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Religious Freedom and Closely Held Corporations: The *Hobby Lobby* Case and Its Ethical Implications

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INTRODUCTION
RELIGIOUS FREEDOM IN AMERICA

Hobby Lobby and its quest for religious freedom captured the attention of a nation for a few moments in late June 2014. The country honed in on the Supreme Court as the Justices weighed the rights of an incorporated, profit-making entity run by devout individuals that objected to particular entitlements granted to women under the Affordable Care Act (ACA). The *Hobby Lobby* case raised important legal issues such as whether the law allows for-profit corporations to exercise religion (yes!) and whether protection for religious freedom trumps the rights of third parties to cost-free preventive health care (sort of!). The Court's decision also brought to light some major ethical dilemmas such as: (1) whether the government has the right to second-guess a person's religious beliefs, (2) when do religious beliefs become too attenuated from the actions they oppose to truly pose a burden on religion, and (3) whether only human beings can experience religion. Though the lawyers will move on to the next legal challenge, Americans in general must continue to grapple with these ethical dilemmas as citizens of a society that needs to find the appropriate balance between religious freedom and improving public heath.

This Article attempts to answer some of these questions by evaluating the *Hobby Lobby* case from many different angles. Part I recounts the stories underlying the legal challenge. When told in depth, these stories, often neglected in law review articles and judicial opinions, add context and nuance to the case and help bring topics to

life that seem boring if analyzed purely in legalese. For example, the Greens tell a story of a family that considers its work at Hobby Lobby a fulfillment of its calling from God. The Greens sincerely believe they are expected to practice their religion at work even if it costs the corporation, and themselves, a great deal of money. The federal government tells the story of a nation in desperate need of better and less expensive health care options, particularly for women. The government claims that women need cost-free preventive health care (and particularly cost-free contraceptives) in order to improve their health and reduce unwanted pregnancies. Better access to contraceptives will also give women more power to control their reproductive lives and compete more effectively in the workplace. Part I brings these litigants to life and sets the stage for a discussion of the law in Part II.

More specifically, Part II synthesizes the state of the law surrounding religious freedom and preventive health care at the time the *Hobby Lobby* case hit the Supreme Court. This Part recounts the history of religious freedom in America and how this concept worked its way into the first words of the First Amendment and eventually into the broadly protective Religious Freedom Restoration Act (RFRA). Part II ends with an evaluation of the ACA's contraceptive mandate and its requirements regarding access to cost-free preventive health care for women.

Part III evaluates the Supreme Court's decision in the *Hobby Lobby* case in detail, section-by-section, and summarizes the numerous court determinations that led to that case. The discussion begins with the district court's denial of Hobby Lobby's request that the court stay the individual mandate, and ends with the Supreme Court's decision issued on the last day of its October 2013 term. In fact, the steps between these two decisions are many. The case went from the District Court for the Western District of Oklahoma (where Hobby Lobby asked for a preliminary injunction), to the Tenth Circuit Court of Appeals (where that decision was affirmed), to the United States Supreme Court (where Hobby Lobby's appeal was summarily denied) back to the Tenth Circuit sitting en banc (where the Tenth Circuit urged the district court to issue the preliminary injunction), back to the district court (where the judge reversed himself and issued the injunction), and finally to the Supreme Court (where Hobby Lobby emerged victorious).

Part IV begins by concluding that the Court reached the correct legal decision in the case considering: (1) the important place

religious exercise holds in the fabric of America, today and historically; (2) the broad brush with which Congress painted RFRA; and (3) the fact that Hobby Lobby's employees will still receive all twenty FDA-approved contraceptives at no cost. The discussion then moves to the ethical issues created by the Supreme Court decision. The three ethical dilemmas analyzed in this Part are whether corporations can exercise religion, whether religion trumps third-party rights, and whether governments have any business analyzing the beliefs of a religious adherent in order to better craft public policy.

The Article concludes with a call for further research into potential answers to these and other ethical dilemmas, keeping in mind that *Hobby Lobby* is just the first shoe to drop in the fight between religious freedom and the ACA.

I
THE BACKGROUND: HOBBY LOBBY'S AND HHS' SIDES OF THE STORY

Both sides in a legal dispute have a story to tell. Too often these stories are glossed over or neglected completely as lawyers, government officials, pundits, and the public rush to assess a case's legal implications. This race to analyze the law often brushes off the actual people involved in the litigation and their important personal interests. The following two Sections take the time to flesh out the stories on both sides of this important case beginning with Hobby Lobby and its founder, David Green. This discussion is important because these stories add context, nuance, and life to often tedious and stale legal issues, as well as help each side make its legal case.

For example, the law requires that a plaintiff, who accuses the government of burdening religious exercise, possess a sincerely held religious belief.[1] Hobby Lobby's story makes clear that its founder and controlling shareholders, with little doubt, are sincere Christians and desire to inculcate their religious values and beliefs into their company's culture.[2] The law also requires that the government have a

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[1] *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2763 n.28 (2014) (reiterating that "[t]o qualify for RFRA's protection, an asserted belief must be 'sincere'" (citation omitted)).

[2] The federal government does not contest the sincerity of Hobby Lobby's controlling shareholders. Brief for Petitioners at 8, Sebelius v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354) ("The Greens maintain the sincere religious conviction 'that

compelling interest before it mandates actions that restrict religious freedom.[3] The Department of Health and Human Services' (HHS) story demonstrates the government's compelling interest in reducing the cost of contraceptives for women of childbearing age, who have historically paid much more for preventive care than men, and who use contraceptives far more when they are low or no cost.[4] The government also has an interest in equalizing the workplace playing field for women by giving them more access to control of their reproductive lives, as well as reducing the number of unwanted pregnancies and abortions.

A. The Plaintiff's Story: The Green Family and the Vocational Call to Exercise Religion at Work

David Green grew up poor in Altus, Oklahoma.[5] His family resided in a two-bedroom house; his parents took one room, his three sisters took the other, and David slept with his brothers on rollaway beds in the kitchen.[6] His father was the pastor of a local church, and the family struggled to make ends meet.[7] Green recounted:

> [T]here were plenty of times our cupboards were bare. If company was coming, we would stock the fridge with "leftovers"—we'd put tinfoil over empty cans or plates on top of empty bowls, as if they were full. Folks had enough worries. No need to make them worry about the preacher's family.[8]

He was not much of a student (having to repeat seventh grade), but was able to wrangle an internship with a local five-and-dime store for high school credit.[9] As he swept the floors and stocked shelves, Green became intimately familiar with how the store worked.[10] The child of

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human life begins at conception,' that is, 'when sperm fertilizes an egg.'" (citation omitted)).

3 42 U.S.C. § 2000bb-1(b)(1) (2012) ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person . . . is in furtherance of a compelling governmental interest . . . .").

4 Brief for Petitioners, *supra* note 2, at 50 (quoting Senator Diane Feinstein who recited the statistic that "[w]omen of childbearing age spend 68 percent more in out-of-pocket health care costs than men" (internal quotation marks omitted)).

5 David Green, *The Hobby Lobby Way to Success*, GUIDEPOSTS, http://www.guideposts.org/inspiration/inspirational-stories/how-founder-of-hobby-lobby-achieved-success (last visited July 3, 2014).

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

a pastor began to see how his own religious beliefs influenced his work ethic even at this young age. He recounted:

> By senior year I was putting in almost 40 hours a week at [the store]. I added to Mom's fund for mission projects. I was able to buy her a dining room set, a new sofa and a refrigerator. *More important, I discovered what I could do for the Lord—work at the calling he had given me with all my might*.[11]

In 1970, Green borrowed $600 to create Greco Products and began to construct miniature picture frames in his garage.[12] As Greco Products' frames grew in popularity, Green obtained 300 square feet of commercial retail space in 1972 and founded Hobby Lobby.[13] The company has since grown from one small store in Oklahoma to more than 600 stores nationwide.[14] Today, Hobby Lobby's stores "average 55,000 square feet and offer more than 67,000 crafting and home decor products. Hobby Lobby is listed as a major private corporation in *Forbes* [sic] and *Fortunes* [sic] list of America's largest private companies, and . . . carries no long-term debt."[15] Hobby Lobby employs more than 13,000 people.[16] Green manages the privately held company with members of his immediate family under various trusts.[17] Green is now a self-made billionaire and ranked as the 310th richest person in the world according to *Forbes*, with a net worth of $4.9 billion.[18]

Most importantly for this Article, the Greens organized their company to operate under the values that matter to them as

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[11] *Id.* (emphasis added).

[12] *Our Company*, HOBBY LOBBY, http://www.hobbylobby.com/our_company/ (last visited July 3, 2014) [hereinafter Hobby Lobby Website]; Mark L. Russell, *A Candid Interview with David Green Founder and CEO of Hobby Lobby*, HIGH CALLING (Oct. 25, 2012), http://www.thehighcalling.org/leadership/candid-interview-david-green-founder-and-ceo-hobby-lobby#.U7alLqhHuKY.

[13] Hobby Lobby Website, *supra* note 12.

[14] *Id.*

[15] *Id.*

[16] *See* Verified Complaint at 2, Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278 (W.D. Okla. 2012) (No. CIV-12-1000-HE) [hereinafter Hobby Lobby Complaint]. The Greens also run Mardel, Inc., a Christian bookstore and education company, through various trusts. *Id.* Although Mardel was part of the lawsuit against the contraceptive mandate, this Article, for the sake of simplicity, focuses on Hobby Lobby exclusively.

[17] *Id.* (stating that Green, along with his wife Barbara Green, his son Steve Green, his son Mart Green, and his daughter Darsee Lett, own and operate Hobby Lobby).

[18] *#310 David Green*, FORBES (Sept. 28, 2014, 7:50 PM), http://www.forbes.com/profile/david-green/.

"committed evangelical Christians."[19] For example, Hobby Lobby is committed to:

> 1. Honoring the Lord in all we do by operating the company in a manner consistent with Biblical principles.
>
> ***
>
> 2. Serving our employees and their families by establishing a work environment and company policies that build character, strengthen individuals, and nurture families.
>
> 3. Providing a return on the owner's investment, sharing the Lord's blessings with our employees, and investing in our community.[20]

David Green talks often about his vocational calling.[21] In many denominations of the Christian faith, the concept of a calling is extremely important. The author and social critic Os Guinness provides an important definition of this idea: "Calling is the truth that God calls us to himself so decisively that everything we are, everything we do, and everything we have is invested with a special devotion, dynamism, and direction lived out as a response to his summons and service."[22] The concept historically was meant to indicate a call from God to sacred, religious service (i.e., to become a priest, pastor, or missionary).[23] Martin Luther, a seminal character in the Protestant Reformation, was the first Christian leader to discuss the idea of a calling as it relates to *secular* vocations and occupations.[24] Luther used the example of the Lord's Prayer, which asks God to "give us today our daily bread,"[25] and argued that God gives people their daily bread when people work diligently in an

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19 Hobby Lobby Complaint, *supra* note 16, at 1.

20 *Id.* at 10.

21 *See, e.g.*, Press Release, Chad Previch, Hobby Lobby, Hobby Lobby Marks 40 Years of Helping Families Celebrate Life, http://www.hobbylobby.com/assets/pdf/40years/40years.pdf?CFID=19116044&CFTOKEN=9ca5ef41d64685e8-FF377CBC-F411-46CC-9E837F4869EF9F5B (last visited July 4, 2014) (quoting Green as saying, "I've always viewed retail as my calling . . . . Through our business success, we've been able to donate more than 10 percent of our income to charitable causes and employ more than 18,000 amazing people at stores across the nation").

22 OS GUINNESS, THE CALL 29 (1998).

23 Gene Edward Veith, *The Doctrine of Vocation: How God Hides Himself in Human Work*, MODERN REFORMATION, http://www.modernreformation.org/default.php?page=articledisplay&var2=541%20%20God%20Hides%E2%80%A6 (last visited July 4, 2014).

24 *Id.*

25 *Matthew* 6:11 (New Int'l Version), *available at* https://www.biblegateway.com/passage/?search=Matthew%206:9-13.

economy of others working diligently.[26] John Calvin, the influential French theologian, "held a dynamic view of calling, believing that every Christian has a vocational calling to serve God in the world in *every* sphere of human existence, lending a new dignity and meaning to ordinary work."[27] Calvin's idea was that God requires people to use their talents to glorify God in all spheres of life.[28] The Bible contemplates the concept of calling in the following verses:

> 1. Nevertheless, each person should live as a believer in whatever situation the Lord has assigned to them, just as God has called them. This is the rule I lay down in all the churches.[29]
> 2. Whatever the activity in which you engage, do it with all your ability . . . .[30]

In summary, many Christians see their secular work as taking on special meaning because it reflects a believer's devotion and obedience to God's plan. As evidenced by Green's story and statements, the Green family's actions, Hobby Lobby's values, and the fact that the company decided to fight this expensive and time-consuming legal battle against the federal government, it is obvious that the Greens take their calling from God very seriously. Green stated:

> [Hobby Lobby's] strategy is to be very bold. We tell people about the Good News of Jesus. We have five chaplains. We are very, very bold. . . . I can't help but tell people of the greatest story ever told—God's love and our eternal life. We do that with our five chaplains. We're very busy telling people about Christ.[31]

Because of this calling, members of the Green family "believe[] they are obligated to run their businesses in accordance with their faith. Commitment to Jesus Christ and to Biblical principles is what gives their business endeavors meaning and purpose."[32] The company applies the Greens' calling in five concrete ways:

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[26] Veith, *supra* note 23.

[27] Hugh Whelchel, *John Calvin's Contribution to the Biblical Doctrine of Work*, INST. FOR FAITH, WORK & ECON. (Jan. 17, 2013), http://blog.tifwe.org/john-calvin-doctrine-of-work/.

[28] *Id.*

[29] *1 Corinthians* 7:17 (New Int'l Version), *available at* https://www.bible.com/bible/111/1co.7.17.niv.

[30] *Ecclesiastes* 9:10 (Int'l Standard Version), *available at* http://biblehub.com/ecclesiastes/9-10.htm.

[31] Russell, *supra* note 12.

[32] Hobby Lobby Complaint, *supra* note 16, at 2.

1. Hobby Lobby employs full time chaplains for its employees;
2. Hobby Lobby pays employees above the minimum wage;
3. Hobby Lobby monitors [its] products to make sure "all are consistent with their beliefs";
4. Hobby Lobby gives millions of dollars to fund Christian missionaries and missions around the globe; and
5. Hobby Lobby closes stores on Sundays at the cost of millions in potential profits.[33]

This background clarifies the sincerity of the Greens' religious beliefs. Beginning with Green's small enterprise in the 1970s, the Hobby Lobby story is one of a family believing that it has been called to operate its closely held business "in a manner consistent with biblical principles."[34] As mentioned at the beginning of this Section, these sincerely held religious beliefs play a role in the legal analysis discussed below in Part II. Before moving to this analysis, however, the next Section discusses the similarly compelling story of the U.S. Department of Health and Human Services (the other party to the case) and its desire to grant women of childbearing age more equality in preventive health care coverage.

B. The Defendant's Story: Enhancing Women's Preventive Health Care

The federal government did an admirable job defending the ACA and its contraceptive mandate throughout the *Hobby Lobby* case.[35] The government told its story on both a macro- and micro-level. On the macro-level, forty-four to forty-seven million Americans found themselves without health insurance prior to the ACA's enactment in 2010.[36] These uninsured people were not the poorest of the poor because Medicaid covers them.[37] These uninsured people were also not seniors older than sixty-five because Medicare covers them.[38] The

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33 *Id.*

34 Hobby Lobby Website, *supra* note 12.

35 *See, e.g.*, Brief for Petitioners, *supra* note 2.

36 *See, e.g.*, *ObamaCare Facts: Affordable Care Act, Health Insurance Marketplace*, OBAMACARE FACTS, http://obamacarefacts.com (last visited July 6, 2014).

37 *See* 42 U.S.C. §§ 1396–1396w-5 (2012) (authorizing the Medicaid health insurance program).

38 *See id.* § 1395c (authorizing the Medicare program, which "provides basic protection against the costs of hospital, related post-hospital, home health services, and hospice care . . . for . . . individuals who are age 65 or over").

vast majority of these millions of uninsured people were the working poor or, as one commentator put it:

> [The people] . . . who have the kind of lousy jobs that don't come with employer-subsidized health insurance benefits, and those with pre-existing conditions who cannot get affordable coverage in a system that is based on pure free-market principles, and various other groups that fell through the cracks of the status quo hodge-podge that we call the U.S. "system" of health insurance.[39]

In a nutshell, the ACA was intended to incentivize uninsured people to obtain what would become more affordable health insurance.

The ACA was also intended to create a more uniform, comprehensive, and efficient insurance system throughout the nation.[40] Greater access to care, as a result of being insured under this comprehensive structure, "has been shown to reduce mortality, improve mental health, and improve self-reported health status."[41] The system that the ACA created has many worthy benefits to Americans such as: (1) small business tax credits to offset insurance costs[42] and controls on large increases in insurance premiums;[43] (2) stronger protections against health care fraud;[44] (3) mandatory

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39 Eric Black, *Too Many Obamacare Critics Seem Oblivious to Law's Real Purpose*, MINNPOST (Oct. 1, 2013), http://www.minnpost.com/eric-black-ink/2013/10/too-many-obamacare-critics-seem-oblivious-laws-real-purpose.

40 This was the government's first argument put forth in the *Hobby Lobby* case. Brief for Petitioners, *supra* note 2, at 38 ("The Affordable Care Act and its preventive-services coverage provision advance the compelling interest in ensuring a 'comprehensive insurance system with a variety of benefits available to all participants.'" (citation omitted)).

41 Jason Furman, *Six Economic Benefits of the Affordable Care Act*, WHITE HOUSE (Feb. 6, 2014, 12:47 PM), http://www.whitehouse.gov/blog/2014/02/06/six-economic-benefits-affordable-care-act.

42 26 U.S.C. § 45R (2012).

43 Patient Protection and Affordable Care Act; Health Insurance Market Rules; Rate Review; Final Rule, 45 C.F.R. pts. 144, 147, 150 (Feb. 27, 2013) (showing the final rule and discussing the statutory requirement that the federal government, along with the states, monitor premium increases in health insurance coverage).

44 18 U.S.C. § 1347 (2012).

> Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice—
>
> (1) to defraud any health care benefit program; or
>
> (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program,

coverage even if patients have preexisting conditions;[45] (4) coverage for young adults under a parent's plan until the age of twenty-six;[46] (5) more robust Medicare[47] and Medicaid programs (including lower prescription drug prices for some Medicare beneficiaries);[48] and, most importantly for the *Hobby Lobby* case, (6) free preventive services including cost-free access to contraceptives for women.[49]

It was this cost-free contraceptive mandate that the government honed in on to tell its micro-level story. It is not difficult to persuade someone of the strong public health rationale for women to be able to control whether or when they become pregnant. This freedom allows women to participate more fully in the workforce and choose an appropriate time to start a family. Additionally, evidence suggests that half of all pregnancies in the United States are unplanned.[50] It stands to reason that the use of contraceptives will reduce this high number of unintended pregnancies, which cost American taxpayers upwards of $11 billion per year.[51] It further stands to reason that fewer

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> in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 10 years, or both.

Id. § 1347(a).

[45] 42 U.S.C. § 300gg-1 (2012) (stating, subject to certain conditions, "each health insurance issuer that offers health insurance coverage in the individual or group market in a State must accept every employer and individual in the State that applies for such coverage"); *id.* § 300gg-3 (stating that a "group health plan and a health insurance issuer offering group or individual health insurance coverage may not impose any preexisting condition exclusion with respect to such plan or coverage"); *id.* § 300gg-4(a) (requiring that group health plans and health insurance issuers may not condition eligibility for insurance on certain health-related factors).

[46] *Id.* § 300gg-14(a) ("A group health plan and a health insurance issuer offering group or individual health insurance coverage that provides dependent coverage of children shall continue to make such coverage available for an adult child until the child turns 26 years of age.").

[47] *See, e.g.*, *id.* § 1396d.

[48] *See, e.g.*, *id.* § 1395w-114a.

[49] *Id.* § 300gg-13(a)(4). *See generally Benefits of ObamaCare: Advantage of ObamaCare*, OBAMACARE FACTS, http://obamacarefacts.com/benefitsofobamacare.php (last visited July 6, 2014) (discussing in plain English the benefits stemming from the ACA).

[50] *See, e.g.*, Press Release, Bill Albert, The Nat'l Campaign to Prevent Teen and Unplanned Pregnancy, Institute of Medicine Report on Clinical Preventive Services for Women: A Statement from the National Campaign to Prevent Teen and Unplanned Pregnancy (July 19, 2011), *available at* https://thenationalcampaign.org/press-release/institute-medicine-report-clinical-preventive-services-women.

[51] *Id.* (finding that, in addition to direct medical costs, unintended pregnancy "imposes burdens on individuals and families, as well as considerable social and economic costs to society"); Brief for Petitioners, *supra* note 2, at 46–47.

unwanted pregnancies will lower the number of abortions performed each year (the United States averages 1.21 million abortions annually, and 4 out of every 10 unintended pregnancies are aborted).[52] In the end, the government argued, increasing women's access to contraceptives will help women better compete in the workforce, allow women to control whether and when they become pregnant, reduce health care costs, and reduce the number of abortions in America.

Finally, from the cost perspective, there is evidence that women between the ages of nineteen and forty-four "spent 70 percent more per capita than did males in the same age group [on personal health care]. This is the largest measured difference of any age-group, largely due to the costs associated with maternity care."[53] This higher cost structure leads many women to avoid or delay medical tests, medical treatments, and filling prescriptions.[54] The government set out to equalize the health care playing field via the cost-free contraceptive mandate.

The government's story demonstrates both a macro-level compelling interest in a uniform, national health care system, and a micro-level compelling interest in ensuring that women have cost-free access to all FDA-approved contraceptives. Though the government made both arguments in the *Hobby Lobby* case, the micro-level contraceptive access argument, as applied to closely held corporations, played the biggest role in the Supreme Court decision.[55] Therefore, this Article will focus on that aspect of the ACA as opposed to the big picture, structural components of the law. With both sides' stories on the table, Part II summarizes the law

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52 *Abortions in America: Incidence of Abortion*, OPERATION RESCUE, http://www.operationrescue.org/about-abortion/abortions-in-america/ (last visited July 7, 2014).

53 *U.S. Personal Health Care Spending by Age and Gender: 2010 Highlights*, CTRS. FOR MEDICARE & MEDICAID SERVS., http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/Downloads/2010AgeandGenderHighlights.pdf (last visited July 6, 2014).

54 Brief for Petitioners, *supra* note 2, at 49–50.

55 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2779 (2014). ("[The government] 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.' . . . RFRA, however, contemplates a 'more focused' inquiry . . . [which] requires us to 'loo[k] beyond broadly formulated interests' and to 'scrutiniz[e] the asserted 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." (citations omitted)).

surrounding this case beginning with protection of religious freedom and moving to the specific legal requirements revolving around the ACA's contraceptive mandate.

II
THE LAW SURROUNDING RELIGIOUS FREEDOM AND HEALTH CARE

Part I focused on the idea that each side in a legal dispute has a story to tell, and that these stories are too often neglected in judicial opinions. This neglect depersonalizes the litigants and their stake in a case. In this case, Hobby Lobby's side of the story goes all the way back to the childhood of its founder David Green to show how his religious convictions shaped his calling, or his religiously-inspired approach, to his chosen vocation. More than forty years later, Green's small, garage-based picture frame business is now a national retail chain. Hobby Lobby—a closely held corporation with nearly 600 stores and more than 13,000 employees—makes a sincere and serious attempt to inculcate Christian values into its corporate mission and daily business life.

On the other side of the docket, the U.S. Department of Heath and Human Services tells a story of a nation groaning under the weight of increasing and unaffordable health care costs. The ACA granted forty million uninsured Americans the opportunity and incentive to purchase what will hopefully become affordable health insurance. The law is also designed to help all Americans receive more robust health insurance at a lower price. The federal government's side of the story hones in on the ACA's contraceptive mandate and its ability to decrease the inequities disfavoring women in health care. No-cost contraceptives will decrease the number of unwanted pregnancies and abortions and will help women fully participate in the workforce by being able to better control their reproductive lives.

Part II of this Article moves from the litigants' stories to the legal principles that determined which side prevailed. This Part begins with a brief sketch of religious freedom in early America. This background provides context for an evaluation of how the constitutional protections of religious freedom (i.e., the First Amendment and its interpretation by the courts) and statutory protections of religious freedom (i.e., RFRA and the Religious Land Use & Institutionalized Persons Act) developed. The final Section in Part II evaluates the ACA's contraceptive mandate and the requirements it places on certain for-profit corporations to provide cost-free access to twenty different forms of FDA-approved birth control. The litigants' personal

stories will mix in with the legal realities of the case to form an interesting discussion in Part III, which evaluates the litigation of this case from the filing of Hobby Lobby's complaint in a federal district court in Oklahoma, to resolution in the United States Supreme Court.

A. Religious Freedom in America: A Brief Sketch

Religious freedom in America has been both an important component of daily life weaved into the social fabric of the nation and a controversial subject in its application, implementation, and scope. Many seventeenth century settlers from Europe were religious people fleeing religious persecution in their homeland.[56] These migrants, often employing the machinery of colonial and state government, protected and promoted their favored religion while often meddling in the lives of those with different religions or no religion at all. Freedom to believe as one wished about religion—otherwise known as freedom of conscience—was a concept that carried little weight in the 1600s. However, the idea began to resonate with Americans as time passed and the nation matured. This Section briefly traces how freedom of conscience became protected in American society, from its toehold in the seventeenth century, to its codification in the first words of the Constitution's First Amendment near the end of the eighteenth century. This background allows for a more contextualized evaluation of the Supreme Court's interpretations of the First Amendment and RFRA as well as its treatment of religious freedom in later sections.

1. Early Americans: Religious Persecution by Groups Seeking Religious Freedom in the New World

The earliest European settlers in the New World were generally Christians of different denominations, such as Puritans, Congregationalists, Quakers, Baptists, and Methodists, who escaped their old homes in search of new religious freedom. For many, this emigration gave settlers the freedom to practice their religion more

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[56] *Religion and the Founding of the American Republic, America as a Religious Refuge: The Seventeenth Century, Part 1*, LIBRARY OF CONG., http://www.loc.gov/exhibits/religion/rel01.html (last visited July 21, 2014) [hereinafter *Library of Congress: Religion Part 1*] ("Many of the British North American colonies that eventually formed the United States of America were settled in the seventeenth century by men and women, who, in the face of European persecution, refused to compromise passionately held religious convictions and fled Europe.").

freely and with fewer governmental roadblocks. In fact, several of the original colonies were "established as havens for specific sects and denominations"[57] or "plantations of religion."[58] However, even while members of these growing societies practiced their faith in daily life more freely than they had in Europe, they also fought bitterly against other community members who held different theological beliefs.[59] Early religious and political leaders thought that a uniform system of belief was necessary "to nurture and preserve political unity within a nation."[60] Ironically, and "[a]lthough they were victims of religious persecution in Europe, the [early settlers] supported the Old World theory that sanctioned [them], the need for uniformity of religion in the state."[61] Support for this theory meant that, in the earliest moments of American history, there was little to no protection for an individual's freedom of conscience when it came to religion.[62]

A few examples elucidate this religious discrimination in early America. The most famous religious nonconformists within the Puritan community, Roger Williams and Anne Hutchinson, were banished following disagreements over theology and policy.[63] From Puritan Boston's earliest days, "Catholics ('Papists') were anathema and were banned from the colonies, along with other non-Puritans. Four Quakers were hanged in Boston between 1659 and 1661 for persistently returning to the city to stand up for their beliefs."[64] The

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57 Gordon Smith, *Protecting the Weak: Religious Liberty in the Twenty-First Century*, 1999 BYU L. REV. 479, 486 (reproducing a speech by U.S. senator from Oregon Gordon Smith).

58 *Library of Congress: Religion Part 1*, *supra* note 56.

59 Kenneth C. Davis, *America's True History of Religious Tolerance*, SMITHSONIAN MAG. (Oct. 2010), http://www.smithsonianmag.com/history/americas-true-history-of-religious-tolerance-61312684/ ("From the earliest arrival of Europeans on America's shores, religion has often been a cudgel, used to discriminate, suppress and even kill the foreign, the 'heretic' and the 'unbeliever'—including the 'heathen' natives already here. Moreover, while it is true that the vast majority of early-generation Americans were Christian, the pitched battles between various Protestant sects and, more explosively, between Protestants and Catholics, present an unavoidable contradiction to the widely held notion that America is a 'Christian nation.'").

60 Lynn D. Wardle, *Protection of Health-Care Providers' Rights of Conscience in American Law: Present, Past, and Future*, 9 AVE MARIA L. REV. 1, 7 (2010).

61 *Religion and the Founding of the American Republic, America as a Religious Refuge: The Seventeenth Century, Part 2*, LIBRARY OF CONG., http://www.loc.gov/exhibits/religion/rel01-2.html (last visited Oct. 10, 2014).

62 *See* Wardle, *supra* note 60, at 7.

63 Smith, *supra* note 57, at 486–87. Williams went on to found the Rhode Island colony "upon the principles of freedom of conscience and complete separation of church and state." *Id.* at 487.

64 Davis, *supra* note 59.

idea that one could freely exercise a religion different from the community norm could be considered heresy—often punishable by death.

On the political front, colonial and state governments often enforced the religious intolerance of the majority under penalty of law. For example, the Massachusetts colonial government limited its officeholders to Christians.[65] Catholics were banned from public office in New York State from 1777 to 1806, while Maryland granted full rights to Catholics but not to Jews.[66] "Delaware required an oath affirming belief in the Trinity. Several states, including Massachusetts and South Carolina, had official, state-supported churches."[67] Some colonial governments taxed citizens, sometimes against their will, to support religious causes. The taxes were owed regardless of whether the taxpayer supported the favored religion (though taxpayers were often allowed to select which church to support).[68] People were expected to attend public worship ceremonies and avoid disparaging the majority's religion.[69] Though there were voices crying out against the suppression of free religious exercise in the 1600s (and even a few state laws regarding the "tolerance of other religions"), true progress toward religious freedom would not occur until the following century.[70]

2. Freedom of Conscience Gains Significant Ground

Beginning in the seventeenth century, Americans began to express their opposition to government support of religion and the lack of freedom of religious conscience. Dissidents argued that freedom to exercise one's chosen religion is a natural, unalienable right, and governments should not force people to support religion by sanction of law. For example, in 1779, Thomas Jefferson drafted the Virginia Act for Establishing Religious Freedom, which guaranteed equality to

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65 *Id.*

66 *Id.*

67 *Id.*

68 Reynolds v. United States, 98 U.S. 145, 162–63 (1879).

69 *Id.*

70 *See, e.g.*, Maryland Toleration Act (Sept. 21, 1649), *available at* http://avalon.law.yale.edu/18th_century/maryland_toleration.asp (mandating tolerance against Trinitarian Christians while also allowing capital punishment for anyone who denied the deity of Jesus).

all Virginia citizens regardless of religion.[71] The bill, which passed in 1786, stated:

> We the General Assembly of Virginia do enact that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.[72]

James Madison was another strong believer in the unalienable right of religious freedom.[73] Madison's home state of Virginia was one of the first states to include religious freedom in an official declaration of individual rights. In fact, Virginia's 1776 Declaration of Rights was a model for the federal Bill of Rights.[74] Madison successfully advocated that the language in Virginia's Declaration of Rights, initially written to protect the "fullest toleration in the exercise of religion," should instead provide more robustly that "all men are entitled to the full and free exercise of religion."[75]

Later, in 1785, Madison's Memorial and Remonstrance Against Religious Assessments[76] provided a fifteen-point defense of religious liberty, which one commentator later called "the most powerful defense of religious liberty ever written in America."[77] Arguing against a Virginia state bill that would have levied a tax to support

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71 *An Act for Establishing Religious Freedom* (1786), *available at* http://www.encyclopediavirginia.org/An_Act_for_establishing_religious_Freedom_1786.

72 *Id.* § II.

73 *See* Wardle, *supra* note 60, at 7–8.

74 *Virginia Declaration of Rights (1776)*, BILL OF RIGHTS INST., http://billofrightsinstitute.org/resources/educator-resources/americapedia/americapedia-documents/va-declaration-rights/ (last visited July 20, 2014) (discussing the influence of the Declaration of Rights on James Madison—the primary author of the Bill of Rights).

75 Joseph Loconte, *James Madison and Religious Liberty*, HERITAGE FOUND. (Mar. 16, 2001), http://www.heritage.org/research/reports/2001/03/james-madison-and-religious-liberty ("Madison didn't like it. He objected to [fellow Virginian George] Mason's use of the word 'toleration' because it implied that the exercise of faith was a gift from government, not an inalienable right. Madison's substitute—'all men are entitled to the full and free exercise' of religion—essentially won the day. This put Madison far ahead of John Locke, who generally mustered no more than grudging toleration for religious belief."); *see also* VIRGINIA DECLARATION OF RIGHTS § 16 (1776), *available at* http://www.archives.gov/exhibits/charters/virginia_declaration_of_rights.html.

76 *See* JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (June 20, 1785), *available at* http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html.

77 Loconte, *supra* note 75 (quoting biographer Irving Brant).

Christian teachers, Madison contended that it is improper for the government to embrace religion. He wrote that "[t]he Religion then of every man must be left to the conviction and conscience of every . . . man to exercise it as these may dictate. This right is in its nature an unalienable right."[78] Madison believed strongly that

> freedom of conscience—meaning belief or conviction about religious matters—[was] the centerpiece of all civil liberties. He called religious belief "precedent, both in order of time and in degree of obligation, to the claims of Civil Society." By placing freedom of conscience prior to and superior to all other rights, Madison gave it the strongest political foundation possible.[79]

By 1789, twelve of the original thirteen states had protections for religious freedom in their constitutions.[80] Many states also began to provide accommodations for people who had religious reasons for not complying with a particular law. For example, "[v]irtually all states by 1789 allowed Quakers to testify or vote by an affirmation rather than an oath [and] several colonies had exempted Quakers and Mennonites from service in the militia."[81] However, this movement toward greater freedom to exercise religion was not expressly incorporated into the seven articles of the Constitution. The framers believed that such protection from government interference with religion was unnecessary because the federal government was not granted power in the Constitution to meddle with religion.[82] This conclusion was a nearsighted omission that angered many states and nearly stopped the constitutional ratification process in its tracks.[83] In response, the first Congress debated and passed the First Amendment (and the other nine amendments making up the Bill of Rights) to

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78 MADISON, *supra* note 76.

79 Loconte, *supra* note 75.

80 Thomas C. Berg, *Free Exercise of Religion*, HERITAGE FOUND., http://www.heritage.org/constitution#!/amendments/1/essays/139/free-exercise-of-religion (last visited July 22, 2014).

81 *Id.*

82 *See About the First Amendment*, FIRST AMENDMENT CTR., http://www.firstamendmentcenter.org/about-the-first-amendment (last visited July 22, 2014) ("When the U.S. Constitution was signed on Sept. 17, 1787, it did not contain the essential freedoms now outlined in the Bill of Rights, because many of the Framers viewed their inclusion as unnecessary.").

83 *The Bill of Rights: A Brief History*, AM. CIVIL LIBERTIES UNION (Mar. 4, 2002), https://www.aclu.org/racial-justice_prisoners-rights_drug-law-reform_immigrants-rights/bill-rights-brief-history.

placate some of these dissenting states and avoid a second Constitutional Convention.[84]

3. Freedom of Religion Comes Full Circle: The First Amendment

The First Amendment's leading words demark the boundaries of the government as it deals with the intermingling of religion and American public life: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[85] The *Hobby Lobby* case deals with the Free Exercise Clause, or the second clause in the sentence: "Congress shall make no law . . . prohibiting the free exercise [of religion]."[86] Though the text of the Free Exercise Clause is absolute—"Congress shall make no law"—the Supreme Court has not interpreted it as such. Instead, the Court has

> place[d] some limits on the exercise of religion. For example, courts would not hold that the First Amendment protects human sacrifice even if some religion required it. The Supreme Court has interpreted this clause so that the freedom to believe is absolute, but the ability to act on those beliefs is not.[87]

Note that the Amendment's language refers to "Congress" passing laws concerning religion and not state governments. Until the mid-1900s, this technical reading meant that states could pass laws restricting a person's religious freedom unless the state's own constitution prohibited such legislation. That interpretation changed in 1940 when the Supreme Court held, in *Cantwell v. Connecticut*, that the First Amendment applied to laws emanating from states as well.[88] The Court stated that the Free Exercise Clause was a part of (or

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[84] *Cf. Creating the United States: Demand for a Bill of Rights*, LIBRARY OF CONG., http://www.loc.gov/exhibits/creating-the-united-states/demand-for-a-bill-of-rights.html (last visited July 22, 2014) ("Fastening on Anti-Federalist criticisms that the Constitution lacked a clear articulation of guaranteed rights, Madison proposed amendments that emphasized the rights of individuals rather than the rights of states . . . .").

[85] U.S. CONST. amend I, § 1.

[86] *Id.*

[87] Claire Mullally, *Free-Exercise Clause Overview*, FIRST AMENDMENT CTR. (Sept. 16, 2011), http://www.firstamendmentcenter.org/free-exercise-clause; *see also* Reynolds v. United States, 98 U.S. 145, 166 (1878) ("Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?").

[88] 310 U.S. 296, 303–04 (1940).

incorporated into) the "liberty" component of the Fourteenth Amendment's Due Process Clause.[89] The next few Sections discuss how free exercise cases arise and how the Supreme Court and Congress have interpreted the Free Exercise Clause when adjudicating these issues. This discussion will lead to an analysis of Congress' response to a particular Supreme Court case through RFRA.

4. How Free Exercise Cases Generally Arise

Free Exercise cases under the First Amendment generally arise when a person, or a group of people, is required by a particular law to act in contradiction to his or her religious beliefs. A major issue of contention for the courts in these cases is that the Constitution does not define the term "religion" or the phrase "free exercise of [religion]." The broad wording makes it difficult to ascertain, for example, when a religious adherent should be granted an exemption from a generally applicable law. These dilemmas force courts to cobble together some sort of definition of religion in each case and place some outer bounds on what it means for a person to exercise religion. The general result has been as follows: first, courts tend to credit a religious adherent's definition of religion in any particular case. Courts, however, look at whether a person's religious beliefs are sincere. Judges attempt to test sincerity, although this sincerity analysis makes courts nervous because of the potential for entanglement with religion.[90] Second, courts are reluctant to inquire into whether a person's interpretation of a religious tenet is accurate. Interpretive accuracy is seen as a religious issue between the adherent and the religion. Courts do not require a person's belief to be an accurate portrayal of a requirement from a religious text, for example.[91] Third, courts are reluctant to inquire into how central a

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[89] *Id.* at 303 ("The fundamental concept of liberty embodied in that [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment. . . . The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.").

[90] *See, e.g.*, Lineker v. State, No. A-8957, 2006 WL 2847849 (Alaska Ct. App. Oct. 4, 2006) (denying a Free Exercise Clause case brought by a couple who doused themselves in extracted marijuana liquid as part of an alleged religious ritual).

[91] *See, e.g.*, Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 715 (1981) (refusing to second-guess the religious beliefs of a Jehovah's Witness employee who refused to work on the production of tanks for religious reasons but agreed to work as a sheet fabricator producing steel for tanks).

religious tenet is to a particular religious denomination. Again, whether a religious tenant is of greatest importance to a denomination is seen as a religious issue between the adherent and the religion.[92] Finally, courts will give more credit to laws of general applicability than they will to laws that target religion. This deference is because legislative bodies need to be able to pass laws to make society function and to protect the public without worrying about a myriad of exemptions for religious adherents.[93]

The remainder of this Section discusses how the Supreme Court has interpreted and tweaked the Free Exercise Clause from the adoption of the First Amendment to the landmark case of *Employment Division v. Smith*[94] in 1990 in which the Court effected a sea change in free exercise jurisprudence. The discussion then moves to Congress' responses to the *Smith* decision. It is important to keep an eye on how the history of religious freedom in America influenced these decisions and statutes. The following Section will begin with coverage of the major Supreme Court cases before turning attention to RFRA.

*B. Pre-*Smith *Law*

The *Smith* decision is the most important and controversial free exercise case prior to the *Hobby Lobby* decision.[95] In *Smith*, the Court radically departed from the precedent it had crafted beginning in 1879 and tweaked until 1990. This early line of precedent will be referred to in this Article as pre-*Smith* law. This Article will delve deeper into the *Smith* case in Part II.C and Congress' response to the decision in Part II.D. This Section, however, evaluates how the Supreme Court interpreted the Free Exercise Clause up until 1990.

1. A Narrow Interpretation of the Free Exercise Clause: Separating Religious Belief from Religious Practice

The Supreme Court's first definitive statement on the Free Exercise Clause arrived in *Reynolds v. United States*.[96] In *Reynolds*, the Justices distinguished between religious belief (which the Court found

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92 *See, e.g.*, Hernandez v. Comm'r, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.").

93 *See, e.g.*, Emp't Div. v. Smith, 494 U.S. 872, 889–90 (1990).

94 *Id.*

95 *Id.*

96 98 U.S. 145 (1878).

was absolutely protected from governmental interference under the Free Exercise Clause) and religious conduct (which the Court held is often, but not always, protected from governmental interference).[97] The case revolved around an interesting set of facts at an intriguing time in American history. In 1862, Congress passed the Morrill Anti-Bigamy Act, primarily to curb the Church of Jesus Christ of Latter Day Saints' (or the Mormon Church's) practice of polygamy.[98] George Reynolds, a Mormon living in the Utah Territory and a high-ranking official in the Mormon Church, took a second wife and claimed the practice was an accepted religious doctrine of the Mormon Church. Reynolds believed:

> it was the duty of male members of said church, circumstances permitting, to practise [sic] polygamy; . . . that this duty was enjoined by different books which the members of said church believed to be of divine origin, and among others the Holy Bible, and also that the members of the church believed that the practice of polygamy was directly enjoined upon the male members thereof by the Almighty God, in a revelation to Joseph Smith, the founder and prophet of said church; that the failing or refusing to practise [sic] polygamy by such male members of said church, when circumstances would admit, would be punished, and that the penalty for such failure and refusal would be damnation in the life to come.[99]

Reynolds' argument, in essence, was that taking a second wife was a religious obligation and would save his soul from eternal damnation. In spite of potentially condemning Reynolds for eternity, the government charged him under anti-polygamy law, and the Supreme Court upheld Reynolds' conviction, as well as the statute, under the Free Exercise Clause.[100] In reaching this decision, the Court noted that the word "religion" is left undefined in the Constitution and, therefore, the Justices were forced to evaluate what the term

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[97] *Id.* at 166 ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.").

[98] Morrill Anti-Bigamy Act, ch. 126, § 1, 12 Stat. 501 (1862) (punishing polygamy with a fine up to $500 and a maximum five-year prison sentence). *See generally* Jeremy Byellin, *Today in 1862: The Morrill Anti-Bigamy Act Was Signed into Law*, THOMSON REUTERS (July 8, 2011), http://blog.legalsolutions.thomsonreuters.com/legal-research/today-in-1862-the-morrill-anti-bigamy-act-was-signed-into-law/ (discussing how President Lincoln allowed the Mormon Church to ignore the anti-bigamy law in return for remaining neutral during the Civil War; this waiver ended, however, after the war when Congress gave the federal government more power to enforce the law).

[99] *Reynolds*, 98 U.S. at 161.

[100] *Id.* at 168.

meant in the historical context surrounding when the First Amendment was adopted.[101] This historical exercise led the Court to proclaim:

> [I]t may safely be said there never has been a time in any State of the Union when polygamy has not been an offence [sic] against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life.[102]

In other words, the historical criminalization of polygamy in the United States (and in England before that) strongly indicated that the Free Exercise Clause tolerated governmental interference with the practice (but not interference with the belief in the practice), even if polygamous marriages were undertaken for religious reasons.[103] In the end, the important precedent from *Reynolds* today is that the government cannot interfere with a person's religious belief, but civil authorities are "left free to reach actions . . . in violation of social duties or subversive of good order."[104] This principle is often referred to as the belief/action distinction.[105]

The Court's narrow interpretation of the Free Exercise Clause does not give a religious adherent many defenses to generally applicable laws that apply to the religious and nonreligious alike.[106] In fact, the *Reynolds*' free exercise test is a quasi-rational basis test (called "quasi" in this Article because the Court did not identify it as such), meaning that the government may prohibit religious action as long as it has a rational basis for doing so.[107] This is a fairly easy legal standard for the government to meet in most cases. Therefore, using

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[101] *Id.* at 162 ("The word 'religion' is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is, what is the religious freedom which has been guaranteed.").

[102] *Id.* at 165.

[103] *See id.* at 167 ("To permit [polygamy among members of the Mormon Church] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.").

[104] *Id.* at 164.

[105] *See, e.g.*, Davison M. Douglas, *Belief-Action Distinction in Free Exercise Clause History*, AM. CIVIL LIBERTIES UNION (Nov. 29, 2011), http://uscivilliberties.org/historical-overview/3186-beliefaction-distinction-in-free-exercise-clause-history.html.

[106] The Court has also taken this approach in subsequent cases. *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599 (1961); Gillette v. United States, 401 U.S. 437 (1971).

[107] *See* Mullally, *supra* note 87.

this approach, "the courts generally rejected religious-freedom claims against generally applicable laws" for almost a century after *Reynolds.*[108]

2. A More Recent, Expansive Interpretation of the Free Exercise Clause: The Warren Court and the Strict Scrutiny Test

The *Reynolds* approach "was employed from 1878 until 1963 to uphold the anti-polygamy laws,[109] the social security laws,[110] military conscription laws,[111] Sunday closing laws,[112] social security identification requirements,[113] federal oversight of federal lands,[114] prison regulations,[115] and state taxation of products sold by a religious organization."[116] Fast forward to the 1960s when, during the Warren Court era, the Supreme Court read the Free Exercise Clause more expansively. A new broader standard arrived in 1963 with the Court's decision in *Sherbert v. Verner*.[117]

Adeil Sherbert, a recent convert to the Seventh-day Adventist Church, worked in South Carolina as a textile mill operator.[118] Her new religion prohibited her from working on Saturdays, "the Sabbath Day of her faith."[119] The mill moved to a six-day workweek two years after Sherbert's conversion and subsequently fired her because she refused to work on Saturdays for religious reasons.[120] She sought other work compatible with her religious principles and, finding none, applied for unemployment benefits under the South Carolina Unemployment Act.[121] This Act required an applicant for benefits to:

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108 *Id.*

109 *See Reynolds*, 98 U.S. 145.

110 United States v. Lee, 455 U.S. 252 (1982).

111 *Gillette*, 401 U.S. 437.

112 Braunfeld v. Brown, 366 U.S. 599 (1961).

113 Bowen v. Roy, 476 U.S. 693 (1986).

114 Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

115 O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).

116 Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378 (1990); Marci A. Hamilton, Employment Division v. Smith *at the Supreme Court: The Justices, the Litigants, and the Doctrinal Discourse*, 32 CARDOZO L. REV. 1671, 1675 (2011).

117 374 U.S. 398 (1963).

118 *Id.* at 399 n.1.

119 *Id.* at 399.

120 *Id.* at 399, 399 n.1.

121 *Id.* at 399–400. *Sherbert* was an incorporation case because the Supreme Court decided the constitutionality of a state law under the Free Exercise Clause. *See id.* at 401.

(1) be able to work, and (2) be available for work.[122] The law also ruled an applicant ineligible if she turned down suitable work when offered.[123] The state argued that Sherbert's self-imposed restriction concerning work on Saturdays made her ineligible because she failed, without good cause, "to accept suitable work when offered."[124] The state denied her benefits because, according to the South Carolina Employment Security Commission, her beliefs were not good enough cause to fail to accept suitable work.[125] Sherbert appealed to the South Carolina Supreme Court, which upheld the decision because the Commission's "construction of the statute place[d] no restriction upon the appellant's freedom of religion nor [did] it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience."[126]

The Supreme Court disagreed and held that the state's denial of benefits violated the Free Exercise Clause. In a 7-2 opinion, Justice Brennan affirmed the holding in *Reynolds* that a person's religious beliefs must be protected from government interference claiming that "[t]he door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such."[127] He also reiterated the idea proffered by the Court in *Reynolds* that a person's religious actions are not *per se* off limits from governmental interference.[128] Justice Brennan argued that the government is often allowed to step in when a person's "conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order."[129] Justice Brennan then crafted a test, now known as the *Sherbert* test, to determine whether the Free Exercise Clause will bar governmental inference with religious action:

1. The plaintiff must hold a sincere religious belief. As mentioned earlier, disproving sincere religious belief is difficult and, in many cases, the government does not contest the first prong of the test at trial.[130]

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122 *Id.* at 400 n.3 (citing S.C. CODE ANN. § 68-113(3) (1962)).

123 *Id.* (citing S.C. CODE ANN. § 68-114(3)).

124 *Id.* at 401.

125 *Id.*

126 *Id.* (citation omitted) (internal quotation marks omitted).

127 *Id.* at 402 (citation omitted) (emphasis omitted).

128 *Id.* at 403.

129 *Id.*

130 *E.g.*, *id.* at 399 n.1 ("No question has been raised in this case concerning the sincerity of appellant's religious beliefs. Nor is there any doubt that the prohibition against

2. The party challenging the federal or state law must prove that the law at issue substantially burdens religious exercise.[131] The law may only pose an indirect burden but, if that burden impedes the observance of religion or discriminates "invidiously" between religions, it is suspect under the Free Exercise Clause.[132] It is important to look to whether the plaintiff is compelled to violate her religion in order to follow the law.[133]

3. If the plaintiff is substantially burdened, the government must show that it has a compelling interest that justifies the substantial burden on religious exercise.[134] The Court expressly revoked the quasi-rational basis test from *Reynolds* because of the high sensitivity and importance of a person's religious belief under the American system.[135]

4. The government should also proffer "alternative forms of regulation [which] would combat . . . abuses without infringing First Amendment rights."[136] The *Sherbert* test is essentially a balancing test between the state's interest and the burden on the sincere religious adherent.

Many commentators mistakenly add another requirement to the *Sherbert* test: the government must prove that its law burdens religious freedom in the "least restrictive" manner possible to achieve its compelling interest.[137] More accurately, the Court in *Sherbert* required the government to show alternative regulations, but the law does not need to be the least restrictive means possible of achieving its goals.

The majority applied the test to Sherbert's case and found in her favor.[138] First, she held a sincere religious belief that her religion banned work on the Sabbath (in her case, Saturdays).[139] Second, the

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Saturday labor is a basic tenet of the Seventh-day Adventist creed, based upon that religion's interpretation of the Holy Bible.").

131 *Id.* at 403.

132 *Id.* at 403–04 (citation omitted).

133 *Id.* at 404.

134 *Id.* at 406.

135 *Id.* ("It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation . . . .'" (citation omitted)).

136 *Id.* at 407.

137 *See, e.g.*, James D. Nelson, *Incarceration, Accommodation, and Strict Scrutiny*, 95 VA. L. REV. 2053, 2057 (2009); Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65, 79 (1996).

138 *Sherbert*, 374 U.S. at 408–10.

139 *Id.* at 399 n.1.

South Carolina law substantially infringed her free exercise rights granted under the Constitution by compelling her to choose between her religious beliefs and her unemployment benefits.[140] At this point, for the government to have won the case, it had to prove that a compelling interest existed in denying Sherbet benefits. The Court held that the government's proffered interests in reducing fraudulent withdrawals from the unemployment fund and preventing fraudulent religious claims that hinder employers from scheduling Saturday work were not compelling enough to restrict Sherbert's free exercise rights.[141] One can only imagine that this case would have come out differently had the Court employed the *Reynolds* test; the government certainly has a rational basis for combating fraud in the unemployment system.

The second major pre-*Smith* free exercise case moved from the employment arena to the educational arena. In *Wisconsin v. Yoder*,[142] the Supreme Court addressed a state law mandating parents to send their children aged seven through sixteen to either a public or private school; homeschooling was not allowed.[143] Three members of the Amish religion refused to send their children to school as the law required because of their "fundamental [religious] belief that salvation requires life in a church community separate and apart from the world and worldly influence."[144] The Amish object to high school and higher education in general, because

> the values they teach are in marked variance with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to a "worldly" influence in conflict with their beliefs. The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing; a life of "goodness," rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society.[145]

A school district administrator filed a complaint, and the Amish parents "were charged, tried, and convicted of violating the

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140 *Id.* at 403–04.

141 *Id.* at 406–07.

142 406 U.S. 205 (1972).

143 *See* WIS. STAT. § 118.15 (1969).

144 *Yoder*, 406 U.S. at 210.

145 *Id.* at 210–11.

compulsory-attendance law in Green County Court and were fined the sum of $5 each."[146] The parents argued that the compulsory attendance law violated their First Amendment free exercise rights; in contrast, the state made a *Reynolds*-style argument that while the First Amendment protects religious beliefs, religious actions remain unprotected in this instance.[147] The Supreme Court disagreed[148] and reiterated that the First Amendment provides a fundamental right to exercise religion.[149] Though this fundamental right must be balanced against the government's competing interests, it is difficult to overcome. In other words, the free exercise of religion is so crucial that it can trump generally applicable laws such as mandatory school attendance requirements. Although not expressly stating as such, Chief Justice Burger's opinion applied the *Sherbert* test:

1. The plaintiff must hold a sincere religious belief. The Court looked first to the sincerity of the parents' beliefs, stating: "In evaluating those claims we must be careful to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent."[150] The Justices wanted to make certain that the parents' educational decisions were "rooted in religious belief" as opposed to purely secular concerns about state education.[151] This analysis provides strong precedent for courts when inquiring into the sincerity of a religious adherent's beliefs.

2. The plaintiff must prove that the law at issue substantially burdens religious exercise.[152] Finding the claims to be sincerely religious, the Court moved on to consider the impact of the law on these religious beliefs and found that impact to be substantial: "The impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs."[153]

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146 *Id.* at 208.

147 *Id.* at 219 ("Wisconsin . . . argues that 'actions,' even though religiously grounded, are outside the protection of the First Amendment.").

148 *Id.* at 219–20. The vote for Yoder and the other Amish parents was unanimous; Justice Douglas dissented in part but voted with the majority. *Id.* at 241. The vote was 7-0, as Justices Powell and Rehnquist took no part in the consideration or decision of the case. *Id.* at 206.

149 *Id.* at 221.

150 *Id.* at 215.

151 *Id.*

152 *Sherbert*, 374 U.S. at 403.

153 *Yoder*, 406 U.S. at 218.

3. If the plaintiff is substantially burdened, the government must show that it has a compelling interest that justifies the substantial burden on religious exercise.[154] Finally, the Court considered the compelling interests advocated by the state. The *Yoder* opinion found that the state's interest in educating its citizens was "paramount" and that "providing public schools ranks at the very apex of the function of a State."[155] But, even so, the Court's balancing test concluded that Wisconsin was unable to overcome the Amish parents' free exercise rights. The state needed more and better evidence to prove that failing to attend high school would create people doomed to be burdens on society.[156]

4. The government should also proffer "alternative forms of regulation [which] would combat . . . abuses without infringing First Amendment rights."[157] This aspect of the *Sherbert* test was not addressed directly in the *Yoder* opinion. Although, the Court discussed the long-proven ability of the Amish to raise productive citizens and, "[a]gainst this background it would require a more particularized showing from the State [that people without high school educations are burdens on society] to justify the severe interference with religious freedom such additional compulsory attendance would entail."[158] This reasoning can be interpreted as requiring the government to adduce some alternative methods of enforcing interest.

The bottom line from *Yoder* is that the values underlying the free exercise of religion "must be protected" and, therefore, those values may trump very important—even compelling—governmental interests.[159] This ruling falls on the opposite spectrum from *Reynolds*, as the religious beliefs and actions of the Amish parents were allowed to contradict a law of "paramount" importance.

Finally, there are two business-related free exercise cases from the Supreme Court that provide important precedent in this area. It is interesting to note that the for-profit businesses in both these cases lost, but the Court did evaluate their lawsuits under the Free Exercise Clause. First, in *Braunfeld v. Brown*, the Court held that general laws advancing secular goals, but indirectly burdening religion, are generally valid unless the government can meet its purpose with less impact on religious exercise.[160] More specifically, the Supreme Court

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154 *Sherbert*, 374 U.S. at 406.

155 *Yoder*, 406 U.S. at 213.

156 *See id.* at 232–33.

157 *Sherbert*, 374 U.S. at 407.

158 *Yoder*, 406 U.S. at 227.

159 *Id.* at 222.

160 366 U.S. 599, 607 (1961).

upheld a mandatory Sunday retail business closure law—meant to provide a day of repose for all citizens—against a Free Exercise Clause challenge.[161] The Justices held:

> If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.[162]

Braunfeld introduces the "less restrictive alternatives" test (not quite a "least restrictive alternative" as found in RFRA) to the Free Exercise Clause case law.

Second, in *United States v. Lee*, the Court held that comprehensive, general, and neutral national programs (i.e., Social Security)—which apply regardless of religion—must apply uniformly, must allow for only a few exceptions, and may trump religious freedom in the commercial sphere when religious adherents enter into commerce as a matter of choice.[163] More specifically, the Court held that Social Security employer payroll taxes applied to an Amish carpenter who employed several other Amish people and had filed a free exercise challenge.[164] The Justices held:

> [E]very person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When 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. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees.[165]

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161 *Id.* at 609.

162 *Id.* at 607.

163 455 U.S. 252, 261–62 (1982).

164 *Id.* at 254.

165 *Id.* at 261.

C. The Re-Narrowing of the Free Exercise Clause: The Controversial Case of Employment Division v. Smith

The free exercise philosophy of *Sherbert* and *Yoder* contrasts greatly with *Employment Division v. Smith*.[166] The *Smith* decision in 1990 took the Court back to the *Reynolds* era reasoning on free exercise jurisprudence. In *Smith*, the Court rejected the *Sherbert* test and its expansive interpretation of the Free Exercise Clause for the first time. A balancing test weighing religious freedom against governmental interest was no longer appropriate when judging generally applicable laws.

The facts in *Smith* are simple. Oregon banned the possession of controlled substances without a prescription.[167] Using federal law—and its scheduling of drugs into different categories based on potential for abuse and existence of accepted use in medical treatment—the state criminalized the possession of peyote, which is "a hallucinogen derived from [a small, spineless cactus] plant."[168] Alfred Smith and Galen Black worked at a drug rehabilitation clinic and were terminated "because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both are members."[169] The use of controlled substances was considered misconduct under the terms of their employment. Both filed claims for unemployment compensation. The Oregon Employment Division deemed them ineligible for unemployment benefits because they were terminated for misconduct.[170] Smith and Black argued that this denial of unemployment benefits was based on their unwillingness to forgo their religious beliefs to remain employed; this treatment, they argued, violated the Free Exercise Clause as interpreted by *Sherbert*.[171]

Justice Scalia, writing for a 5-3 majority (Justice Kennedy did not participate in the case), reemphasized the holding from *Reynolds* that the government may not meddle with a person's religious belief.[172] This fundamental truth, Justice Scalia explained, means that a law may not "compel affirmation of religious belief,[173] punish the

166 494 U.S. 872 (1990).

167 *Id.* at 874 (citing OR. REV. STAT. § 475.992(4) (1987)).

168 *Id.* at 874.

169 *Id.*

170 *Id.*

171 *Id.* at 876, 878.

172 *Id.* at 879.

173 *See* Torcaso v. Watkins, 367 U.S. 488 (1961).

expression of religious doctrines it believes to be false,[174] impose special disabilities on the basis of religious views or religious status,[175] or lend its power to one or the other side in controversies over religious authority or dogma."[176] He then posited that religious action, since *Reynolds*, has been viewed as different from religious belief and that the First Amendment allows for some regulation. For example, general laws that apply equally to the religious and nonreligious alike and that do not target religion can trump free exercise rights.[177] These generally applicable laws may hinder or, in some cases, preclude someone's religious practice and still be constitutional. The majority determined that the Court must uphold these types of laws because broad exemptions for religious adherents would require constitutionally mandated

> religious exemptions from civic obligations of almost every conceivable kind–ranging from compulsory military service,[178] . . . to the payment of taxes,[179] . . . to health and safety regulation[s] such as manslaughter and child neglect laws,[180] . . . compulsory vaccination laws,[181] . . . drug laws,[182] . . . and traffic laws[;][183] . . . to social welfare legislation such as minimum wage laws,[184] . . . child labor laws,[185] . . . animal cruelty laws,[186] . . . environmental protection laws,[187] . . . and laws providing for equality of opportunity for the races . . . .[188] The First Amendment's protection of religious liberty does not require this.[189]

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174 United States v. Ballard, 322 U.S. 78, 86–88 (1944).

175 *See* McDaniel v. Paty, 435 U.S. 618 (1978); Fowler v. Rhode Island, 345 U.S. 67, 69 (1953); *cf.* Larson v. Valente, 456 U.S. 228, 245 (1982).

176 *Smith*, 494 U.S. at 877; *see* Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 445–52 (1969); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 95–119 (1952); Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708–25 (1976).

177 *Smith*, 494 U.S. at 879–80.

178 *See, e.g.*, Gillette v. United States, 401 U.S. 437 (1971).

179 *See, e.g.*, United States v. Lee, 455 U.S. 252 (1982).

180 *See, e.g.*, Funkhouser v. State, 763 P.2d 695 (Okla. Crim. App. 1988).

181 *See, e.g.*, Cude v. State, 377 SW.2d 816 (Ark. 1964).

182 *See, e.g.*, Olsen v. Drug Enforcement Admin., 878 F.2d 1458 (D.C. Cir. 1989).

183 *See* Cox v. New Hampshire, 312 U.S. 569 (1941).

184 *See* Tony and Susan Alamo Found. v. Sec. of Labor, 471 U.S. 290 (1985).

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

186 *See, e.g.*, Church of the Lukumi Babalu Aye Inc. v. City of Hialeah, 723 F. Supp. 1467 (S.D. Fla. 1989); *cf.* State v. Massey, 51 S.E.2d 179 (N.C. 1949).

187 *See* United States v. Little, 638 F. Supp. 337 (Mont. 1986).

188 *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 603–04 (1983).

189 Emp't Div. v. Smith, 494 U.S. 872, 888–89 (1990).

Without giving the government the benefit of the doubt when it comes to generally applicable laws, society would have a hard time regulating itself if religious adherents could object to any law on the books. This special treatment would cause the law to resemble a patchwork quilt with holes in many of its squares. Therefore, the Court held that the *Sherbert* test, and its strong protection of religious exercise, does not apply to generally applicable laws.[190] The majority found support in the fact that the *Sherbert* test had only been used three times to invalidate governmental action as applied to religious adherents—all three were denials of unemployment benefits.[191] The *Sherbert* test had been applied in other free exercise contexts, but the governmental action was always upheld.[192] In the end, the Court held that the state of Oregon was allowed to deny unemployment benefits to these terminated workers.[193]

Since the 1980s, the Court had been slowly whittling away at the *Sherbert* test.[194] The majority in *Smith* placed an exclamation point on this trend by rejecting the test completely. This case stands out as a low point in the arc of free exercise law. Prior to the end of the twentieth century and the *Smith* case, or the era in which the arc of freedom of religion was at its apex, the government had to prove that statutes directly or indirectly impacting religious practice passed "strict scrutiny" (or the high hurdle of remedying a compelling governmental interest in a manner that minimizes the burden on a religious practice).[195] After *Smith*, the landscape changed drastically and lawmakers gained great freedom to restrict religious behavior, as long as the statute they enacted was generally applicable to religious and nonreligious individuals alike.[196] After *Smith*, generally

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190 *Id.* at 885.

191 *Id.* at 883–84; *see also* Sherbert v. Verner, 374 U.S. 398 (1963); Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707 (1981); Hobbie v. Unemp't Appeals Comm'n of Fla., 480 U.S. 136 (1987).

192 *Smith*, 494 U.S. at 883; *see, e.g.*, United States v. Lee, 455 U.S. 252 (1982); Gillette v. United States, 401 U.S. 437 (1971).

193 *Smith*, 494 U.S. at 890.

194 *Id.* at 884–85.

195 *See, e.g.*, Daniel Kazhdan, *How Jewish Laws of Resistance Can Aid Religious Freedom Laws*, 100 CALIF. L. REV. 1069, 1071 (2012).

196 *See* Kelleen Patricia Forlizzi, Note, *State Religious Freedom Restoration Acts as a Solution to the Free Exercise Problem of Religiously Based Refusals to Administer Health Care*, 44 NEW ENG. L. REV. 387, 396 (2010) ("Because this newly imposed rational basis standard allows great deference to the legislature at the expense of the individual's constitutional right to free exercise of religion, the *Smith* decision was met with great criticism.").

applicable laws only had to surmount the "rational basis" test first articulated in *Reynolds*—a law passes constitutional scrutiny as long as it is rationally related to a legitimate governmental purpose.[197] This state of affairs harkened back to the idea from *Reynolds* that permitting exceptions to generally applicable laws would "make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[198] In essence, "the Supreme Court [in *Smith*] effectively limited first amendment strict scrutiny to situations in which the government singles out a particular religion and intentionally limits the rights of its members."[199] These types of intentionally discriminatory laws are uncommon, and the *Smith* test was set to govern most challenges accordingly.

This narrow interpretation of the Free Exercise Clause did not sit well with many in the American public. "Religious and civil liberties groups were shocked and angered by the *Smith* decision. They realized that it put small, unpopular religions at risk and threatened even mainstream religions."[200] "Civil rights groups and public leaders alike denounced the *Smith* decision as an excessive over-regulation of religious activity, fearing *Smith* would give the government the unlimited authority to restrict free exercise under the guise that such legislation imposed a mere 'incidental' burden."[201] Within three years of the *Smith* decision, Congress had overruled the case via legislation, RFRA.

D. The Congressional Response to Smith*: The Religious Freedom Restoration Act and the Religious Land Use & Institutionalized Persons Act*

As anger grew over the *Smith* precedent, Congress took notice and debated a strong response. The checks and balances instituted under the American constitutional system allow Congress to check the

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197 *The* Smith *Decision: The Court Returns to the Belief-Action Distinction*, PEW RESEARCH (Oct. 24, 2007), http://www.pewforum.org/2007/10/24/a-delicate-balance6/.

198 Reynolds v. United States, 98 U.S. 145, 167 (1878).

199 Kenneth Marin, Employment Division v. Smith*: The Supreme Court Alters the State of Free Exercise Doctrine*, 40 AM. U. L. REV. 1431, 1432 (1991).

200 Barbara Beckwith, *Reviving the Religious Freedom Restoration Act*, ST. ANTHONY MESSENGER, http://www.americancatholic.org/messenger/feb1998/feature1.asp (last visited July 24, 2014).

201 Forlizzi, *supra* note 196, at 396.

Supreme Court's power by passing legislation overturning (so to speak) a Court ruling. As long as Congress stays within its powers as enumerated in Article I, Section Eight of the Constitution when passing such legislation, the Supreme Court is bound to uphold it. The *Smith* case strengthened the power of the government to pass generally applicable legislation burdening religion. Laws overturning or weakening *Smith*, therefore, would take away federal governmental power, which is an action that needs no Constitutional blessing.[202] For example, legislatively created religious exceptions to laws passed under Congress' taxing power reduce Congress' taxing power.[203] Similarly, legislatively created religious exceptions to laws passed under the commerce power un-exercise Congress' commerce power.[204] In essence, Congress weakened the government's hand through RFRA and such action is constitutionally appropriate.

Smith was decided on April 17, 1990, and by July 26, 1990, the first bill to overturn the *Smith* holding and restore strict scrutiny to religious freedom cases was introduced in Congress.[205] Representative Stephen Solarz, a Democrat from New York, drafted the initial bill called the Religious Freedom Restoration Act of 1990 that read in pertinent part:

> (b) LAWS OF GENERAL APPLICABILITY.—A governmental authority may restrict any person's free exercise of religion only if—
>
> (1) the restriction—
>
> (A) is in the form of a rule of general applicability; and
>
> (B) does not intentionally discriminate against religion, or among religions; and
>
> (2) the governmental authority demonstrates that application of the restriction to the person—
>
> (A) is essential to further a compelling governmental interest; and

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[202] *See* Michael Dorf, *Symposium: Why is RFRA Still Valid Against the Federal Government?*, SCOTUSBLOG (Feb. 20, 2014, 12:06 PM), http://www.scotusblog.com/2014/02/symposium-why-is-rfra-still-valid-against-the-federal-government/.

[203] *Id.*

[204] *Id.*

[205] Religious Freedom Restoration Act of 1990, H.R. 5377, 101st Cong. (1990), *available at* http://www.justice.gov/jmd/ls/legislative_histories/pl103-141/bill-hr5377-1990.pdf.

> (B) is the least restrictive means of furthering that compelling governmental interest.[206]

This language would have legislatively reinstated the *Sherbert* test with an added requirement that any law burdening religion be the "least restrictive" way of furthering the interest. This addition—which, as mentioned above, was not an element of the holdings in *Sherbert* or *Yoder*—only increased the scrutiny on legislation, including laws with an indirect burden on religion. This bill would have forced the government to prove that it considered many alternatives and deliberately chose the one that least burdened religion. For example, this least restrictive test would have required the government to come up with an alterative to banning polygamy in *Reynolds* or an alternative to the Sunday closing law in *Braunfeld*. Notice also that this legislation would not have required the law to create even a "substantial burden" on religious exercise; a mere restriction on religious exercise would suffice to evaluate under strict scrutiny. The House of Representatives held subcommittee hearings on this legislation but it went no further.[207]

Three years later, an extraordinarily similar bill was sponsored in the Senate by Senator Ted Kennedy, a Democrat from Massachusetts,[208] and in the House of Representatives by Representative Charles Schumer, a Democrat from New York.[209] The bill, called the Religious Freedom Restoration Act of 1993 (the enacted RFRA), passed through Congress with near unanimous bipartisan approval; the bill passed the House via voice vote without objection and it passed the Senate with a vote of 97-3.[210] This meant that the overall congressional vote, if taken officially in the House, would have been 562-3. Accordingly, RFRA passed with nearly a

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206 *Id.*; *see also* Douglas Martin, *Stephen Solarz, Globe-Trotting Congressman, Dies at 70*, N.Y. TIMES (Nov. 29, 2010), http://www.nytimes.com/2010/11/30/nyregion/30solarz.html?pagewanted=all&_r=0.

207 *Bill Summary & Status*, LIBRARY OF CONG.: THOMAS, http://thomas.loc.gov/cgi-bin/bdquery/?&Db=d101&querybd=@FIELD%28FLD003+@4%28%28@1%28Rep+Solarz++Stephen+J.%29%29+01087%29%29 (last visited July 24, 2014).

208 Religious Freedom Restoration Act of 1993, S. 578, 103rd Cong. (1993) (enacted), *available at* http://www.justice.gov/jmd/ls/legislative_histories/pl103-141/bill-s578is-1993.pdf.

209 Religious Freedom Restoration Act of 1993, H.R. 1308, 103rd Cong. (1993) (enacted), *available at* http://www.justice.gov/jmd/ls/legislative_histories/pl103-141/bill-hr1308ih-1993.pdf.

210 Peter Steinfels, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES, Nov. 17, 1993, at A18.

99.5% approval rate. President Bill Clinton signed RFRA[211] in the White House Rose Garden on November 16, 1993.[212] At the signing ceremony President Clinton joked, "The power of God is such that even in the legislative process miracles can happen."[213] The congressional findings attached to RFRA were telling as to Congress' intent:

> The Congress finds that—
>
> (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
>
> (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
>
> (3) governments should not substantially burden religious exercise without compelling justification;
>
> (4) in *Employment Division v. Smith*, . . . the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
>
> (5) 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.
>
> The purposes of this chapter are—
>
> (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, . . . and *Wisconsin v. Yoder*, . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
>
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.[214]

Congressional finding number one harkens back to Jefferson's and Madison's thoughts that religious freedom is an unalienable right as discussed in Part II.A.2. Findings two through five and the first purpose statement unveil Congress' intent to legislatively reinstate the Free Exercise Clause precedent prior to *Smith* (most specifically the precedent gleaned from *Sherbert* and *Yoder*) with some added

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211 Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 3, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb–2000bb-4 (2012)).

212 Steinfels, *supra* note 210.

213 *Id.*

214 42 U.S.C. § 2000bb(a)–(b).

protections that the federal courts had grafted into the compelling interest (or strict scrutiny) test since *Sherbert* and *Yoder*. Though not expressly stated, Congress was specifically referring to the "least restrictive means" prong of the compelling interest test, where the government must prove that it evaluated alternative ways to advance its compelling interest and choose the option that least burdened religion. The operative statutory text of RFRA reads:

> (a) In general. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.
>
> (c) Judicial relief. A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under Article III of the Constitution.[215]

RFRA states that the government may not burden a "person's exercise of religion."[216] This phrasing became tremendously important in the *Hobby Lobby* case; because RFRA does not define these terms, the federal Dictionary Act comes into play.[217] The Dictionary Act defines terms that are undefined in the federal code and, in this case, states that the word "person"—unless the context of the particular statute "indicates otherwise . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[218] The controversy in the *Hobby Lobby* case was over how, if at all, the phrase "person's *exercise of religion*" in RFRA alters the context of the word "person" as defined in the

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215 *Id.* § 2000bb-1(a)–(c).

216 *Id.* § 2000bb-1(a).

217 1 U.S.C. § 1 (2012) (providing definitions for statutory terms and phrases).

218 *Id.*

Dictionary Act. Debate over this issue played a major role in the Supreme Court's opinion, which will be discussed in depth in Part III.

It is important to note that RFRA no longer applies to state laws that burden religion. Congress enacted the law to cover both state and federal governments as shown in the following language: "Government [not only Congress] shall not substantially burden a person's exercise of religion."[219] However, the Supreme Court held that Congress exceeded its power to regulate the state side of the equation in *City of Boerne v. Flores*.[220] RFRA continues to apply to federal governmental actions including the contraceptive mandate issued within the federal Patient Protection and Affordable Care Act.

One further federal statute merits brief mention. The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)[221] protects the religious exercise of inmates as well as "individuals, houses of worship, and other religious institutions from discrimination in zoning and landmarking laws."[222] Most relevant for the purposes of this Article, RFRA was amended in 2000 to adopt the definition of religion from RLUIPA.[223] Before the amendment, RFRA defined the "exercise of religion" as "the exercise of religion under the First Amendment."[224] RFRA now states "that the term 'exercise of religion' means religious exercise, as defined in [RLUIPA]."[225] RLUIPA's definition of religion is very broad and protective of freedom of conscience. The Supreme Court described the RLUIPA definition as follows:

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219 RFRA, § 3(a), 107 Stat. at 1488.

220 521 U.S. 507 (1997). The Court in *Flores* held that while

> [i]t is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference. . . . Congress' discretion is not unlimited, however, and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution. Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.

Id. at 536 (citation omitted).

221 42 U.S.C. §§ 2000cc–2000cc-4 (2012). See *Cutter v. Wilkinson*, 544 U.S. 709 (2005), for more general information on RLUIPA.

222 *Religious Land Use and Institutionalized Persons Act (RLUIPA)*, DEP'T OF JUSTICE, http://www.justice.gov/crt/about/hce/rluipaexplain.php (last visited July 25, 2014).

223 Scott Budzenski, Comment, *Tug of War: The Supreme Court, Congress, and the Circuits—The Fifth Circuit's Input on the Struggle to Define a Prisoner's Right to Religious Freedom in* Adkins v. Kaspar, 80 ST. JOHN'S L. REV. 1335, 1345 (2006).

224 *Id.* at 1345 n.75 (citing 42 U.S.C. § 2000bb–2(4) (1993)).

225 42 U.S.C. § 2000bb-2(4) (2012).

> [I]n an obvious 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." 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."[226]

Combining RFRA and RLUIPA shows that Congress did much more than restore pre-*Smith* legal precedent.[227] The combination demonstrates how dedicated Congress has been to protecting the freedom to exercise religion—even in the face of laws of general applicability. With this new landscape in mind, the final Section of this Part delves into the ACA's contraceptive mandate. This is the final piece of the puzzle necessary to evaluate the Supreme Court's *Hobby Lobby* decision.

E. The Affordable Care Act and the Contraceptive Mandate

As discussed briefly in Part I, the Patient Protection and Affordable Care Act[228] and the Health Care and Education Reconciliation Act,[229] which amended the ACA soon after its enactment (together, the ACA), are designed to provide lower cost and more robust health insurance to Americans, restrict insurance companies from denying coverage or canceling policies based on pre-existing conditions or coverage limits; fully cover certain preventative services; and strengthen Medicare and Medicaid.[230] In 2012, the Supreme Court

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226 Burwell v. Hobby Lobby Stores, Inc, 134 S. Ct. 2751, 2761–62 (2014) (citing § 2000cc-5(7)(A), which deleted the reference to the First Amendment, and § 2000cc-3(g), which declared that exercise of religion should be interpreted broadly).

227 The Court in *Hobby Lobby* explained that in *City of Boerne v. Flores*, the Court

> wrote that RFRA's "least restrictive means requirement was not used in the pre-*Smith* jurisprudence RFRA purported to codify." . . . On this understanding of [the Court's] 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.

Hobby Lobby, 134 S. Ct. at 2761 n.3 (quoting City of Boerne v. Flores, 521 U.S. 507, 509 (1997)).

228 Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

229 Pub. L. No. 111-152, 124 Stat. 1029 (2010) (codified in scattered sections of 20, 26, and 42 U.S.C.).

230 *See* Press Release, White House, Fact Sheet: The Affordable Care Act: Secure Health Coverage for the Middle Class (June 28, 2012), *available at* http://www.white

upheld a substantial portion of the ACA from a constitutional challenge in the high profile case of *National Federation of Independent Business v. Sebelius*.[231] This Article deals primarily with the preventative services component (more specifically, the employer contraceptive mandate) of the ACA and how the U.S. Department of Health and Human Services implemented this component.

1. The Contraceptive Mandate

Part I of this Article recounted the federal government's story of a country in which women pay much more for their health care than men—including a large discrepancy in costs for reproductive health services. In defending the ACA, the government argued that "[w]omen who are poor or have low incomes tend to underutilize preventive health care services even though those services can save lives and help avoid costly medical procedures."[232] This decreased use of health services also occurs in the use of contraceptives by women.[233] Decreased contraceptive use is problematic because contraceptives may: (1) help women space out births (short intervals between births can lead to medical issues for newborns); (2) protect women in cases in which giving birth would be medically dangerous; (3) allow women to have flexibility to structure their work and home life; and (4) protect against certain types of cancers, menstrual disorders, and acne.[234] The government argues that health insurance companies can remedy these issues by covering contraceptives, making treatment with this medicine less expensive and possibly free.

To attack these high costs and create an environment in which more women get the wider swath of preventive services they need, the ACA requires that most insurers provide, "with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and

house.gov/the-press-office/2012/06/28/fact-sheet-affordable-care-act-secure-health-coverage-middle-class. There are other benefits that these laws were designed to provide but that are less relevant for this Article. There are also significant negative consequences to the laws. *See generally ObamaCare: Pros and Cons of ObamaCare*, OBAMACARE FACTS, http://obamacarefacts.com/obamacare-pros-and-cons.php (last visited July 26, 2014).

231 132 S. Ct. 2566 (2012).

232 Evelyn M. Tenenbaum, *The Union of Contraceptive Services and the Affordable Care Act Gives Birth to First Amendment Concerns*, 23 ALB. L.J. SCI. & TECH. 539, 540 (2013) (citations omitted).

233 *Id.* at 541 (citations omitted).

234 45 C.F.R. §§ 147, 156 (2013).

Services Administration [HRSA]."[235] This agency of HHS refers to itself as "the primary Federal agency for improving access to health care by strengthening the health care workforce, building healthy communities and achieving health equity."[236] Its "programs provide health care to people who are geographically isolated, economically or medically vulnerable."[237]

Although Congress required that insurance companies comply with HRSA's comprehensive guidelines, these guidelines did not exist at the time the ACA was enacted. Furthermore, a legal requirement that HRSA issue comprehensive guidelines for tens of millions of women is no small undertaking. Therefore, HRSA asked the Institute of Medicine (IOM)—the nonprofit health arm of the National Academy of Sciences created to provide "unbiased and authoritative advice to decision makers and the public"[238]—to study the issue and report back. The IOM studied the scientific and medical evidence concerning women's preventive health services and issued its findings on July 19, 2011, in a report titled *Clinical Preventive Services for Women: Closing the Gaps*.[239] The IOM identified (and HRSA subsequently proposed in its comprehensive guidelines) eight women's health services that insurance companies must cover in the new health care law[240]:

1. Well-woman visits;
2. Screening for gestational diabetes;
3. Human papillomavirus testing;
4. Counseling for sexually transmitted infections;

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235 42 U.S.C. § 300gg-13(a)(4) (2012).

236 *About HRSA*, HEALTH RES. & SERVS. ADMIN., http://www.hrsa.gov/about/index.html (last visited July 26, 2014).

237 *Id.*

238 *About the IOM*, INST. OF MED., http://www.iom.edu/About-IOM.aspx (last visited July 26, 2014).

239 INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS (July 19, 2011). The IOM charges to download the report and requires an account at the National Academy Press to download a free PDF version; however, the IOM provides a four-page summary of the report—including an outline of the eight proposed preventive services it desires for HHS to adopt—for free online. *Report Brief: Clinical Preventive Services for Women: Closing the Gaps*, INST. OF MED., http://www.iom.edu/~/media/Files/Report%20Files/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps/preventiveservicesforwomenreportbrief_updated2.pdf (last updated Sept. 4, 2014) [hereinafter *Report Brief*].

240 *Report Brief*, *supra* note 239.

5. Counseling and screening for human immune-deficiency virus;
6. Contraceptive methods and counseling;
7. Breastfeeding support, supplies, and counseling; and
8. Screening and counseling for interpersonal and domestic violence.[241]

The *Hobby Lobby* case revolves around the sixth IOM/HRSA proposal: contraceptive methods and counseling. Additionally, the HRSA guidelines state that insurance companies should provide all prescribed "Food and Drug Administration [FDA] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity" at no cost.[242] The FDA has approved twenty different forms of contraception, all of which most insurance plans must offer at no cost to patients.[243] In August 2011, HHS "issued an interim final rule requiring insurance plans to cover contraceptives approved by the [FDA] as part of [the contraceptive] mandate."[244]

The federal regulations implementing this part of the ACA read as follows:

> These final regulations promote two important policy goals. First, the regulations provide women with access to contraceptive coverage without cost sharing, thereby advancing the *compelling government interests* in safeguarding public health and ensuring that women have equal access to health care. Second, the regulations *advance these interests in a narrowly tailored fashion* that protects certain nonprofit religious organizations with religious objections to providing contraceptive coverage from having to contract, arrange, pay, or refer for such coverage.[245]

* * *

The regulations do not violate the Free Exercise Clause because they are *neutral and generally applicable*. *The regulations do not*

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241 *Women's Preventive Services Guidelines*, HRSA, http://www.hrsa.gov/womensguidelines/ (last visited July 26, 2014).

242 *Id.*

243 *Birth Control: Medicines to Help You*, FDA, www.fda.gov/forconsumers/byaudience/forwomen/freepublications/ucm313215.htm (last updated Mar. 2013).

244 Elizabeth Sepper, *Contraception and the Birth of Corporate Conscience*, 22 AM. U. J. GENDER SOC. POL'Y & L. 303, 306 (2014) (citing Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621-01 (Aug. 3, 2011) (to be codified at 45 C.F.R. pt. 147)).

245 Coverage of Certain Preventive Services Under the Affordable Care Act, 45 C.F.R. pts. 147, 156, at 39,872, 78 Fed. Reg. 39,870 (2013) (emphasis added).

target religiously motivated conduct, but rather, are intended to improve women's access to preventive health care and lessen the disparity between men's and women's health care costs. And the regulations are *generally applicable* because they do not pursue their purpose only against conduct motivated by religious belief. The exemption and accommodations set forth in the regulations serve to accommodate religion, not to disfavor it.[246]

These comments make it obvious that the final rules are written to hold up against a legal challenge claiming a violation of the free exercise of religion. Notice the language in the rules referring to the government's "compelling interest" in safe, public health care and equal rights to such health care for women. The inclusion of this language is a clear attempt to meet the "compelling governmental interest" prong of RFRA. Notice next the statement that these rules are "narrowly tailored" in order to alleviate the burden on religious exercise. This statement is akin to declaring that the rules are the least restrictive way the government could have met its compelling interest and designed to meet the final prong of RFRA.

The language concerning the Free Exercise Clause in the second paragraph, however, is inserted in case the Court refuses to analyze the mandate under RFRA. If the Court does not hold that for-profit corporations are covered in RFRA's definition of person, the Court may pursue another method of analysis under the Free Exercise Clause. The rules imply that they are constitutionally sound because they are "neutral and generally applicable" and do not target religious conduct. However, RFRA states that the government "shall not substantially burden a person's exercise of religion *even if the burden results from a rule of general applicability*" and the congressional findings state that RFRA was designed specifically to evaluate generally applicable laws under strict scrutiny.[247] However, cases analyzed under the Free Exercise Clause only (because RFRA is not applicable) are still governed by *Smith*.

The final Section of this Part deals with the exemptions from and exceptions to the contraceptive mandate for religious groups and other types of employers and insurance plans.

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246 *Id.* at 39,888 (emphasis added).

247 42 U.S.C. § 2000bb-1(b) (2012) (emphasis added).

2. Accommodations to the Contraceptive Mandate

There are four primary accommodations to the ACA's contraceptive mandate. The first two accommodations are considered exemptions from the contraceptive mandate. If employers qualify, they are not required to provide cost-free contraceptives to their employees. The third accommodation is classified in this Article as an exemption because of the lengthy debate in the *Hobby Lobby* oral arguments and briefs over its classification. The fourth accommodation is a workaround whereby the mandate still applies, but an unrelated entity (the employer's insurance company) pays for employees' contraceptives. Two accommodations are meant specifically for employers and organizations with religious missions, while the other two deal with special types of employers and insurance plans. This Section covers each accommodation in turn.

First, the Religious Employer Exemption places traditional religious organizations outside of the contraceptive mandate. "Early in the rulemaking process, the [Obama] Administration exempted core religious institutions, like churches, synagogues, and mosques, from having to comply with the mandate's requirement that employers provide employees with insurance coverage for contraceptive care."[248] To whittle down the number of employers eligible for this exemption, HRSA proposed that a qualifying organization under the Religious Employer Exemption was 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 nonprofit organization described in [other sections of the federal code that deal with churches and their related entities].[249]

More than 200,000 complaints and comments were filed arguing that this definition was too narrow, and that deep-rooted and full-

[248] Alan E. Garfield, *The Contraception Mandate Debate: Achieving a Sensible Balance*, 114 COLUM. L. REV. SIDEBAR 1, 1–2 (2014), *available at* http://columbialawreview.org/wp-content/uploads/2014/01/Garfield-114-Columbia-Law-Review-Sidebar-1.pdf.

[249] *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).

fledged religious groups were excluded.[250] These complaints caused HHS to alter and simplify the qualifications. The first three prongs of the definition were eliminated and the fourth prong was simplified.[251] Currently, according to the final rules, a "religious employer" is an "organization that is organized and operates as a nonprofit entity and is referred to [in sections of the United States Code dealing with churches, other houses of worship, the integrated auxiliaries of churches and conventions or associations of churches, as well as the exclusively religious activities of any religious order]."[252] This definition still did not satisfy all religious groups and led to the second accommodation to be discussed next.

As mentioned above, after the creation of the Religious Employer Exemption and its subsequent amendment, unexempted religious nonprofit organizations filed a flurry of complaints. For example:

> [R]eligiously affiliated [nonprofits] that were not covered by the exemption, such as universities, hospitals, social service providers, and insurance companies, characterized the rule as an affront to religious liberty. The U.S. Conference of Catholic Bishops insisted that the rule drew "a new distinction—alien to both [the] Catholic tradition and to federal law—between our houses of worship and our great ministries of service to our neighbors, namely, the poor, the homeless, the sick, the students in our schools and universities and others in need, of any faith community or none."[253]

In response, the Obama administration issued a one-year safe harbor for religiously affiliated non-profits as it debated an additional accommodation.[254]

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250 *See, e.g.*, Complaint at 17, Wheaton Coll. v. Burwell, 2014 WL 2826336 (N.D. Ill. June 23, 2014) (No. 1:13-cv-08910).

251 *Religious Exemptions to Contraceptive Coverage*, UNITED HEALTHCARE, http://www.uhc.com/united_for_reform_resource_center/health_reform_provisions/preventive_services/religious_exemptions_to_contraceptive_coverage.htm (last visited July 28, 2014).

252 Exemption and Accommodations in Connection with Coverage of Preventive Health Services, 78 Fed. Reg. 39,896 (July 2, 2013) (to be codified at 45 C.F.R. § 147.131(a)).

253 Sepper, *supra* note 244, at 307 (citations omitted).

254 Press Release, White House, Fact Sheet: Women's Preventive Services and Religious Institutions (Feb. 10, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/02/10/fact-sheet-women-s-preventive-services-and-religious-institutions ("The President will also announce that his Administration will propose and finalize a new regulation during this transition year to address the religious objections of the non-exempted non-profit religious organizations. The new regulation will require insurance companies to cover contraception if the religious organization chooses not to.").

The new accommodation that the Obama administration created, which refers to the groups that the accommodation covers as "Eligible Organizations," is not an exemption from the contraceptive mandate.[255] Consequently, if an employer is subject to the ACA but falls under this accommodation, that employer must still provide its employees with contraceptives at no cost.[256] However, eligible organizations (mostly religious non-profit organizations prior to the *Hobby Lobby* decision) "will not have to contract, arrange, pay for or refer contraceptive coverage to which they object on religious grounds, but such coverage is separately provided to women enrolled in their health plans at no cost."[257] The basic idea is that insurance companies, upon receiving a request from an employer they cover, must pay for contraceptives out of their own pocket and use money that in no way comes from the objecting organization. The argument is that these contraceptive payments will save insurance companies money in the long run as employees using contraceptives will make fewer pregnancy-related insurance claims. In order to qualify for this accommodation, a religious organization must file a form with the government and meet the following criteria:

> 1. The organization opposes providing coverage for some or all of any contraceptive services . . . on account of religious objections.
> 2. The organization is organized and operates as a non-profit entity [which will surely be amended to include for-profit, closely held corporations after *Hobby Lobby*].
> 3. The organization holds itself out as a religious organization [which will be amended and might even be redacted after *Hobby Lobby*].
> 4. The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria [which might be eliminated after courts decide challenges under RFRA to having to file any form regarding contested contraceptives].[258]

As mentioned above, it is important to note that this workaround applied only to religious non-profit entities before the *Hobby Lobby* decision. Now that the Court allows closely held for-profit

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255 *See* 78 Fed. Reg. at 39,896.

256 Press Release, U.S. Dep't of Health & Human Servs., Administration Issues Final Rules on Contraception Coverage and Religious Organizations (June 28, 2013), http://www.hhs.gov/news/press/2013pres/06/20130628a.html.

257 *Id.*

258 45 C.F.R. § 147.131(b).

corporations to avoid the contraceptive mandate, however, HHS will need to revise these rules accordingly. There is a strong likelihood that only the first prong above will remain intact as it currently reads.

Many religious non-profit organizations, such as schools and hospitals, have objected to and filed lawsuits against this workaround.[259] These organizations argue that the mere requirement of filing a form to opt out of the contraceptive mandate is the equivalent of the employer tacitly authorizing the insurance company to provide drugs that induce abortions. Though these lawsuits are outside the scope of this Article, they constitute the next battle against the ACA's contraceptive mandate and merit close analysis as they are adjudicated.

The ACA also does not apply to any business with fewer than fifty employees in a calendar year.[260] This accommodation covers more employees than it might appear upon first glance. For example, the White House issued a report finding that "96 percent of all firms in the United States or 5.8 million out of 6 million total firms [are relieved] from any employer responsibility requirements [under the ACA]. These 5.8 million firms employ nearly 34 million workers."[261] It is important to note that the ACA requirements will apply if employers with fewer than fifty employees begin to offer health insurance plans. This reality led the government, in oral arguments in the *Hobby Lobby* case, to argue that an employer with fewer than fifty employees is not "exempt" from the contraceptive mandate at all.[262] This argument was made in part to show that the ACA is a comprehensive scheme in which uniform application of the contraceptive mandate is key to the law's success. The plaintiffs in the *Hobby Lobby* case argued that this accommodation created a large

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259 *HHS Mandate Information Central*, BECKET FUND FOR RELIGIOUS LIBERTY, http://www.becketfund.org/hhsinformationcentral/#tab4 (last visited July 28, 2014) (collecting cases and other information regarding the ACA's contraceptive mandate).

260 26 U.S.C. § 4980H(a) (2012) (stating the requirements for a "large employer"); *id.* § 4980H(c)(2)(A) (defining an "applicable large employer" as "an employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year"); *see also The Affordable Care Act Increases Choice and Saving Money for Small Businesses*, WHITE HOUSE, at 1, http://www.whitehouse.gov/files/documents/health_reform_for_small_businesses.pdf (last visited July 29, 2014) [hereinafter WHITE HOUSE REPORT] (stating that businesses with fewer than fifty employees are exempt from employer responsibility requirements).

261 WHITE HOUSE REPORT, *supra* note 260, at 1.

262 *See* Transcript of Oral Argument at 58, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354) [hereinafter Transcript of Oral Argument].

exemption that proved that the government did not have a compelling interest in all employees receiving cost-free contraceptives.[263] For purposes of fairness, this Article refers to employers with fewer than fifty employees as receiving an accommodation.

Finally, the ACA allows insurance companies to avoid some of its requirements if their insurance plans do not make any significant changes to plan terms after March 23, 2010—the date the ACA was signed into law.[264] These so-called "grandfathered plans" are allowed to provide the coverage they did prior to the ACA.[265] In addition, these plans are exempt from the duty to provide cost-free contraceptives under the contraceptive mandate (or any other women's preventive health services for that matter).[266] Grandfathered plans may remain exempt (the law provides no expiration date) and will not lose grandfathered status even if, for example, employees leave the plan, employees are added to the plan, employers change insurance providers, or insurance premiums rise within the acceptable range of medical inflation.[267] A plan will lose its grandfathered status if, for example, it eliminates substantially all benefits to diagnose or treat a medical condition (such as diabetes or HIV/AIDS), decreases the employer's contribution to the plan by more than five percent, or lowers the annual insurance coverage limit.[268]

Hobby Lobby did not fit within any of these four accommodations. It was not a religious employer such as a church, synagogue or mosque that qualified for the Religious Employer Exemption. It was not a religious non-profit entity that qualified for the workaround. The

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263 Reply Brief for Respondent at 6, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (Feb. 10, 2014) (No. 13-354), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2014/02/13-354-bs-1-copy.pdf ("[S]mall businesses with fewer than fifty employees—96% of all firms in the United States—are exempt from the ACA requirement that employers provide health insurance to their employees."); *see also id.* at 15 ("[T]he government has already granted a bevy of exceptions to the mandate, for reasons ranging from religious accommodation to administrative convenience. Having granted multiple exemptions for multiple reasons, the government cannot validly fall back on a compelling interest in comprehensiveness.").

264 42 U.S.C. § 18011(a)(2) (2012).

265 *What Does Having Grandfathered Status Mean?*, MED. MUTUAL, https://www.medmutual.com/Healthcare-Reform/The-Basics/Grandfathered-Status.aspx (last visited July 28, 2014).

266 *See* 29 C.F.R. § 2590.715-1251(a)(2)(ii) (2010) ("Being a grandfathered health plan means that your [plan or policy] may not include certain consumer protections of the Affordable Care Act that apply to other plans, for example, the requirement for the provision of preventive health services without any cost sharing.").

267 42 C.F.R. § 147.140(a)-(b), (g) (2011).

268 *Id.* § 147.140(g).

company employed more than 13,000 people, so it was ineligible for the fewer-than-50 employees accommodation.[269] Finally, Hobby Lobby's insurance plan changed after the ACA was enacted, meaning it had lost its grandfathered status.[270] To avoid providing the controversial contraceptives without facing staggering fines, paying an expensive tax, or dropping its health plan entirely, the company needed HHS to amend these accommodations or win the legal battle over its free exercise claims. The legal battle forms the substance of Part III of this Article.

III
THE *HOBBY LOBBY* CASE IN COURT

Hobby Lobby, along with five members of the Green family, sued the federal government on September 12, 2012.[271] The plaintiffs' target was the contraceptive mandate and its requirement that they violate their sincere religious beliefs and provide four types of contraceptives (Plan B, Ella, and two intrauterine devices) that they believed induced abortions.[272] The company faced the ACA's upcoming deadline of July 1, 2013, to include all twenty FDA-approved contraceptives in its health care package. Hobby Lobby had ten months to obtain a court-ordered injunction to stop the mandate's application to its policy, until the litigation was resolved.

At the crux of the lawsuit was Hobby Lobby's belief that the government provided the company with three unacceptable choices: (1) comply with the mandate, offer all twenty FDA-approved contraceptives, and violate the owners' religious beliefs, as well as the religiously-oriented company values in honoring the Lord and nurturing families; (2) ignore the mandate, exclude the four contraceptives at issue from its insurance policy and face extraordinarily large noncompliance penalties of $100 a day per affected employee (totaling around $475 million per year);[273] or (3) drop the company's health insurance plan altogether, and pay the tax

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269 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2765 (2014).

270 *Id*. at 2766.

271 Hobby Lobby Complaint, *supra* note 16, at 40.

272 *Id.* at 23.

273 26 U.S.C. § 4980D(b)(1) (2012) (describing the penalty for non-compliance with the mandate). Hobby Lobby employed around 13,000 people at the time of this decision. The total penalty for non-compliance would be around $475 million (13,000 employees x $100 penalty per day x 365 days per year = $474,500,000.00).

for failing to abide by the ACA's mandate that large employers offer ACA compliant health insurance (assessed monthly and totaling around $26 million per year).[274]

With the looming deadline less than a year away, the company asked a federal district court in Oklahoma for a preliminary injunction. The company's hope was threefold: (1) the district court would issue the injunction before the deadline, (2) Hobby Lobby would win the jury trial or the decisive appeal if the jury verdict or one of the judge's decisions came back unfavorably, and (3) these outcomes would combine to allow Hobby Lobby to avoid making one of these three unacceptable choices. The next Sections evaluate the case each step of the way, from the filing of the complaint in 2012, through the Supreme Court's decision on June 30, 2014. It is interesting to evaluate how each judge and court weighed the private interests in religious freedom that RFRA, the Free Exercise Clause, and pre-*Smith* precedent protected against the government's interest in improving women's health through the contraceptive mandate.

A. The District Court Opinion

Hobby Lobby is based in Oklahoma City, Oklahoma, and this location likely explains why the plaintiffs sued in Oklahoma.[275] The lawsuit requested a jury trial and the following: (1) a declaration that the contraceptive mandate and its enforcement against the plaintiffs violates the First and Fifth Amendments to the Constitution, (2) a declaration that HHS' enforcement of the mandate against the plaintiffs violates RFRA, (3) a declaration that the mandate violates the Administrative Procedure Act (which allows courts to stop agency action that is unlawful),[276] (4) a permanent injunction barring the

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274 *Id.* § 4980H(a), (c)(1) (describing the approximately $2,000 per year tax owed for not providing the insurance required of "large employers" under the ACA). Since Hobby Lobby employed around 13,000 people at the time of this decision, the total penalty for non-compliance under this option would be around $26 million ($2,000 x 13,000 employees = $26,000,000.00).

275 Hobby Lobby Website, *supra* note 12 ("Hobby Lobby Stores [is based] in Oklahoma City, OK . . . .").

276 *See* 5 U.S.C. § 706(2) (2012) (allowing an appellate court to "hold unlawful and set aside agency action, findings, and conclusions found to be [among other things] . . . (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . (B) contrary to constitutional right, power, privilege, or immunity . . . (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"). Hobby Lobby argued that the mandate violated the ACA, which states that no qualified health plan will be forced to provide abortions as part of its essential health benefits. *See* Hobby Lobby Complaint, *supra* note 16, at 38. The government responded to that accusation by stating

enforcement of the mandate against the plaintiffs as well as other organizations that object to the mandate on religious grounds, (5) costs and reasonable attorney's fees, and (6) further relief that the court may award if it is deemed "equitable and just."[277] The part of the plaintiffs' complaint that alleges a violation of RFRA tracks each prong of the statute and alleges, among other things, that:

1. The Greens have a *sincere religious belief* that they may not take part in any activity that would cause an abortion which includes providing coverage or access to abortion-inducing drugs;[278]
2. The four contraceptives at issue in the case may induce abortions and, therefore, the plaintiffs' sincere belief forces them to remove such contraceptives from their health insurance plan. However, such removal places a *substantial burden* on the company to choose between the religious beliefs of its founders and following the law and its substantial fines for [noncompliance].[279]
3. The mandate serves *no compelling governmental interest and is not narrowly tailored* or the least restrictive way the government can achieve its stated interests.[280]

The part of the plaintiffs' complaint that alleges a violation of the First Amendment contained both a free exercise and a free speech component. The free exercise part of the complaint makes the same allegations as the RFRA part of the complaint but adds that the mandate is not a generally applicable law because of its four large accommodations. The plaintiffs argued that the fact that so many people are left out of the mandate's reach indicates that the law was written to target religious exercise. Therefore, the Free Exercise Clause requires, under *Smith*, that the government have a compelling interest to justify its mandate and such an interest does not exist.[281] The plaintiffs' free speech violations are also interesting. Hobby Lobby alleged that the mandate would require the company to provide education and counseling "related to abortion-causing drugs and

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that it does not believe the four contraceptives at issue in the case cause abortions. *See* Transcript of Oral Argument, *supra* note 262, at 76–77 (quoting the Solicitor General as stating that the belief that these drugs cause abortions is "not the judgment that Federal law or State law reflects . . . which do preclude funding for abortions don't consider these particular forms of contraception to be abortion").

277 Hobby Lobby Complaint, *supra* note 16, at 39–40.

278 *Id.* at 29 (emphasis added).

279 *Id.* at 30 (emphasis added).

280 *Id.* (emphasis added).

281 *Id.* at 30–31.

devices."[282] It is this compelled speech, they argued, which is not a narrowly tailored compelling governmental interest and thereby violates the Free Speech Clause of the First Amendment.[283]

The federal district court in Oklahoma denied Hobby Lobby's request for a preliminary injunction.[284] Judge Joe Heaton ruled that the company had failed to demonstrate a probability of success on the merits of their First Amendment or RFRA claims, which is required to issue a preliminary injunction.[285] First, Judge Heaton held that for-profit corporations do not have free exercise rights.[286] These rights are purely personal and, therefore, only available to natural people and religious corporations in which people exercise religion.[287] The court then made the point that religious non-profit corporations are different because what happens at a religiously oriented non-profit entity is much different from what happens at a for-profit corporation.[288] Although the Greens personally possess free exercise rights, the court was unsure whether these personal rights translated to their closely held, for-profit corporation.[289] This decision was unnecessary, however, because the Greens were "unlikely to prevail as to their constitutional claims because the preventive care coverage regulations they challenge[d] are neutral laws of general applicability which are rationally related to a legitimate governmental objective."[290] Recall from *Smith* case generally applicable laws analyzed under the Free Exercise Clause merely have to pass the rational basis test whereby the government only has to show that the law is designed to further a legitimate governmental interest.[291] Since the Greens did not make the case that the mandate was unsupported

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282 *Id.* at 34.

283 *Id.* The plaintiffs also alleged that the compelled counseling would violate their First Amendment rights to expressive association because they would be forced to cooperate with other groups to provide advice on abortion-inducing drugs. *Id.* at 35.

284 Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1296–97 (W.D. Okla. 2012).

285 *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1128 (10th Cir. 2013) (recounting the preliminary injunction denial). A party requesting a preliminary injunction must also show that, absent an injunction, the party will suffer irreparable harm that outweighs any harm to the other side, and that an injunction would serve the public interest. *Id.*

286 *See Hobby Lobby*, 870 F. Supp. 2d at 1287–88.

287 *Id.* at 1288.

288 *Id.*

289 *See id.*

290 *Id.* at 1296.

291 *See* Emp't Div. v. Smith, 494 U.S. 872, 883–85 (1990).

by a legitimate governmental interest, their free exercise claim failed.[292]

The court then moved to the plaintiffs' RFRA claims; Judge Heaton opined that this part of the case presented a "closer question."[293] This close call is because RFRA presents stronger protections for religious exercise than does the First Amendment.[294] Even so, the judge held that for-profit corporations are not persons under RFRA because 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."[295] Similar to the First Amendment holding, the court stated that religious exercise "is, by its nature, one of those 'purely personal' matters . . . which is not the province of a general business corporation."[296] The judge then held that the Greens had not proved that the mandate would place a substantial burden on their religious exercise because the idea that the money that Hobby Lobby paid to insurance companies might be used down the road by a third party to receive an abortion was too attenuated to be substantial under RFRA.[297] Instead, the substantial burden requirement of RFRA must be more "direct and personal" than a mandated provision of money that might be used for contraception.[298]

B. The Tenth Circuit Panel Decision and Initial Supreme Court Appeal

Hobby Lobby appealed the district court's denial of its preliminary injunction to the Tenth Circuit Court of Appeals and asked for injunctive relief while its appeal was pending.[299] A two-judge panel

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292 *Hobby Lobby*, 870 F. Supp. 2d at 1290.

293 *Id.*

294 *Id.*

295 *Id.* at 1291.

296 *Id.*

297 *Id.* at 1293–94.

298 *Id.* at 1294.

299 Hobby Lobby Stores, Inc. v. Sebelius, 2012 U.S. App. LEXIS 26741, at *1–2 (10th Cir. Dec. 20, 2012).

of the Tenth Circuit affirmed the district court and denied Hobby Lobby's request for an injunction.[300] The panel held:

> We agree with the district court that plaintiffs failed to satisfy [the substantial likelihood of success] standard on the first element of their RFRA claim, that the challenged mandate "substantially burden[ed] [their] exercise of religion." . . . Thus, like the district court, we need not consider whether defendants have shown that the mandate is "'in furtherance of a compelling governmental interest' and 'is the least restrictive means of furthering that compelling governmental interest.'"[301]
>
> * * *
>
> [Therefore, w]e do not think there is a substantial likelihood that this court will extend the reach of RFRA to encompass the independent conduct of third parties with whom the plaintiffs have only a commercial relationship.[302]

Hobby Lobby's second loss left the company with only two arrows in its quiver. First, the plaintiffs chose to appeal the injunction to the United States Supreme Court under the All Writs Act.[303] The Court denied Hobby Lobby's request via an order from Justice Sotomayor's—an opinion she had the authority to issue on her own as the sitting "Circuit Justice" overseeing the Tenth Circuit.[304] Justice Sotomayor explained that Hobby Lobby's right to an injunction under RFRA was not "indisputably clear."[305] She also held that the issue was one of first impression and did not tip far enough in the plaintiffs' favor to overcome the difficult standard of the All Writs Act:

> This Court has not previously addressed similar RFRA or free exercise claims brought by closely held for-profit corporations and their controlling shareholders alleging that the mandatory provision of certain employee benefits substantially burdens their exercise of religion. . . . Moreover, the applicants correctly recognize that lower courts have diverged on whether to grant temporary injunctive relief to similarly situated plaintiffs raising similar claims . . . and no court has issued a final decision granting permanent relief with respect to such claims. Second, while the applicants allege they will

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300 *Id.* at *2.

301 *Id.* at *8 (citations omitted).

302 *Id.* at *9–10.

303 Hobby Lobby Stores, Inc. v. Sebelius, 133 S. Ct. 641, 642 (2012).

304 *Id.* at 643. The All Writs Act generally allows federal courts to issue court orders as a necessary and proper aid in adjudicating a case properly under the jurisdiction of the federal courts. 28 U.S.C. § 1651 (2012). *See generally* Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28 (2002) (interpreting the breadth of the All Writs Act).

305 *Hobby Lobby*, 133 S. Ct. at 643 (citation omitted) (internal quotation marks omitted).

> face irreparable harm if they are forced to choose between complying with the contraception-coverage requirement and paying significant fines, they cannot show that an injunction is necessary or appropriate to aid our jurisdiction. Even without an injunction pending appeal, the applicants may continue their challenge to the regulations in the lower courts. Following a final judgment, they may, if necessary, file a petition for a writ of certiorari in this Court.[306]

The second arrow was a long-shot appeal to the Tenth Circuit to rehear the case en banc (or in front of the entire panel of circuit judges).[307] This appeal beat the odds and was granted; the Tenth Circuit also agreed to expedite the case in consideration of the looming deadline that the mandate posed.[308]

C. The Tenth Circuit En Banc Opinion

The Tenth Circuit, sitting en banc, narrowed the case to two issues: (1) Hobby Lobby's First Amendment free exercise challenge and (2) Hobby Lobby's RFRA challenge. Judge Tymkovich wrote a majority opinion that reversed and remanded the district court opinion.[309] The majority found that Hobby Lobby qualifies as a "person" under RFRA because the law did not define the term and, therefore, the Dictionary Act definition applied.[310] The majority's reasoning was as follows:

1. The Dictionary Act includes corporations in its definition of "person."[311]
2. "[N]either the Dictionary Act nor RFRA explicitly distinguishes between for-profit and non-profit corporations . . . ."[312]
3. "[T]he Dictionary Act definition [of person] does not apply if the context [of the statute or related statues] indicates otherwise;" however, the fact that other related statutes, such as Title VII, the Americans with Disabilities Act, and the National Labor Relations Act, provide exemptions for religious

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306 *Id.* (citations omitted).

307 En banc review is extremely rare. Alexandra Sadinsky, *Redefining En Banc Review in the Federal Courts of Appeals*, 82 FORDHAM L. REV. 2001, 2004 (2014).

308 Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1125 (10th Cir. 2013).

309 *Id.* at 1147. Judges Kelly, Hartz, Gorsuch, and Bacharach joined Judge Tymkovich in the majority opinion; however, Judge Bacharach did not join the majority in its holding on the final two prongs of the preliminary injunction standard. *Id.* at 1121.

310 *Id.* at 1129.

311 *See id.*

312 *Id.*

employers evidences "that Congress knows how to" exclude for-profit corporations when it desires. It did not do so in RFRA.[313]

4. The relevant case law is not directly on point and does not discuss whether for-profit corporations may exercise religion; this makes it difficult to glean any insight on Congress' view on the matter when enacting RFRA.[314]

5. The Free Exercise Clause is not a purely personal guarantee. It protects non-profit corporations as well as un-incorporated individuals seeking a profit. It makes little sense to exclude a religious adherent merely because he chooses to incorporate his business.[315]

After concluding that Hobby Lobby qualified as a person under RFRA, the Tenth Circuit proceeded to analyze the requirements necessary to prevail under the statute—a sincere religious belief, a substantial burden on the sincere belief, a compelling governmental compelling, and least restrictive alternatives. The circuit court delineated Hobby Lobby's religious belief (that life begins at conception and must be preserved), found the belief is sincere, and determined that the contraceptive mandate substantially burdened this belief.[316] Furthermore, this substantial burden created a "Hobson's choice" between the company violating its religious belief or face staggering fines.[317]

The court moved to the next prong of RFRA—determining whether the government had a compelling interest in the contraceptive mandate. In its brief to the Tenth Circuit, the government proffered two interests it argued were compelling.[318] First, the government claimed it had a compelling interest (held as such by a federal court in another similar RFRA case) in "safeguarding the public health by regulating the health care and

313 *Id.* at 1129–30 (citation omitted) (internal quotation marks omitted).

314 *Id.* at 1131–32.

315 *Id.* at 1135–36 ("We are also troubled—as we believe Congress would be—by the notion that Free Exercise rights turn on Congress's definition of 'non-profit.' What if Congress eliminates the for-profit/non-profit distinction in tax law? Do for-profit corporations then *gain* Free Exercise rights? Or do non-profits *lose* Free Exercise rights? Or what if Congress, believing that large organizations are less likely to have a true non-profit motive, declares that non-profit entities may not have more than 1,000 employees? Would a church with more than 1,000 employees lose its Free Exercise rights? Or consider a church that, for whatever reason, loses its 501(c)(3) status. Does it thereby lose Free Exercise rights?").

316 *Id.* at 1140–41.

317 *Id.* at 1146–47.

318 Brief for Appellees at 34–41, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013) (No. 12-6294).

insurance markets."[319] As stated in Part I, the idea is that the high cost reduces contraceptive use and increases unintended pregnancies and the number of abortions. Second, the government claimed it had a compelling interest in promoting gender equality.[320] Again, as detailed in Part I, evidence shows that women of childbearing age spend sixty-eight percent more on health care costs than men.[321] The contraceptive mandate helps equalize the playing field.[322] The Tenth Circuit majority found that neither of these interests were compelling for two reasons. First, the majority held that "both interests as articulated by the government are insufficient under [this Court's precedent] because they are 'broadly formulated interests justifying the general applicability of government mandates.' And the government offers almost no justification for not 'granting specific exemptions to particular religious claimants.'"[323] Second, these interests cannot be compelling because tens of millions of people remain uncovered by the mandate.[324] More specifically, as the Supreme Court has said, "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited. . . . The exemptions at issue here would yield precisely this result: they would leave unprotected all women who work for exempted business entities."[325]

Encountering the least restrictive means prong, the Tenth Circuit determined that the proffered governmental interests in public health and gender equality—even if found compelling—would not be undermined by granting the company a partial exemption to the contraceptive mandate.[326] In the words of the majority, "Hobby Lobby . . . ask[s] only to be excused from covering four contraceptive methods out of twenty, not to be excused from covering contraception altogether. The government does not articulate why accommodating such a limited request fundamentally frustrates its goals."[327] These comments are a form of legal scolding—a statement that a party

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319 *Id.* at 35 (citations omitted) (internal quotation marks omitted).

320 *Id.* at 36.

321 *Id.* at 36–37.

322 *Id.* at 37.

323 Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1143 (2013) (citations omitted).

324 *Id.*

325 *Id.* at 1143–44 (citations omitted).

326 *Id.* at 1144.

327 *Id.*

should have or could have done more to make its case. In a footnote, the majority made this point more clearly:

> The government suggests on appeal that a limited number of women can only use the four contraceptives to which Hobby Lobby [objects]. The government did not raise this argument below nor has it provided any factual support for this claim. It is free to raise this argument below in permanent injunction proceedings.[328]

In the end, the least restrictive means prong is a very important part of the analysis, and the government should have made a stronger case. The government, in its brief to the Tenth Circuit, did touch upon the idea that it is a personal decision between a woman and her doctor to choose which type of contraceptive to use.[329] But, the argument was not made in the brief that only a limited number of women are medically able to use only the four contraceptives that Hobby Lobby excluded. The Tenth Circuit majority was looking for more.

The majority did not find fault in the fact that Hobby Lobby's position created a burden on third parties (its employees who would lose a legal entitlement to four types of free contraceptives). In fact, unlike the Supreme Court, the Tenth Circuit did not venture into solutions to this problem. The majority merely held:

> Accommodations for religion frequently operate by lifting a burden from the accommodated party and placing it elsewhere. The government itself has even taken this step with the contraceptive-coverage requirement by accommodating certain religious employers, at the expense of their employees. That is part of accommodating religion—and is RFRA's basic purpose.[330]

Two dissents were filed in the case.[331] The first, written by Chief Judge Briscoe and joined by Judge Lucero, argued that Hobby Lobby does not qualify as a "person" under RFRA, making it impossible for the corporation to establish a likelihood of success on the merits of the case.[332] More specifically, Chief Judge Briscoe wrote:

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328 *Id.* at 1144 n.19.

329 Brief for Appellees, *supra* note 318, at 38.

330 *Hobby Lobby*, 723 F.3d at 1144–45.

331 Both were opinions that concurred in part and dissented in part. *Id.* at 1163, 1178. However, the concurrence part of each opinion was on a minor legal matter in the case concerning the application of the Anti-Injunction Act—a statute barring lawsuits concerning taxes before they are collected. *See id.* at 1121 ("As to jurisdictional matters, the court unanimously holds that Hobby Lobby [has] Article III standing to sue and that the Anti-Injunction Act does not apply to this case."); *see also* 26 U.S.C. § 7421 (2012) (Anti-Injunction Act). Therefore, these two opinions are best classified as dissents from the majority's opinion on RFRA and its application to a for-profit corporation.

332 *Hobby Lobby*, 723 F.3d at 1175 (Briscoe, J., dissenting in part).

> In its eagerness to afford rights under the Religious Freedom Restoration Act (RFRA) and the Free Exercise Clause of the First Amendment to Hobby Lobby . . . the majority ignores the fundamental components upon which sound judicial decisionmaking is grounded: evidence, of which plaintiffs presented none; burdens of persuasion, which indisputably rest on the plaintiffs but which the majority effectively imposes on the defendants; and precedent, of which there is none to support the plaintiffs' novel claims under RFRA, or the new class of corporations effectively recognized by the majority. I therefore dissent from the majority's conclusion that Hobby Lobby . . . [has] established a substantial likelihood of success on the merits of [its] RFRA claims, and the majority's concomitant decision to reverse the district court's denial of plaintiffs' motion for preliminary injunctive relief.[333]

Judge Matheson penned a partial dissent whereby he would: (1) affirm the district court's preliminary injunction denial (Hobby Lobby's RFRA claim), (2) grant the Greens standing for asserting claims under RFRA and the Free Exercise Clause, "(3) reverse the district court's holding that the Greens' RFRA claim is not substantially likely to succeed and remand for reconsideration[,] and (4) affirm the district court's denial of a preliminary injunction on the plaintiffs' Free Exercise Clause claim."[334] Judge Matheson did not believe that Hobby Lobby had produced enough persuasive evidence proving that RFRA applied to for-profit corporations.[335] More specifically, he argued that corporations and their shareholders are generally seen as distinct legal entities under the law, and that Hobby Lobby had not provided enough evidence that this corporate veil should be pierced to allow Hobby Lobby to assume the Green's religious beliefs.[336] Judge Matheson would hold, however, that the Greens personally have a much better case alleging a violation of RFRA.[337] This argument held sway with only four judges on the panel, therefore, it was not part of the majority opinion.

In the end, a five-judge majority of the Tenth Circuit sitting en banc held that the district court had erred in holding that Hobby Lobby had not demonstrated a likelihood of success on its RFRA claim.[338] Three judges disagreed with that assessment and would

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333 *Id.* at 1163.

334 *Id.* at 1191 (Matheson, J., dissenting in part).

335 *Id.* at 1181–83.

336 *Id.*

337 *Id.* at 1184.

338 *Id.* at 1121–22.

have affirmed the district court's denial of the preliminary injunction.[339] The same five-judge majority held that Hobby Lobby met the irreparable harm component of the preliminary injunction standard.[340] Four of the five would have ruled for Hobby Lobby on the other two components of the standard and granted the injunction.[341] However, four judges did not constitute a majority of the eight-judge en banc panel. Therefore, the case was remanded to the federal district court in Oklahoma to "address the remaining two preliminary injunction factors and then assess whether to grant or deny the plaintiffs' motion."[342]

D. The District Court Decision on Remand

On remand and advised by the Tenth Circuit, the district court issued the preliminary injunction.[343] Judge Heaton determined that the balance of harms tilts more toward Hobby Lobby:

> [T]he government's interest in providing [Hobby Lobby's] 13,000 employees with access to all FDA-approved contraceptive methods, through their employment-based group health plans, is not insignificant. However, the bulk of the approved methods are available to them, unlike a substantial number of other employees whose plans the government has completely exempted from the contraceptive-coverage requirement of the ACA. If the injunction does not issue, Hobby Lobby . . . must either face penalties that could conceivably amount to $1.3 million/day or the violation of their newly recognized religious rights, as for-profit corporations, under RFRA. On balance, the court finds the threatened injury to the corporations if the injunction does not issue outweighs the potential harm to the government.[344]

The district court also ruled in favor of Hobby Lobby on the third prong of the preliminary injunction test—the party requesting the injunction must show that an injunction would not be "adverse to the public interest."[345] Though Judge Heaton found this issue to be a closer call, he ruled that the public has an interest in preserving the status quo while the "new and substantial questions of law and public

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339 *Id.* at 1121.

340 *Id.*

341 *Id.*

342 *Id.* at 1122.

343 Hobby Lobby Stores, Inc. v. Sebelius, No. CIV-12-1000-HE, 2013 U.S. Dist. LEXIS 107248, at *3 (W.D. Okla. July 19, 2013).

344 *Id.* at *3–4.

345 *Id.* at *4.

policy" that the contraceptive mandate raised are sorted out legally.[346] This neccessity is especially true since the corporation would face substantial penalties for non-compliance.[347] Hobby Lobby had its injunction, but the company was in fact waiting for the Supreme Court to grant certiorari and hear its case.

E. Hobby Lobby *at the Supreme Court*

The injunction was issued on July 19, 2013, and the Supreme Court granted certiorari four months later on November 26, 2013.[348] The case was consolidated with a case called *Conestoga Wood Specialties Corporation v. Secretary of the U.S. Department of Health and Human Services* (involving a very similar legal challenge but in which the Third Circuit ruled for the government)[349] and an oral argument schedule was allocated. The Court heard oral argument on March 25, 2014, and issued its decision on June 30, 2014, the last day of its October 2013 term.[350]

The *Hobby Lobby* case was the highlight of the Supreme Court's term. Just before the decision, an MSNBC article captured the moment like this: "Monday's the day. That's when the suspense of the most-watched Supreme Court case this term is expected to abate."[351] The article was titled *Every Way the Supreme Court Could Rule in Hobby Lobby*, which was impressive because the popular press seldom dissects the Court's cases in this exhaustive of a manner.

1. The Majority Opinion

In a controversial[352] 5-4 decision, the Supreme Court ruled in favor of Hobby Lobby.[353] Justice Alito authored the majority opinion and

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346 *Id.* at *4–5.

347 *Id.* at *4.

348 Sebelius v. Hobby Lobby Stores, Inc., 134 S. Ct. 678 (2013) (mem.).

349 724 F.3d 377 (3d Cir. 2013). For sake of brevity, the *Conestoga Wood* case will not be discussed in this analysis because it raised the same legal issues that can be dealt with adequately via an analysis of the *Hobby Lobby* case.

350 *Burwell v. Hobby Lobby Stores, Inc.*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/sebelius-v-hobby-lobby-stores-inc/ (last visited Nov. 19, 2014).

351 Irin Carmon, *Every Way the Supreme Court Could Rule in* Hobby Lobby, MSNBC (June 28, 2014, 3:41 PM), http://www.msnbc.com/msnbc/every-way-the-supreme-court-could-rule-hobby-lobby.

352 *See, e.g.*, Ed Silverstein, *Hobby Lobby Decision Creates Controversy About Contraception, Obamacare*, INSIDE COUNSEL (July 1, 2014), http://www.insidecounsel.com/2014/07/01/hobby-lobby-decision-creates-controversy-about-con ("The *Burwell vs. Hobby Lobby Stores, Inc.* case, which was narrowly decided by the U.S. Supreme Court,

was joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas.[354] Justice Ginsburg filed the primary dissent, in which Justice Sotomayor joined in full, and Justices Breyer and Kagan joined in part.[355] Justices Breyer and Kagan also filed a very short joint dissent.[356]

In some cases, the Supreme Court does not tip its hand as to its ruling until the reader is deeply into an opinion. For example, the Court masked its holding in the constitutional challenge to the ACA itself until the Court upheld the ACA as a tax many pages into the opinion.[357] In *Hobby Lobby*, however, Justice Alito issued a strong statement that revealed the Court's decision in the first few paragraphs:

> 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.[358]

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has led to a lot of controversy. Those who support conservative religious values champion the recently released decision, but pro-choice advocates were critical of the 5-4 ruling."); Mark Blumenthal & Ariel Edwards-Levy, *HUFFPOLLSTER: Views of Supreme Court Shift After Hobby Lobby Ruling*, HUFFINGTON POST (July 10, 2014, 5:42 PM), http://www.huffingtonpost.com/2014/07/10/supreme-court-hobby-lobby_n_5575723.html ("Although the Hobby Lobby decision was unpopular with Democrats, whose image of the Court shifted from mixed to negative after the ruling, Republicans (who were more positive about the Court to begin with) became even more positive. Favorable ratings of the Supreme Court jumped six points among Republicans, while unfavorable views rose seven points among Democrats. But the greatest change in perception of the Supreme Court came from independents. Last week, independents were more unfavorable than favorable, this week, a majority of independents are favorable." (citation omitted)).

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

354 *Id.* at 2758.

355 *Id.* Justices Breyer and Kagan joined all but Part III-C-I of Justice Ginsburg's dissent. *Id.*

356 *Id.*

357 Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2593 (2012).

358 *Hobby Lobby*, 134 S. Ct. at 2759.

The remainder of Justice Alito's opinion was structured into five parts and is best organized part-by-part in table form.

TABLE 1. The *Hobby Lobby* Decision: Part-by-Part

PART	ANALYSIS
I(A) RFRA	The majority opinion began by introducing RFRA and reiterating its broad protection of religious liberty and its legislative reversal of *Smith*.[359] Justice Alito also reiterated that RLUIPA altered the definition of religion in RFRA "in an obvious effort to effect a complete separation from First Amendment case law" and in order to define the "exercise of religion" to include "'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'"[360] The majority opinion painted RFRA, appropriately, with the broad brush that Congress intended.
I(B) THE CONTRACEPTIVE MANDATE	The opinion then introduced the ACA's contraceptive mandate, its requirements, and its history.[361] Justice Alito took care to point out each of the mandate's four major exemptions/accommodations and stated that the mandate "presently does not apply to tens of millions of people."[362] This type of argument is generally meant to indicate that the mandate is not part of a comprehensive legal scheme. The takeaway from Parts I(A)–(B) is that RFRA is a broad and comprehensive protection for religious exercise and the mandate is important but not as broad or comprehensive.
II(A) & (B) LITIGANT BACKGROUND STORIES	Justice Alito then began to tell, albeit briefly, the story of the plaintiffs in the *Conestoga Wood* case and the *Hobby Lobby* case respectively.[363] As discussed in Part I, this type of storytelling is a rare but important treat in a judicial opinion. These two sections end with a very brief sketch of the procedural history of both cases.[364]

359 *Id.* at 2760–61.

360 *Id.* at 2762 (quoting 42 U.S.C. § 2000cc-5(7)(A) (2012)).

361 *Id.* at 2762–63.

362 *Id.* at 2764.

363 *Id.* at 2764–66.

364 *Id.* at 2764–67.

PART	ANALYSIS
III(A) FOR-PROFIT CORPORATIONS & RFRA	Part III moved to the meat of the case and began to evaluate whether for-profit corporations may make legal claims under RFRA. The Court stated that RFRA was designed to extend "far beyond what this Court has held is constitutionally required."[365] This statement indicates the majority's belief that Congress intended to extend protection to individuals, to non-profit corporations, and to people who incorporate in order to make a profit. Otherwise, small business owners in particular would be put to the unfair choice: "[E]ither give up the right to seek judicial protection of their religious liberty or forgo the benefits, available to their competitors, of operating as corporations."[366] The majority claimed that corporations are merely a legal fiction created to provide protection to people.[367] In that vein, "protecting the free-exercise rights of corporations like Hobby Lobby . . . protects the religious liberty of the humans who own and control those companies."[368] In an important line from the case, Justice Alito concluded that "[c]orporations, 'separate and apart from' the human beings who own, run, and are employed by them, cannot do anything at all."[369] This was the part of the case that everyone was anticipating. How would the Justices justify, if at all, a for-profit corporation's right to exercise religion? The answer was that corporations are mere shells with the primary purpose of protecting people, and this includes protecting people's religious exercise.
III(B)(1) CORPORATIONS ARE PERSONS UNDER RFRA	The majority then spent time further proving that the term "person" in RFRA applied to corporations. The Court referred to the Dictionary Act definition of "person" as required by law and found that "[w]e see nothing in RFRA that suggests a congressional intent to depart from the Dictionary Act definition, and HHS makes little effort to argue otherwise."[370] In other words, the context of RFRA did not "indicate otherwise" in terms of defining person to exclude for-profit corporations. Justice Alito also found strength in the fact that the Court had entertained RFRA cases by non-profit

365 *Id.* at 2767.
366 *Id.*
367 *Id.* at 2768.
368 *Id.*
369 *Id.*
370 *Id.* at 2768.

PART	ANALYSIS
	corporations in the past and in HHS' concession that non-profit corporations are "persons" under RFRA.[371] He added, "[n]o known understanding of the term 'person' includes *some* but not all corporations."[372] The government's case would have been stronger if the corporate form across the board was found not to qualify for protection under RFRA. But, Supreme Court precedent interpreting the free exercise of religion has taken a different approach.
III(B)(2) CORPORATIONS EXERCISE RELIGION UNDER RFRA	Part III(B)(2) attacked the notion that corporations cannot "exercise religion" as RFRA requires. The majority reiterated that, as it proved earlier in Part III(B)(1), corporate form is not enough to reason that corporations may not exercise religion because not-profit corporations may exercise religion[373] The fact that corporations seek profit is also not enough to disqualify for-profit corporations under RFRA, because a sole proprietorship may make free exercise claims.[374] In addition, laws in all fifty states allow corporations to form "for any lawful purpose" and "modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so."[375] In fact, Justice Alito added, "[f]or-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives."[376] The majority's point was that because corporations are able to support environmental and charitable causes they are also able to exercise religion.

[371] *Id.* (citing Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 132 S. Ct. 694 (2012); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993)).

[372] *Hobby Lobby*, 134 S. Ct. at 2769.

[373] *Id.* at 2769.

[374] *Id.* at 2770.

[375] *Id.* at 2771.

[376] *Id.*

PART	ANALYSIS
III(B)(3) RFRA BROADER THAN PRE-*SMITH* LAW	Part III(B)(3) attacked the government's argument that RFRA only codified pre-*Smith* precedent and such precedent never held that for-profit corporations have free exercise rights.[377] The majority opinion stated that this argument was incorrect because: (1) RFRA has never been tied to the then-existing Supreme Court cases before *Smith*: instead, RFRA was tied to the "exercise of religion under the First Amendment" (a much broader scope);[378] (2) RLUIPA severed RFRA's definition of religion to the ties of pre-*Smith* law; (3) "the one pre-*Smith* case involving the free-exercise rights of a for-profit corporation suggests, if anything, that for-profit corporations possess such rights [to exercise religion]";[379] and (4) 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*?[380] This pre-*Smith* precedent claim was not the government's strongest argument considering the explicit text of RFRA—specifically its least restrictive means prong which played little if any part in pre-*Smith* law.
III(B)(4) COURTS CAN DETERMINE CORPORATE RELIGIOUS BELIEFS	Part III(B)(4) held that it is possible to determine the sincerity of a corporation's religious beliefs—especially the religious beliefs of a closely held corporation like Hobby Lobby. The government had argued that it would be difficult to measure the religious sincerity of a large, publicly traded corporation.[381] The Court did not disagree but argued that the Hobby Lobby case does "not involve publicly traded corporations, and it seems

377 *Id.* at 2771–72.

378 *Id.* at 2772.

379 *Id.*

380 *Id.* at 2773.

381 *Id.* at 2774.

PART	ANALYSIS
	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."[382] The Court stated that state corporate law would help determine the outcome of fights about religion among bickering corporate shareholders.[383]
IV(A) SUBSTANTIAL BURDEN	Part IV(A) moved on to discuss RFRA's requirement that the mandate substantially burdens Hobby Lobby's religious exercise. The Court held that it does substantially burden religious exercise because of the large penalties the corporation will face if it ignores the mandate.[384] Whether the burden is $475 million for ignoring the mandate or $26 million for dropping its insurance plan, the Court found both to be substantial.[385]
IV(B) HOBBY LOBBY NEED NOT ELIMINATE ITS INSURANCE POLICY	Part IV(B) attacked the argument that it might be cheaper for Hobby Lobby to eliminate its insurance and pay the $2,000 penalty per employee. The elimination of Hobby Lobby's policy would allow employees to receive their contraceptive entitlement, cost the company less (because the $26 million tax penalty would cost less than providing insurance for 13,000 employees), and, therefore, eliminate the mandate's substantial burden.[386] The Court disapproved of this argument for a number of reasons. First, it was raised by a so-called friend of the court in amicus curiae briefs, and not by the government itself in the case.[387] This is a big no-no in litigation. If you want a court to consider an issue, you must raise it in court. As Justice Alito put it: "We do not generally entertain arguments that were not raised below and are not advanced in this Court by any party . . . and there are strong reasons to adhere to that practice in these cases."[388] The problem with considering arguments not raised in court is that neither party has a fair chance to brief and argue for or against the position.

382 *Id.*

383 *Id.* at 2774–75.

384 *Id.* at 2775–76.

385 *Id.*

386 *Id.* at 2776.

387 *Id.*

388 *Id.* (citations omitted).

PART	ANALYSIS
	Further, the majority stated, even if it were to consider the argument about eliminating the insurance plan, the argument would not be persuasive because: (1) the Green family has religious reasons for offering insurance, and (2) it is not clear whether this option would actually be cheaper than providing insurance.[389] Health insurance is a valuable benefit to employees, and the company would have to increase wages in order to stay competitive in the employment marketplace.[390] This increase in wages would occur along with paying the ACA noncompliance tax and, therefore, the Court held, "it is far from clear that it would be financially advantageous for an employer to drop coverage and pay the penalty."[391]
IV(C) **COURTS SHALL NOT MEDDLE IN RELIGIOUS BELIEFS**	Part IV(C) attacked the government's argument that the use of contraceptives is too attenuated from the company's payment to cover employee insurance to matter under RFRA. The Court warned that it is not appropriate for a court to second-guess a party's religious belief as to where to draw the line at when it must refuse to facilitate abortions.[392] This distinction is a purely religious matter for the adherent to come to terms with absent governmental interference and the Court has held as much before.[393]
V(A) **ONE OF HHS' INTERESTS CONCEDED AS COMPELLING**	Part V(A) began the compelling interest and least restrictive means analysis required under RFRA. The Court stated that the government provided two very broad, compelling interests: (1) promoting public health and (2) promoting gender equality.[394] These were the same interests it proposed in the Tenth Circuit. Justice Alito stated that RFRA requires a "more focused inquiry" or, more specifically, RFRA "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened."[395] This demonstration did not happen with these two broad interests.

389 *Id.* at 2777.

390 *Id.*

391 *Id.*

392 *Id.* at 2778–79.

393 *Id.* at 2778 (citing Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707 (1981)).

394 *Id.* at 2779–80.

395 *Id.* (citations omitted) (internal quotation marks omitted).

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	The government also provided a narrower, compelling interest—to insure that women have cost-free access to contraceptives because the more expensive contraceptives become the less women use them.[396] The Court could not come to a definitive conclusion on whether this interest was compelling and, therefore, punted: "We will assume that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA."[397] It is likely that the majority conceded this prong because it was about to hold that even this interest was not the least restrictive manner of meeting the government's goals as required by RFRA.
V(B) GOVERNMENT DID NOT CHOOSE LEAST RESTRICTIVE ALTERNATIVE	Justice Alito began Part V(B) with this sentence: "The least-restrictive-means standard is exceptionally demanding . . . and it is not satisfied here."[398] And with those fourteen words, the contraceptive mandate's application to Hobby Lobby was doomed. In making this conclusion, the Court detailed two less restrictive alternatives to the mandate: (1) the government could pay for the four contraceptives to be delivered to women whose employer objects to the mandate on religious grounds, and/or (2) the workaround for religious non-profit corporations could be used for closely held for-profit corporations.[399] The Court expected the government to provide some figures as to how much paying for the contraceptives itself would cost (at least an estimate of the average cost per employee).[400] The Court also stated: "Nor has HHS provided any statistics regarding the number of employees who might be affected because they work for corporations like Hobby Lobby . . . Nor has HHS told us that it is unable to provide such statistics."[401] In the end, the majority expected HHS to make arguments for less restrictive alternatives and provide figures for such arguments. It is understandable why HHS chose not to spend much time on the issue as that would go against

396 *Id.* at 2780.

397 *Id.*

398 *Id.* (citation omitted).

399 *Id.* at 2780–82.

400 *Id.* at 2780 ("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.").

401 *Id.* at 2780–81.

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	its belief that the mandate is the most effective way to meet its interests. Importantly, the Court took no position on whether this workaround would apply to all claims by religious corporations but stated that it would work for Hobby Lobby.[402]
V(C) REBUTTING ARGUMENTS BY HHS & THE PRINCIPAL DISSENT	In Part V(C), the majority took the time to criticize a few major points of Justice Ginsburg's dissent and a few HHS arguments. The majority first took issue with the dissent's claim that a ruling for Hobby Lobby will cause religious claimants to come out of the woodwork and make RFRA claims because they do not want to pay for vaccinations or blood transfusions.[403] Justice Alito countered, "HHS points to no evidence that insurance plans in existence 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."[404] Here again the majority chastised HHS for failing to provide enough evidence for its arguments. Justice Alito continued: > 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 the least restrictive means of providing them.[405] Second, Justice Alito countered the dissent's prediction that a ruling for Hobby Lobby would lead to other religious employers attempting employment discrimination and cloaking it "as religious practice to escape legal sanction."[406] The majority claimed that the government "has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial

402 *Id.* at 2782.
403 *Id.* at 2783.
404 *Id.*
405 *Id.*
406 *Id.*

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	discrimination are precisely tailored to achieve that critical goal."[407] Third, Justice Alito countered the government's argument that the contraceptive mandate is part of a comprehensive system, like the Social Security system in *Lee*, that does not work unless as many people as possible participate.[408] The majority argued that paying taxes, as was the case in *Lee*, is much different from providing contraceptives under the mandate.[409] This is because there is no less restrictive alternative to paying taxes (chaos would ensue if taxpayers could claim exemptions from taxes on religious grounds), but there are less restrictive alternatives to requiring employers to provide contraceptives their religion forbids them from providing.[410] Finally, the majority claimed that the dissent really just had a problem with the breadth of RFRA and that the dissenters would prefer to go back to the rational basis test for generally applicable laws from the decision in *Smith*.[411] In response, Justice Alito replied, that > 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." . . . 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.[412] And, with that, Hobby Lobby's victory was secured.

In the end, the Court held that the "contraceptive mandate, as applied to closely held corporations, violates RFRA. Our decision on that statutory question makes it unnecessary to reach the First

407 *Id.*
408 *Id.* at 2783.
409 *Id.*
410 *Id.* at 2784.
411 *Id.*
412 *Id.* at 2785.

Amendment" claims.[413] The case was remanded back to the lower courts for "further proceedings consistent with this opinion."[414]

2. Justice Kennedy's Concurrence

Justice Kennedy concurred briefly to make a few points. First, he emphasized that the majority opinion considered that the government's interest in promoting the health of female employees is compelling.[415] The majority conceded this point so it could move on to the least restrictive prong, but Justice Kennedy reiterated that the Court found the interest compelling nonetheless. The majority's concession on this matter will be helpful to the government in future cases in which it proffers promoting women's health as a compelling interest. Second, Justice Kennedy made the point that the government had a less restrictive alternative in the workaround for religious non-profit corporations.[416] Justice Kennedy was not fond of the majority's statement that another less restrictive alternative in the case would be for the government to create an entirely new program to pay for the contraceptives. But, he praised the majority for not delving into the issue of whether RFRA can require the government to create a new program as a less restrictive alternative.[417] In the end, the workaround was good enough.

3. The Dissenters

As mentioned above, two dissents were filed in the case. Justice Ginsburg's dissent stands as the primary dissent because it: (1) was joined (at least in part) by four Justices, (2) contained a lengthy discussion of the dissenters' position, and (3) was referred to as such by the majority. Justice Kennedy, a member of the majority, took the rare step of referring to this opinion as a "respectful and powerful dissent."[418] Justice Ginsburg began by recoiling at what she called the "startling breadth" of the majority's decision.[419] In her opinion, the majority allowed "commercial enterprises, including corporations, along with partnerships and sole proprietorships, [to] opt out of any law (saving only tax laws) they judge incompatible with their

413 *Id.*
414 *Id.*
415 *Id.* at 2785–86.
416 *Id.*
417 *Id.*
418 *Id.* at 2785.
419 *Id.* at 2787.

sincerely held religious beliefs."[420] This conclusion is the polar opposite of the holding in *Smith*. Justice Ginsburg also found that, under the majority opinion:

> Compelling governmental interests in uniform compliance with the law, and disadvantages that religion-based opt-outs impose on others [like third parties], hold no sway . . . 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.[421]

Evaluating the substance of the Court's opinion, Justice Ginsburg opined that the majority did not "pretend" that the Free Exercise Clause authorized "religion-based accommodations so extreme."[422] Instead, it relied on a very broad reading of RFRA.[423] She exclaimed:

> 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 . . . 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.[424]

The problem to Justice Ginsburg was that 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.'"[425] The fact that the Senate let this legislation die indicated to Justice Ginsburg a congressional intent to leave health care decisions to women and their doctors.[426] She also worried that the majority opinion failed to give proper guidance to lower courts on cases in which for-profit corporations claimed their owners' religious exercise prohibited them from following the law.[427] She listed a litany of past cases in which courts would have a tough time applying the RFRA standard as interpreted by the majority: (1) an "owner of [a] restaurant chain

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420 *Id.*

421 *Id.*

422 *Id.*

423 *Id.*

424 *Id.*

425 *Id.* at 2789.

426 *See id.*

427 *Id.* at 2804.

refused to serve black patrons based on his religious beliefs opposing racial integration;"[428] (2) "born-again Christians who owned closely held, for-profit health clubs believed that the Bible proscribed hiring or retaining an 'individual[l] 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 person 'antagonistic to the Bible,' including 'fornicators and homosexuals;'"[429] and (3) a "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."[430]

In the end, Justice Ginsburg would have confined religious exemptions under RFRA to organizations formed "'for a religious purpose,' 'engage[d] primarily in carrying out that religious purpose,' and not 'engaged . . . substantially in the exchange of goods or services for money beyond nominal amounts.'"[431] For-profit corporations like Hobby Lobby, obviously, would not qualify under her test.

Justices Breyer and Kagan dissented together with a brief statement that read in its entirety:

> 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.[432]

This short dissent is very interesting because it could indicate that seven of the Court's nine Justices are willing to consider for-profit corporations as persons under RFRA. The following chart summarizes the timeline and outcome of the confusing legal proceedings in the *Hobby Lobby* case.

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428 *Id.* (citing Newman v. Piggie Park Enters., Inc., 256 F. Supp. 941, 945 (S.C. 1966)).

429 *Hobby Lobby*, 134 S. Ct. at 2804–05 (citing *In re* Minnesota *ex rel.* McClure, 370 N.W.2d 844, 847 (Minn. 1985)).

430 *Hobby Lobby*, 134 S. Ct. at 2805 (citing Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013)).

431 *Hobby Lobby*, 134 S. Ct. at 2805–06 (citation omitted).

432 *Id.* at 2806.

TABLE 2. The *Hobby Lobby* Case: Timeline and Outcomes

PROCEEDING	DATE OF DECISION	COURT	OUTCOME
Hobby Lobby sues HHS & requests preliminary injunction	Sept. 12, 2012 (Lawsuit filed) November 19, 2012 (Opinion handed down)	District Court for the Western District of Oklahoma	Injunction denied
Hobby Lobby appeals the denial of the preliminary injunction	December 20, 2012	Tenth Circuit Court of Appeals	Denial of injunction affirmed by two-judge panel
Hobby Lobby appeals the denial of the preliminary injunction	December 26, 2012	United States Supreme Court	Denial of injunction affirmed (in chambers opinion by Justice Sotomayor)
Hobby Lobby requests en banc consideration of its request for injunction	June 27, 2013	Tenth Circuit Court of Appeals	Case remanded to district court to review all three factors of preliminary injunction standard
Case remanded to district court	July 19, 2013	District Court for the Western District of Oklahoma	Preliminary injunction issued
Supreme Court grants certiorari	November 26, 2013	United States Supreme Court	Oral argument & briefing scheduled
Supreme Court issues its decision	June 30, 2014	United States Supreme Court	Hobby Lobby wins & case remanded to implement decision

The final substantive part of this Article discusses the major ethical issues spun off from the *Hobby Lobby* decision. This analysis will take into consideration the stories of the litigants, the history of religious freedom in America, the case and statutory law governing the field, and the court decisions in the case.

IV
ETHICAL IMPLICATIONS OF THE *HOBBY LOBBY* DECISION

The Supreme Court made the right decision to grant certiorari in the *Hobby Lobby* case. The Court was the only body able to bring clarity to the very difficult and increasingly relevant legal dilemma of whether closely held, for-profit corporations are covered by RFRA and whether the mandate substantially burdened religion. The Court's decision also seems appropriate considering: (1) the important place religious exercise holds in the fabric of America, today and historically, (2) the broad brush with which Congress painted RFRA, and (3) the fact that Hobby Lobby's employees will still receive sixteen of the twenty FDA-approved contraceptives at no cost. Another plus is that Congress remains free to amend RFRA and its definition of religion if a majority of legislators are dissatisfied with the judicial outcome. The *Hobby Lobby* decision should be somewhat palatable to the government as well because women still receive contraceptives at no cost under the Religious Non-Profit Workaround (which now needs a new name).

The case did, however, create a myriad of new legal dilemmas. For example, what happens when one shareholder—a person of faith—takes control of a public corporation and desires to remove these same four contraceptives from the company's insurance plan? The majority opinion in *Hobby Lobby* confines the immediate holding to closely held corporations and claims that corporate giants are unlikely to make RFRA claims. But, what if the day comes that someone akin to David Green (someone worth five billion dollars or so) buys a majority stake in a public company? In addition, it remains to be seen what is left of the *Smith* precedent now that individuals, non-profit corporations, sole proprietorships, and for-profit corporations are covered by RFRA. Does that groundbreaking case now have any contemporary relevance when religious adherents can file a claim under a statute that broadly protects their religious exercise? It is very likely that, in the near future, a slew of law review articles will tackle these legal dilemmas and others in depth. The legal community and popular press are already abuzz with analysis of the legal controversies stemming from the case.

The final substantive part of this Article takes a different approach and will evaluate a few major ethical dilemmas created by the Court's *Hobby Lobby* decision. These ethical dilemmas deal with concepts such as consequences, the greatest good for the greatest number, the duty of a person or a corporation in a society, the means one takes to

accomplish a goal, and the virtues that lead to happiness. These dilemmas are also ethical in nature, as they do not rely on the law for guidance, and because legal precedent does not control the search for the truth. In other words, this Part will take a refreshing look at a controversial legal case. In the end, this Part does not endeavor to answer these ethical questions. That is a task for another article and another day. The goal is to create a roadmap that lays out some of the most important ethical dilemmas facing the nation post-*Hobby Lobby*.

Each Section below will present the dilemma using language from the Court's *Hobby Lobby* opinion. Then, the dilemma will be rephrased in a shorter and more general fashion. Each Section will then analyze the major positions on both sides of the ethical dilemma.

A. Ethical Dilemma #1: The Devout Corporation Dilemma

1. The Language from the Hobby Lobby *Opinion*

> As we will show, Congress provided protection for people like the . . . 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 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. . . . And protecting the free-exercise rights of corporations like Hobby Lobby . . . protects the religious liberty of the humans who own and control those companies. . . . [It has been argued that:] "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." . . . 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.[433]

[433] *Hobby Lobby*, 134 S. Ct. at 2768 (citing Conestoga Wood Specialties Corp. v. U.S. Dep't of Health and Human Servs., 724 F.3d 377, 385 (3d Cir. 2013)).

2. The Resulting Ethical Dilemma

The dilemma posed by this statement can be phrased a few different ways: first, may a corporation actually exercise religion? Or, is it ethical for the people who own corporations to transpose their religious beliefs onto the corporation as its official religious beliefs?

This dilemma stirred up emotions on both sides of the *Hobby Lobby* debate. If one can get beyond the entirely one-sided arguments,[434] this dilemma actually presents a very difficult question from many non-legal perspectives. From the philosophical perspective, what does it mean to be religious? Is religion relegated to the human mind? Are corporations merely an extension of the minds of the humans who own them? From the theological perspective, does it matter the form in which someone practices religion? Does God care if owners of a corporation play Christian music for their customers? Would God be upset if a religious owner did business on the Sabbath or provided money for contraceptives that might end a human life? From a relational perspective, how important is it for religious people to express their beliefs at home and in the workplace? This ethical dilemma can be styled the "Devout Corporation Dilemma." Two positions emerge on either side of this dilemma, and this Section analyzes them in turn.

a. The "Religion as Inherently Human" Position

The basis of this position is that religion is reserved for rational, thinking human beings. It is as impossible for an animal to believe in God as it is for a legal fiction such as a corporation. This position has three primary arguments, and each will be discussed in turn.

First, religion is a very personal matter and only makes sense if contemplated in the mind of a rational human being. For example, only human beings pray, worship, attend religious services, and

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434 *See, e.g.*, Sen. Marc Begich, *My Turn: Hobby Lobby Decision Should Outrage Alaskans*, JUNEAU EMPIRE (July 24, 2014, 12:05 AM), http://juneauempire.com/opinion/2014-07-24/my-turn-hobby-lobby-decision-should-outrage-alaskans#.U9l20ahHuKY ("In late June, a narrow majority of five male [J]ustices issued an opinion . . . in which for-profit companies challenged the guarantee that women receive health insurance coverage of birth control of her choice without cost-sharing. As Alaskans, we don't want the government intruding into our lives and telling us how to make personal decisions. Bosses should not be able to dictate family planning and birth control options for Alaska women. . . . The simple fact that 99 percent of women will use contraceptives at some point in their lives shows just how out-of-touch this decision is. As a result of the Hobby Lobby case, more than 60,000 Alaska women could be denied access to the affordable birth control and reproductive care options that work best for them.").

believe in a higher power. Corporations cannot physically undertake these solemn religious rights. Instead, a corporation is merely an "artificial being, invisible, intangible, and existing only in contemplation of law" and is, therefore, unable to possess such an inherently "human" right.[435] Justice Ginsburg touched on this position in her *Hobby Lobby* dissent stating, "the exercise of religion is characteristic of natural persons, not artificial legal entities."[436] Advocates for this position harken back to James Madison who said:

> [W]e hold it for a fundamental and undeniable truth "that religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction . . . ." The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.[437]

One hang-up for this position is that religious non-profits are treated more closely to a religious individual than a for-profit corporation. The majority made this point in the case—the corporate form cannot be the reason for treating non-profits and for-profits differently, so is the profit motive enough? The "Religion as Inherently Human" position would not classify religious non-profits as exercising religion but would claim that religious people associate with them in order to practice religion in a communal setting. As Judge Heaton found in denying Hobby Lobby's preliminary injunction, this is just not the case with for-profit corporations.

The second primary argument posited by this position is that allowing corporations to exercise religion opens the door for fraudsters and profiteers to come out of the woodwork. After *Hobby Lobby*, owners of for-profit businesses now have an incentive to claim a religious exemption to many generally applicable laws. Some of these claimed burdens will be sincere, as was the case with Hobby Lobby, while others will surely be insincere. These fraudsters will make the religious case, but the real reason behind their complaints will be the fact that these generally applicable laws hamper their profits or make business transactions more burdensome. This issue becomes more relevant when one recognizes that closely held businesses employ around fifty-three percent of all working

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435 *Conestoga Wood Specialties Corp*., 724 F.3d at 385 (citations omitted) (internal quotation marks omitted).

436 *Hobby Lobby*, 134 S. Ct. at 2794.

437 MADISON, *supra* note 76.

Americans.[438] A rash of insincere claims by these owners will mean that many millions of employees will be negatively affected by people taking advantage of the *Hobby Lobby* precedent.

Third, the very point of the corporate form is to allow the owners of a corporation to separate and protect themselves from the liability of the corporation when things go wrong. Incorporating allow owners to become rich if the company succeeds but remain protected from losing everything if the company incurs a great deal of debt, makes mistakes, or fails.[439] Owners of corporations are protected because, in a bankruptcy or after winning a judgment, creditors can generally go after the assets of a business but not the personal assets of its owners. This protection is referred to as the corporate veil, and it has been historically difficult to pierce. The only way this works is if the owner and the corporation are seen as separate entities. The Supreme Court took this separate entities position in a case involving Don King, the famous boxing promoter:

> [L]inguistically speaking, the employee and the corporation are different "persons," even where the employee is the corporation's sole owner. After all, incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs.[440]

The "Religion as Inherently Human" position posits that it is unethical for business owners to take advantage of the separation from their corporation when desirable (to protect their assets from creditors or for tax purposes) and then reunite when free exercise of religion works in their favor. Indeed, if the veil may be pierced in religious exercise cases (in other words, if the owners and the corporation are seen as united) might it also be the ethical course for courts to pierce the veil more easily to accommodate creditors?

b. The "Corporate Conduit" Position

Justice Alito took this position in his majority opinion in the Hobby Lobby case. The general idea is that a corporation exists merely to do

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438 Alison Griswold, *How Many People Could the* Hobby Lobby *Ruling Affect?*, SLATE (June 30, 2014, 2:32 PM), http://www.slate.com/blogs/moneybox/2014/06/30/hobby_lobby_supreme_court_ruling_how_many_people_work_at_closely_held_corporations.html.

439 *See* Lawrence E. Rafferty, *Corporate Veil and Hobby Lobby* (July 13, 2014), http://jonathanturley.org/2014/07/13/corporate-veil-and-hobby-lobby/.

440 Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163 (2001).

what a majority of its shareholders desire. In fact, a corporation cannot legally act outside of the will of a majority of its owners. In other words, a corporation is nothing more than a conduit that makes it easier, safer, and more efficient to conduct business. The beliefs and opinions of the owners travel through and are expressed by this conduit. For example:

> If the majority of stockholders decide that a corporation should publicize speech on political or moral issues, then the corporation will engage in such speech on their behalf. Similarly, stockholders can use corporations to adhere to a variety of secular moral principles. Some corporations boycotted apartheid South Africa because of the stockholders' moral abhorrence of racism. If people can and do use publicly traded corporations to speak out on political issues or adhere to secular moral principles, then the same goes for religious principles. For example, the majority stockholders of a firm may choose to adhere to Orthodox Jewish religious law, and therefore refuse to do business on the sabbath [sic].[441]

One of the strongest arguments in favor of this position is that corporations need not seek profit as their only or even one of their primary goals. It is both ethical and legal for the owners to require that their corporation seek other goals, such as social responsibility. And many corporations in America have attempted to be good corporate citizens.[442] For years, American business schools have been teaching this idea and referring to it as Corporate Social Responsibility, or the Triple Bottom Line.[443] In general, these names refer to the idea that corporations should seek profits, return on investment and shareholder value while also remaining conscious of the effects of corporate activity on the environment and the larger

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441 Ilya Somin, *Can People "Exercise Religion" Through Publicly Traded Corporations?*, VOLOKH CONSPIRACY (July 12, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/07/12/can-people-exercise-religion-through-publicly-traded-corporations/ (citing and elaborating on an argument by David Post who had engaged in a debate over this issue).

442 *See Analysis Grades Sustainability Reporting of 120 Companies*, RELIABLE PLANT, http://www.reliableplant.com/Read/17733/analysis-grades-sustainability-reporting-of-120-companies (last visited Nov. 19, 2014).

443 *See* Cindy Tickle, *Top Business Schools Integrating Corporate Social Responsibility*, UNIV. OF NOTRE DAME (Oct. 22, 2009), http://business.nd.edu/news_and_events/mendoza_in_the_news/article.aspx?id=4543 (listing the top ten American business schools focused on corporate social responsibility in 2009–10).

community.[444] In other words, a corporation should seek to be profitable as well as environmentally and socially responsible.

Some corporations have been on the cutting edge of social change in terms of labor standards in countries used to produce goods and source materials.[445] Other companies have strong environmental policies to reduce waste and carbon emissions into the atmosphere.[446] Corporate shareholders have joined together to lead movements to force their corporations to pay more attention to social and environmental concerns.[447] Others have joined the fair-trade movement, which "adds its brand to products that have been produced and traded in an environmentally and socially 'fair' way."[448] Though debate exists in the literature, many business leaders argue ardently

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444 *See Triple Bottom Line*, ECONOMIST (Nov. 17, 2009), http://www.economist.com/node/14301663. The creator of the concept was John Elkington. *See generally* JOHN ELKINGTON, CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF 21ST CENTURY BUSINESS (New Society Publishers 1998).

445 *See, e.g.*, *Participating Companies*, FAIR LABOR ASS'N, http://www.fairlabor.org/affiliates/participating-companies (last visited July 31, 2014) ("As part of FLA, some of the world's leading brands have committed to ensuring fair labor practices and safe and humane working conditions throughout their supply chains. Companies that have committed to FLA's Code of Conduct and established systems to identify and remedy ethical violations are making significant strides towards that goal. These companies are working with FLA to develop and improve social compliance systems that flag issues and lead to sustainable solutions when workers are at risk. Companies join the FLA on a voluntary basis, but they must meet strict labor standards for as long as they are affiliated. FLA holds Participating Companies accountable for monitoring 100% of their own supply chains . . . .").

446 *See, e.g.*, Kamelia Angelova & Jay Yarow, *The 15 Best Companies for the Planet*, BUS. INSIDER (Sept. 23, 2009, 8:37 AM), http://www.businessinsider.com/the-15-best-companies-for-the-environment-2009-9?op=1 ("Here's the 15 best companies for the environment based on a complicated methodology that assessed environmental impact, green policies and reputation. Newsweek came up with the rankings after working with environmental consultants for over a year.").

447 *See, e.g.*, *About* ICCR, INTERFAITH CTR. FOR CORPORATE RESPONSIBILITY, http://www.iccr.org/about-iccr (last visited July 30, 2014) ("The Interfaith Center on Corporate Responsibility is a coalition of faith and values-driven organizations who view the management of their investments as a powerful catalyst for social change. Our membership comprises nearly 300 organizations including faith-based institutions, socially responsible asset management companies, unions, pension funds and colleges and universities that collectively represent over $100 billion in invested capital.

ICCR members and staff engage hundreds of multinational corporations annually to promote more sustainable and just practices because we believe in doing so they will secure a better future for their employees, their customers and their shareholders.").

448 *Triple Bottom Line*, *supra* note 444 ("From small beginnings, the movement has picked up steam in the past five years. Nevertheless, the Fairtrade movement is still only small, focused essentially on coffee, tea, bananas and cotton, and accounting for less than 0.2% of all UK grocery sales in 2006.").

that being a socially responsible corporation is also profitable.[449] For example, a recent study shows that a person's "willingness to buy, recommend, work for, and invest in a company is driven 60% by . . . perceptions of the company—or it's reputation, and only 40% by . . . perceptions of the products or services it sells."[450] Prominent companies have gone down this path and received international acclaim:

> Ben and Jerry's ice cream offers one prominent example; the company uses only fair trade ingredients and developed a dairy farm sustainability program in its home state of Vermont. Starbucks has created its C.A.F.E. Practices guidelines, which are designed to ensure the company sources sustainably grown and processed coffee by evaluating the economic, social and environmental aspects of coffee production. Tom's Shoes, another notable example of a company with CSR at its core, donates one pair of shoes to a child in need for every pair a customer purchases.[451]

It is a mainstream belief that corporations act ethically when they seek a corporate conscience—especially when it comes to the environment and social causes. However, this so-called corporate conscience is not found in the building in which the corporation is based or on the piece of paper that authorizes it to do business. Instead, the corporate conscience belongs to the people that own the corporation and possess the beliefs that the corporation expresses. These people employ their corporation as a conduit to express their beliefs.

Because corporate responsibility is accepted, and even praised, it would make little sense for the corporate conscience to be inapplicable to other beliefs such as religion. In other words, if a company is allowed to publicly express its belief in a clean environment, fair labor practices, or fair-trade products publicly, then it must also be allowed to express its religious beliefs publically. Similarly, if an employer is allowed to impose a reasonable environmental footprint policy regarding climate change on its

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449 *See, e.g.*, Donna Fenn, *Shhh, It's a Secret: Being Socially Responsible Pays Off*, CBS NEWS (May 11, 2011, 8:20 AM), http://www.cbsnews.com/news/shhh-its-a-secret-being-socially-responsible-pays-off/.

450 Jacquelyn Smith, *The Companies with the Best CSR Reputations*, FORBES (Oct. 2, 2013, 11:59 PM), http://www.forbes.com/sites/jacquelynsmith/2013/10/02/the-companies-with-the-best-csr-reputations-2/ (citing a study by the Reputation Institute).

451 Nicole Fallon, *What is Corporate Social Responsibility?*, BUS. NEWS DAILY (Feb. 27, 2014, 10:16 AM), http://www.businessnewsdaily.com/4679-corporate-social-responsibility.html.

employees,[452] then it also must be ethical for an employer to impose reasonable policies influenced by religion on its employees. Otherwise, the distinction begins to look like ideological and political warfare instead of a principled stance based on ethics.

Another important ethical argument on this side of the debate is the one that the Green family made in the *Hobby Lobby* case—the idea of a calling to a vocation. Because many religious people see their faith as infused into every area of their life, it is unacceptable for the law to force them to feign faithlessness in the workplace. In other words, it is unfair to allow people to incorporate as a non-profit or sole proprietorship and exercise their religion as they wish but then take that right away merely because the same people undertake the same conduct under a for-profit structure. Green expressed this position well: "You can't have a belief system on Sunday and not live it the other six days."[453]

B. Ethical Dilemma #2: The Third Party Problem

1. The Language from the Hobby Lobby *Opinion (Justice Ginsburg in Dissent)*

> 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 . . . or dependents of persons those corporations employ.[454]

2. The Resulting Ethical Dilemma

Is it ethical for a corporation to impose its religious beliefs on third parties (i.e., its employees)—especially employees who do not agree with the corporation's religious beliefs? What about when the corporation's religious beliefs cause its employees to involuntarily lose a government-granted entitlement?

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[452] *See Corporate Environmental Policy*, MCGRAW-HILL COS., http://www.mcgraw-hill.com/Content/cr/environmental-policy.pdf (last visited July 30, 2014) (discussing measures the company is taking to reduce its impact on climate change, and stating that the company will continue "to engage employees through programs such as the Green Teams and Personal Sustainability Practice (PSP) module to reduce the Corporation's environmental footprint").

[453] Brian Solomon, *David Green: Biblical Billionaire*, FORBES, Oct. 8, 2012, at 116, 118, *available at* http://www.forbes.com/sites/briansolomon/2012/09/18/david-green-the-biblical-billionaire-backing-the-evangelical-movement/.

[454] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2787 (2014).

Employees who work for corporations are forced to follow the organization's rules all the time. Oftentimes, these rules take something of value from an employee. For example, some workplace rules require employees to wear uniforms they would prefer not to wear. Some employees might feel that this takes away their dignity. Other workplace rules forbid employees from conducting personal matters of any kind while at work. Some employees might feel that this takes away some of their freedom. Though there are lines, employers are granted a lot of leeway to tell employees what to do in return for a paycheck.

Under the ACA, the government granted employees of large employers (fifty or more employees) the right to cost-free contraceptives. This is an entitlement (in this case, a right to benefits granted by the government) that Hobby Lobby took away, perhaps only in small part, by removing four controversial contraceptives[455] from its health insurance policy. The dilemma becomes whether it is ethical for an employer to take away a governmental provided entitlement granted to an employee (a third party or bystander in the dispute between the company and the government) based solely on the employer's religious beliefs. This ethical dilemma can be called the "Third Party Problem."

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[455] *See* Brief for 67 Catholic Theologians and Ethicists as Amici Curiae Supporting Respondents, Sebelius v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356), at 11 ("[T]he Catholic faith views the destruction of a human embryo at any time before conception-including during 'the interval between conception and implantation of the embryo' . . .-as an abortion, and gravely wrongful." (citation omitted)); *see also* Brief for Catholic Med. Ass'n as Amici Curiae Supporting Respondents, Sebelius v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354), at 2 ("Amicus opposes [the government's] requirement that [Hobby Lobby] and other employers provide drugs and devices that can operate post-fertilization by preventing the implantation of existing human embryos in the endometrium, thereby terminating the pregnancy and killing the embryo."). *But see* Brief for Physicians for Reproductive Health et al. as Amici Curiae Supporting Petitioners, Sebelius v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354), at 10 ("Abortificient has a precise meaning in the medical and scientific community and it refers to the termination of a pregnancy. Contraceptives that prevent fertilization from occurring, or even prevent implantation, are simply not abortifacients regardless of an individual's personal or religious beliefs or mores.").

a. The "Religion as Cornerstone" Position

This posits that freedom of religion is a fundamental right that has played a pivotal role in American greatness.[456] Freedom of religion encompasses "not only the right to believe (or not to believe), but also the right to express and to manifest religious beliefs. These rights are fundamental and should not be subject to political process and majority votes."[457] Buttressing this argument is the fact that the first words of the First Amendment to the Constitution deal with religious freedom.

Subsequently, in RFRA, Congress sketched out even more expansive protections for religious beliefs and religious actions—even when in conflict with laws meant to serve the greater good. RFRA was passed almost unanimously because the American public recognized that the *Smith* decision, and its diminution of religious freedom, was at odds with the principle of religious exercise as a fundamental right. The most logical conclusion is that Congress acted swiftly and decisively on RFRA because it knew it had a duty to right this wrong. Because religious freedom is so important to the fabric of the American experiment, protecting religion often trumps the rights of other parties.

To summarize, this position holds that religious exercise is so important that, in a balancing test between freedom of religion on one side and an important governmental interest on the other, it will be extraordinarily difficult to tip the scales away from religion. This is true even if the required accommodations cause disruptions to the ordering of society through generally applicable laws. This side of the debate sees nothing unethical with a bias toward religious freedom. In fact, the Tenth Circuit expressed this position in its opinion on Hobby Lobby's injunction request:

> Accommodations for religion frequently operate by lifting a burden from the accommodated party and placing it elsewhere. The government itself has even taken this step with the contraceptive-coverage requirement by accommodating certain religious employers, at the expense of their employees. That is part of accommodating religion—and is RFRA's basic purpose.[458]

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456 *Cf. The ACLU and Freedom of Religion and Belief*, AM. CIVIL LIBERTIES UNION, https://www.aclu.org/religion-belief/aclu-and-freedom-religion-and-belief (last visited July 31, 2014).

457 *Id.*

458 Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1144–45 (10th Cir. 2013).

b. The "Third Party Rights" Position

This position encapsulates the old adage that your right to swing your arms stops at the place where my nose begins.[459] Or, in terms of religious freedom, a person's freedom of religion stops when the religious practice begins to injure third parties. This is the position that the federal government spent the most time advocating for at oral argument in the Supreme Court. The Solicitor General kept pounding the point that Hobby Lobby was allowed to act on its religious beliefs concerning the facilitation of abortion, but the company's decision to drop the four controversial contraceptives crossed the line. To hold otherwise, the Solicitor General argued, would cause the Court to find itself, "skating on thin constitutional ice."[460] Solicitor General Verrilli quoted Justice Jackson, who advocated for the "Third Party Rights" position:

> Limitations which of necessity bound religious freedom begin to operate whenever activities begin to affect or collide with the liberties of others or of the public. Adherence to that principle is what makes possible the harmonious functioning of a society like ours, in which people of every faith live and work side by side.[461]

Third Party Rights adherents would advocate that the "real-world effect of giving corporations religious rights under RFRA or the First Amendment is not to deepen the corporations' personal relationship with God, but to give their owners and managers the power to impose their religious and political beliefs on their employees."[462] Allowing this power imbalance is an unethical decision regardless of how the Supreme Court ruled on it as a legal matter.

Justice Ginsburg proved to be a proponent of this position in her *Hobby Lobby* dissent. It is interesting that her position did not change even though the third parties she alleged were injured by Hobby Lobby's religious beliefs still received contraceptives at no cost, except for the four FDA-approved methods that Hobby Lobby objected to providing (Plan B, Ella, and copper and hormonal IUDs).

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459 Zechariah Chafee, *Freedom of Speech in Wartime*, 32 HARV. L. REV. 932, 957 (1919).

460 Transcript of Oral Argument, *supra* note 262, at 43.

461 *Id.* at 41.

462 Jamie Raskin, *The Gospel of Citizens United: In Hobby Lobby, Corporations Pray for the Right to Deny Workers Contraception*, PEOPLE FOR THE AM. WAY, http://www.pfaw.org/media-center/publications/gospel-citizens-united-hobby-lobby-corporations-pray-right-deny-workers-co (last visited July 30, 2014).

Justice Ginsburg was not looking at the ends produced by the Court's decision. Rather, she disagreed with the means the Court used to weight religious freedom more heavily than third party rights. Although she did not articulate the point in her dissent, she might argue that there will come a day when religious freedom will trump a compelling governmental interest, and the injured third parties will not be made whole as they were in the *Hobby Lobby* case.

C. Ethical Dilemma #3: Is It Ethical for Government to Challenge Religious Beliefs?

1. The Language from the Hobby Lobby *Opinion*

> The [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. Arrogating the authority to provide a binding national answer to this religious and philosophical 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. . . .
>
> [The Greens] 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 . . . is to determine" whether the line drawn reflects "an honest conviction."[463]

2. The Resulting Ethical Dilemma

Does the government act ethically by judging the sincerity or importance of a religious belief in an attempt to structure society in an orderly manner and protect the public via laws of general applicability? This dilemma can become very complex when the government attempts to organize society via generally applicable laws and religious adherents strenuously object and ask for an accommodation. The government, as the only party in the dispute with the power to grant an accommodation, is then forced to ponder issues such as whether the religious belief is really important enough to the adherent to merit an exemption or close enough in proximity to

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[463] *Hobby Lobby*, 134 S. Ct. at 2778–79.

substantially burden religion. But is it even ethical for the government to evaluate religious beliefs at all? Is that not an issue best left between the adherent and her religious organization and doctrine? Or, is the most ethical decision to make all religious adherents prove only that their belief is sincere and then receive automatic accommodations? This latter conclusion seems wrong as people could feign religiousness to escape regulation or could create chaos in the system by opting out en masse. On the other end of the scale, must the government act ethically only by ensuring that the system it uses to grant or deny accommodations operates fairly?

Tensions of this nature arose in the *Hobby Lobby* case when the government argued that the money the company spent on health care was too attenuated in time and circumstance from an employee's eventual decision to have an abortion to matter. This is a sensitive question and there are two positions on this issue. This Section discusses them both.

a. The "Government Must Govern" Position

This position is basically a rehashing of Justice Scalia's majority opinion in *Smith*. The idea is that government needs to be able to govern effectively and efficiently using generally applicable laws. The taxpayers that support the government deserve no less. While any targeting of religion is per se unethical, there will be times when religious freedoms butt heads with laws that treat everyone the same and have no bias against religion.

This position argues that it is ethical for the government to refuse to accommodate religion in these cases in order to structure society in an orderly way and protect the public from harm. In essence, this is a utilitarian argument whereby the ethical choice is the one that produces the greatest good for the greatest number of people. There are more people in society who benefit from generally applicable laws than there are religious adherents who suffer. Consequently, generally applicable laws typically promote the greatest good for the greatest number, and supporting them over religious freedom, which will benefit fewer people, is the ethical choice. In order to make this utilitarian calculus and determine who will be hurt and who will be helped, the government must have the ability to evaluate religious beliefs.

As noted above, this position was advocated in *Hobby Lobby* when the government argued that the decision to use one of the four

controversial contraceptives was far too attenuated to implicate the corporation in any potential abortion. The argument was that Hobby Lobby only paid money to a plan provider under certain terms to cover certain medicines and procedures. What the employees then decided to do with the benefits of their health insurance occurred later in time and was a personal matter between patients and their doctors. The contraceptive mandate is nothing more than a generally applicable law that benefits thousands of employees. On the other hand, a decision for Hobby Lobby benefits only the five members of the controlling ownership group. The most ethical choice, therefore, would have been for a court to conduct this analysis and rule against Hobby Lobby.

b. The "Let Religions Ponder Religion" Position

This position claims that the government has no right to determine whether a person's religious beliefs are accurate, central to a particular adherent's religion, or too attenuated to be substantially burdened. At most, to prevent fraudulent claims, the government may look into whether a religious belief is sincerely held. Beyond sincerity, any evaluation of religious belief must be left to the religious adherent to ponder, perhaps in consultation with other adherents or an official religious body.

Supporters of this position would argue that, in the *Hobby Lobby* case, the government had no right to make any claim as to whether the Greens' religion (evangelical Christianity) actually advocated that any of the four controversial contraceptives facilitated an abortion. Further, the government had no right to determine that the circumstances were too remote for the Greens' religion to actually believe that the company was facilitating abortions through its health plan. This is, pure and simple, an assessment that the Greens must make in consultation with their religious texts and church doctrine, other religious adherents, and church leaders. The "Government Must Govern" position is less ethical because religious people must be allowed to ponder and come to conclusions on the real-world implications of their religious beliefs for themselves.

CONCLUSIONS AND CALL FOR FURTHER RESEARCH

The *Hobby Lobby* case is a tale of two parties with powerful stories. Hobby Lobby is a closely held business controlled by a sincerely religious family and run according to Christian principles.

David Green found his calling in Hobby Lobby and endeavored to share the Christian message to the widest audience possible. To this end, he closes his stores on Sunday (the Sabbath day for many Christians) so his employees can celebrate their religions and spend time with their families. In addition, he donates "as much money to evangelical causes as anyone alive,"[464] plays religious music in Hobby Lobby stores, and avoids stocking or transporting products that might reflect poorly on his Christian outreach. No one in the litigation made the argument that any of the owners of Hobby Lobby possessed anything other than sincere religious beliefs. When the company argued that the four contraceptives at issue violated their religious beliefs, they meant it.

The federal government told the story of a nation in desperate need of drastic health care reform. American women, in particular, need help as they pay more for preventive care than men. Studies show that these costs cause women to utilize such care (including contraceptives) less than they should. The Affordable Care Act remedies this problem by shifting contraceptive costs from employees to employers. Because of the sensitive nature of the issue, the government was forced to exempt or accommodate certain religious groups from the contraceptive mandate. Other accommodated parties such as employers with fewer than fifty employees and grandfathered insurance plans were also excluded from the mandate leaving tens of millions of Americans outside of its reach.

This Article then described how the country began to place a special emphasis on religious freedom soon after its settlement in the 1600s and 1700s. Government favoring of religion was expressly eliminated from consideration in the First Amendment while freedom of conscience was protected. These protections were widely celebrated. However, the First Amendment's Free Exercise Clause is vague and does not define the term religion or what it means to exercise religion. This omission left the issue of interpreting its meaning to Congress and the courts. Judges initially interpreted the Free Exercise Clause narrowly; courts reasoned that the government needed to be able to operate without a myriad of accommodations granted to religious adherents. With this narrow interpretation, the government was granted the freedom to enact anti-polygamy laws, Social Security laws, military conscription laws, Sunday closing laws,

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464 Solomon, *supra* note 453, at 122.

Social Security identification requirements, prison regulations, and state taxation of products sold by a religious organization.

This narrow interpretation was expanded in the mid-1900s when the Supreme Court subjected laws burdening religion to a balancing test that tipped in favor of religious freedom. Judges would balance the substantial burden on a religious adherent with the government's interest in the regulation. A governmental interest needed to be compelling and narrowly tailored to pass judicial scrutiny. The sea change in freedom of religion case law came in *Smith*, where the Supreme Court held that the government only needed a rational basis to enact laws of general applicability—even if these laws substantially burdened religious exercise. Congress reacted to the public outrage against the *Smith* decision and enacted RFRA in near unanimous fashion. Congress stated that this statute protected religious freedom in a broad manner. For parties covered under RFRA, the *Smith* test did not apply, and the government needed a compelling interest coupled with evidence that it chose the least restrictive means possible to effectively meet its goals. RLUIPA broadened RFRA's definition of religion and removed the reference to the First Amendment and much of its limiting judicial precedent.

This American tradition of protecting religious freedom helped Hobby Lobby prove that it should be excluded from the contraceptive mandate's coverage. The Supreme Court, ruling via a narrow 5-4 majority, held that Congress intended that RFRA cover for-profit corporations because federal law defined persons to include for-profit corporations, and the context of the statute and similar laws did not provide otherwise. The majority then found that the Greens held a sincere religious belief that the contraceptive mandate substantially burdened them. The Court conceded that the government had a compelling interest in providing women cost-free access to contraceptives but found that the Religious Non-Profit Workaround provided a less restrictive (or less burdensome) way to meet this need. This opinion provoked a passionate dissent from Justice Ginsburg, who claimed that RFRA was never designed to protect for-profit corporations, and that the majority was opening up the law for companies to cloak discrimination in employment as sincere religious exercise.

The *Hobby Lobby* case remedied two major legal issues in need of resolution with the following conclusions: (1) for-profit corporations are covered under RFRA, and (2) the contraceptive mandate could not overcome RFRA's demanding standard. This Article argued that this

decision was proper considering the broad brush used by Congress to protect religious freedom in RFRA, the most logical reading of the statutory text (which added the least restrictive alternative prong to further protect religious freedom), the special solicitude that religion in general garners in the American culture, and the fact that female employees at Hobby Lobby will still receive some, but not all, contraceptives at no cost.

Finally, this Article proves that the *Hobby Lobby* case was not just interesting from a legal perspective. This decision spun off many important legal dilemmas. For example, after *Hobby Lobby*, may a publicly traded corporation, with a more diverse group of shareholders (including one majority shareholder with strong religious beliefs), make a successful challenge under RFRA? The majority limited its *Hobby Lobby* ruling to closely held corporations but did not specifically rule that larger corporations could never qualify for protection. The majority only stated that such challenges were unlikely. Also, the *Hobby Lobby* opinion pushed the *Smith* case into even murkier territory as all different types of litigants (individuals, non-profit corporations, unincorporated businesses, and for-profit corporations) now may successfully make RFRA claims.

This Article chose a few of the most prominent ethical dilemmas for analysis. For example, a major ethical debate surrounds the idea of a corporation being able to exercise religion. The "Religion as Inherently Human" position posits that only humans have the capacity to have sincere religious experiences. On the other side, the "Corporate Conduit" position holds that corporations exist to do the bidding of the majority of their shareholders. The "Corporate Conduit" position has led corporations to take the position that environmentally safe and socially responsible business practices matter. If corporate owners can express their beliefs in pollution reduction, improved global labor standards, and climate change, the theory posits, they can surely exercise religious beliefs as well.

Another ethical dilemma revolves around third parties and whether it is ethical for religious employers to take away a government entitlement from their employees. The "Religion as Cornerstone" position holds that these difficult choices between religion and third party rights often tip in favor of religion because religion has always been a cornerstone of American greatness. This special solicitude toward religion led Congress to pass RFRA and its exceptionally strong protection of religious exercise. The "Third Party Rights"

position, on the other hand, stands for the idea that an employer's right to exercise religion stops at the point such exercise injures third parties.

The *Hobby Lobby* case also brings into the spotlight the dilemma of whether the courts have an ethical right to scrutinize whether a religious belief is sincere or whether a religious belief is too attenuated from the circumstances to substantially burden religion. The "Government Must Govern" position holds, like the *Smith* decision, that the government must be allowed to enact generally applicable laws to structure society and protect the public good without having to accommodate a multitude of religious exercise claims. In many circumstances, the government needs to be able to execute a uniform policy. On the other side, the "Let Religions Ponder Religion" position holds that courts have no place second-guessing a person's religious beliefs. This position would argue that RFRA's broad protection for religion is also the most ethical way to deal with these claims.

There are certainly other ethical dilemmas created by the *Hobby Lobby* decision. It will be interesting to see future articles analyze these issues and delve into creative solutions using tools from philosophy, theology, sociology, and other relevant fields in addition to the law. As soon as these articles are published, however, new issues will appear on the horizon, because the traffic buzzing around the intersection of religious freedom and generally applicable regulations never stops. The next shoe to drop, as mentioned briefly in Part II, will come from cases filed by religions non-profit corporations challenging the Non-Profit Workaround. These potential cases prove that *Hobby Lobby* was only the beginning of a new post-*Smith* sea change in the area of religious freedom, and it will be interesting to see the impact of the decision as time passes and new issues arise.