceremony ¹ to another woman. **Elane** Photography’s co-owner and lead photographer, Elaine Huguenin, is personally opposed to same-sex marriage and will not photograph any image or event that [***6] violates her religious beliefs. Huguenin responded to Willock that **Elane** Photography photographed only “traditional weddings.” Willock emailed back and asked, “Are you saying that your company does not [***6] offer your photography services to same-sex couples?” Huguenin responded, “Yes, you are correct in saying we do not photograph same-sex weddings,” and thanked Willock for her interest.

[8] In order to verify **Elane** Photography’s policy, Willock’s partner, Misti Collinsworth, e-mailed **Elane** Photography and inquired about its willingness to photograph a wedding, without mentioning the sexes of the participants. Huguenin sent Collinsworth a list of pricing information and an invitation to meet with her and discuss her services. A few weeks later, Huguenin again e-mailed Collinsworth to follow up.

[9] Willock filed a discrimination complaint against **Elane** Photography with the New Mexico Human Rights Commission for discriminating against her based on her sexual orientation in violation of [***7] the NMHRA. The Commission concluded that **Elane** Photography had discriminated against Willock in violation of **Section 28-1-7(F),** which prohibits discrimination by public accommodations on the basis of sexual orientation, among other protected classifications. It awarded Willock attorneys’ fees, which Willock later waived. No other monetary or injunctive relief was granted.

[10] **Elane** Photography appealed to the Second Judicial District Court for a trial de novo pursuant to **Section 28-1-18(A).** See NMSA 1978, § 39-3-1 (1955) (“All appeals from inferior tribunals to the district courts shall be tried anew in said courts on their merits, as if no trial had been had below, except as otherwise provided by law.”). **Elane** Photography sought a reversal of the award of attorneys’ fees, a declaratory judgment that it had not discriminated on the basis of sexual orientation, and a ruling that its rights had been violated, among other relief. The parties filed cross-motions for summary judgment, and the district court granted summary judgment for Willock. **Elane** Photography again appealed, and the Court of Appeals affirmed. **Elane** Photography, LLC v. Willock, 2012 NMCA 86, ¶ 1, 284 P.3d 428. We granted [***8] certiorari.

[11] **Elane** Photography argues before this Court that: (1) it did not discriminate on the basis of sexual orientation, and therefore it did not violate the NMHRA; or, alternatively, (2) by requiring **Elane** Photography to accept clients against its will, the NMHRA violates the protection of the First Amendment against compelled speech; (3) the NMHRA violates **Elane** Photography’s First Amendment right to freely exercise its religion; and (4) the NMHRA violates **Elane** Photography’s right under the NMRFRA to freely exercise its religion. For the reasons that follow, we reject **Elane** Photography’s arguments and affirm summary judgment for Willock.

DISCUSSION

[12] The parties agree on the facts in this case, and the only question for this Court to consider is whether Willock is entitled to judgment as a matter of law. See Self v. United Parcel Serv., Inc., 1998 NMSC 46, ¶ 6, 126 N.M. 396, 970 P.2d 582 (HN8 “Summary judgment is appropriate where

¹ Willock referred to the event as a “commitment ceremony” in her e-mail to **Elane** Photography. However, the parties agree that the ceremony was essentially a wedding—**Elane** Photography emphasizes that there were vows, rings, a minister, flower girls, and a wedding dress, and Willock uses the word “wedding” to describe the ceremony in her brief. We use the terms “wedding” and “commitment ceremony” interchangeably.
there are no genuine issues of material fact and the movant
is entitled to judgment as a matter of law.”). HN9 On
appeal, we review a grant of summary judgment de novo.
Id.

I. ELANE PHOTOGRAPHY REFUSED TO SERVE
WILLOCK ON THE BASIS OF HER SEXUAL
ORIENTATION IN [***9] VIOLATION OF THE
NMHRA

[*13] The NMHRA seeks to promote the equal rights of
people within certain specified classes by protecting them
against discriminatory treatment. See Juneau v. Intel Corp.,
2006 NMSC 2, ¶ 14, 139 N.M. 12, 127 P.3d 548 (“The
NMHRA protects against discriminatory treatment . . . .”).
To accomplish this goal, the NMHRA makes it unlawful for
HN10 “any person in any public accommodation to make a
distinction, directly or indirectly, in offering or refusing to
offer its services, facilities, accommodations or goods to
any person because of race, religion, color, national origin,
ancestry, sex, sexual orientation, gender identity, spousal
affiliation [***61] or physical or mental handicap.” Section
28-1-7(F) (emphasis added). The Court of Appeals affirmed
the district court’s holding that Elane Photography was a
public accommodation under Section 28-1-2(H), Elane
Photography, 2012 NMCA 86, ¶ 18, and Elane Photography
did not challenge that holding in this appeal. Accordingly,
Elane Photography waived its right to challenge that
conclusion as a matter of New Mexico law. See Fikes v.
Furst, 2003 NMSC 33, ¶ 8, 134 N.M. 602, 81 P.3d 545
(HN11 “[I]t is improper for this Court to consider any
[*10] questions except those set forth in the petition for
certiorari.”). We therefore accept the Court of Appeals’
confirmation that at the time of its interactions with Willock
and Collinsworth, Elane Photography was a public
accommodation as defined in Section 28-1-2(H), and as
such, was subject to Section 28-1-7(F) of the NMHRA. See

[*14] Elane Photography argues that it did not violate
the NMHRA because it did not discriminate on the basis of
sexual orientation when it refused service to Willock.
Instead, Elane Photography explains that it “did not want to
convey through [Huguenin]’s pictures the story of an event
celebrating an understanding of marriage that conflicts with
the owners’ beliefs.” Elane Photography argues that it
would have taken portrait photographs and performed other
services for same-sex customers, so long as they did not
request photographs that involved or endorsed same-sex
weddings. However, Elane Photography’s owners testified
that they would also have refused to take photos of a
couple holding hands or showing affection for each other.
Elane Photography also argues in [***11] its brief that it
would have turned away heterosexual customers if the
customers asked for photographs in a context that endorsed
same-sex marriage. For example, Elane Photography states
that it “would have declined the request even if the
ceremony was part of a movie and the actors playing the
same-sex couple were heterosexual.” Therefore, Elane
Photography reasons that it did not discriminate “because of
. . . sexual orientation,” § 28-1-7(F), but because it did not
wish to endorse Willock’s and Collinsworth’s wedding.

[*15] HN12 The NMHRA prohibits discrimination in
broad terms by forbidding “any person in any public
accommodation to make a distinction, directly or indirectly,
in offering or refusing to offer its services . . . because of
. . . sexual orientation.” Section 28-1-7(F) (emphasis added).
Elane Photography is primarily a wedding photography
business. It provides wedding photography services to
heterosexual couples, but it refuses to work with homosexual
couples under equivalent circumstances.

[*16] Elane Photography’s argument is an attempt to
distinguish between an individual’s status of being
homosexual and his or her conduct in openly committing to
a person of the same sex. It was [***12] apparently
Willock’s e-mail request to have Elane Photography
photograph Willock’s commitment ceremony to another
woman that signaled Willock’s sexual orientation to Elane
Photography, regardless of whether that assessment was real
or merely perceived. The difficulty in distinguishing between
status and conduct in the context of sexual orientation
discrimination is that people may base their judgment about
an individual’s sexual orientation on the individual’s
conduct. To allow discrimination based on conduct so
closely correlated with sexual orientation would severely
undermine the purpose of the NMHRA.

[*17] The United States Supreme Court has rejected similar
attempts to distinguish between a protected status and
attractively correlated with that status. In Christian
Legal Society Chapter of the University of California,
Hastings College of the Law v. Martinez, 561 U.S. 661,
130 S. Ct. 2971, 2980, 177 L. Ed. 2d 838 (2010), students
at Hastings College of the Law formed a chapter of the
Christian Legal Society and sought formal recognition from
the school. The Christian Legal Society required its members
to affirm their belief in the divinity of Jesus Christ and to
refrain from “[u]nrepentant homosexual [***13] conduct.”
Id. & id. n.3. Hastings refused to recognize the organization
[***62] on the ground that it violated Hastings’
nondiscrimination policy, which prohibited exclusion based
on religion or sexual orientation. \textit{Id.} at ___, 130 S. Ct. at 2980. The Christian Legal Society argued that "it [did] not exclude individuals because of sexual orientation, but rather on the basis of a conjunction of conduct and the belief that the conduct is not wrong." \textit{Id.} at ___, 130 S. Ct. at 2990 (internal quotation marks omitted). The United States Supreme Court rejected this argument, stating:

Our decisions have declined to distinguish between status and conduct in this context. See \textit{Lawrence v. Texas}, 539 U.S. 558, 575, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination." (emphasis added)); \textit{id., at 583, 123 S.Ct. 2472} (O'Connor, J., concurring in judgment) ("While it is true that the law applies only to conduct, the conduct targeted by this law is closely related with being homosexual. Under such circumstances, the law is targeted at more than conduct. It is instead directed toward gay persons as a class."); cf. \textit{Bray v. Alexandria Women's Health Clinic}, 506 U.S. 263, 270, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").

\textit{Id.} We agree that \textit{HN13} when a law prohibits discrimination on the basis of sexual orientation, that law similarly protects conduct that is inextricably tied to sexual orientation. Otherwise we would interpret the NMHRA as protecting same-gender couples against discriminatory treatment, but only to the extent that they do not openly display their same-gender sexual orientation.

[*18] In this case, we see no basis for distinguishing between discrimination based on sexual orientation and discrimination based on someone’s conduct of publicly committing to a person of the same sex. Our role is to determine and follow the intent of the Legislature, \textit{State v. Hall}, 2013-NMSC-001, ¶ 9, 294 P.3d 1235, and the NMHRA evinces a clear intent to prevent discrimination as it is broadly defined in \textit{Section 28-1-7(F)}. New Mexico has a strong state policy of promoting equality for its residents regardless of sexual orientation. See \textit{Section 28-1-7} (defining unlawful discriminatory practices); \textit{HN15} \textit{NMSS 1978, § 29-21-2} (2009) (prohibiting profiling by law enforcement on the basis of sexual orientation); \textit{NMSS 1978, § 31-18B-2(D)} (2007) (including sexual orientation as a protected status under the Hate Crimes Act); \textit{Chatterjee v. King}, 2012-NMSC-019, ¶ 36, 280 P.3d 283 (recognizing that a child can have two legal parents of the same sex); \textit{In re Jacinta M.}, 1988 NMCA 100, ¶ 11, 107 N.M. 769, 764 P.2d 1327 (holding that a children’s court could not find a custodian unsuitable solely because of his or her sexual orientation). As a matter of New Mexico law, \textit{HN14} the NMHRA prohibits a public accommodation from refusing to serve a client based on sexual orientation, and \textit{Elane} Photography violated the law by refusing to photograph Willock’s same-sex commitment ceremony.

[*19] We are not persuaded by \textit{Elane} Photography’s argument that it does not violate the NMHRA because it will photograph a gay person (for example, in single-person portraits) so long as the photographs do not reflect the client’s sexual preferences. \textit{HN15} The NMHRA prohibits public accommodations from making any distinction in the services they offer to customers on the basis of protected classifications. \textit{Section 28-1-7(F).} For example, \textit{HN16} if a restaurant offers a full menu to male customers, it may not refuse to serve entrees to women, even if it will serve them appetizers. The NMHRA does not permit businesses to offer a "limited menu" of goods or services to customers on the basis of a status that fits within one of the protected categories. Therefore, \textit{Elane} Photography’s willingness to offer some services to Willock does not cure its refusal to provide other services that it offered to the general public. Similarly, it does not help \textit{Elane} Photography to argue that it would have turned away heterosexual polygamous weddings or heterosexual persons pretending to have a same-sex wedding. Those situations are not at issue here, and, if anything, these arguments support a finding that \textit{Elane} Photography \textit{HN17} intended to discriminate against Willock based on her same-sex sexual orientation. Therefore, we hold that \textit{Elane} Photography discriminated against Willock on the basis of sexual orientation in violation of the NMHRA.

II. THE NMHRA DOES NOT VIOLATE \textit{ELANE} PHOTOGRAPHY’S FIRST AMENDMENT RIGHTS

[*20] \textit{Elane} Photography challenges enforcement of the NMHRA on the grounds that enforcement of the law violates its right to free speech and \textit{HN17} the free exercise of its religion under the \textit{First Amendment to the United States Constitution}. For the reasons that follow, we reject both of these arguments.

A. THE NMHRA DOES NOT VIOLATE \textit{ELANE} PHOTOGRAPHY’S FREE SPEECH RIGHTS

[*21] Specifically regarding its free speech rights, \textit{Elane} Photography argues that the NMHRA compels it to speak in violation of the \textit{First Amendment} by requiring it to photograph a same-sex commitment ceremony, even though it is against the owners’ personal beliefs. We disagree.
1. The NMHRA does not compel Elane Photography to speak the government’s message

[**25**] The right to refrain from speaking was established in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642, [**641**] 63 S. Ct. 1178, 87 L. Ed. 1628 (1943), in which the United States Supreme Court held that the State of West Virginia could not constitutionally require students to salute the American flag and recite the Pledge of Allegiance. The Court held that a state could not require “affirmation of a belief and an attitude of mind,” *id. at 633*, and that the [***20***] state had impermissibly “invade[d] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control,” *id. at 642*.

[**26**] Similarly, in *Wooley, 430 U.S. at 717*, the United States Supreme Court held that the State of New Hampshire could not constitutionally punish a man for covering the state motto on the license plate of his car. The Wooley plaintiffs considered “Live Free or Die,” the state motto, “repugnant to their moral, religious, and political beliefs,” *id. at 707*, and they raised a First Amendment challenge to the state’s law forbidding residents to hide or alter the motto. *Id. at 709, 713*. The Wooley Court framed the question presented as “whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his [or her] private property in a manner and for the express purpose that it be observed and read by the public” and concluded that the measure was unconstitutional. *Id. at 713*.

[**27**] Elane Photography reads *Wooley* and *Barnette* to mean that the government may not compel people “to engage in unwanted expression.” However, the cases themselves [***21***] are narrower than Elane Photography suggests; they involve situations in which the speakers were compelled to publicly “speak the government’s message.” *Rumsfeld, 547 U.S. at 63*. In *Wooley* and *Barnette*, the respective states impermissibly required their residents to affirm or display a specific government-selected message: “Live Free or Die” in *Wooley, 430 U.S. at 707*, and allegiance to the flag in *Barnette, 319 U.S. at 632-33*. Both cases stand for the proposition that the First Amendment does not permit the government to “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” *Barnette, 319 U.S. at 642*. However, unlike the laws at issue in *Wooley* and *Barnette*, the NMHRA does not require Elane Photography to recite or display any message. It does not even require Elane Photography to take photographs. The NMHRA only mandates that if Elane Photography concludes that by requiring it to photograph same-sex weddings on the same basis as opposite-sex weddings, the NMHRA unconstitutionally compels it to “create and engage in expression” that sends a positive message about same-sex marriage [***19***] not shared by its owner.

[**23**] Elane Photography observes that photography is an expressive art form and that photographs can fall within the constitutional protections of free speech. See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995) (observing that abstract art and instrumental music are “unquestionably shielded” by the First Amendment). Elane Photography also states that in the course of its business, it creates and edits photographs for its clients so as to tell a positive story about each wedding it photographs, and the company and its owners would prefer not to send a positive message about same-sex weddings or same-sex marriage. Elane Photography concludes that by requiring it to photograph same-sex weddings on the same basis that it photographs opposite-sex weddings, the NMHRA unconstitutionally compels it to “create and engage in expression” that sends a positive message about same-sex marriage [***19***] not shared by its owner.

[**22**] The First Amendment to the United States Constitution provides that HN16 “Congress shall make no law . . . abridging the freedom of speech.” *U.S. Const. amend. I*. This prohibition applies equally to state governments. *Gitlow v. New York*, 268 U.S. 652, 666, 45 S. Ct. 625, 69 L. Ed. 1138 (1925) (assuming without deciding that free speech and press rights are incorporated by the Due Process Clause of the Fourteenth Amendment); *Edwards v. South Carolina*, 372 U.S. 229, 235, 83 S. Ct. 680, 9 L. Ed. 2d 697 (1963) (“It has long been established that HN17 these First Amendment freedoms [of speech, assembly, and petition] are protected by the Fourteenth Amendment from invasion by the States.”). United States Supreme Court precedent makes it clear that the right to speak freely [***18***] includes the right to refrain from speaking. See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428, 51 L. Ed. 2d 2752 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.").

[*24*] The compelled-speech doctrine on which Elane Photography relies is comprised of two lines of cases. The first line of cases establishes the proposition that the government may not require an individual to “speak the government’s message.” *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 63, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006). The second line of cases prohibits the government from requiring a private actor “to host or accommodate another speaker’s message.” *Id. Elane* Photography argues that by requiring it to photograph same-sex weddings on the same basis as opposite-sex weddings, the NMHRA violates both prohibitions. We address each argument in turn.
Photography operates a business as a public accommodation, it cannot discriminate against potential clients based on their sexual orientation.

[*28] Furthermore, the laws at issue in *Wooley* and *Barnette* had little purpose other than to promote the government-sanctioned message. See *Wooley*, 430 U.S. at 716-17 (rejecting the state’s contentions that (1) the state motto made it easier for law enforcement to identify improper license plates, and (2) the state hoped “to communicate to others an official view as to proper appreciation of history, state pride, and individualism”); *Barnette*, 319 U.S. at 640 (identifying “national unity” as the goal of compulsory flag salutes) (internal quotation marks and citation omitted). The *Barnette* Court noted that the dissenting students’ choice not to salute the flag “[did] not bring them into collision with rights asserted by any other individual.” 319 U.S. at 630. That is not the case here, where *Elane* Photography’s asserted right not to serve same-sex couples directly conflicts with Willock’s right under Section 28-1-7(F) of the NMHRA to obtain goods and services from a public accommodation without discrimination on the basis of her sexual orientation. Antidiscrimination laws have important purposes that go beyond expressing government values: they ensure that services are freely available in the market, and they protect individuals from humiliation and dignitary harm. See *Daniel v. Paul*, 395 U.S. 298, 307-08, 89 S. Ct. 1697, 23 L. Ed. 2d 318 (1969) [*23] (stating that the purpose of Title II of the Civil Rights Act of 1964 was “to [re]move the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public”) (internal quotation marks and citation omitted); *Katzenbach v. McClung*, 379 U.S. 294, 299-300, 85 S. Ct. 1377, 13 L. Ed. 2d 290 (1964) (discussing the economic impact of discrimination in public accommodations).

[*29] The fact that compliance with the NMHRA will require *Elane* Photography to produce photographs for same-sex weddings to the extent that it would provide those services to a heterosexual couple does not mean that the NMHRA compels speech in the manner of the laws challenged in *Wooley* and *Barnette*. *Elane* Photography’s argument here is more analogous to the claims raised by the law schools in *Rumsfeld*. In that case, a federal law made universities’ federal funding contingent on the universities allowing military recruiters access to university facilities and services on the same basis as other, non-military recruiters. 547 U.S. at 52-53. A group of law schools that objected to the ban on gays in the military challenged the law on a number of constitutional grounds, including that the law in question [*24] compelled them to speak the government’s message. *Id.* at 52, 53, 61-62. In order to assist the military recruiters, schools had to provide services that involved speech, “such as sending e-mails and distributing flyers.” *Id.* at 60.

[*30] The United States Supreme Court held that this requirement did not constitute compelled speech. *Id.* at 62. The Court observed that the federal law ‘‘neither limits what law schools may say nor requires them to say anything.” *Id.* at 60. Schools were compelled only to provide the type of speech-related services to military recruiters that they provided to non-military recruiters. *Id.* at 62. “There [was] nothing . . . approaching a Government-mandated pledge or motto that the school [had to] endorse.” *Id.*

[*31] The same situation is true in the instant case. Like the law in *Rumsfeld*, HN18 the NMHRA does not require any affirmation of belief by regulated public accommodations; instead, it requires businesses that offer services to the public at large to provide those services without regard for race, sex, sexual orientation, or other protected classifications. Section 28-1-7(F). The fact that these services may involve speech or other expressive services does not render [*25] the NMHRA unconstitutional. See *Rumsfeld*, 547 U.S. at 62 (“The compelled speech to which the law schools point is plainly incidental to the [law’s] regulation of conduct, and it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” (internal quotation marks and citation omitted)). *Elane* Photography is compelled to take photographs of same-sex weddings only to the extent that it would provide the same services to a heterosexual couple. See *id.* at 62 (speech assisting military recruiters was “only ‘compelled’ if, and to the extent, the school provide[d] such speech for other recruiters”).

2. The NMHRA does not compel *Elane* Photography to host or accommodate the message of another speaker

a. State laws prohibiting discrimination by public accommodations do not constitute compelled speech

[*32] The second line of compelled-speech cases deals with situations in which a government entity has required a speaker to “host or accommodate another speaker’s message.” *Id.* at 63. *Elane* Photography argues that a same-sex wedding [*26] or commitment ceremony is an expressive event, and that by requiring it to accept a client who is having a same-sex wedding, the NMHRA compels it to facilitate the messages inherent in that event. *Elane*
Photography argues that there are two messages conveyed by a same-sex wedding or commitment ceremony: first, that such ceremonies exist, and second, that these occasions deserve celebration and approval. *Elane* Photography does not wish to convey either of these messages.

[*33] *HN19* The United States Supreme Court has never found a compelled-speech violation arising from the application of antidiscrimination laws to a for-profit public accommodation. In fact, it has suggested that public [*HN20*] accommodation laws are generally constitutional. See *Hurley*, 515 U.S. at 572 (“Provisions like these are well within the State’s usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the *First* or *Fourteenth* Amendments . . . . [T]he focal point of [such statutes is] rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed [*HN21*] grounds.”). The United States Supreme Court has found constitutional problems with some applications of state public accommodation laws, but those problems have arisen when states have applied their public accommodation laws to free-speech events such as privately organized parades, *id. at 566, 573, 580-81;* and private membership organizations, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659, 659 n.4, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000). *Elane* Photography, however, is an ordinary public accommodation, a “clearly commercial entity[,]” *id. at 657,* that sells goods and services to the public.

[*34] The NMHRA does not, nor could it, regulate the content of the photographs that *Elane* Photography produces. It does not, for example, mandate that *Elane* Photography take posed photographs rather than candid shots, nor does it require every wedding album to contain a picture of the bride’s bouquet. Indeed, the NMHRA does not mandate that *Elane* Photography choose to take wedding pictures; that is the exclusive choice of *Elane* Photography. Like all public accommodation laws, *HN20* the [*HN21*] NMHRA regulates “the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds.” See *Hurley*, 515 U.S. at 572 (describing the Massachusetts public accommodation law). *Elane* Photography argues that because the service it provides is photography, and because photography is expressive, “some of [the] images will inevitably express the messages inherent in [the] event.” In essence, then, *Elane* Photography argues that by limiting its ability to choose its clients, the NMHRA forces it to produce photographs expressing its clients’ messages even when the messages are contrary to *Elane* Photography’s beliefs.

[*35] *Elane* Photography has misunderstood this issue. It believes that because it is a photography business, it cannot be subject to public accommodation laws. The reality is that because it is a public accommodation, its provision of services can be regulated, even though those services include artistic and creative work. If *Elane* Photography took photographs on its own time and sold them at a gallery, or if it was hired by certain clients but did not offer its services to the general public, the law would not apply [*HN22*] to *Elane* Photography’s choice of whom to photograph or not. The difference in the present case is that the photographs that are allegedly compelled by the NMHRA are photographs that *Elane* Photography produces for hire in the ordinary course of its business as a public accommodation. This determination has no relation to the artistic merit of photographs produced by *Elane* Photography. If Annie Leibovitz or Peter Lindbergh worked as public accommodations in New Mexico, they would be subject to the provisions of the NMHRA. Unlike the defendants in *Hurley* or the other cases in which the United States Supreme Court has found compelled-speech violations, *Elane* Photography sells its expressive services to the public. It may be that *Elane* Photography expresses its clients’ messages in its photographs, but only because it is hired to do so. The NMHRA requires that *Elane* Photography perform the same services for a same-sex couple as it would for an opposite-sex couple; the fact that these services require photography stems from the nature of *Elane* Photography’s chosen line of business.

[*36] The cases in which the United States Supreme Court found that the government unconstitutionally required a [*HN23*] speaker to host or accommodate another speaker’s message are distinctly different because they involve direct government interference with the speaker’s own message, as opposed to a message-for-hire. [*HN24*] In two cases, the Court found a compelled-speech problem where the government explicitly required a publisher to distribute an opposing point of view. In the first of these cases, *Miami Herald Publishing Co. v. Torinillo*, 418 U.S. 241, 244, 94 S. Ct. 2831, 41 L. Ed. 2d 730 (1974), the United States Supreme Court invalidated Florida’s “‘right of reply’” statute. The law provided that if a candidate for public office was criticized in a Florida newspaper, the candidate could demand that the newspaper print his or her reply, free of

---

2 *Dale* also was decided on freedom of association grounds. *Id. at 644.* *Elane* Photography has not argued that its right of expressive association was violated.
cost, in as conspicuous a location as the criticism that had appeared. Id. The Court expressed concern that the statute might deter editors from printing criticism of candidates, thereby chilling political news coverage and commentary in the state. Id. at 257. Furthermore, the statute unconstitutionally wrested control over editorial decisions about “[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public [***31] issues and public officials” away from the editors and into the hands of the state. Id. at 258.

[***37] Similarly, in Pacific Gas & Electric Co. v. Public Utilities Commission of California, 475 U.S. 1, 20-21, 26, 106 S. Ct. 903, 89 L. Ed. 2d 1 (1986) (plurality opinion; Marshall, J., concurring in judgment), a plurality of the United States Supreme Court held unconstitutional a decision by the California Public Utilities Commission to allow a third-party group to send out messages with a utility’s billing statements. The utility had traditionally distributed a newsletter to its customers with its monthly billing statements. Id. at 5 (plurality opinion). The Public Utility Commission decided that the space in the billing envelopes belonged to the customers, not to the utility, and it allowed an intervenor in a ratemaking proceeding involving the utility to send out messages in the utility’s billing envelopes four times per year. Id. at 5-6, 13 (plurality opinion). Citing Tornillo, the United States Supreme Court held that this decision unconstitutionally compelled the utility to accommodate the intervenor’s speech. Pacific Gas, 475 U.S. at 9-13 (plurality opinion). The Court noted that the Commission’s ruling required [***32] the utility to disseminate messages that were hostile to the utility’s own interests, id. at 14 (plurality opinion), and, depending on what the intervenors said, the utility might “be forced either to appear to agree with [the intervenors’] views or to respond,” when it would have preferred to remain silent on an issue. Id. at 13 (plurality opinion).

[***39] In addition, although Elane Photography raises concerns that its speech will be chilled, there [***33] is no risk of a chilling effect in this case. In Tornillo, the “right of reply” statute could have discouraged newspapers from printing criticism of political candidates. 418 U.S. at 257. By contrast, the relevant choice facing Elane Photography and similar businesses is not whether to publish a story, as in Tornillo, but whether to operate as a public accommodation. If a commercial photography business wishes to offer its services to the public, thereby increasing its visibility to potential clients, it will be subject to the antidiscrimination provisions of the NMHRA. If a commercial photography business believes that the NMHRA stifles its creativity, it can remain in business, but it can cease to offer its services to the public at large. Elane Photography’s choice to offer its services to the public is a business decision, not a decision about its freedom of speech.

[***40] In Pacific Gas and Tornillo, a government entity overtly required a speaker to publicize an opposing message. Elane Photography cites a third case, Hurley, in which the compelled-speech violation was more subtle. In Hurley, 515 U.S. at 560-61, the private organizers of the Boston St. Patrick’s Day parade denied the [***34] application of a group of gay, lesbian, and bisexual Irish-Americans (known as GLIB) to march as a unit in the parade. Id. at 561. Massachusetts courts held that this constituted discrimination on the basis of sexual orientation. Id. at 561, 563-64. The United States Supreme Court reversed, holding that the parade did not discriminate against gay participants; instead, the issue was “the admission of GLIB as its own parade unit carrying its own banner,” which had unquestionable expressive content. Id. at 572, 581.

[***41] Hurley is different from the instant case in two significant ways. First, the Massachusetts courts appear to have erroneously classified the privately organized parade as a public accommodation. See id. at 573 (“[T]he state courts’ application of the statute had the effect of declaring the sponsors’ speech itself to be the public accommodation.”). Second, parades by their nature express a message to the public. Id. at 568. By requiring the parade organizers to include GLIB, the Massachusetts courts directly altered the expressive content of the parade. Id. at 572-73. The presence of a group in a parade carries expressive weight, and Hurley implicated associational rights [***35] as well as free-speech rights. Id. at 565; see Dale, 530 U.S. at 659 (“Although we did not explicitly deem the parade in Hurley an expressive association, the analysis we applied there is similar to the analysis we apply here.”). Elane
Photography argues that photographs are also inherently expressive, so Hurley must apply to this case as well. However, the NMHRA applies not to Elane Photography’s photographs but to its business operation, and in particular, its business decision not to offer its services to protected classes of people. HN21 While photography may be expressive, the operation of a photography business is not. By way of analogy, the NMHRA could not dictate which groups a parade organizer had to include. However, if a business sold parade-planning services, and that business operated as a public accommodation, the NMHRA would prohibit that business from refusing to offer parade-planning services to persons because of their sexual orientation. Thus, Elane Photography’s reliance on Hurley is misplaced.

[*42] Elane Photography’s situation is actually clearer than that of our hypothetical business that organized parades, because even a parade for hire would still be a public event. See [*36] id. at 568 (describing the public nature of parades and their dependence on parade-watchers). By contrast, Elane Photography does not routinely publish for or display its wedding photographs to the public. Instead, it creates an album for each customer and posts the photographs on a password-protected website for the customers and their friends and family to view. Whatever message Elane Photography’s photographs may express, they express that message only to the clients and their loved ones, not to the public.

[*43] We note that when Elane Photography displays its photographs publicly and on its own behalf, rather than for a client, such as in advertising, its choices of which photographs to display are entirely its own. The NMHRA does not require Elane Photography to either include photographs of same-sex couples in its advertisements or display them in its studio. However, if Elane Photography offers its services to the public, the NMHRA requires Elane Photography to provide those same services to clients who are members of a protected class under the NMHRA.

b. Observers are unlikely to believe that Elane Photography’s photographs reflect the views of either its owners or its employees

[*44] [*37] Elane Photography also argues that if it is compelled to photograph same-sex weddings, observers will believe that it and its owners approve of same-sex marriage. The United States Supreme Court incorporates [*69] the question of perceived endorsement into its analysis in cases that involve compulsion to host or accommodate third-party speech. See, e.g., Hurley, 515 U.S. at 577 (“Without deciding on the precise significance of the likelihood of misattribution, it nonetheless becomes clear that in the context of an expressive parade . . . the parade’s overall message is distilled from the individual presentations along the way, and each unit’s expression is perceived by spectators as part of the whole.”). The Hurley Court observed that admitting GLIB or any other organization into a parade would likely be perceived as a message from the parade organizers “that [GLIB’s] message was worthy of presentation and quite possibly of support as well.” Id. at 575. Therefore, the Court further observed that the government’s forced inclusion of GLIB compromised the parade organizer’s “right to autonomy over [its] message.” Id. at 576.

[*45] In contrast to Pacific Gas and Tornillo, the United States Supreme [*38] Court has not found compelled speech violations where the government has not explicitly required a publisher to disseminate opposing points of view and where observers are unlikely to mistake a person’s compliance with the law for endorsement of third-party messages, as in Hurley. In Rumsfeld, the United States Supreme Court rejected not only the law schools’ argument that they were forced to speak the government’s message, but also their argument that they were required to host the recruiters’ speech in such a way that violated compelled speech principles. 547 U.S. at 64–65 (“[The law schools’] accommodation of a military recruiter’s message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school.”). The law schools in Rumsfeld worried that “treat[ing] military and nonmilitary recruiters alike . . . could be viewed as sending the message that they see nothing wrong with the military’s policies [regarding gays in the military], when they do.” Id. The Rumsfeld Court held that students “can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so,” and that the law [*39] schools were free to express their disagreement with the military’s policy. Id. at 65.

[*46] Rumsfeld drew on earlier cases that had considered whether observers would conflate the speech of third parties with the opinions of the parties to the suit. In PruneYard Shopping Center v. Robins, 447 U.S. 74, 76–78, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980), a California shopping center was sued under a California constitutional provision that required privately owned shopping centers to allow individuals to engage in expressive activities on their premises. The shopping center argued that the state could not constitutionally compel it “to participate in the dissemination of an ideological message.” Id. at 86–87. The United States Supreme Court rejected the argument, id. at 88, holding that because the shopping center was a business

Reprinted with the permission of LexisNexis'
establishment that was open to the public, “[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition . . . will not likely be identified with those of the owner.” Id. at 87. The Court also noted that the government had not dictated any particular message or engaged in viewpoint discrimination, and that the shopping center could disavow the third-party messages by posting its own signs. Id. “Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law.” Id.

[*47] Elane Photography makes an argument very similar to one rejected by the Rumsfeld Court: by treating customers alike, regardless of whether they are having same-sex or opposite-sex weddings, Elane Photography is concerned that it will send the message that it sees nothing wrong with same-sex marriage. Reasonable observers are unlikely to interpret Elane Photography’s photographs as an endorsement of the photographed events. It is well known to the public that wedding photographers are hired by paying customers and that the photographer may not share the happy couple’s views on issues ranging from the minor (the color scheme, the hors d’oeuvres) to the decidedly major (the religious service, the choice of bride or groom). As in Rumsfeld and PruneYard, Elane Photography is free to disavow, implicitly or explicitly, any messages that it believes the photographs convey. We note that after Rumsfeld, many law schools published open letters expressing their continued opposition to military policies and military recruitment on campus. See, e.g., Dean’s Letter Regarding Military Recruiting on Campus & Faculty Letter Regarding Military Recruitment, Columbia Law School, http://web.law.columbia.edu/careers/military-recruiting-on-campus (last visited Aug. 9, 2013); Military Recruitment Policy, University of Dayton School of Law, http://www.udayton.edu/law/careers/services/military-policy.php (last visited Aug. 9, 2013); Employer Recruiting Policies and Guidelines, Harvard Law School, http://www.law.harvard.edu/current/careers/ocs/employers/recruiting-policies-employers/index.html#Non-Discrimination (last visited Aug. 9, 2013). Elane Photography and its owners likewise retain their First Amendment rights to express their religious and political beliefs. They may, for example, post a disclaimer on their website or in their studio advertising that they oppose same-sex marriage but that they comply with applicable antidiscrimination laws.

c. Elane Photography’s allocation of its work time does not raise First Amendment concerns

[*48] Elane Photography next argues that when its employees spend time taking and editing photographs of same-sex weddings, they have less time to spend doing their preferred work of photographing opposite-sex weddings. Therefore, by Elane Photography’s reasoning, the state has interfered with Elane Photography’s message, just as it did in Pacific Gas and Tornillo. In Tornillo, the newspaper had limited space to print its stories, and printing replies by politicians took up space in which the newspaper could have published other material. 418 U.S. at 256-57. Similarly, the utility in Pacific Gas was required to share the space inside its billing envelopes; when a third party used the space, the utility could not distribute its own newsletter without paying additional postage. 475 U.S. at 5-6. The instant case is different because Elane Photography does not produce a publication whose limited space has been taken over by the government.

[*49] Instead, Elane Photography’s complaint is based on its staff’s limited time. Elane Photography argues that if it accepts same-sex couples as clients, its employees must “spend a day shooting pictures and three to four weeks selecting, editing, and arranging images” of the clients’ weddings, when they would prefer to spend this time working on images of heterosexual weddings. [*43] Therefore, it argues, the NMHRA interferes with Elane Photography’s own speech.

[*50] We disagree because HN22 the allocation of work time is a matter of personal preference, not compelled speech, and it is not constitutionally protected. See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261, 85 S. Ct. 1415, 1416 L. Ed. 2d 540 (1964) (rejecting Thirteenth Amendment challenge to law requiring motel to serve African-American guests). By their nature, laws prohibiting discrimination in public accommodations require businesses and their employees to spend time and energy serving customers whom they might prefer not to serve. See Hurley, 515 U.S. at 578 (describing common law public accommodation rules as guaranteeing that individuals “will not be turned away merely on the proprietor’s exercise of personal preference”). These laws apply even when the businesses provide skillful or physically intimate services. See Bragdon v. Abbott, 524 U.S. 624, 628-29, 118 S. Ct. 2196, 141 L. Ed. 2d 540 (1998) (applying public accommodations provisions of the Americans with Disabilities Act to dental practice). This is the purpose of antidiscrimination laws: they force businesses to treat customers alike, regardless of their race, religion, or other protected status. [*44] These laws are necessary precisely because some businesses would otherwise refuse to work with certain customers whom the laws protect.

[*51] HN23 Antidiscrimination laws have been consistently upheld as constitutional. [*71] See, e.g., Hurley, 515 U.S.
3. There is no exemption from antidiscrimination laws for creative or expressive professions

[*52] There are no cases from either New Mexico jurisprudence or that of the United States Supreme Court that would compel a conclusion that the NMHRA violates Elane Photography’s freedom of speech because it is engaged in a creative and expressive profession. We decline to draw the line between “creative” or “expressive” professions and all others. While individuals in such professions undoubtedly engage in speech, and sometimes even [***45] create speech for others as part of their services, there is no precedent to suggest that First Amendment protections allow such individuals or businesses to violate antidiscrimination laws. The wedding industry in particular employs a variety of professionals who offer their services to the public and whose work involves significant skills and creativity. For example, a flower shop is not intuitively “expressive,” but florists use artistic skills and training to design and construct floral displays. Bakeries also offer services for hire, and wedding cakes are famously intricate and artistic. Courts cannot be in the business of deciding which businesses are sufficiently artistic to warrant exemptions from antidiscrimination laws. These suggestions are not idle hypotheticals: we take judicial notice of a variety of situations in which florists, bakers, and other wedding vendors have refused to serve same-sex couples. See, e.g., Lee Moran, Baker refuses to make wedding cake for lesbian couple, N.Y. Daily News (Feb. 4, 2013), http://www.nydailynews.com/news/national/baker-refuses-wedding-cake-lesbian-couple-article-1.1254776; Annette Cary, Arlene’s Flowers in Richland sued by gay couple, [***46] Tri-City Herald (Apr. 18, 2013), http://www.tricityherald.com/2013/04/18/2361691/arlenes-flowers-in-richland-sued.html (quoting a florist as objecting to “using her time and artistic talent to support an event . . . that she believes is wrong”) (emphasis added); see also Cervelli v. Aloha Bed & Breakfast, Civ. No. 11-1-3103-12 ECN, Order (Haw. Circ. Court 1st Cir. Apr. 15, 2013) www.lambdalegal.org/sites/default/files/2013-04/cervelli.pdf (finding that a bed and breakfast violated Hawaii’s public accommodation law when it refused service to a same-sex couple and granting partial summary judgment for declaratory and injunctive relief).

[*53] We are persuaded by cases suggesting that HN24 the First Amendment does not exempt creative or expressive businesses from antidiscrimination laws. In Hishon v. King & Spalding, 467 U.S. 69, 71-73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984), the United States Supreme Court reversed the dismissal of a Title VII employment discrimination complaint against the law firm of King & Spalding. In doing so, the Court rejected the firm’s argument that by applying antidiscrimination laws to the firm’s selection of its partners, the government “would infringe [First Amendment] constitutional rights [***47] of expression or association.” Id. at 78. The Court held that “[i]nvincible private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.” Id. (alteration in original) (internal quotation marks and citation omitted). Legal work unquestionably involves creative and expressive skill and effort, but antidiscrimination laws still govern how a law firm runs its business.

[*54] Elane Photography attempts to distinguish King & Spalding by arguing that the type of compelled-speech claim Elane Photography advances should apply only to public accommodations law because such an exemption “would protect a firm’s decision not to advocate an argument that its partners cannot in good conscience advance.” However, this decision would already be protected [***72] under New Mexico law. The NMHRA does not prohibit a law firm, even one that is a public accommodation, from turning away clients with whose views the firm disagrees or with whom it simply does not wish to work. See § 28-1-7(F) (prohibited grounds do not include ideology or personal dislike). What the NMHRA forbids, and what [***48] Elane Photography’s proposed exception would allow, is for a law firm to turn away a client because the firm finds the client offensive on the basis of a protected classification. Accepting Elane Photography’s argument would exempt from antidiscrimination laws any business that provided a creative or expressive service. Such an exemption would not be limited to religious objections or to sexual orientation discrimination; it would allow any business in a creative or expressive field to refuse service on any protected basis, including race, national origin, religion, sex, or disability.

[*55] Elane Photography also suggests that enforcing the NMHRA against it would mean that an African-American photographer could not legally refuse to photograph a Ku Klux Klan rally. This hypothetical suffers from the reality that political views and political group membership, including membership in the Klan, are not protected categories under the NMHRA. See § 28-1-7(F) (prohibiting
public accommodation discrimination based on "race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation or physical or mental handicap"). Therefore, an African-American could [**49] decline to photograph a Ku Klux Klan rally. However, the point is well-taken when the roles in the hypothetical are reversed—a Ku Klux Klan member who operates a photography business as a public accommodation would be compelled to photograph an African-American under the NMHRA. This result is required by the NMHRA, which seeks to promote equal rights and access to public accommodations by prohibiting discrimination based on certain specified protected classifications.

[*56] However, adoption of Elane Photography’s argument would allow a photographer who was a Klan member to refuse to photograph an African-American customer’s wedding, graduation, newborn child, or other event if the photographer felt that the photographs would cast African-Americans in a positive light or be interpreted as the photographer’s endorsement of African-Americans. A holding that the First Amendment mandates an exception to public accommodations laws for commercial photographers would license commercial photographers to freely discriminate against any protected class on the basis that the photographer was only exercising his or her right not to express a viewpoint with which he or she disagrees. Such a holding would [*50] undermine all of the protections provided by antidiscrimination laws.

[*57] In short, we conclude that the NMHRA’s prohibition on sexual-orientation discrimination does not violate Elane Photography’s First Amendment right to refrain from speaking. The government has not required Elane Photography to promote the government’s message, nor has the government required Elane Photography to facilitate third parties’ messages, except to the extent that Elane Photography already facilitates third parties’ messages, for hire, as part of the services that it offers as a for-profit public accommodation. Even if the services it offers are creative or expressive, Elane Photography must offer its services to customers without regard for the customers’ race, sex, sexual orientation, or other protected classification.

B. THE NMHRA DOES NOT VIOLATE ELANE PHOTOGRAPHY’S FIRST AMENDMENT FREE EXERCISE RIGHTS

[*58] Elane Photography argues that enforcement of the NMHRA against it for refusing to photograph Willock’s wedding violates its First Amendment right to freely exercise its religion. See HN25 U.S. Const. amend. 1 (Congress shall make no law prohibiting the free exercise of religion).

[*59] It is an open question whether [*51] Elane Photography, which is a limited liability company rather than a natural person, has First Amendment free exercise rights. Several federal courts have recently addressed this [*73] question with differing outcomes. Compare, e.g., Conestoga Wood Specialties Corp. v. Sec’y of U.S. Dep’t of Health & Human Servs., ___ F.3d ___, 724 F.3d 377, 2013 U.S. App. LEXIS 15238, *7 (3d Cir. July 26, 2013, No. 13-1144) (“[W]e conclude that for-profit, secular corporations cannot engage in religious exercise . . .”), with Grote v. Sebelius, 708 F.3d 850, 854 (7th Cir. 2013) (“[T]he [plaintiffs’] use of the corporate form is not dispositive of the [free exercise] claim.”). However, it is not necessary for this Court to address whether Elane Photography has a constitutionally protected right to exercise its religion. Assuming that Elane Photography has such rights, they are not offended by enforcement of the NMHRA.

[*60] Under established law, HN26 “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).” Emp’t Div. Dept of Human Res. of Or. v. Smith, 494 U.S. 872, 879, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990) [*52] (internal quotation marks and citation omitted). In order to state a valid First Amendment free exercise claim, a party must show either (a) that the law in question is not a “neutral law of general applicability,” id. (internal quotation marks and citation omitted) or (b) that the challenge implicates both the Free Exercise Clause and an independent constitutional protection, id. at 881, or possibly (c) that the law operates “in a context that len[ds] itself to individualized government assessment of the reasons for the relevant conduct.” Id. at 884. Elane Photography does not claim that the individualized assessment situation is applicable to the present case. We address its claims under the other two categories below.

1. The NMHRA is a neutral law of general applicability
[*61] The United States Supreme Court elaborated on the rule concerning "law that is neutral and of general applicability" in Church of the Lukumi Babalu Ave, Inc. v. City of Hialeah, 508 U.S. 520, 531, 546, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993), HN27 A law is not neutral "if [its] object . . . is to infringe upon or restrict practices because of their religious motivation." Id. at 533. It is not generally applicable if it "imposes[s] burdens only on conduct motivated by religious belief" while permitting exceptions for secular conduct or for favored religions. Id. at 543. These inquiries are related, id. at 531; the Court observed that improper intent could be inferred if the law was a "religious gerrymander" that burdened religion but exempted similar secular activity. Id. at 534-35. If a law is neither neutral nor generally applicable, it "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." Id. at 531-32; see also id. at 546. ("The compelling interest standard that we apply once a law fails to meet the Smith requirements is not water[ed] . . . down but really means what it says." (internal [*54] quotation marks and citation omitted)).

[*62] In Lukumi Babalu Ave, the city of Hialeah had passed several ordinances that prohibited religious sacrifice of animals but exempted secular slaughterhouses, kosher slaughterhouses, hunting, fishing, euthanasia of unwanted animals, and extermination of pests. Id. at 526-28, 536, 543-44. The Court held that this was a "religious gerrymander." id. at 535, the result of which was "that few if any killings of animals [were] prohibited other than Santeria sacrifice," id. at 536. The Court concluded that "[t]he ordinances had as their object the suppression of religion" and were therefore nonneutral. Id. at 542. The Court then examined whether the ordinances were generally applicable and whether the government [*74] was selectively burdening only religiously motivated conduct. Id. at 542-43. The Court did not precisely define the standard for assessing general applicability, but it did observe that the Hialeah ordinances were grossly under-inclusive with respect to the laws’ stated goals, id. at 543-45, and it concluded that the laws burdened "only . . . conduct motivated by religious belief." Id. at 545. The Court applied strict scrutiny to the ordinances [*55] and found them unconstitutional. Id. at 546-47.

[*63] Elane Photography argues that the NMHRA is not generally applicable and that this Court therefore should apply strict scrutiny to the application of the NMHRA to Elane Photography. Elane Photography identifies several exemptions from the antidiscrimination provisions of the NMHRA and argues that these exemptions make it not generally applicable. Specifically, Elane Photography points to Section 28-1-9(A)(1), which exempts sales or rentals of single-family homes if the owner does not own more than three houses, and Section 28-1-9(D), which exempts owners who live in small multi-family dwellings and rent out the other units. Elane Photography argues that these exemptions, like those in Lukumi Babalu Ave, "impermissibly prefer the secular to the religious.”

[*64] This is a misreading of Section 28-1-9. Unlike the exemptions in Lukumi Babalu Ave, the exemptions in Section 28-1-9(A) and (D) [*56] apply equally to religious and secular conduct. Neither subsection discusses motivation; homeowners who meet the criteria of Section 28-1-9(A) and (D) are permitted to discriminate regardless of whether they do so on religious or nonreligious grounds. Therefore, the NMHRA does not target only religiously motivated discrimination, and these exemptions do not prevent the NMHRA from being generally applicable. These exemptions also do not indicate any animus toward religion by the Legislature that might render the law nonneutral; similar exemptions commonly appear in housing discrimination laws, including the federal Fair Housing Act. See 42 U.S.C. § 3603(b)(1) & (2) (2012) (exempting from compliance “any single-family house sold or rented by an owner,” provided such “owner does not own more than three . . . houses” and subject to additional limitations, and also exempting “rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his [or her] residence”).

[*65] Elane Photography also argues that the exemptions to [*57] the NMHRA for religious organizations undercut the purpose of the statute. In particular, Elane Photography highlights Section 28-1-9(B) and (C), which in its reading permits religious organizations to “decline same-sex couples as customers.”

[*66] Once again, Elane Photography’s interpretation rests on a distorted reading of the statute. Section 28-1-9(B) allows religious organizations to “limit[] admission to or give[e] preference to persons of the same religion or denomination or [to make] selections of buyers, lessees or tenants” that promote the organization’s religious principles. In the context of “buyers, lessees or tenants,” “buyers” clearly refers to purchasers of real estate rather than retail

---

4 The owner also may not engage in discriminatory advertising. Section 28-1-9(A). In addition, if the seller was not the most recent occupant of the house, he or she is exempt from the NMHRA for only one sale per twenty-four month period. Section 28-1-9(A)(2).
customers. Id. Subsection (C) exempts religious organizations from provisions of the NMHRA governing sexual orientation and gender identity, but only regarding “employment or renting.” If a religious organization sold goods or services to the general public, neither subsection would allow the organization to turn away same-sex couples while catering to opposite-sex couples of all faiths. Subsection (B) permits religious organizations to serve only or primarily people of their own faith, as [***58] well as to discriminate in certain limited real estate transactions; Subsection (C) applies only to employment and, again, to real estate.

[*67] In other words, neither of the religious exemptions in Section 28-1-9 would [**75] permit a religious organization to take the actions that Elane Photography did in this case. Furthermore, these exemptions do not prevent the NMHRA from being generally applicable. HN28 Exemptions for religious organizations are common in a wide variety of laws, and they reflect the attempts of the Legislature to respect free exercise rights by reducing legal burdens on religion. See, e.g., Hobbie v. Unemp’t Appeals Comm’n of Fla., 480 U.S. 136, 144-45, 107 S. Ct. 1046, 94 L. Ed. 2d 190 (1987) (observing that the United States Supreme Court “has long recognized that the government may (and sometimes must) accommodate religious practices” and listing examples). Such exemptions are generally permissible, see Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 329-30, 107 S. Ct. 2862, 97 L. Ed. 2d 273 (1987) (upholding religious exemption to Title VII of the Civil Rights Act of 1964 against an Establishment Clause challenge), and in some situations they may be constitutionally mandated, see Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, ___ U.S. ___, 132 S. Ct. 694, 705-06, 181 L. Ed. 2d 630 (2012) [***59] (holding that the First Amendment precludes the application of employment discrimination laws to disputes between religious organizations and their ministers).

[*68] The exemptions in the NMHRA are ordinary exemptions for religious organizations and for certain limited employment and real-estate transactions. The exemptions do not prefer secular conduct over religious conduct or evince any hostility toward religion. We hold that the NMHRA is a neutral law of general applicability, and as such it does not offend the Free Exercise Clause of the First Amendment.

2. Elane Photography has not adequately briefed its hybrid rights claim

[*69] In Smith, the United States Supreme Court left open the possibility that a neutral law of general applicability could nevertheless be unconstitutional if the law infringed both free exercise rights and an independent constitutional protection. 494 U.S. at 881. [*70] The Court recognized that in pre-Smith cases, it had sometimes applied more rigorous scrutiny to neutral, generally applicable laws. Id. The Court distinguished those cases by characterizing them not as simple free exercise cases, but as “hybrid situation[s],” id. at 882, in which the free exercise claims were [***60] raised “in conjunction with other constitutional protections, such as freedom of speech and of the press.” Id. at 881. Elane Photography mentions that because it raised both a free exercise claim and a compelled-speech claim, it has made a hybrid-rights claim under which the NMHRA should receive strict scrutiny.

HN29 This Court requires that the parties adequately brief all appellate issues to include an argument, the standard of review, and citations to authorities for each issue presented. In re Adoption of Doe, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 (“[T]o present an issue on appeal for review, an appellant must submit argument and authority as required by rule.” (emphasis omitted)). “We will not review unclear arguments, or guess at what [a party’s] arguments might be.” Headley v. Morgan Mgmt. Corp., 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076. To rule on an inadequately briefed issue, this Court would have to develop the arguments itself, effectively performing the parties’ work for them. See State v. Clifford, 1994-NMSC-048, ¶ 19, 117 N.M. 508, 873 P.2d 254 (“We remind counsel that we are not required to do their research . . . .”). This creates a strain on judicial [***61] resources and a substantial risk of error. It is of no benefit either to the parties or to future litigants for this Court to promulgate case law based on our own speculation rather than the parties’ carefully considered arguments.

[*71] Elane Photography devotes a single three-sentence paragraph to its hybrid-rights claim, stating that a hybrid claim exists because it has raised a compelled-speech claim and a free exercise claim under the NMRFRA. However, as discussed in this opinion, neither of these claims is independently viable, and Elane Photography offers no analysis to explain why the two claims together should be greater than the sum of [***76] their parts. Elane Photography cites two cases, Axson-Flynn v. Johnson, 356 F.3d 1277 (10th Cir. 2004), and Health Services Division, Health & Environment Dep’t v. Temple Baptist Church, 1991-NMCA-055, 112 N.M. 262, 814 P.2d 130, but provides no explanation of how or why we should apply these precedents to the facts of this case. As a matter of New Mexico law, Elane Photography’s briefing of its
hybrid-rights claim is inadequate to permit us to review the issue. For this reason, we do not consider its hybrid-rights argument.

III. ENFORCEMENT OF THE NMHRA

NMFRA DOES NOT VIOLATE THE NMRFRA BECAUSE THE NMRFRA IS NOT APPLICABLE IN A SUIT BETWEEN PRIVATE PARTIES

Finally, Elane Photography argues that the Commission’s enforcement of the NMHRA against it violates the New Mexico Religious Freedom Restoration Act. The NMRFRA provides:

*HN30* A government agency shall not restrict a person’s free exercise of religion unless:

A. the restriction is in the form of a rule of general applicability and does not directly discriminate against religion or among religions; and

B. the application of the restriction to the person is essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

Section 28-22-3. “Free exercise of religion” is defined as *HN31* “an act or a refusal to act that is substantially motivated by religious belief.” Section 28-22-2(A).

Willock argues, and the Court of Appeals held, that the NMRFRA did not protect Elane Photography’s refusal to photograph Willock’s wedding, even though the refusal was religiously motivated, because the NMRFRA “was not meant to apply in suits between private litigants.” Elane Photography, 2012 NMCA 86, ¶ 46. There is no other case law [***63] on this point in New Mexico; the Court of Appeals relied on federal cases interpreting the federal Religious Freedom Restoration Act. Id. ¶¶ 46-47.

The NMRFRA states that *HN32* “[a] person whose free exercise of religion has been restricted by a violation of the New Mexico Religious Freedom Restoration Act may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government agency.” Section 28-22-4(A) (emphasis added). Elane Photography argues that the phrase “against a government agency” modifies “appropriate relief,” rather than “a judicial proceeding.” In other words, Elane Photography argues that although the relief available is limited, the NMRFRA can be invoked even when the government is not a party.

However, *HN33* the statute is violated only if a “government agency” restricts a person’s free exercise of religion. Section 28-22-3. A “government agency” includes “the state or any of its political subdivisions, institutions, departments, agencies, commissions, committees, boards, councils, bureaus or authorities.” Section 28-22-2(B). The list of government agencies does not include the Legislature or the courts. It could be expected [***64] that the Legislature would have included itself and the courts in Section 28-22-2(B) if it meant the NMRFRA to apply in common-law disputes or private enforcement actions. Instead, the examples of government agencies are exclusively administrative or executive entities.

Moreover, the structure of the NMRFRA as a whole suggests that the Legislature contemplated that the statute would apply only to legal actions in which the government was a party. The only relief authorized by the statute is “injunctive or declaratory relief against a government agency,” § 28-22-4(A)(1), or “damages pursuant to the Tort Claims Act” with attorneys’ fees and costs, § 28-22-4(A)(2).

Nowhere does the NMRFRA authorize damages or injunctive relief against a non-governmental party.

Elane Photography argues that because Willock’s suit was adjudicated by the New Mexico Human Rights Commission, which is presumably a “government agency” for purposes of Section 28-22-2(B), the Commission’s [***77] decision against it qualifies as a restriction of its free exercise of religion. However, Elane Photography appealed the Commission’s determination to a New Mexico district court for a trial de novo pursuant to Section 28-1-13(A).

The instant appeal concerns the district court’s grant of summary judgment for Willock; the Commission is not a party to this case, and its order no longer has any legal effect. See § 39-3-1 (stating that appeals to the district court for trials de novo “shall be tried anew . . . as if no trial had been had below”). Willock argues, and we agree, that the Commission acted merely as an administrative tribunal to decide the dispute between Elane Photography and herself.

The government’s adjudication of disputes between private parties does not constitute government restriction of a party’s free exercise rights for purposes of the NMRFRA.

For the reasons stated above, we hold that as a matter of New Mexico law, *HN35* the New Mexico Religious Freedom Restoration Act is inapplicable to disputes in which a government agency is not a party.

CONCLUSION

Elane Photography’s refusal to serve Vanessa Willock violated the New Mexico Human Rights Act, which prohibits a public accommodation from refusing to offer its services to a person based on that person’s sexual orientation.
Enforcing the NMHRA against *Elane Photography* does not violate the Free Speech or the Free Exercise clause of the First Amendment [*66*] or the NMRFA. For these reasons, we affirm the grant of summary judgment in Willock’s favor.

[*67*] IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Chief Justice

CHARLES W. DANIELS, Justice

BARBARA J. VIGIL, Justice

RICHARD C. BOSSON, Justice, specially concurring

Concur by: RICHARD C. BOSSON

Concur

BOSSON, Justice, specially concurring.

[*80*] In 1943 during the darkest days of World War II, the State of West Virginia required students to salute the American flag and decreed that refusal to salute would “be regarded an Act of insubordination” which could lead to expulsion for the student and criminal action against the parent. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 626-29, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943). Some students refused to salute, believing as Jehovah’s Witnesses “that the obligation imposed by law of God is superior to that of laws enacted by temporal government.” *Id.* at 629. They looked for authority in the Bible, Book of Exodus, Chapter 20, verses 4 and 5: “Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth: thou shalt not bow down thyself to them, nor serve them.” *Id.* (internal [*67*] quotation marks omitted). Jehovah’s Witnesses considered “the flag is an ‘image’ within this command,” which they were bound by God not to salute. *Id.*

[*81*] In a ringing endorsement of the First Amendment, the United States Supreme Court struck down the West Virginia statute, noting the irony of the state’s position: “To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual’s right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.” *Id.* at 634. And again, “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” *Id.* at 642. In his concurrence, Justice Black had this to add:

The Jehovah’s Witnesses, without any desire to show disrespect for either the flag or the country, interpret the Bible as commanding, at the risk of God’s displeasure, that they not go through the form of a pledge of allegiance to any flag. The devoutness of their belief is evidenced by [*78*] their willingness [*68*] to suffer persecution and punishment, rather than make the pledge.

*Id.* at 643 (Black, J., concurring). Considering the times, the Barnette opinion stands today as an act of the utmost courage; it represents one of the Court’s finest moments.

[*82*] Jonathan and Elaine Huguenin see themselves in much the same position as the students in Barnette. As devout, practicing Christians, they believe, as a matter of faith, that certain commands of the Bible are not left open to secular interpretation; they are meant to be obeyed. Among those commands, according to the Huguenins, is an injunction against same-sex marriage. On the record before us, no one has questioned the Huguenin’s devoutness or their sincerity; their religious convictions deserve our respect.

In the words of their legal counsel, the Huguenins “believed that creating photographs telling the story of that event [a same-sex wedding] would express a message contrary to their sincerely held beliefs, and that doing so would disobey God.” If honoring same-sex marriage would so conflict with their fundamental religious tenets, no less than the Jehovah’s Witnesses in Barnette, how then, they ask, can the State of New Mexico compel them to [*69*] “disobey God” in this case? How indeed?

[*83*] Twenty-four years later, during the zenith of the Civil Rights era, the Supreme Court provided a partial answer. In Loving v. Virginia, the State of Virginia, like sixteen similarly situated states with miscegenation laws, prohibited marriage between the white and black races, making it a crime punishable by imprisonment. 388 U.S. 1, 4, 6, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967). Such laws arose as an incident of slavery and were common in Virginia and elsewhere since early times. *Id.* at 6. The Lovings, an interracial couple, had been lawfully married elsewhere and wanted to live openly as husband and wife in Virginia. *Id.* at 2-3. For their honesty, they were prosecuted and convicted; their prison sentences were suspended on condition that
they leave Virginia and not return for 25 years. *Id.* at 3. The Virginia trial judge, in justifying the convictions, drew strength from his view of the Bible:

"Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with this arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races [*70] to mix."

*Id.* at 3. Whatever opinion one might have of the trial judge’s religious views, which mirrored those of millions of Americans of the time, no one questioned his sincerity either or his religious conviction. In affirming the Lovings’ convictions, Virginia’s highest court observed the religious, cultural, historical and moral roots that justified miscegenation laws. See *id.*

[*85] The Supreme Court struck down Virginia’s miscegenation statute. *Id.* at 11-12. Observing that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential in the orderly pursuit of happiness by free men," the Court held categorically that "[t]here can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Id.* at 12.

State laws, even those religiously inspired, may not discriminate invidiously on the basis of race.

[*86] There is a lesson here. In a constitutional form of government, personal, religious, and moral beliefs, when acted upon to the detriment of someone else’s rights, have constitutional limits. One is free to believe, think and speak as one’s conscience, or God, dictates. [*71] But when actions, even religiously inspired, conflict with other constitutionally protected rights—in Loving the right to be free from invidious racial discrimination—then there must be some accommodation. Recall that Barnette was all about the students; their exercise of First Amendment rights did not infringe upon anyone else. The Huguenins cannot make that claim. Their refusal to do business with the same-sex couple in this case, no matter how religiously inspired, was an affront to the legal rights of that couple, the right granted them [*79] under New Mexico law to engage in the commercial marketplace free from discrimination.

[*87] But of course, the Huguenins are not trying to prohibit anyone from marrying. They only want to be left alone to conduct their photography business in a manner consistent with their moral convictions. In their view, they seek only the freedom not to endorse someone else’s lifestyle. Loving, therefore, does not completely answer the question the Huguenins pose. To complete the circle, we turn to our third case.

[*88] *Heart of Atlanta Motel, Inc. v. United States*, upheld the federal Civil Rights Act of 1964, a milestone enactment which, among other achievements, declared [*72] invidious discrimination unlawful, not just by the state but by private citizens, when providing goods and services in the sphere of public accommodations. 379 U.S. 241, 246, 261-62, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964). The Act declared: "‘All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion or national origin.’ *Id.* at 247. A watershed achievement, the Act vindicated nearly a century of frustrated effort to fulfill the promise of the Fourteenth Amendment, to end not only slavery but all of its traces as well. See *id.* at 244-46.

And ending second-class citizenship, being denied a seat in a restaurant or a room in an inn—purely on the basis of one’s race or religion—was a goal that drove the passage of the Act. See *id.* at 252-53.

[***74] has made it clear that to discriminate in business on the basis of sexual orientation is just as intolerable as discrimination directed toward race, color, national origin or religion. See NMSA 1978, § 28-1-7(F) (2004). The Huguenins today can no more turn away customers on the basis of sexual orientation—photographing a same-sex marriage ceremony—than they could refuse to photograph African-Americans or Muslims.

[*90] All of which, I assume, is little comfort to the Huguenins, who now are compelled by law to compromise the very religious beliefs that inspire their lives. Though the rule of law requires it, the result is sobering. It will no doubt leave a tangible mark on the Huguenins and others of similar views.

[*91] On a larger scale, this case provokes reflection on what this nation is all about, its promise of fairness, liberty, equality of opportunity, and justice. At its heart, this case teaches that at some point in our lives all of us must compromise, if only a little, to accommodate the contrasting values of others. A multicultural, pluralistic society, one of our nation’s strengths, demands no less. The Huguenins are free to think, to say, to believe, as they wish; they may pray to [***75] the [**80] God of their choice and follow those commandments in their personal lives wherever they lead. The Constitution protects the Huguenins in that respect and much more. But there is a price, one that we all have to pay somewhere in our civic life.

[*92] In the smaller, more focused world of the marketplace, of commerce, of public accommodation, the Huguenins have to channel their conduct, not their beliefs, so as to leave space for other Americans who believe something different. That compromise is part of the glue that holds us together as a nation, the tolerance that lubricates the varied moving parts of us as a people. That sense of respect we owe others, whether or not we believe as they do, illuminates this country, setting it apart from the discord that afflicts much of the rest of the world. In short, I would say to the Huguenins, with the utmost respect: it is the price of citizenship. I therefore concur.

RICHARD C. BOSSON, Justice
RELIGIOUS REFUSALS TO
PUBLIC ACCOMMODATIONS LAWS:
FOUR REASONS TO SAY NO

LOUISE MELLING*

Introduction ............................................. 177
I. Accommodations Were Rejected in Other Anti-Discrimination
   Measures ........................................... 180 R
II. Accommodations Do Not Quiet the Storm ................... 185 R
III. Accommodations Come at a Cost ......................... 188 R
IV. Accommodations Undermine the Purpose of Anti-
   Discrimination Laws ............................. 191 R
Conclusion ............................................. 192 R

INTRODUCTION

A storm is brewing. Two fronts are colliding: advances for equality for
lesbian, gay, bisexual, and transgender (LGBT) people and women on the
one hand and claims of religious liberty on the other. In numerous contexts,
those of faith are objecting on religious grounds to laws prohibiting discrimi-
nation. The question arises whether and when those objecting should be ac-
commodated and thus exempted from compliance with the law. The question
has arisen recently, for example, in litigation as to for-profit businesses ob-
jecting to complying with the federal rule requiring insurance coverage for
contraception,1 businesses refusing to serve LGBT people,2 pharmacies re-

* Louise Melling is a Deputy Legal Director of the American Civil Liberties Union
(ACLU) and the Director of its Center for Liberty, which encompasses the ACLU’s work
on freedom of religion and belief, LGBT rights and HIV/AIDS, reproductive rights, and
women’s rights. This Article is adapted from a talk given as part of the opening plenary
for the Religious Accommodation in the Age of Civil Rights Conference at Harvard Law
School in April 2014. The author extends her thanks to Doug NeJaime, Rose Saxe, and
Reva Siegel for comments; to Kelsey Townsend for editorial and research assistance; and
to Brian Hauss, Marvin Lim, and Nicole Taykhman for research assistance. Particular
thanks to Awbrey Yost and the staff of the Harvard Journal of Law and Gender for their
insights throughout the editorial process.

1 The U.S. Supreme Court recently resolved this question, ruling that the Religious
Freedom Restoration Act, 42 U.S.C.A. § 2000bb-1 (2014), prohibits the federal govern-
ment from requiring closely held for-profit corporations to provide insurance coverage
for contraception over a religious objection. Burwell v. Hobby Lobby Stores, Inc., 134 S.
Ct. 2751, 2785 (2014). The question whether religious liberty can be used as a shield in
other contexts remains unanswered by the Court. See, e.g., id. at 2783.

2 E.g., Initial Decision Granting Complainants’ Motion for Summary Judgment and
Denying Respondents’ Motion for Summary Judgment at 2–3, Craig v. Masterpiece
perma.cc/RM8P-YMJ2; Complaint for Injunctive Relief, Declaratory Relief, & Damages
at 6–8, Cervelli v. Aloha Bed & Breakfast, No. 11-1-3103-12-ECN (Haw. Cir. Ct. Dec.

Please note that the copyright in the Journal of Law and Gender is held
by the President and Fellows of Harvard College, and that the copyright
in the article is held by the author.
fusing to fill prescriptions for contraception, and religiously affiliated schools refusing to hire or retain single women who are pregnant or gay staff who get married.

Much has been written and more has been said about this issue. This Article focuses on one aspect of the debate. It challenges arguments posed by some scholars supportive of LGBT rights who urge accommodation of those objecting on religious grounds to laws barring discrimination against people based on sexual orientation or gender identity. These scholars advance a number of reasons for permissive accommodations—accommodations that the Federal Constitution neither compels nor prohibits. Among

178 Harvard Journal of Law & Gender [Vol. 38


3 See, e.g., Stormans, Inc. v. Selecky, 586 F.3d 1109, 1117 (9th Cir. 2009); Morris-Fitz, Inc. v. Quinn, 976 N.E.2d 1160, 1164 (Ill. App. Ct. 2012).


7 In Employment Division v. Smith, 494 U.S. 872 (1990), the U.S. Supreme Court all but foreclosed the notion that the Federal Constitution would require an exemption from a law so as to accommodate burdens on religious exercise. Justice Scalia, writing for the Court, stated, “[T]he 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 prohibits).’” Id. at 879 (quoting United States v. Lee, 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring in judgment)). On the other hand, the Court has also rejected an Establishment Clause challenge to the provision of Title VII exempting religiously affiliated institutions
other reasons, these scholars argue, accommodations respect diversity and religious liberty, enable anti-discrimination laws to pass, reduce conflict, and address harms that objectors would otherwise face.8

This Article offers four reasons why those arguments should be questioned and indeed rejected. The first is a challenge from history: calls for similar accommodations were rejected in the context of the Civil Rights Act of 1964.9 No convincing justification exists to choose a different path today. Second, the premise that accommodations help to ease moments of conflict is wanting, as the debates concerning abortion and more recently contraception readily demonstrate. Third, the harm to the person of faith denied an accommodation must be counterpoised with that of the person turned away from a place of public accommodation or denied employment because of a religious accommodation. That harm, which is often given little voice in the current debates, should weigh heavily because it damages a person’s sense of dignity and frustrates the promise of equality. Finally, accommodations undermine a fundamental purpose of anti-discrimination law, which is to change norms.

Any discussion of accommodations to anti-discrimination laws must begin with a question as to what kind of accommodation is at issue.10 Is the accommodation for an individual or an institution? Accommodations for institutions—be they small businesses, universities, or hospitals—often have implications for third parties.11 Unless the institution hires and serves only people who share the beliefs of its owners, an accommodation will reverberate for those who patronize or work for the institution. If the accommodation is for an institution, does the institution receive government funds? If so, any accommodation and the discrimination that results will have the govern-


8 E.g., Berg, supra note 6, at 226–35; Minow, supra note 6, at 782–83.


10 For the following set of questions and analysis, I thank Catherine Weiss and Caitlin Borgmann for the framework they developed more than a decade ago to analyze claims for religious refusals. See generally ACLU REPRODUCTIVE FREEDOM PROJECT, RELIGIOUS REFUSALS AND REPRODUCTIVE RIGHTS (2002), archived at http://perma.cc/5LX7-5X4L (outlining framework for analysis of claims for religious refusals of health services).

11 Id. at 6–11.
ment’s imprimatur. If the accommodation is for an individual, is the person a public official? If so, different questions arise than if the person is in the private sector. To sanction discrimination by one serving in a public role is again to put the government’s imprimatur on the conduct. In thinking about accommodations, these distinctions matter; not all accommodations are created equal.

This Article speaks to arguments for accommodations for institutions that operate in the public sphere and serve and hire people of different faiths. More specifically, it addresses arguments for accommodations for institutions that, for reasons of faith, seek to refuse employment and services, among other public goods, to individuals because of their sexual orientation or gender identity.

I. ACCOMMODATIONS WERE REJECTED IN OTHER ANTI-DISCRIMINATION MEASURES

As noted earlier, several scholars strongly supportive of LGBT rights urge advocates to accept calls for accommodations for individuals and institutions that object on religious grounds to complying with anti-discrimination measures. The question for those entertaining this argument is why one should accept accommodations in this context when such calls were rejected at other moments in history.

The current conflict over the propriety of exemptions rooted in religion to laws barring discrimination is not a new one. Rather, it is a conflict that is in many ways predictable. Such claims for exemptions come at critical moments of advances in civil rights where there is a call for a change in the social rules addressing discrimination. That is what is happening now. Protections against discrimination in employment, public accommodations, housing, and education on the basis of sexual orientation and gender identity are at last being debated and passed. Laws ensuring access to contraception address a lingering vestige of sex discrimination. These changes come with calls for exemptions—to preserve the status quo for at least some sectors of society and to continue to contest the change.

---

12 Where this Article concerns accommodations to laws barring discrimination based on sexual orientation or gender, any accommodation sanctions discrimination, just as an accommodation permitting a business to refuse service to an interracial couple sanctions discrimination. The question is how to weigh claims of religious freedom against the discrimination.

13 See Berg, supra note 6, at 226–35; Minow, supra note 6, at 782–83.


16 I credit James Esseks, Director of the ACLU’s LGBT Rights Project, with having referred to this strategy of calling for exemptions as “Plan B,” with “Plan A” being to advocate against the change in legal norms. See Rod Dreher, Does Faith = Hate?, Am.
Indeed, this very debate played out in the context of race and, to some degree, gender. Many, including those whose beliefs at that time dictated separation of the races, resisted racial equality and integration. Even the courts invoked these religious doctrines in upholding convictions for violations of anti-miscegenation laws, penalties for African-Americans who refused to sit in the “colored car,” and fines on Berea College for integrating. The courts declared separation of the races divinely ordered, going so far as to say, “[s]uch equality does not in fact exist, and never can. The God of nature made it otherwise . . . .”

But as Martha Minow notes in her scholarship, times changed. Arguments in favor of racial segregation lost currency and the legal norms changed, though not without resistance. That resistance included calls for accommodations predicated on religious belief. The House version of the

Conservative (Oct. 9, 2013), archived at http://perma.cc/XBA4-DTSF (“[T]he most important goal at this stage is not to stop gay marriage entirely but to secure as much liberty as possible for dissenting religious and social conservatives while there is still time.”) (quoted in Koppelman, supra note 6, at 5). Professors NeJaime and Siegel show how these claims are not just about preserving a space to maintain religious views but rather are part of “a long-term effort to contest society-wide norms.” See Douglas NeJaime & Reva B. Siegel, Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics, 124 Yale L.J. (forthcoming 2015) (manuscript at 2) (on file with author).
Civil Rights Act of 1964 as originally passed included an accommodation that wholly exempted religiously affiliated employers from its terms banning discrimination in employment. The Act ultimately passed without the accommodation, but the resistance did not stop. There were later efforts, albeit unsuccessful, to amend the Act to include a broad religious exemption.

The resistance to integration rooted in religion carried into the courts as well. In upholding a conviction for violation of Virginia’s anti-miscegenation law, the trial court in *Loving v. Virginia* stated, “Almighty God created the races white, black, yellow, malay and red and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix.” This reasoning did not hold. The Supreme Court struck down the ban, noting there was “no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification.”

There was also resistance rooted in religion to laws barring discrimination in public accommodations and education. For example, a barbeque franchise resisted compliance with the Civil Rights Act of 1964, refusing to serve African-Americans on the ground that the Act “contravene[d] the will of God.” The court rejected the defense, stating that, while the franchise owner “has a constitutional right to espouse the religious beliefs of his own choosing . . . he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens.”

Most famously, Bob Jones University and its companion plaintiff, Goldsboro Christian Schools, invoked religion to resist integration in education. Goldsboro regarded “[c]ultural or biological mixing of the races . . . as a violation of God’s command,” and sponsors of Bob Jones University maintained that “the Bible forbids interracial dating and marriage.” In the Supreme Court, the schools argued that the loss of their tax-exempt status because of their discriminatory policies violated their Free Exercise rights. The Supreme Court rejected the claim, reasoning that “the interests asserted by petitioners cannot be accommodated with [the] compelling governmental interest” in “eradicating racial discrimination in education—discrimination.

---

25 *Id.*
26 *Id.* at 1277.
28 *Loving*, 388 U.S. at 11–12.
32 *Id.* at 583 n.6.
33 *Id.* at 580.
that prevailed, with official approval, for the first 165 years of this Nation’s constitutional history.34

Thus, although the nation’s efforts to achieve integration met with resistance based on religious beliefs, the Civil Rights Act of 1964 passed without an accommodation for those opposed to integration on religious grounds;35 laws banning interracial marriage fell without measures to accommodate those of faith opposed to interracial relationships;36 and the courts rejected claims rooted in faith for accommodations to laws barring discrimination in public accommodations and education.37

This history forces a basic question: Why grant accommodations for religious objectors in today’s anti-discrimination laws when similar calls were rejected in the context of civil rights? What principles account for a difference? Or would advocates of greater solicitude in today’s debates also argue for accommodations in the debates over race if they were in play today?

Several rationales are offered to explain the difference: the move for marriage equality is new and reflects a big change; race has a unique place in American history; and laws affecting racial discrimination are subject to the highest level of scrutiny.38 These conceits, however, do not answer the question. The suggestion underlying a number of these rationales—that today’s questions are somehow more divisive—is not borne out by history. For example, public support for interracial marriage at the time of the Loving decision, twenty percent, was far lower than what it is today for marriage for same-sex couples, fifty-five percent.39 Even President Harry Truman said in 1963 that racial intermarriage was counter to the teachings of the Bible.40 And no one can suggest that integration of schools was anything less than

34 Id. at 604.
36 Loving, 388 U.S. at 11–12.
37 E.g., Piggie Park Enter., Inc., 256 F. Supp. at 945; Bob Jones Univ., 461 U.S. at 574.
38 E.g., Berg, supra note 6, at 234–35; Minow, supra note 6, at 815–22.
40 Truman Against Interracial Marriage: ‘Lord, Too’, He Quips, CHI. DAILY DEFENDER, Sept. 12, 1963, at 8, available at ProQuest, Doc. No. 493991026 (quoting President Truman’s statement that “[t]he Lord created it that way. You read your Bible and you’ll find out[.]”).
contentious.\textsuperscript{41} The Treasury Department ruling that racially segregated schools would not be eligible for tax-exempt status came seventeen years after \textit{Brown v. Board of Education}\textsuperscript{42} to address continued segregation through private schools.\textsuperscript{43} Congress tried on thirteen occasions between the issuance of the Treasury Department ruling and the \textit{Bob Jones University} decision to overrule the Treasury Department ruling.\textsuperscript{44} In short, the suggestion that there was no need for accommodations because the country was more ready for change in the context of race discrimination than discrimination based on sexual orientation and gender identity is not persuasive.

More compelling is the argument put forth by Andrew Koppelman that had the Civil Rights Act of 1964 included accommodations for religious objections, entire swaths of the country would have invoked them.\textsuperscript{45} In contrast, Koppelman argues, accommodations in the LGBT context would likely be asserted in relatively small numbers, and economic factors and the pressure of rapidly changing public opinion will propel an ever smaller number of businesses to assert, and perhaps even hold, religious objections to serving or hiring LGBT individuals.\textsuperscript{46} Koppelman’s assertions may well be correct,\textsuperscript{47} but they do not suffice to justify accommodations in today’s context. While the numbers subject to discrimination may be smaller today than would have been the case were exemptions included in the civil rights laws of the 1960s, the harm to the dignity of those turned away and to the promise of equality is significant.\textsuperscript{48} To return to the language of the Court in \textit{Bob Jones Univ.}, accommodations are not a ‘good-faith effort’ to comply with the law. Instead, they are discriminatory in effect.


\textsuperscript{42} 347 U.S. 483 (1954) (declaring racially segregated public schools unconstitutional).

\textsuperscript{43} Rev. Rul. 71-447, 1971-2 C.B. 230 (“The issue here is whether a private school that does not have a racially nondiscriminatory policy as to students is ‘charitable’ within the common law concepts found in section 501(c)(3). . . . [R]acial discrimination in education is contrary to Federal public policy.”).

\textsuperscript{44} \textit{Bob Jones Univ.}, 461 U.S. at 600.

\textsuperscript{45} Koppelman, \textit{supra} note 6, at 16.

\textsuperscript{46} See id. at 17–18.


\textsuperscript{48} See \textit{infra} Part III.
Jones University, the interests asserted by religious objectors “cannot be accommodated” with the compelling governmental interest “in eradicating . . . discrimination.”

In essence, the arguments advanced to justify accommodations in the LGBT context, where similar claims were rejected in the race context, come down to a basic proposition: that the interest in ending discrimination based on sexual orientation and gender identity is different and less important than the interest in ending race discrimination. Indeed, enshrining pockets of discrimination against LGBT people in our laws, where the law has not done so elsewhere, will create a second-class version of equality. Requests to discriminate that are rooted in religion should be rejected today, just as they were fifty years ago.

II. ACCOMMODATIONS DO NOT QUIET THE STORM

Proponents of accommodations today often argue that accommodations will quiet the storm, ease resistance, and in fact advance LGBT rights. The argument has intuitive appeal. It is about accommodating difference, embracing pluralism, respecting religious beliefs, and, in the context this Article addresses, managing change. Change is hard. We all resist some change, and often with deep conviction. So efforts to respect both sides—by acknowledging how hard change is and how hard no change is—make sense. At their core, the calls for accommodation also often rest on a belief that gradual culture change will be better and longer lasting change than that demanded by law. History, however, complicates this narrative.

49 Bob Jones Univ., 461 U.S. at 604.
50 The second-class status cannot be justified by the different levels of scrutiny afforded race, gender, and sexual orientation under the Federal Constitution. Those tiers reflect a difference in judicial scrutiny given the rationales the state offers to justify differential treatment, not the value we put on the goal of ending discrimination. Stated otherwise, we would not say that a state’s interest in ending discrimination against women is not compelling, simply because sex discrimination is subject to intermediate scrutiny. See Roberts v. U.S. Jaycees, 468 U.S. 609, 624 (1984) (holding that the goal of eliminating gender discrimination in public accommodations serves a compelling state interest).

51 See, e.g., Berg, supra note 6, at 226–35; Minow, supra note 6, at 823–27.
52 Minow, supra note 6, at 823–27, 843–47.
53 Not all scholars advocating for accommodations appear concerned with the promise of changing attitudes of those currently objecting to LGBT rights, however. See, e.g., Berg, supra note 6, at 226–32 (focusing on accommodation, while contemplating that many who disapprove of same-sex relationships are unlikely to change their opinions). Others are concerned with changing attitudes but think that uncompromising legal demands will foster conflict. See Eskridge, supra note 6, at 716 (“As the Supreme Court has learned from its experience with Brown and Roe and the backlashes each decision generated, strongly clashing primordial sentiments are dangerous to our democracy. Judges are incompetent to resolve these issues where the nation is closely but intensely divided, but they can and ought to lower the stakes of such primordial politics.”). The narrative of backlash on which Eskridge and some others have relied is itself contested.

See, e.g., PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR &
Consider the lessons from the reproductive rights world. In 1973, just months after Roe v. Wade, Congress passed a significant accommodations law that provides that neither institutions nor individuals can, by virtue of receiving federal funds, be required to perform abortions or sterilizations or to make their facilities or personnel available for these procedures if such performance is contrary to the individual’s or institution’s religious beliefs. The decades that followed have brought waves of laws permitting institutions and individuals to refuse to provide abortions. For example, forty-six states currently permit individual health-care providers to refuse to provide abortion services, and forty-four states permit health-care institutions similarly to refuse. The exemptions continue to expand, going beyond performance of abortions to a right to refuse conduct that might be seen as facilitating abortion. For example, federal, state, and local government agencies and programs now risk losing federal dollars if they “subject[ ] any institutional or individual health-care entity to discrimination on the basis that the health-care entity does not provide, pay for, provide coverage of, or refer for abortions.” No one would say these accommodations have quieted the storm surrounding abortion. Nor can it be said that the space provided by these laws has resulted in a gentle change in attitude.

The more recent debates over the Affordable Care Act’s rule requiring health insurance plans to cover contraception also call into question the notion that accommodations quiet the storm. Originally, the rule exempted, loosely speaking, houses of worship. There was an outcry, in particular

---

**Notes:**

54 410 U.S. 113 (1973).


56 GUTTMACHER INST., STATE POLICIES IN BRIEF: REFUSING TO PROVIDE HEALTH SERVICES (2014), archived at http://perma.cc/66QB-FAVN.


58 Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46621, 46623 (proposed Aug. 3, 2011) (defining exempted religious employer as “one that: (1) Has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization . . . .”); see also Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012).
from religiously affiliated entities, which included protest in the form of lawsuits.\(^{59}\) The Obama Administration responded with an accommodation meant to ensure coverage for women, while “protect[ing] such religious organizations [with religious objections to contraceptive coverage] from having to contract, arrange, or pay for contraceptive coverage.”\(^{60}\) Religiously affiliated nonprofit organizations that objected on religious grounds to providing coverage for some or all contraception could certify their objection with their insurer, which would then assume the cost and administration of contraceptive coverage for employees of those institutions.\(^{61}\) That accommodation did not quiet the storm. Rather, the lawsuits continued, with more than forty cases ultimately being filed by nonprofit institutions that objected to providing the certification.\(^{62}\) Most recently, in the face of a U.S. Supreme Court order temporarily enjoining enforcement of the accommodation,\(^{63}\) the Administration further modified the rule.\(^{64}\) Again, even in the face of this modification, the lawsuits continue.\(^{65}\)

A similar pattern is already emerging in the LGBT arena. Provisions in marriage laws stating explicitly that clergy and houses of worship cannot be required to perform or recognize marriages to which they object have not lessened the conflict. There is, rather, an increasing call for measures to ensure that those objecting on religious grounds to marriages of same-sex


\(^{60}\) Coverage of Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16501, 16503 (proposed Mar. 21, 2012).

\(^{61}\) Id.


\(^{64}\) Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51092 (proposed Aug. 27, 2014).

couples need not in any way facilitate or acknowledge the marriage. These measures are meant to permit businesses to refuse to provide services, employers to refuse partner benefits, and landlords to refuse housing. This is not surprising as some who advocate for accommodations for opponents of marriage for same-sex couples look to the laws governing abortion and religious refusals as providing a model. This alone should give advocates for LGBT rights pause, as it suggests continued conflict and accommodations that persist, and even expand.

Finally, following the Supreme Court’s decision in *Hobby Lobby*, any accommodation in an anti-discrimination law will almost surely fan, not calm, conflict. In *Hobby Lobby*, the Court looked to the accommodation for nonprofit religiously affiliated organizations as a predicate for holding that closely held for-profit corporations could not be required to provide insurance for contraception. More specifically, when assessing whether the rule was narrowly tailored, the Court reasoned that if the government could accommodate nonprofit corporations with religious objections to the rule, it presumably could accommodate for-profit companies with religious objections as well. Looking forward then, any accommodation that is included in a statute may well give rise to litigation arguing that the accommodation must be expanded. For example, were the Employment Non-Discrimination Act—a federal bill banning discrimination in employment based on sexual orientation and gender identity—to pass with an exemption for religiously affiliated institutions, for-profit businesses would presumably look to *Hobby Lobby* to try to argue that they too should be exempt from the law’s mandate against discrimination.

In short, before *Hobby Lobby*, accommodations did not quiet the storm. Post- *Hobby Lobby*, they will only intensify the conflict.

### III. Accommodations Come at a Cost

Today’s litigation, legislative debates, and academic conferences include robust discussion of the harm of not granting accommodations. As

---


67 See id.

68 See, e.g., Berg, *supra* note 6, at 218.

69 This vision, of course, is not shared by all supporters of LGBT rights who advocate for accommodations. See, e.g., Koppelman, *supra* note 6, at 21–22.

70 *Hobby Lobby*, 134 S. Ct. at 2781–83.

71 Id.


they should. There is a real harm—even if not subject to legal remedy—for those required to comply with a rule that conflicts with their sincerely held beliefs. Less discussed, yet essential to the conversation, are the harms resulting from accommodations: to those denied jobs, services, and benefits by virtue of an accommodation and to the underlying anti-discrimination goals. The harms run deep to the individual and to the principle at stake.

At their core, accommodations produce a dignitary harm for the person who is turned away. As the Senate Commerce Committee said in the context of the public accommodations provisions of the Civil Rights Act:

The primary purpose . . . is to solve this problem, the deprivation of personal dignity that surely accompanies denials of equal access to public establishments. Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public . . . .

Roy Wilkins of the NAACP spoke similarly: “The truth is that the affronts and denials that this section, if enacted, would correct are intensely human and personal. Very often they harm the physical body, but always they strike at the root of the human spirit, at the very core of human dignity.”

As the U.S. Supreme Court recognizes, the harm to dignity resulting from discrimination is not limited to instances of race discrimination. When striking down gender-based preemptory challenges in jury selection, the Court stated that such discrimination can be an “assertion of . . . inferiority” that “denigrates the dignity of the excluded” and “reinvokes a history of exclusion.” This harm also extends to individuals denied benefits and recognition by virtue of sexual orientation and gender identity. In United States v. Windsor, when striking the provision of the Defense of Marriage Act denying federal recognition of same sex marriage, the Court emphasized how a state’s decision to give LGBT people the right to marry “conferred

---

75 See, e.g., Marvin Lim & Louise Melling, Inconvenience or Indignity? Religious Exemptions to Public Accommodations Laws, 22 J.L. & Pol’Y 705, 708–16 (2014) (arguing harm to dignity from accommodations in anti-discrimination laws). This Article focuses on the dignitary harm. There are, of course, other harms, including the economic harm of not being hired or of being fired because of one’s sexual orientation or gender identity. Those harms are more readily apparent and thus not addressed here.


79 J.E.B., 511 U.S. at 142; see also Roberts v. U.S. Jaycees, 468 U.S. 609, 625 (“[S]igmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race.”).
upon them a dignity and status of immense import.”80 The Defense of Marriage Act, in contrast, effectuated not just a denial of the economic benefits tied to marriage but also a “differentiation [that] demeans the couple.”81

These quotations speak to a real dignitary harm that will result if laws barring discrimination based on sexual orientation or gender identity embrace or tolerate accommodations. The point is encapsulated in the comment of Anthony Kapel “Van” Jones in reference to a hotly contested bill in Arizona that could have sanctioned discrimination against LGBT people, “The one great achievement of the last century, we took out of American lexicon six words: ‘We don’t serve your kind here.'”82

Neither the statements of the Supreme Court nor the comment of Van Jones, however, capture the entirety of the harm. Anti-discrimination laws are fundamentally a way of according recognition, of embracing and opening the doors to those traditionally excluded. By declaring that a group has a right to access goods and services and jobs in an anti-discrimination law, the political community takes an affirmative step to accord respect and recognition to a previously excluded group. Exemptions to these laws undermine that respect and recognition and they legitimize discrimination, even if only in small pockets of society.

Such discrimination—sanctioned by law, even if exercised by few—will undermine the traditionally stigmatized group’s belief that the community will ever give them a fair shake.83 An example illustrates this point. Assume the law protects against LGBT discrimination in public accommodations, with an exemption for establishments with a religious objection. Imagine being a lesbian traveling with your girlfriend. What happens when you are turned away at an inn consistent with the law’s accommodation? How do you feel as you approach the next reception desk? And the next one? Or when next you go on vacation? How long does the anxiety linger, even if only one inn turns you away?

The promise of equality is not real or robust if it means you can be turned away. It takes but one metaphorical “Heterosexuals Only” sign to make an LGBT person question whether society is in fact embracing her and her kind, so to speak.84 It takes only one such experience, sanctioned by the

81 Id. at 2694.
82 This Week with George Stephanopoulos (ABC television broadcast Mar. 2, 2014), archived at http://perma.cc/K2Y9-VWXM.
83 See R.A. Lenhardt, Understanding the Mark: Race, Stigma, and Equality in Context, 79 N.Y.U. L. Rev. 803, 840 (2004) (noting that “racial stigma deprives individuals of the confidence that they are being dealt with in good faith, leaving them (quite understandably) somewhat mistrustful of even those individuals who expressly claim and perhaps even believe that they are nonracist”).
84 Some scholars, such as Koppelman, suggest businesses should provide notice of their objection and thus avert “unpleasant surprise.” Koppelman, supra note 6, at 19–21.

A physical “Heterosexuals Only” sign, while eliminating surprise, will hardly allay the dignitary harm. One’s sense of value in society will be diminished whether he or she is rebuffed at the desk or by a sign on the door or by a notice on a website.
IV. Accommodations Undermine the Purpose of Anti-Discrimination Laws

The fourth and final point relates to the function of the law. Social movements press for laws proscribing discrimination, appreciating that the law has the power to punish and the promise to lead. The law creates norms.86

Think about what the law has done vis-à-vis race. It has not ended discrimination or voluntary segregation. It has not worked miracles. But it has established a norm, a standard that creates a baseline of expectations. We understand it is impermissible to discriminate based on race. We understand that it is impermissible, even when done in the name of religion.

Compare that to the story of gender and the norms the law has created. In that context, the law has demanded less; it has limited progress and vision. The law created a constitutional norm that discrimination based on pregnancy and abortion is not about gender.87 And in America today, a culture exists in which resistance to birth control and abortion is not readily understood as discrimination based on gender.88 In *Hobby Lobby*, for example, the case was viewed as posing issues of cost and religious liberty and maybe health.89 It was not readily or widely discussed as a case about sex discrimination.90

Relatedly, the current constitutional norm provides that the state can use its power to discourage abortion91—to discourage the exercise of a con-

---

85 See Berg, *supra* note 6, at 229.
86 See Koppelman, *supra* note 6, at 24–25 (characterizing anti-discrimination law as reshaping values and beliefs and practices).
87 See Geduldig v. Aiello, 417 U.S. 484, 493–97 (1974) (holding exclusion of pregnancy from disability insurance coverage did not constitute sex discrimination as there was no identity between excluded group and gender; rather the program created two groups—pregnant women and non-pregnant persons); see also Bray v. Alexandria Women’s Health Clinic, 506 U.S. 263, 269–74 (1993) (to disfavor abortion is not to discriminate invidiously against women as a class).
88 Denial of benefits for contraception is not readily understood as gender discrimination under Title VII, for example. Compare Erickson v. Bartell Drug Co., 141 F. Supp.2d 1266, 1277 (W.D. Wash. 2001), *with In re Union Pacific R.R. Emp’t Practices Litig.*, 479 F.3d 936, 944–45 (8th Cir. 2007). This is true even though Title VII was amended to provide that discrimination based on pregnancy is sex discrimination for purpose of its employment protections.
stitutional right. For nearly as long as the constitution has recognized abortion as a protected right, our laws have said that institutions and individuals can refuse to provide it. But abortion is not an abstract thing; it is a thing that women do. So our legal regime has said that hospitals and doctors can close their doors on women who seek not to be mothers.92 This norm has led to nurses even claiming a right not to provide care to women before and after their abortions—a right not to take blood pressure or to ensure a woman has a ride home.93 In other words, the legal norm we have established has fostered the cultural norm of stigmatizing women who get abortions—women can be turned away and even treated as untouchable.

The examples, although not specifically about religious accommodations, pose a challenge in the current debate about accommodations: what norm should the law set? If our laws sanction accommodations, they will sanction discrimination, at least in some parts of society. And if the laws sanction discrimination, they risk perpetuating discriminatory norms, as has happened in the context of gender and reproductive rights.94 If the law is to advance the promise of equality, the norm cannot be that it is impermissible to discriminate based on sexual orientation and gender identity, except when it is not.

CONCLUSION

The effort to end discrimination based on sexual orientation and gender identity in the law and culture is at a critical juncture. The question is, will our laws accommodate those who object on religious grounds? If the promise of equality is to be robust, this Article argues, the answer must be no. It is not a vision without cost, but neither is the alternative. The price of sanctioning, with the force of law, the message of “we don’t serve your kind here” is too great, no matter the motivation.

invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion.


I want to begin with a few comments on the title of today’s symposium. It strikes me that there are at least three reasons why free exercise of religion is a "second class right" in our own particular period of American history. The first, of course, is that this right was essentially written out of the Constitution by the Supreme Court in Smith v. Employment Division. To put it plainly, I believe that the decision in that case effectively repealed the Free Exercise Clause of the First Amendment to the US Constitution rendering it, at best, a second class right. We have no right to the free exercise of religion at this moment, unless that exercise exists in tandem with other rights specifically set out in the Constitution, or unless that exercise is directly targeted, per se, by state action.

Second, and speaking now more directly to my own field of political analysis, it seems to me that political developments have rendered free exercise law “less sexy” recently as compared with establishment law. At the heart of this development is the fact that the United States is so deeply divided in political terms on the matter of religion’s proper role in the public square. To be sure, the United States population is still arguably the most religious population in the industrialized world. There are polls that indicate, for example, that forty percent of Americans attend religious services on a weekly basis. That figure is not an accurate reflection of actual attendance patterns, of course, but the mere fact that forty-percent say that they attend service probably tells you a great deal about religious culture in America. Nevertheless, there is a large, vocal slice...
of the American public that is vehemently and resolutely secular, and another larger slice that is at the very least "de-churched." These populations face off against another large, [*1442] and even more vocal element that is devoted with zeal (in the true sense of that term) to resist efforts to secularize public life in the United States, and to ensure that public institutions, and public law continue to reflect what they consider to be the religious, and often Christian traditions of American culture and politics. As a result, political conflicts surrounding the Establishment Clause took center stage in American political strife over the last twenty five years or so. People who never heard of Smith or Sherbert or Yoder, very definitely have heard of Jerry Falwell, and if you tell them that they are going to be governed by laws written by Falwell and his supporters then they stand ready to throw more bricks into that wall separating church and state that the Establishment Clause supposedly erected.

Third, free exercise slipped into second class constitutional citizenship because legal and political fights surrounding the free exercise of religion were increasingly fought out over the years not on their own terms but on terms set by what that exercise would mean in terms of the Establishment Clause. For quite some time, when people talked about the free exercise of religion, that exercise would be interpreted in terms of its establishment ramifications. In other words, if Captain Goldman is allowed to wear a yarmulke, then why am I not allowed to wear a Met hat? If the Yoders can have their fourteen-year-old child churning butter and raising barns instead of attending high school, then why can’t I have my fourteen-year-old child fixing cars in my mechanic shop? If devotees of Santaria can slaughter animals in religious rituals, then why can’t I kill chickens at a cock fight? The point is that every time a free exercise exception is contemplated it is interpreted by secularists as a potential violation of the prohibition against establishment. Put another way, people tended to think in establishment terms when it came to politics, rather than in free exercise terms.

We will see in a moment that this dynamic is in the process of shifting. But before I return to that point, I do want to say in my own name that the notion of free exercise ought to be given more political attention and support than it has been given in recent decades in the United States. I say this as a political scientist rather than a lawyer or a Constitutional scholar, and let me give you an everyday example of what I mean. My scholarship has been based for most of my career on analysis of the political behavior of Catholic clergy, and particularly Catholic bishops, all over the world. I have noticed in the course of this work, that The New York Times, almost metronomically, runs an op-ed every election year in [*1443] which somebody tells the Catholic Archbishop of New York to shut up and stay out of politics. The leading newspaper in New York City consistently sends the message that while the Catholic Archbishop of New York is allowed to run the St. Patrick’s Day Parade every March he should stay completely out of political debate and contention every November.

I would argue that this admonition is based on a fundamental misunderstanding not only of the U.S. Constitution, but also on the difference between the separation of church and state, on the one hand, and the banishment of religion from politics, on the other. The former is possible, and an appropriate subject for constitutional adjudication. The latter is not quite as susceptible to legal and constitutional argumentation, and it is probably an impossible goal in any event. What I mean to say is that the idea that you can actually squeeze all of the religion out of democratic politics in a “religious society” is an absurdity, and probably a constitutionally inappropriate one at that. The Catholic Archbishop of New York has the right to say whatever he wishes to say, no? He is an American citizen, and even if he wasn’t, he would have the right to weigh in on issues that had an impact on his interests. So the idea, fairly common in secular circles, that religious leaders ought not to even talk about politics lest they risk the constitutional separation between church and state, is an affront not only to freedom of speech, but also to freedom of religion. The problem arises, of course, when speech in pursuit of that exercise turns into advocacy for laws which would arguably violate the Establishment Clause of the Constitution. Again, we see how the two clauses are connected to each other, and we see how that connection is open to divergent interpretation in political terms. I would prefer to err on the side of protecting the rights of clergymen, whether it is Cardinal Edward Egan from the pulpit in New York or Rev. Jerry Falwell on television in Virginia - neither of whom have I ever agreed with on anything other than this, by the way - to speak out in support of laws they think appropriate, rather on the side of seeing their advocacy as a threat to the integrity of the wall separating church from state. This whole area strikes me as a matter more of free exercise than it is of establishment, and my claim here is that the construction of such conflicts in establishment terms has played an important role in rendering free exercise a second class right.

I also think, however, that this political dynamic is in the process of changing, changing in directions that have the potential to greatly enhance the profile of the free exercise of religion. And I [*1444] would like to end my comments by drawing
our attention to these political shifts. I believe that it was decided a few years ago by leaders of the Religious Right, purely as a matter of political strategy, to stop talking in terms of passing laws that would further religion’s role in the public square, and begin talking in terms of how restrictions on the public expression of religion in America are restrictions on the constitutionally protected right to free exercise of religion. In this formulation, for example, state organized prayer in public schools is not a law respecting an establishment of religion. Instead, the prohibition of state organized prayer in public schools is a legal regime that infringes upon the free exercise rights of school age children and their parents. In the same way, public expression of religion - in parks, government buildings, or any public space - is now defined as a necessary precondition for the constitutionally protected exercise of religion.

My impression is that this shift was driven by a political calculation on the part of political operatives that the general American public will be more likely to support arguments in favor of free exercise and free expression than they will be likely to accept arguments in favor of theocracy. The rhetoric of liberty, after all, is at the very heart of almost all positions taken across the full spectrum of American politics. We have no far left in America, and we have no far right, and that is largely because the far left and the far right both argue against liberty, a position that is basically disallowed in most American political discourse. The far left is against certain forms of economic liberty because they distrust the private ownership of the means production. The far right is against certain forms of political liberty because they distrust the social decay that may result from autonomy and individual choice. But, by and large, we do not have these elements in our politics, at least not explicitly. Instead, we have two mass-based liberal parties of the middle. As a result, what we call “the right” in America calls for property rights and economic autonomy couched in terms of liberty, and what we call “the left” in America calls for rights to education, healthcare, housing, or reproductive “choice,” similarly phrased in the terms of liberty. The entire American political spectrum, in other words, defines its ideology in terms of liberty. Everyone is in favor of liberty; it is just a matter of how liberty is defined - which liberties are treasured by this party, and which are treasured by that party. So, if you can frame your positions as defending the free exercise of religion rather than as effort to impose religious law upon secularists and minorities, you will stand a much better [*1445] chance of winning the public’s support.

The political incentive to move in the direction of rhetoric based in free exercise rights is, I would argue, particularly clear at the moment given the growing divide within the Republican Party on these matters. We see this in all sorts of issues, as the libertarian and laissez faire wings of the Republican Party grow increasingly concerned about the degree to which the religious right has taken over the institutional levers of the GOP, and at least potentially rendered it suspect to secular Americans. We are seeing this fascinating dynamic played out at the moment as Republican presidential candidates trip over themselves to prove their bona fides to a primary electorate they assume to be dominated by religious conservatives - Romney simply by turning his back on his entire political past; McCain by trying desperately to change the subject; and Giuliani, comically really, promising to appoint members of the Supreme Court who will disagree with him on every social position he has ever taken as a public official. But once the nomination is secured, the winning candidate will then engage in the counter-spectacle of trying to establish his “moderation,” so as not to frighten off secular Republicans and independents.

In such a freighted political environment, the free exercise clause holds out a welcome and enticing life preserver. Listen, the religious wing of the Republican Party is now saying, we are not threatening you with theocracy, and we never have; we are simply defending individual liberty as we protect the public’s constitutionally enshrined right to exercise religion in public as well as in private. As I said earlier, I believe this is a matter of political positioning and has precious little with the principles of the First Amendment. But regardless of its foundations, this new way of talking about the role of religion in America has the potential to make the exercise of religion less of a second class citizen in our constitutional order.

Copyright (c) 2007 Albany Law Review
Albany Law Review

2007

Author: Steven K. Green*

* Professor of Law and Director, Center for Religion, Law and Democracy, Willamette University College of Law.

LexisNexis Summary

... A brief glance at the religion clauses quickly reveals that there are two clauses - free exercise and nonestablishment - suggesting (at least) two values. ... As with free speech, there is no affirmative obligation on the government to support or enhance free exercise rights. ... Rather, the question became whether the government had any affirmative obligation to enhance the claimants' religious practice through its operations. ... Stewart was on to something by asking whether the school might be obligated to facilitate religious practice as a counter-balance to its secular curriculum; unfortunately, he let the matter drop. ... Most later challenges to secularism in public schools have claimed direct burdens on religious belief and practice, thus relieving courts from having to address whether any affirmative accommodation requirement exists in the absence of a free exercise burden. ... Though coming close to suggesting a positive quality to free exercise, Scalia couched his understanding of the accommodation zone as permissive rather than obligatory. ... But whether military service imposes a free exercise burden or something less, the accommodation undertaken by the government has taken on a unique, positive quality. ... That is the positive quality of nonestablishment that free exercise lacks. ...

Text

[1453]

I. Introduction

In several articles, Professor Fred Gedicks has argued that the rules governing the religious liberty interests vary depending on the application and functionality of that interest. For example, Gedicks writes in his "Two-Track Theory" that when the government is distributing benefits to a large class of individuals, neutrality should be the controlling paradigm, such that religious entities can participate in the receipt of benefits, and even use those benefits for religious purposes, without violating the Establishment Clause.¹ Conversely, when the government is speaking itself or advancing its own policy goals in a government administered program, that separationism should be the dominant paradigm.² Gedicks schema, offered as an interpretative model for the Establishment Clause, is a refinement of a common approach to religion clause analysis generally: divide and conquer.³ Conquer the religion clause analytical conundrum by dividing

---

¹ Frederick Mark Gedicks, A Two-Track Theory of the Establishment Clause, 43 B.C.L. Rev. 1071, 1090, 1104 (2002).
² Id. at 1090; see also Frederick Mark Gedicks, Neutrality in Establishment Clause Interpretation: Its Past and Future, in Church-State Relations in Crisis: Debating Neutrality 191-210 (Stephen V. Monsma ed., 2002).
the clauses according to the values represented. A brief glance at the religion clauses quickly reveals that there are two clauses - free exercise and nonestablishment - suggesting (at least) two values. The fact that the religion clauses contain two or more principles lends itself to a comparative model.

The modern Supreme Court has struggled with whether the clauses represent primarily a unitary value, complementary values, or distinct values that may be at tension. On one hand, Justice Wiley Rutledge wrote in his dissent in Everson v. Board of Education that "religion’ appears only once in the [First] Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid "an establishment’ and another, much broader, for securing "the free exercise thereof.’" Relatedly, Justice William Brennan, a leading student of the religion clauses on the Court, viewed the clauses as promoting complementary values, declaring that the Establishment Clause was "a coequal executor, with the Free Exercise Clause, of religious liberty." 4

More frequently, the Court has seen the clauses as promoting distinct values, though interrelated, that sometimes are in conflict. The Court has said that the nub of a free exercise violation rests on coercion. With respect to the Establishment Clause, however, the Court has generally been unwilling to restrict the purposes so narrowly. As Justice Hugo Black said for the Court in Engel v. Vitale:

Although these two clauses may in certain instances overlap, they forbid two quite different kinds of government encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. 8

The resistance of a majority of the Court to cabin the Establishment Clause value(s) too narrowly is exemplified in the exchanges between the majority, concurring, and dissenting opinions in Allegheny County v. ACLU and Lee v. Weisman that offered competing analytical paradigms of endorsement or coercion. 9 If all that the Establishment Clause protected against was coercion, remarked Justices Sandra O’Connor and Harry Blackmun in the respective cases, then the Establishment Clause would be superfluous to the Free Exercise Clause, making the former a "redundancy." 10

Thus, the Establishment Clause must serve an additional function beyond enhancing religious exercise. But merely acknowledging an additional purpose behind nonestablishment begs the question of whether it is still chiefly a different way to get to a common goal. The debate continues over whether enhancing religious liberty remains the primary unifying value of both clauses, such that those secondary values represented in Establishment Clause are subservient to the primary goal of enhancing religious exercise.

This Article takes a different approach to this debate about whether distinct values are represented in the two religion clauses. The differences between the clauses turn not so much on distinct substantive values particular to each clause but in the means of achieving those shared values. The Establishment Clause is primarily for purpose of enhancing religious liberty writ large: ensuring religious equality; guaranteeing disentanglement of religion and government; ensuring the legitimacy of the secular democratic order; and diffusing religious divisiveness. As Justice Blackmun remarked in his Lee

---

6 See Cutter v. Wilkinson, 544 U.S. 709, 719 (2005) ("While the two Clauses express complementary values, they often exert conflicting pressures.").
8 Engel, 370 U.S. at 430.
10 Allegheny, 492 U.S. at 628 (O’Connor, J., concurring); Lee, 505 U.S. at 604, 606 (Blackmun, J., concurring).
The Establishment Clause protects religious liberty on a grand scale: it is a social compact that guarantees for generations a democracy and strong religious community - both essential to safeguarding religious liberty.  

Conversely, the Free Exercise Clause has a purpose of protecting religious liberty on a small scale: protecting freedom of conscience and the ability to practice one’s religious beliefs by preventing government coercion. Thus, absent a crossover to protect the autonomy of religious institutions that has both Free Exercise and Establishment Clause qualities, nonestablishment ensures distinct qualities of religious liberty unrelated to free exercise and does so on a grander scale.

In this sense, nonestablishment is the superior religious liberty clause. So understood, religious free exercise is the second-class religion clause right, as the title to this symposium asks.

Second - and to the heart of my thesis - the Establishment and [1456] Free Exercise clauses interact with and respond to government in different ways. Free exercise, by virtue of its more limited quality, is essentially a negative right - a shield against government coercion, but one that does not place any affirmative obligations on the government.  

Professor Esbeck is half right; whereas government may sometimes permissively accommodate religious practice, government generally is under no duty to enhance free exercise and is only required to remove government burdens on that practice. In essence, the “Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government.”

But unlike free exercise, the nonestablishment value can tell the government what it must do. Thus, nonestablishment has both negative and positive qualities, not only preventing government from engaging in conduct that endorses, favors, advances, or disparages religion, but also imposing affirmative obligations on government to act in ways that enhance Establishment Clause values. This latter obligation of enhancement is unique to the nonestablishment religious liberty value.

II. Why This Schema

As stated, the nonestablishment value is concerned with ensuring religious equality, guaranteeing disentanglement of religion and government by protecting the autonomy of religious institutions, ensuring the legitimacy of government, and diffusing religious [1457] divisiveness. These values place affirmative obligations on the government to act in a

---

11 Lee, 505 U.S. at 606 (Blackmun, J., concurring).
19 See School Dist. of Abington Township v. Schempp, 374 U.S. 203, 227 (1963) (Douglas, J., concurring) (“While the Free Exercise Clause of the First Amendment is written in terms of what the State may not require of the individual, the Establishment Clause, serving the same goal of individual religious freedom, is written in different terms.”).
particular, non-religious manner, to tailor its policies and programs in particular, non-religious ways. Thus, as we saw in
the high school football game prayer case, Santa Fe Independent School District v. Doe, the government at times must
affirmatively disassociate itself from impressions of religious endorsement, even when it is not itself speaking. Although
the Santa Fe Court majority viewed the student-led prayer as comparable to government speech due to the extensive school
control over the football game, the holding did not turn on such a finding. 21 Rather, the Court held that due to the
heightened school involvement in and control over the game and pre-game activities, observers would perceive the private
religious messages as being delivered with the approval of the school administration. 22 The school was obligated to diffuse
such impressions of endorsement. Endorsement, therefore - assuming it still remains as a nonestablishment value - prohibits
more than the government’s own religious speech and also bars the government from associating itself with the religious
speech of private individuals: “Indeed, the very concept of ‘endorsement’ conveys the sense of promoting someone else’s
message.” 23 This requirement not to associate with private religious messages in turn places obligations on the government
to act in some remedial fashion. As Justice O’Connor remarked in her controlling concurring opinion in Capitol Square
Review v. Pinette (the Klan cross case in front of the Ohio Statehouse):

The [Establishment] Clause is more than a negative prohibition against certain narrowly defined forms of government
favoritism; it also imposes affirmative obligations that may require a State, in some situations, to take steps too avoid being
perceived as supporting or endorsing a private religious message. 24

[*1458] This requirement of affirmative disassociation is not based solely on principles of nonadvancement of religion.
The Establishment Clause, as well as the overall structure of our Constitution, recognizes that America has a secular
democratic government. The Constitution contemplates a secular public order, one in which government may promote
liberal democratic principles to the exclusion of other ideologies, including religious ones. 25 Thus government may and
should promote secular goals over religious goals. 26 This also means an affirmative obligation on government to maintain
a secular public order, and a collective right of citizens to enforce this arrangement, which was underscored by the Court’s
reconsideration of taxpayer standing in the Hein v. Freedom From Religion Foundation case. 27

Free exercise, in contrast, is more closely linked to other expressive interests found in the First Amendment. As with free
speech, there is no affirmative obligation on the government to support or enhance free exercise rights. The closest parallel
would be the public forum doctrine in free speech jurisprudence. Early on, the Court intimated that some government
property - quintessential public forums - must be kept available for private discourse, a form of a public subsidy for speech.
28 Any requirement for government to facilitate private speech has been eroded in recent years. The rationale supporting

J. L. Ethics & Pub. Pol’y 243, 256-67 (1999); Steven K. Green, Of (Un)Equal Jurisprudential Pedigree: Rectifying the Imbalance

22 In this context the members of the listening audience must perceive the pregame message as a public expression of the views
of the majority of the student body delivered with the approval of the school administration.” Id. at 308.
23 Allegheny, 492 U.S. at 600-01; accord Santa Fe, 530 U.S. at 308.
citation omitted).
26 Statements by Court members suggesting that the religion clauses bar the government from preferring secularism over religion-
such as are found in Zorach v. Clauson, 343 U.S. 306, 314 (1952) (citing a “callous indifference to religious groups” where a school
district declined to allow for release time instruction) - have not withstood the test of time or subsequent case law. Generally, courts have
refused to concede that secularism is the antithesis of religion, that it is a zero-sum gain, such that the government cannot prefer secular
approaches over religious approaches. The test enunciated in Lemon v. Kurtzman, 403 U.S. 602, 612 (1971), where the Court requires
that government act with a secular purpose in mind, establishes as much.
an affirmative aspect to public forum doctrine is grounded primarily in notions of democratic participation and accountability. But the Court has not been inclined to expand upon those rationales to support an affirmative obligation for other free expression interests. 29

[*1459] To be sure, as Cass Sunstein has written, it is disquieting to view the First Amendment as promoting only negative rights. As he argues with respect to free expression, the "positive dimension" of the Amendment "consists of a command to government to take steps to ensure that the system of free expression is not violated by legal rules giving too much authority to private citizens," such as expansive libel laws or those enforcing hostile audience constraints. 30

Certainly, a parallel exists with free exercise as well in that government may be required to take affirmative steps to enhance religious "liberty" by preventing religious discrimination or harassment (or promoting religious tolerance in public schools). But these obligations to act - if they do exist - occur usually within the context of government workplaces or schools where the government otherwise imposes restrictions on private conduct, such that the failure to prevent discrimination or harassment may be equivalent to an affirmative acquiescence of the wrongful conduct. 31 Also, this obligation to act is little different from requiring the government to remove private burdens on religion, just as the Free Exercise Clause may require the government to remove official burdens. 32 Obligations to act when religion has been burdened ("substantially" is the standard) is different from obligations to act in non-burdensome situations. The affirmative, constitutional obligation on the government to prevent private religious discrimination outside its own controlled environments is questionable; even so, laws designed to minimize religious intolerance and harassment are qualitatively and quantitatively different from an obligation to enhance religious exercise through programs such as Charitable Choice or school release time. In the former, discrete statutes create neutral environments in which religious belief or practice may flourish or die on its own; any enhancement of religious practice is a secondary affect. Laws designed to enhance religious belief (short of removing a discernable burden) put the government in the role of promoting religious belief, which is neither its duty nor within its purview.

Thus outside of mandatory expressive forums, government is not [*1460] obligated to support private expression, religious or otherwise. Similarly, government is not obligated to enhance religious liberty, only not to burden its practice. This is historically true; our experience has taught that government is often ill-equipped to enhance religious liberty without reverting to favoritism and inviting those concerns that drive the Establishment Clause. 33

This is why permissive accommodation of religion is a narrow field. Amos tied the government’s ability to accommodate religion to relieving potential free exercise burdens, as have later holdings. 34 While the scope of the accommodation in Amos was broader than the actual burden itself, it was still tied to a potential burden on religion. 35 That "religious groups have been better able to advance their purposes" due to permissive exemptions from general laws has sometimes been a by-product, but has not been a justification for legislative accommodations. 36 Also, the Court’s cases reveal a concern about accommodations imposing burdens on third persons. 37 But more than anything, a permissive accommodation is not


34 See Cutter, 544 U.S. at 720; Kiryas Joel, 512 U.S. at 705.

35 Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 336 (1987).

36 Id.

obligatory. That the government may, in some instances, accommodate religion without violating the Establishment Clause does not turn free exercise into a positive right.

III. Practical Applications of Schema

This part discusses practical applications of this positive-negative right dichotomy within religion clause jurisprudence. To do so, it focuses on three contemporary examples of where these issues arise: government religious displays, government funding of religious social service programs (“Charitable Choice”), and military chaplains. On first blush, the first two examples would not commonly be considered to raise free exercise issues; rather, government religious displays and Charitable Choice cry out for Establishment Clause analysis. The government provision of military (and prison and hospital) chaplains more clearly raises free exercise considerations - which, as argued, likely represents that singular instance where the Free Exercise Clause may be thought of as having a positive quality. But as with the other two examples, government chaplaincies require a threshold analysis under the Establishment Clause. What ties the three examples together, and makes them relevant to the topic of this Article, is that all three have been characterized recently as possessing a positive free exercise component. The argument that has appeared in all three contexts is that the government should be required to affirmatively accommodate religious expression or practice through its own activities and policies, even though (as in the first two examples) there has been no burden on religion that would justify either a mandated or permissive accommodation. Finally, the issues of government religious displays and government funding of religious social services represent applications of the positive quality of nonestablishment.

To be sure, other examples may make stronger cases for a positive free exercise component. Over the years, the courts have been presented with several opportunities to discover such an interest but they have always backed away. In Goldman v. Weinberger, the Court found no free exercise violation in a military dress regulation that prohibited an Orthodox Jewish Air Force psychologist from wearing his yarmulke while in uniform. The military could easily have accommodated Rabbi Goldman’s religious attire, as it had done so earlier or as it was later required to do by Congress. But Goldman did not argue that there was an affirmative aspect to free exercise - supported by a value of pluralism - to assist him in the enjoyment of his religion. Rather, he claimed that the regulation burdened the exercise of his religious beliefs. The Court avoided addressing the degree of any burden on Goldman’s beliefs, deferring to the military’s authority over internal matters such as a dress code. The Court suggested, however, that irrespective of a viable free exercise claim, no positive aspect to free exercise existed either: “the First Amendment does not require the military to accommodate such practices in the face of its [policy].”

Lyng v. Northwest Indian Cemetery Protective Association also presented a potentially compelling case for identifying a positive quality to the Free Exercise Clause. There, several Native Americans claimed that the proposed upgrade of an unpaved road in the Six Rivers National Forest near sacred archeological sites would infringe on their ability to engage in spiritual rituals. The plaintiffs asserted a burden on their religion by the road upgrade and, this time, the Court demurred that the government “threat to … some religious practices is extremely grave.” Despite so finding, however, the Court characterized the claims in broader terms with broader implications. Highlighting that the claimants sought to restrict the government's uses of “its land,” with implications for a host of other government programs, the Court extracted

39 Id. at 506.
40 Id. at 509.
41 Id. at 509-10.
42 Id. at 509-10.
44 Id. at 451.
that incidental effects of government programs, which make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions. The crucial word in the constitutional text is “prohibit.”

Government, Justice O’Connor remarked, “simply could not operate if it were required to satisfy every citizen’s religious needs and desires.” The Court’s minimizing of the coercive aspect of the government action was arguably inconsistent with its own acknowledgment that the proposed project “could have devastating effects on traditional Indian religious practices.” But the Court was taking the long view by considering the potential impact of a government obligation to affirmatively accommodate religious needs outside of burdensome situations. No affirmative obligation existed on the government to promote religious pluralism or to protect a class of persons whose religious beliefs and practices had long been excluded from the cultural mainstream and had been all but destroyed by official government policy and a European-American hegemony. As sympathetic as the claim was in this context, the Court opined that once recognized, a positive quality to free exercise would quickly place obligations on a “board range of government activities - from social welfare programs to foreign aid to conservation projects,” the accommodations which would either hamstring government functioning or risk the government assessing the strength or weakness of particular religious claims. The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours.

It is not that the Court reached the wrong conclusion in Lyng - the government’s interest in the control over “its land” would likely prevail under even a Sherbert analysis - rather, the Natives’ strong showing of a religious burden made the Court’s “affirmative right” rhetoric overstated and misplaced. The Court’s difficulty reconciling the burden issue - along with its “slippery slope” concerns for the management of other government property - prevented it from squarely considering whether in that situation, which involved a people who have had a historic trust relationship with the government and have been subjected to cultural genocide, a positive aspect could exist to free exercise in the absence of a cognizable burden on religious practice.

A third context where courts have occasionally grappled with whether there exists a positive aspect to the Free Exercise Clause has been with religiously-based objections to secular public schooling. In his Schempp dissent, Justice Stewart argued that the policies providing for prayer and Bible reading facilitated the free exercise rights of those students who wished to engage in religious activity and that this interest might limit the Establishment Clause’s ban on state supported religion. Stewart was vague whether the absence of organized prayer and Bible reading rose to level of a free exercise burden or constituted some lesser religious infringement. Even less clear in Stewart’s opinion was whether states had an affirmative obligation to permit the practices in view of the potential “establishment of a religion of secularism” that would result from the prayer ban. The “desire” of parents to have their children exposed to religious influences plus the willingness of states to accommodate those majority norms (plus the absence of evidence of compulsion behind the prayer and

45 Id. at 453 ("Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, its land.").
46 Id. at 450-51.
47 Id. at 452.
48 Id. at 451.
50 Id. at 452.
readings) obviated the need for Steward to explore the headier issue, which was [*1464] unfortunate. 52 Stewart’s musings, however, led the Court majority to respond that schools could be neutral on religious matters without evincing hostility toward religion, though some accommodation about religious matters might be permissible. 53 But the majority also asserted that the Constitution did not obligate the state to facilitate the religious desires of the majority: “While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs.” 54 That banning the religious practices imposed no burden on free exercise, and that to allow them would constitute an establishment violation, obviated the need to consider whether some positive aspect to free exercise existed in between the Scylla and Charybdis of the two clauses. Stewart was on to something by asking whether the school might be obligated to facilitate religious practice as a counter-balance to its secular curriculum; unfortunately, he let the matter drop.

Most later challenges to secularism in public schools have claimed direct burdens on religious belief and practice, thus relieving courts from having to address whether any affirmative accommodation requirement exists in the absence of a free exercise burden. 55 Finding no burden ends the analysis, and the specter of an Establishment Clause violation as the alternative has always loomed large. Edwards v. Aguillard presented a possible opportunity; there, the justification for teaching creation science was not to accommodate the burdened religious beliefs of the pro-creationist children and their parents but to promote “academic freedom,” which the Court found to be a sham. 56 The absence of a burden claim could have provided an opportunity for the Court to consider whether schools should, rather than merely could, facilitate the religious beliefs of the putative majority as a counterweight to secularism. Any such inquiry was doomed, however, in light of the machinations of the Louisiana legislature to promote fundamentalist religious doctrine. 57 Justice Scalia raised [*1465] the issue in his dissent, noting that religious accommodations are “not only permissible, but [also] desirable,” even in the absence of a burden on religion, and that it was acceptable for legislatures to mandate such accommodations through law. 58 Though coming close to suggesting a positive quality to free exercise, Scalia couched his understanding of the accommodation zone as permissive rather than obligatory. 59 With his narrow reading of the Establishment Clause bar in Edwards, Scalia had no reason to venture into unchartered waters by arguing for an affirmative accommodation interest.

Perhaps the ever-present specter of an Establishment Clause violation in the school context will always short-circuit any consideration of a positive aspect to free exercise in the absence of a clear burden on student religious expression. 60 The point to be taken from the above examples is that the Court has had ample opportunity within arguably free exercise contexts to consider any positive quality to free exercise beyond relieving government-imposed burdens. Although the analysis has often been lacking, the message has been clear: while the clause may require government to refrain from burdening religious practice, it does not obligate the government to change its own conduct or facilitate religious belief and practice.

52 Id. at 312-13.
53 Id. at 225 (“It might well be said that one’s education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization.”).
54 Id. at 225-26.
55 See Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1070 (6th Cir. 1987); Grove v. Mead Sch. Dist., 753 F.2d 1528 (9th Cir. 1985), cert. denied, 474 U.S. 826 (1986).
57 Id. at 593 (“The purpose of the Creationism Act was to restructure the science curriculum to conform with a particular religious viewpoint.”).
58 Id. at 618 (Scalia, J., dissenting).
59 Id.
60 Relatedly, in Board of Education v. Mergens, 496 U.S. 226, 239 (1990), the Court upheld the Equal Access Act not as an accommodation of religion but as an effort by Congress “to address widespread discrimination against religious speech in the public schools” once the schools otherwise make allowance for student speech. By finding no Establishment Clause bar, the Court deferred to Congress’ determinations without considering any countervailing free exercise arguments.
With that rule in mind, we turn to three recent situations where arguments have been made for a positive quality to the free exercise interest.

A. Religious Displays

Government owned or sponsored religious displays should present one of the easier examples of the positive quality to nonestablishment. A sympathetic Court has struggled to identify rationales for permitting some government use of religious discourse and symbolism, looking at times to tradition, long-standing historical uses, and/or ceremonial deism. I do not seek here to offer a general theory for resolving such cases or a bright line of how to distinguish government acknowledgments of our religious past and traditions from endorsements of faith. But assuming we can distinguish permissible acknowledgments of religion from impermissible endorsements, the obligations imposed by the Establishment Clause become clear. The government’s use of religious discourse and symbolism should be prohibited; as Justice Stevens argues, there should be “a strong presumption against the display of religious symbols on public property” outside of a clear public forum. But more for the topic of this Article, the government has a duty to disassociate itself from impressions of government endorsement of religion, either its own religious messages or the messages of private persons. As Justice O’Connor has stated, the Establishment Clause imposes affirmative obligations on the government “to take steps too avoid being perceived as supporting or endorsing a private religious message.” The Establishment Clause “forbids a State from hiding behind the application of formally neutral criteria and remaining studiously oblivious to the effects of its actions.”

This is why the Texas Ten Commandments decision - Van Orden - is wrong. Except for those rare situations where the imagery is indisputably aesthetic - National Gallery Madonnas; the frieze in the Supreme Court chamber - the government should not expropriate, use, or even associate itself with inherently religious symbols. When the government is speaking - and there was no claim in Van Orden that Texas had created a public forum for free expression on the state capitol grounds - it must support a secular public order.

It is therefore surprising that within this context, with its strong claim for a positive application of the Establishment Clause, that some critics have argued for a positive free exercise application as well. Supporters of this neutrality theory have made claims, to a large degree unchallenged, of government’s obligation to treat religion as favorably as non-religion, even within its own programs or speech. In the words of Stephen Monsma, “the key to governmental neutrality is that government does not recognize, accommodate, or support any one particular religion over any other nor either religious or secular worldviews and groups over one another.” As Professor Suzanna Sherry has summed up the argument:

The claim that the Establishment Clause should be subordinated when it conflicts with religious or speech rights of believers is really a claim that … the government must remain neutral not only on the potential truth of religious claims but also on their epistemology. It is a claim that the government should not be permitted to privilege reason over faith as a method of obtaining and verifying truth claims.

In essence, a neutrality approach insists the government must take affirmative steps to facilitate religious values, even in the absence of a free exercise burden, once it has decided to advance comparable secular ones. Thus, a government may

---

63 Van Orden, 545 U.S. at 708 (Stevens, J., dissenting).
65 Id.
be obligated to include those religious representations of Christmas if it decides to sponsor a holiday display containing only secular representations (e.g., a Santa Claus; a Christmas tree; garland).

This argument is inconsistent with the secular nature of democratic government, under which the government is entitled to privilege secular values over religious ones. The government may favor rational approaches to policy formation over alternative epistemologies, including religious systems. The government need not be neutral or evenhanded toward religion in administering its programs; it may prefer rational, empirically-based solutions and outcomes over religiously based ones.

Importantly, the preference for and advancement of secular policies over religious policies is not the same as discrimination against religion. Where government promotion of secularism crosses the line into coercion is when the government requires private citizens to agree with its positions or policies. Government must also avoid taking sides on matters of contested religious belief. But this on its own does not disable the government from promoting secular policies and perspectives to the exclusion of comparable religious ones. In essence, government is generally not required to treat religion equally with nonreligion, only not to treat religion unfairly.

[*1468] This is an important distinction that is worth repeating. Government may advance secular ideals without disparaging religion. Contrary to what some may claim, the boundary between secularism and religion is not a zero-sum game, such that every secular value is advanced at the cost of a comparable religious value. Neither government nor society operates in a Manichaean framework. While government should not consciously disparage religion or religious choices, it may create incentives for secular ones. And, it follows, the government may be required to take affirmative steps to advance those values. But a comparable positive quality to free exercise does not exist.

B. Charitable Choice

Similarly, the federal government was under no obligation to change the rules with respect to the eligibility of Faith-Based Organizations (FBOs) to compete for government grants and contracts when it enacted Charitable Choice in 1996. Whether the Faith-Based Initiative will survive as a permissive accommodation of religion remains to be seen. Because the statute is not facially unconstitutional, it will likely survive as a constitutional accommodation in theory, though some applications may fail in fact.

But the rhetoric surrounding the enactment of Charitable Choice and the Bush Administration’s promotion of the Faith-Based Initiative has been full of claims of government obligations to include more religious groups. The implication has been that the failure to expand the offering infringes on free exercise principles, even though there is no arguable burden on the religious practices of either the FBOs or beneficiaries. The strength of this argument may depend on whether one characterizes a particular government funded program as an open forum (as in Rosenberger v. Rector, such that government cannot discriminate on the basis of a religious viewpoint) or more restricted government offering over which government goals dominate (Rust v. Sullivan). Even if it is classified as the former, the evidence is overwhelming that prior to Charitable Choice the government did not discriminate against religious providers or beneficiaries, but rather only against certain religious uses.

68 See Sullivan, supra note 24, at 201.
But more fundamentally, considering the positive quality of nonestablishment with the negative quality of free exercise, the federal government was under no obligation to restructure its funding goals to include religious alternatives. No free exercise burden would be presented by a secular-only program, neither with respect to beneficiaries nor potential religious providers. To quote former Chief Justice Burger:

Never … has the Court interpreted the First Amendment to require the Government itself to behave in ways that the individual believes will further his or her spiritual development or that of his or her family. The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens… “The Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government.” 75

C. Military Chaplains

Chaplains for quartered service men and women and inmates in prisons and hospitals may represent the only example of a positive right aspect to the Free Exercise Clause. The argument is that the structure of military service, by closely regulating the activities and personal freedoms of its employees, “deprives such persons of the opportunity to practice their faith at places of their choice.” 76 Thus “in order to avoid infringing [on] the free exercise guarantees,” the government may “provide substitutes” to meet those religious needs. 77 Commonly, this accommodation of servicemembers’ religious needs via the chaplaincy system is viewed as not merely being permissive, but as a mandate in order to prevent a free exercise violation by the government. As the one decision that has directly addressed the constitutionality of the chaplaincy system remarked:

It is readily apparent that the [Free Exercise] Clause … obligates Congress, upon creating an Army, to make religion available to soldiers who have been moved by the Army to areas of the world where religion of their own denominations is not available to them. Otherwise the effect of compulsory military service could be to violate their rights under both Religion Clauses of the First Amendment. 78

Although the Katcoff court did not say in so many words, it effectively held that the organization and structure of the military burdens a servicemember’s “right under the Free Exercise Clause to practice his freely chosen religion.” 79 The assumption that the chaplaincy system functions as an accommodation to prevent an otherwise free exercise violation has been readily embraced by courts and most commentators.

The free exercise burden has been overstated; while it is possible to view the chaplaincy system as a mandatory free exercise accommodation, it is better to consider it as an accommodation to address interferences with religious practice that fall short of actual burdens on religion. 80 Unlike the burden imposed on Ms. Sherbert that required her to choose between employment and a central tenet of her religious faith - observing the Sabbath by not working (more was involved than merely the ability to attend Saturday worship) - servicemembers are not coerced to violate tenets of their faith. The burdens on religious practice imposed by military life are not so comprehensive or encompassing. In most if not all situations, servicemembers have opportunities to engage in aspects of their religious faith. 81

77 Id.
79 Id. at 232.
But whether military service imposes a free exercise burden or something less, the accommodation undertaken by the government has taken on a unique, positive quality. The negative quality of free exercise normally requires that the government exempt the religious practitioner from complying with the burdening law or regulation.\footnote{See \textit{Thomas v. Review Bd.}, 450 U.S. 707, 718 (1981).} Because the military cannot exempt servicemembers\footnote{See \textit{Bowen v. Roy}, 476 U.S. 693, 699 (1986).} from the burdening requirement - i.e., military service - the free exercise interest takes on a positive quality: the highly structured and financially costly chaplaincy system. At least in this narrow context, courts have "interpreted the First Amendment to require the Government itself to behave in ways that the individual believes will further his or her spiritual development."\footnote{See generally Heather Cook, \textit{Service Before Self? Evangelicals Flying High at the U.S. Air Force Academy}, 36 \textit{J. L & Educ.} 1 (2007).}

A more controversial application of this principle involves the religious expression of military chaplains themselves. Recently, controversy has erupted over proposed requirements at the Air Force Academy and the Navy that would restrict the ability of chaplains to engage in proselytizing activity. These proposed regulations were partially in response to reports from the Air Force Academy about chaplains disparaging the religious beliefs of non-evangelical cadets. The initial proposals - to place some restrictions on the chaplains to engage in religious activity - were generally appropriate. The interference by Congress and the back-tracking by the Pentagon has been disappointing.\footnote{See \textit{Garcetti v. Ceballos}, 126 S. Ct. 1951 (2006).} While some free exercise issues are at stake, they belong chiefly, if not exclusively, to the cadets and sailors. The purpose of the Chaplain Corps is not to enhance the free exercise of chaplains; moreover, they are serving as government actors and their speech is effectively government speech.\footnote{See \textit{Garcetti v. Ceballos}, 126 S. Ct. 1951 (2006).} A prohibition on proselytizing by chaplains does not burden their free exercise interests because there is no positive free exercise obligation on government to enhance their religious beliefs.

IV. Conclusion

Understanding free exercise as a negative right and nonestablishment as encompassing both negative and affirmative qualities would go far to remediating many church-state controversies and misunderstandings. This does not mean that free exercise is an unimportant right - it is no less important than free expression generally. I still believe that Employment Division v. Smith was wrongly decided and that free exercise claims of indirect government burdens should be allowed. But ameliorating a cognizable burden on religion is different from extracting an obligation from government to enhance one’s religious practice. While I cannot require the government to help me be more religious,\footnote{See \textit{Garcetti v. Ceballos}, 126 S. Ct. 1951 (2006).} I can obligate the government to be secular. That is the positive quality of nonestablishment that free exercise lacks.
**SYMPOSIUM: A SECOND-CLASS CONSTITUTIONAL RIGHT? FREE EXERCISE AND THE CURRENT STATE OF RELIGIOUS FREEDOM IN THE UNITED STATES: THE FALL OF FREE EXERCISE: FROM NO LAW’ TO COMPELLING INTERESTS TO ANY LAW OTHERWISE VALID**

2007

**Reportor**

70 Alb. L. Rev. 1399

**Length:** 7826 words

**Author:** Vincent Martin Bonventre*

* Ph.D., M.A.P.A., University of Virginia; J.D., Brooklyn Law School; B.S., Union College. Professor of Law, Albany Law School; Faculty Advisor, Albany Law Review.

**LexisNexis Summary**

... The First Amendment explicitly allows “no law ... prohibiting the free exercise” of religion. ... “Acts of licentiousness” and “practices inconsistent with the peace and safety of this State” were the sole limitations expressed. ... Oregon v. Smith, decided by the Court in 1990 by a 5-4 vote, rejected the compelling state interest test for free exercise of religion. ... It was a clear change from what most scholars and Court observers believed was the settled jurisprudence of fundamental rights, the First Amendment, and religious liberty. ... Reynolds v. United States and Davis v. Beason were each unanimous decisions rejecting free exercise challenges to laws targeting the Mormon religious practice of polygamy. ... In light of such landmarks as Palko, Barnette, Sherbert, and Yoder, it was no wonder that the belief was widespread that free exercise of religion was safeguarded by the Court’s compelling-interest, strict-scrutiny test. ... Indeed, the Court’s equal protection jurisprudence has long applied strict scrutiny whenever governments’ disparate treatment burdens a fundamental right. ...

**Text**

[*1399]

The First Amendment explicitly allows “no law ... prohibiting the free exercise” of religion. ¹ Currently, however, Supreme Court doctrine permits any law that operates to prohibit the free exercise of religion, unless that law happens to be invalid.

---

¹ U.S. Const. amend. I. Pertinent to religious freedom, the First Amendment begins: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Id. According to the very language of the First Amendment, its history, and early Supreme Court case law, the guarantees of religious freedom in the Bill of Rights were originally applicable only to the federal government. See Baron v. Mayor of Balt., 32 U.S. (1 Pet.) 243, 247 (1833). Free exercise of religion was “incorporated,” “absorbed,” or nationalized and, thus, made assertable against state and local governments through the Fourteenth Amendment’s guarantees of “liberty” and “due process” in a series of decisions in which the Supreme Court made clear that freedom of religion is a preferred right entitled to special protection. See, e.g., Palko v. Connecticut, 302 U.S. 319, 324-26 (1937) (identifying free exercise of religion as one of those rights “implicit in the concept of ordered liberty” and about which “neither liberty nor justice would exist if they were sacrificed”); Cantwell v. Connecticut, 310 U.S. 296, 310-11 (1940) (emphasizing that “in the realm of religious faith, and in that of political belief ... the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential”; and specifying that only “a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State” would be a permissible infringement on those liberties).
for some other reason. This enormous gulf and resulting drastic dilution of free exercise protection under federal constitutional case law is the instigation for today’s symposium.

The Albany Law Review is among the very oldest and most distinguished law reviews in this country. Among other things, it has a tradition of provocative, enlightening annual symposia, exploring crucial legal-societal issues affecting America and the world. In recent years we have had symposia on torture; on lesbian, gay, bisexual, and transgender families; on violence as a concept in international law; on judicial selection, campaign speech, and activism; on American court reliance on foreign law; and even on human cloning. We are able to sponsor such symposia because of the distinguished participants who visit Albany Law School each year for the event, such as those who are with us today; and also because of the exceptional law review students who work to put these symposia together, such as this year’s members and, particularly, our Editor-in-Chief Jerald Sharum and Symposium Editor Peter VanBortel. This year we will be focusing on the current constitutional status of free exercise of religion from a wide range of perspectives. To get things started, let me offer a few introductory remarks to help place our topic in context.

First Amendment Formulation

Again, the very language of the First Amendment free exercise protection is rather absolute. It simply and unqualifiedly permits “no law” that prohibits religious exercise. As Hugo Black was fond of saying, “no law’ means no law.” But such a strictly literalist approach to the First Amendment generally - and to free exercise specifically - such an

2 Employment Div., Dep’t of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) (holding - and insisting that the Court had not previously held to the contrary - that the First Amendment’s guarantee of religious free exercise does not protect a religious objector from the dictates of “an otherwise valid law”).


6 The First Amendment literally forbids only “Congress“ from infringing upon free exercise. Indeed, the history of the Bill of Rights and the early case law make clear that the guarantees in the first ten amendments to the Federal Constitution were intended as protections against the federal government alone. Barron, 32 U.S. (1 Pet.) at 247, 250. The Supreme Court eliminated any lingering doubt about the free exercise protection several years later when it specifically held that the religious liberty guaranteed in the First Amendment - like the rest of the protections in the Bill of Rights - did not apply to state or local governments, but only to the federal. Permoli v. New Orleans, 44 U.S. (1 How .) 589, 609 (1845).

Nearly a century later, however, federal constitutional “liberty” was explicitly guaranteed against undue enroachment by the states and their local governments in the Due Process Clause of the post-Civil War, 1868-ratified Fourteenth Amendment. The Supreme Court eventually seemed to “incorporate” the free exercise of religion guarantee of the First Amendment into the Fourteenth Amendment in Hamilton v. Regents of the University of California. 293 U.S. 245, 262 (1934); id. at 265 (Cardozo, J., concurring). The Court’s pronouncement was unequivocal a few years later in Cantwell v. Connecticut. 310 U.S. 296, 303 (1940).

7 See Henry J. Abraham & Barbara A. Perry, Freedom and the Court: civil rights and liberties in the united states 27<NDASH>28 (8th ed. 2003) [hereinafter Abraham, Freedom]. Under the very terms of the First Amendment, Justice Black’s famous aphorism is no less applicable to the free exercise of religion guarantee of the First Amendment - and to every other liberty guaranteed in that amendment - than it is to the freedom of speech to which he most typically applied it. See, e.g., Hugo L. Black, A Constitutional Faith 45 (1968); Edmond Cahn, Justice Black and First Amendment "Absolutes": A Public Interview, 37 N.Y.U. L. Rev. 549, 553-54, 563 (1962); Hugo L. Black, The Bill of Rights, 35 N.Y.U. L. Rev. 865 (1960).
unconditional, categorical, absolutist application is hardly realistic, probably impossible, and, indeed, would be reckless to order and civility in a free society. 8

On the other hand, it is instructive to consider revolutionary-era documents and understandings of religious liberty. Thomas Jefferson’s Bill for the Establishment of Religious Freedom in Virginia is, to be sure, among the most seminal. Drafted by Jefferson in 1777 and ultimately passed into law several years hence, owing largely to the efforts of James Madison, 9 it recognized government’s justified interference with religious liberty only within the narrowest confines. In Jefferson’s words, which were left unchanged in the statute enacted by the Virginia legislature, “it is time enough for the rightful purposes of civil government for its officers to interfere when [religious] principles break out into overt [1402] acts against peace and good order.” 10 Only “overt acts,” and only when they disturbed the “peace and good order,” would allow abridgement of the guaranteed freedom of religion.

Thomas Jefferson’s formulation was early recognized by the Supreme Court as central to understanding the First Amendment’s protection of religious liberty. 11 New York State’s constitution, drafted by John Jay and adopted the same year Jefferson authored his religious freedom bill, similarly guaranteed free exercise with only narrow exceptions. 12 “Acts of licentiousness” and “practices inconsistent with the peace and safety of this State” were the sole limitations expressed. 13 Several other state constitutions enacted at the time of the Revolution, among them those of Georgia, 14 Massachusetts, 15 and New Hampshire, 16 as well as the Northwest Ordinance, 17 likewise sharply restricted government’s authority over religious exercise. Public disturbances, threats to safety, and other such conduct inconsistent with peaceful society were alone identified as limitations on the immunity of religious practices and duties from government interference. 18

But whether free exercise of religion is construed to be absolute, as it is stated in the First Amendment, or subject to the limited restrictions identified in early state charters, there is a huge abyss between either of those and the current Supreme

8 Regarding free speech, to which Hugo Black typically applied his literalist approach, one need only imagine “no law” prohibiting insubordinate, defiant speech in the armed forces, or “no law” prohibiting deliberately dishonest and malicious defamatory or perjurious speech. These and other readily imaginable examples, though perhaps extreme, nevertheless would seem to make clear that “no law” cannot be applied without at least some minimal flexibility and essential qualifications.

Examples of religious exercise to which “no law” cannot sensibly or responsibly be applied are even easier to imagine - e.g., human sacrifice, child labor, parental refusal to allow life-saving or disease-preventing medical treatment, female mutilation, pedophilia, etc.

9 Saul K. Padover, Jefferson 79-82 (1980); see also Michael W. McConnell et al., Religion and the Constitution 54 (2d ed. 2006) [hereinafter McConnell, Religion].

Jefferson counted the Virginia Statute for Establishing Religious Freedom among only three accomplishments for which he wished to be remembered. In accordance with his own instructions, Jefferson’s epitaph, engraved on his tombstone at Monticello, Virginia, identifies him only as the author of that statute and the Declaration of Independence, and as the Father of the University of Virginia. Dumas Malone, The Sage of Monticello 499 (1977).

10 Padover, supra note 9, at 81; McConnell, Religion, supra note 9, at 55.


12 Bernard Schwartz, 2 The Roots of the Bill of Rights 301 (1980).

13 Id. at 312.

14 Id. at 299 (“provided it be not repugnant to the peace and safety of the State”).

15 Id. at 340 (“provided he doth not disturb the public peace, or obstruct others in their religious worship”).

16 Id. at 375 (same as Massachusetts).

17 Id. at 400 (“demeaning himself in a peaceable and orderly manner”).

Court formulation that subordinates free exercise to any otherwise valid law. There is a huge abyss in terms of legal doctrine between, on the one hand, no law or no law except for state interests in peace and safety, and on the other, any law that passes a minimal legitimate-interest or rational-basis test. But that is presently the test under federal constitutional jurisprudence.

[*1403]

Smith’s Precursors

Oregon v. Smith, 19 decided by the Court in 1990 by a 5-4 vote, rejected the compelling state interest test for free exercise of religion. 20 The decision engendered a great deal of surprise, criticism, and reaction at both the federal and state level. 21 It was a clear change in the Supreme Court’s jurisprudence, 22 notwithstanding the insistence of Justice Scalia, the author of the Court’s opinion. 23 It was a clear change from what 24 most scholars and Court observers believed was the settled jurisprudence of fundamental rights, the First Amendment, and religious liberty.


20 The vote was 6-3 to reject the specific free exercise claim in question, but Justice Sandra Day O’Connor, who concurred in the result, did not join Justice Antonin Scalia’s opinion for the Court rejecting the compelling state interest test. Instead, she authored a separate concurring opinion, joined by the three dissenting justices, emphatically disagreeing with the majority for “dramatically departing from well-settled First Amendment jurisprudence.” Smith, 494 U.S. at 891 (O’Connor, J., concurring).

21 At the federal level, Congress passed the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-41, 107 Stat. 1488, to restore the pre-Smith compelling-interest test for free exercise claims. The Supreme Court, however, invalidated “RFRA,” at least insofar as it was applicable to the states, in City of Boerne v. Flores, 521 U.S. 507 (1997).


23 See Smith, 494 U.S. at 893-96 (O’Connor, J., concurring). As noted by Justice O’Connor, joined by the three dissenters, the majority’s holding was possible only by ”disregard[ing the Court’s] consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct.” Id. at 892; see also id. at 907-08 (Blackmun, J., dissenting) (“Until today, I thought this was a settled and inviolate principle of this Court’s First Amendment jurisprudence.”).

But this is not to suggest that prior to 1990 the Supreme Court had a particularly strong or consistent track record in protecting the free exercise of religion. A very quick recollection of a few of the most notable free exercise landmarks leads to the inescapable conclusion that the Supreme Court has, at the very best, been erratic.

Among the Court’s earliest forays into free exercise were the Mormon polygamy cases in the late 1800’s. Reynolds v. United States and Davis v. Beason were each unanimous decisions rejecting free exercise challenges to laws targeting the Mormon religious practice of polygamy. In its 1878 ruling in Reynolds, the 9-0 Court upheld a criminal prosecution against a practicing Mormon polygamist in the Utah Territory, under a federal statute criminalizing bigamy in any United States territory. Several years later, in Davis, the Court contemptuously declared that for Mormons to “call their advocacy [of polygamy] a tenet of religion is to offend the common sense of mankind.” The Court also confidently declared a distinction between a “religion’ [that] has reference to one’s views of his relations to his Creator, and to the obligations they impose,” and a “cultus or form of worship of a particular sect” - the latter, in the Justices’ view, quite clearly including the Mormons. The 9-0 Davis Court thus had little difficulty upholding a statute of the Idaho Territory which conditioned the right to vote upon an oath against practicing, advising, or encouraging polygamy. Later that same year, the Court approved an act of Congress that dissolved the Mormon Church’s corporate charter in Utah and confiscated most of its property.

The Quakers did not fare much better before the Court. In its 1929 decision in United States v. Schwimmer, the Court affirmed the denial of naturalized citizenship to a fifty year old woman who, true to her pacifist convictions as a Quaker, had acknowledged on her application: “I would not take up arms personally” in defense of the country. To the majority, this refusal offended “a fundamental principle of the Constitution,” namely “the duty of citizens by force of arms to defend our government.” In one of the earliest glimmers of hope for free exercise, however, three of the justices took issue with the Court’s decision. Oliver Wendell Holmes, joined in his dissenting opinion by Louis Brandeis, reminded the majority of another - “more imperative[ ]” - fundamental of the Constitution: “the principle of free thought - not free thought for those who agree with us.” Moreover, with direct reference to the religious pacifism in question, Holmes expressed his dismay that Quakers could be disqualified from citizenship simply “because they believed more than some of us do in the teachings of the Sermon on the Mount.”

25 98 U.S. 145 (1878).
26 133 U.S. 333 (1890).
27 Reynolds, 98 U.S. at 146.
28 Davis, 133 U.S. at 341-42.
29 Id.
30 Id. at 346-47.
31 The Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890) (upholding a federal statute dissolving the corporate charter of the Mormon church and forfeiting all its property except that used exclusively for religious worship, burial and parsonage).
32 279 U.S. 644 (1929).
33 Id. at 647.
34 Id. at 650.
35 Id. at 654-55 (Holmes, J., dissenting).
36 Id. at 655. Two years hence, in United States v. Macintosh, 283 U.S. 605 (1931), the Court again upheld the denial of naturalization on the basis of pacifist religious beliefs, in this case involving a Canadian Baptist minister who served as a chaplain at Yale. The Court’s decision now garnered a bare five Justice majority. As before, Holmes and Brandeis dissented, this time joining an opinion by Charles Evans Hughes. Ultimately, the position of Holmes, Brandeis, and Hughes became the majority when the Court explicitly overruled Schwimmer and Macintosh fifteen years later in Girouard v. United States, 328 U.S. 61, 69 (1946).
Three years later, in Hamilton v. Regents of the University of California, the Court built upon Schwimmer and Macintosh. It rejected the free exercise claims of students who were expelled from the state university for refusing to participate in required classes in military instruction. The Justices were unanimous that the students' religious convictions were "unquestionably" sincere and "undeniably" included within the "liberty" safeguarded against state encroachment by the Fourteenth Amendment. Nevertheless, [*1406] according to the Court, that liberty "plainly" did not include "the right to be students in the State University" without satisfying "the conditions of attendance" imposed by the state - regardless of how objectionable to the avowedly safeguarded religious principles. Subsequently, in its 1945 decision in In re Summers, the Court applied parallel reasoning to uphold Illinois's denial of admission to the bar of a federally certified conscientious objector. Albeit now by a bare 5-4 vote, the Court rejected the claim of an applicant who was disqualified solely for his religious scruples against serving in the state's militia.

The justices were equally unsympathetic to religious freedom challenges to the so-called Sunday "blue laws." These state provisions, prohibiting most businesses from operating on the Christian Sabbath, were variously claimed to violate equal protection, due process, non-establishment, and free exercise. In Braunfeld and Crown Kosher, Orthodox Jewish retail merchants in Pennsylvania and Massachusetts attacked their states' blue laws for unfairly burdening their religious convictions. With Saturday being their own religious Sabbath, and Sunday being the legally mandated one, their work week was reduced to five days. For the Court, however, the critical point was that the state restrictions did "not make unlawful any religious practices," but "simply regulated a secular activity." The conceded "financial sacrifice" resulting from the legislated day of rest was dismissed as "only an indirect burden on the exercise of religion." No accommodation or [*1407] exemption need be granted.

Immediately prior to the 1990 Smith decision, another pair of cases similarly evinced a rather dismissive attitude toward religious liberty by respective majorities of the Court. In Goldman v. Weinberger, the Justices rejected the appeal of an Orthodox Jewish rabbi in the Air Force who was threatened with a court martial for wearing his yarmulke indoors in violation of the military dress code. By a 5-4 vote, the Court refused even to consider the feasibility or desirability of accommodating the undisputed religious requirement. Instead, it deferred without scrutiny or balancing to the generalized, "perceived need for uniformity" in the military.

---

37 293 U.S. 245 (1934).
38 Id. at 261, 262.
39 Id. at 265.
40 Id. at 262.
41 325 U.S. 561 (1945).
42 Id. at 571-72.
44 Braunfeld, 366 U.S. at 605.
45 Id. at 606. To Justice Potter Stewart, who was among three dissenters in both Braunfeld and Crown Kosher, what mattered was the actual "impact" of the blue laws, rather than a distinction between direct and indirect burdens. As he put it, these laws "compelled an Orthodox Jew to choose between his religious faith and his economic survival." Id. at 616 (Stewart, J., dissenting). This "cruel choice," he argued, was not one that a "State can constitutionally demand [and] not something that can be swept under the rug and forgotten in the interest of enforced Sunday togetherness." Id. Indeed, the majority itself recognized limitations on "indirect" burdens on free exercise. Even these were constitutionally impermissible if "the State may accomplish its purpose by means which do not impose such a burden." Id. at 607 (majority opinion). According to the Court, however, there simply were no alternatives that would adequately accomplish the legitimate state purposes served by the blue laws. Id. at 608-09.
46 475 U.S. 503 (1986).
47 Id. at 509-10.
Similarly, the same year in Bowen v. Roy, the Court refused to accommodate religious objections to a social security number. The sincere belief that such a numerical identification would cause grave spiritual harm was equated with an “objection to the size or color of the Government’s filing cabinets,” and the free exercise request for some alternative identification was disdained as a claimed “right to dictate the conduct of the Government’s internal procedures.”

Only Compelling Interests

On the other hand, there certainly have been some landmark victories for religious liberty in Supreme Court history. Beginning no later than the 1937 decision in Palko v. Connecticut, free exercise of religion was recognized as “implicit in the concept of ordered liberty” that the Constitution safeguards against both federal and state transgression. Delineating a jurisprudence of fundamental rights that has ever-since governed the Court’s recognition of the most closely guarded liberties, Benjamin Cardozo’s majority opinion specifically identified free exercise among those truly essential rights about which it could be said that “neither liberty nor justice would exist if they were sacrificed.”

Shortly after Palko, the Court sided with free exercise in the several Jehovah’s Witness proselytizing cases. In Cantwell, for example, a unanimous Court invalidated convictions for engaging in religious solicitation without a license, and for allegedly inciting a breach of the peace. The Witnesses involved, who did not obtain the statutorily required license, had stopped pedestrians in a predominantly Roman Catholic area, asking them to listen to a phonograph recording which, among other things, was condemned by the Church as an instrument of Satan. As for the licensing requirement, the Court ruled that it was invalid as applied to the religious conduct in question. The prevention of fraudulent and dangerous activity was surely permissible. But, in the Court’s view, the law imposed an impermissible prior restraint on religious proselytizing and it had an unacceptable potential for religious censorship. As for the religious conduct itself, it was constitutionally protected unless it constituted a “narrowly drawn … clear and present danger to a substantial interest of the State” - which the Court found it did not.

During the same period as the proselytizing cases, the Court rendered what is perhaps the seminal decision for free exercise of religion - certainly the most seminal up to that time. In its 1943 ruling in West Virginia State Board of Education v.

---

49 Id. at 699-700.
51 Id. at 324-25.
52 Id. at 326.
54 Cantwell, 310 U.S. at 300-01.
55 Id. at 301.
56 Id. at 306-07.
57 Id. at 305-07.
58 Id. at 311. The Court explained that a state’s interest in preserving the peace had to be weighed against the “overriding interest” of the United States reflected in the Constitution that “the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged.” Id. at 307.

In other Jehovah Witness proselytizing cases decided in the early 1940s, the Court similarly invalidated the licensing, taxing, and outright prohibition of bookselling, soliciting, door to door distribution of literature, and public evangelism - as applied to religious activity. See Douglas, 319 U.S. at 157 (police stopping public evangelism on Sundays in response to citizen complaints); Martin, 319 U.S. at 141 (ordinance prohibiting door to door distribution of literature); Murdock, 319 U.S. at 105 (tax for soliciting orders for articles); Jones, 319 U.S. at 103 (license tax on bookselling).
Barnette, 59 the Court invalidated the state’s mandatory flag salute in public schools as applied to religious objectors. Speaking through Robert Jackson, 60 whose words both eloquent and moving are among the most oft-quoted of any lines in any Supreme Court opinion then and now, the justices not only overruled a merely three year old precedent, but replaced it with one whose sentiments are at the core of the nation’s constitutional dedication to freedom of conscience. In a passage - with respect to which the opportunity to quote should rarely be passed - Jackson wrote:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us. 61

The controversy in Barnette arose when Jehovah’s Witness children were expelled from school for refusing, on religious grounds, to participate in the compulsory salute. 62 While acknowledging the legitimate interest in fostering national unity and patriotism in the schools, 63 the Court held that those goals could not be accomplished, consistent with the Constitution, by coercion. Though a state was typically free to regulate with little more than a “rational basis” for doing so, the Court explained that fundamental liberties such as speech and worship could “not be infringed on such slender grounds.” 64 As Jackson put it, those “freedoms … are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.” 65

That formulation, if not as absolute as a literal reading of the First Amendment, is at least as strong as that of the revolutionary-era documents that immunized religious exercise from all government interference except when necessary to secure peace, safety, and the equal rights of others. 66 Jackson’s opinion in Barnette thus laid the groundwork for the Court’s explicit adoption of the compelling state interest test for religious liberty twenty years later in Sherbert v. Verner. 67

In Sherbert, the Court overruled the denial of unemployment compensation benefits to a Seventh Day Adventist whose refusal to work on Saturday, her religion’s Sabbath, had been deemed “without good cause” and, thus, disqualifying under the state’s compensation law. 68 As viewed by the six Justice majority, the state’s position forced a cruel and impermissible choice between obeying religious precepts and receiving benefits which would otherwise be granted. It was tantamount to a fine imposed for religious worship. 69 Drawing upon the Court’s precedents that had underscored the especially rigorous protection to be afforded those “indispensable democratic freedoms secured by the First Amendment,” 70 the Justices made

59 319 U.S. 624 (1943).

60 Justice Robert H. Jackson, a favorite son of Albany Law School owing to his only formal legal education being at the law school for the 1911-12 academic year, was celebrated in recent symposia sponsored by the law school and this law review and published in its pages. See Symposium, A Tribute to Justice Robert H. Jackson, 68 Alb. L. Rev. 509-56 (2005); Tribute, Robert H. Jackson: Public Servant, 68 Alb. L. Rev. 777-813 (2005); Tribute, Wartime Security and Constitutional Liberty, 68 Alb. L. Rev. 1113-52 (2005); see also Commencement Address of United States Attorney-General Jackson, N.Y.L.J., June 10, 1941, at 1.

61 Barnette, 319 U.S. at 642.

62 Id. at 625-30.

63 Id. at 640-41.

64 Id. at 639.

65 Id.

66 See supra notes 9-18 and accompanying text.


68 Id. at 399-402.

69 Id. at 404.

clear that only a “compelling state interest,” that is, “only the gravest abuses, endangering paramount interests” 71 could justify even an incidental infringement on free exercise. According to the Court, the state’s posited interest of avoiding the possibility of spurious religious claims simply did not meet the test.

Thereafter, beyond the several cases in which it applied the same analysis to similar denials of unemployment benefits, 72 the Court arguably reached the high-water mark in its protection of free exercise nine years after Sherbert, in Wisconsin v. Yoder. 73 At issue was the state’s compulsory education law as applied to the Amish. 74 They objected, on religious grounds, to subjecting their children to any worldly influence beyond the basic reading, writing, and arithmetic skills taught in the elementary grades. 75 Speaking through Chief Justice Warren Burger, the Court recognized the state’s strong interest in education, 76 but it refused to consider that interest “absolute to the exclusion or subordination of other interests,” 77 such as those “claiming protection under the Free Exercise Clause.” 78 With a citation to its decision in Sherbert, the Court balanced the competing interests in favor of free exercise because the state had failed to demonstrate, with particularity, why it should not grant the exemption sought by the Amish. 79

Finally, it bears recalling how the Court in Yoder summarized the state of free exercise jurisprudence. It left little doubt that the compelling-interest test, however variously stated, was the appropriate standard for adjudging free exercise claims against government interference. As Burger wrote for the Court: “The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.” 80

Smith’s Recasting of Free Exercise

In light of such landmarks as Palko, Barnette, Sherbert, and Yoder, it was no wonder that the belief was widespread that free exercise of religion was safeguarded by the Court’s compelling-interest, strict-scrutiny test. That was deemed to be well-settled doctrine. 81 Indeed, this was especially so because of the countless precedents in which the Court had repeated that infringements on any fundamental right were subject to the closest judicial scrutiny and were justifiable only by paramount governmental interests. 82

---

71 Sherbert, 374 U.S. at 406 (inner quotation marks and citation omitted).
74 Id. at 207.
75 Id. at 208-11.
76 Id. at 214, 221.
77 Id. at 215. There is no question as to the meaning of the Court’s reference to “other interests.” Not only had the Court been discussing free exercise by name, but the reference was immediately followed by a citation to Sherbert, as well as to other decisions discussing the overriding nature of state interests necessary to intrude upon religious liberty.
78 Id. at 214.
79 Id. at 236.
80 Id. at 215 (emphasis added).
But in Oregon v. Smith, speaking through Justice Antonin Scalia, a five Justice majority assured everyone who thought that the compelling-interest test applied to free exercise that, in fact, it had never really applied, except for a few aberrational unemployment compensation cases. Upholding a state drug prohibition against members of a Native American church which used peyote in its sacramental ritual, the Court denied an exemption sought on free exercise grounds. The Scalia-penned opinion declared that the Court had “never held,” and it would not now hold, that “an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”

Confronted with a considerable body of precedents which certainly seemed to suggest the opposite, Scalia attempted to recast the prior case law into two categories that would not contradict his pronouncement. The first category comprised those cases involving “hybrid” rights. These included, for example, the proselytizing cases and Yoder. According to Scalia’s majority opinion, free exercise had succeeded in these cases only “in conjunction with other constitutional protections” - e.g., free speech in Cantwell and parental rights in Yoder. But, of course, such a characterization of those precedents renders free exercise of religion entirely superfluous. A violation of free speech, parental rights, or some other constitutionally protected liberty is prohibited by itself. In the world of the “hybrid” theory, the free exercise guarantee adds nothing.

The second category consisted of those cases in which religion or a particular religion’s belief or practice was singled out for disparate treatment. According to this recharacterization, the compelling-interest test was applied in Sherbert and the other compensation decisions only because “religious hardships” were being treated less favorably than other “personal reasons” for refusing employment. But again, free exercise as a substantive right with its own guarantee and protection is rendered superfluous. Any law or other government action discriminating on the basis of religion would run afoul of equal protection. Indeed, the Court’s equal protection jurisprudence has long applied strict scrutiny whenever governments’ disparate treatment burdens a fundamental right.

Free exercise itself, under Smith, thus has no independent significance. There is no freedom to practice - i.e., to exercise - one’s religion, only a freedom from invidious discrimination.

The reasons motivating the Smith majority’s rather tortured reading of the free exercise guarantee and the Court’s precedents can be distilled to two. There is the specter of free exercise run wild, permitting each individual to choose which laws to obey and, thus, “to become a law unto himself.” The majority warned that applying the compelling-interest test, in its undiluted form, “would be courting anarchy.” Under such a scenario, religious exemptions would be required for

83 Smith, 494 U.S. at 872.
84 Id. at 883 (insisting that “we have never invalidated any governmental action on the basis of the Sherbert test except the denial of unemployment compensation”).
85 Id. at 878-79 (emphasis added).
86 Id. at 895-97, 903 (O’Connor, J., concurring) (showing how the majority “misreads settled First Amendment precedent”); id. at 908 (Blackmun, J. dissenting) (accusing the majority of “miscalculating this Court’s precedents”); see also McConnell, supra note 24, at 1120 (finding that the majority’s “purported … use of precedent is troubling, bordering on the shocking”).
87 Smith, 494 U.S. at 882.
88 Id. at 881.
89 Id. at 884.
91 Smith, 494 U.S. at 882, 885 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)).
92 Id. at 888.

Of course, this parade of horribles is preposterous. Judges are in the business of judging, of balancing, of making distinctions. 94 No judge worthy of judicial office, indeed no sensible human being, is incapable of distinguishing between religious conduct involving human sacrifice, child abuse, endangering the public health and safety, racial discrimination, and other grave concerns on the one hand, as opposed to religious conduct which involves nothing of that sort but nevertheless conflicts with some general law or regulation dealing with some non-compelling or non-essential government interest. And Justice Scalia and the four justices who joined him were surely more than able to make those distinctions.

A second reason motivating the rejection of the compelling-interest test might well have been judicial restraint, a preference for leaving any possible accommodation of free exercise to the political process. 95 To be sure, there have been legislative efforts by Congress and some states to restore the pre-Smith level of protection to free exercise, and some state supreme courts have declined to follow Smith and, instead, have adhered to the standards of Sherbert and Yoder as a matter of state constitutional law. 96

[*1414] But the critical point is that the nation’s constitutional promise of religious free exercise is no longer guaranteed special protection. No longer is free exercise safeguarded under the Constitution against routine government interests. No longer must state courts subject infringements upon free exercise to the compelling-interest test; in fact, no longer may federal courts do so to infringements by state governments. 97 No longer is that the law of the land.

Hence, for example, in a recent decision of the New York State Court of Appeals - a state tribunal with a somewhat strong tradition of independent state constitutional adjudication 98 - the compelling-interest test was rejected. 99 Though the court also rejected the "otherwise valid law" standard of Smith, the test it adopted under the state constitution required "substantial deference" to the legislature 100 and provided little additional protection for free exercise. Genuine burdens on free exercise are perfectly permissible under the New York rule, unless it can be demonstrated that the "interference with religious practice is unreasonable. 101 Free exercise under state constitutional standards such as New York’s, as under the Supreme Court’s ruling in Smith, is effectively reduced to a mere privilege, protected only against burdens that are proven to fail the test of reasonableness, or are otherwise invalid.

Conclusion

The Supreme Court majority in Smith acknowledged the inevitable burden on free exercise resulting from its judicial passivity in protecting religious liberty. "Leaving accommodation to the political process,” Scalia conceded, “will place at

93 Id. at 888-89.
95 Smith, 494 U.S. at 890.
96 See supra note 21 and accompanying text.
100 Id. at 466.
101 Id. at 467. The California Supreme Court, another one of the nation’s influential state tribunals, has thus far simply declined to choose between the compelling-interest test and the Smith standard. See Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 91 (Cal. 2004).
a relative disadvantage those religious practices that are not widely engaged in." \( ^{102} \) But he justified this as a "consequence of democratic \([*1415]\) government [that] must be preferred" - preferred, apparently, to taking free exercise more seriously by insuring more rigorous safeguards. \( ^{103} \)

In response, it would again be difficult to improve upon lines written by Justice Jackson in Barnette:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. \( ^{104} \)

\( ^{102} \) Smith, 494 U.S. at 890.

\( ^{103} \) Id.