
ARTICLES

RUNNING MOM AND POP BUSINESSES BY THE GOOD BOOK: THE SCOPE OF RELIGIOUS RIGHTS OF BUSINESS OWNERS

*Loren F. Selznick**

I. INTRODUCTION

Prior to the 2014 decision in *Burwell v. Hobby Lobby Stores, Inc.*,¹ a separation of church and commerce doctrine was developing unabated in federal and state courts.² As United States Solicitor General Donald B. Verrilli, Jr. put it at the *Hobby Lobby* argument: “[O]nce you make a choice to go into the commercial sphere, . . . you are making a choice to live by the rules that govern you and your competitors in the commercial sphere.”³

In other words, business owners were free to practice religion on their own time, but when they entered the commercial world, faith had to bow to secular law. The *Hobby Lobby* case, construing the federal Religious Freedom Restoration Act, put an end to the notion of a nationally-imposed, religion-free commercial zone.⁴ State and local zones, however, are a different matter.

This article will contrast the religious rights of small business owners under federal and state law by visiting two recent battle sites in the American culture war.⁵ Both controversies involved family-owned businesses operated in accordance with deeply held religious beliefs.⁶ In both, the government required business

* Assistant Professor of Business Law, College of Business, Bloomsburg University of Pennsylvania; 1983, Cornell Law School, J.D.

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

² See Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1, 7 (2013).

³ Transcript of Oral Argument at 81, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354).

⁴ See *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2759; see also Colombo, *supra* note 2, at 6.

⁵ “America is in the midst of a culture war that has and will continue to have reverberations not only within public policy but within the lives of ordinary Americans everywhere.” JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* 34 (1991).

⁶ See *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2759; Douglas Laycock, *Religious Liberty and*

owners to perform acts that violated their religious convictions.⁷ In the federal cases, closely-held businesses faced fines under the Affordable Care Act for refusing to include emergency contraceptives in their employee health plans.⁸ In the state cases, small businesses were penalized for violating antidiscrimination laws when they declined to provide services for same-sex weddings.⁹

The issue is whether family-owned businesses can be run in accordance with religious principles when those principles conflict with the law. To what extent can federal, state, and local governments compel business owners to take actions they believe to be sinful? What has been the effect of *Burwell v. Hobby Lobby Stores, Inc.* on the separation of church and commerce theory?

II. HISTORICAL SETTING OF RELIGIOUS FREEDOM IN BUSINESS

Religious freedom and tolerance are imbedded in the American psyche. Students begin learning about the history and tradition as early as nursery school and kindergarten when they are taught about the Thanksgiving holiday.¹⁰ While Americans have generally accepted the concept of separation of church and state, the government and some interest groups have pressed for a separation between church and private business as well.¹¹

The concept would have been inconceivable to the Pilgrims and Puritans who escaped England seeking the freedom to live by their religious principles. When they came to North America, the Puritans sought the freedom to practice their religious faith “by applying the doctrines and commandments of the Bible to every detail of life,”¹² including their commercial dealings. Puritanism

the Culture Wars, 2014 U. Ill. L. Rev. 839, 849, 852–53 (2014); *infra* note 52 and accompanying text. “One result of [our] religious diversity is that some participants in our market economy attempt to exercise religion and make money at the same time.” Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Moneymakers?*, 21 GEO. MASON L. REV. 59, 60 (2013).

⁷ *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2759.

⁸ *See, e.g., id.*; *Korte v. Sebelius*, 735 F.3d 654, 658 (7th Cir. 2013), *cert denied sub nom.*, *Burwell v. Korte*, 134 S. Ct. 2903 (2014); *Gilardi v. U.S. Dep’t of Health & Human Serv.*, 733 F.3d 1208, 1210 (D.C. Cir. 2013), *vacated*, 134 S. Ct. 2902 (2014); *Beckwith Elec. Co. v. Sebelius*, 960 F. Supp. 2d 1328, 1331–32 (M.D. Fla. 2013); *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1292–93 (D. Colo. 2012), *aff’d*, 542 F. App’x. 706 (10th Cir. 2013).

⁹ *See, e.g., Elane Photography, LLC v. Willock*, 309 P.3d 53, 58 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014).

¹⁰ *See Thanksgiving Lessons for Grades PreK–2*, SCHOLASTIC, <http://www.scholastic.com/teachers/lesson-plan/thanksgiving-lessons-grades-prek-2> (last visited Sept. 26, 2015).

¹¹ *See Colombo, supra* note 2, at 15.

¹² GEORGE C. BEDELL ET AL., RELIGION IN AMERICA 18 (1975).

was practiced primarily through day-to-day conduct and public action rather than “through sacred symbol” or “the glories or the pomps of art.”¹³ The “emphasis” was “on serving the Lord in one’s vocation—as a tradesman, as a merchant, as an artisan, or as a magistrate or ‘citizen.’”¹⁴ The Quakers, too, established themselves in business by conducting their commercial enterprises in accordance with religious principles.¹⁵

The Founders of the United States over a century later recognized the role of religion in commercial pursuits.¹⁶ Thomas Jefferson said: “[Th]ose who labour in the earth are the chosen people of God It is the focus in which he keeps alive that sacred fire, which otherwise might escape from the face of the earth.”¹⁷ Benjamin Franklin said, “God governs in the Affairs of Men.”¹⁸

Between the Revolution and the Civil War, the United States became home to a number of religious communal movements in which religious rule ordered every facet of life, including the economy and the family.¹⁹ Individuals spiritually rooted in the

¹³ HENRY W. CLARK, *HISTORY OF ENGLISH NONCONFORMITY* 266 (1911).

¹⁴ SYDNEY E. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 118 (1972).

¹⁵ SOCIETY OF FRIENDS, *PROCEEDINGS OF FRIENDS’ GENERAL CONFERENCE: SUPPLEMENT TO FRIENDS’ INTELLIGENCER* 81 (1914) (“Among the thousands of men who became Friends at the rise of our Society, there were hundreds of shopkeepers, merchants and tradesmen. They grasped a new fact of life; and this fact of life changed the religious, social and economic conditions of their lives. It changed their mode of living, and their mode of doing business. They felt it right they should pay the same respect, in simple truthful word and action, to all men. . . . [W]hen . . . people came to have experience of Friends’ honesty and faithfulness and found that their yea was yea and their nay, nay; that they kept their word in their dealings and would not cheat them; but that if they sent a child to their shops for anything they were as well used as if they had come themselves—the lives and conversations of Friends did preach, and reach to the witness of God in the people. Then things altered so that all inquiry was: where is there a draper, or shopkeeper, or tailor, or shoemaker, or any other tradesman that is a Quaker?” (quoting GEORGE FOX’S JOURNAL 126 (Percy Livingston Parker ed., 1903)).

¹⁶ Wesley J. Smith, *Obama Looks to Strip Entrepreneurs of Religious Liberty*, FIRST THINGS (Aug. 10, 2012), <http://www.firstthings.com/web-exclusives/2012/08/obama-looks-to-strip-entrepreneurs-of-religious-liberty#print> (“Do entrepreneurs sacrifice their religious liberties merely by seeking a profit? That question would have stunned our Founding Fathers, most of whom were businessmen as well as statesmen. George Washington owned a large for-profit farm. So did James Madison. John Adams and Alexander Hamilton ran successful law practices. Benjamin Franklin was a printer and an inventor. Having secured freedom of religion for themselves and their posterity, these men of liberty would be astounded that the government they established asserted the legal authority to force business owners to violate their religious beliefs in the operation of their enterprises.”).

¹⁷ THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 164–65 (William Peden ed., 1954).

¹⁸ *Religion and the Founding of the American Republic: Religion and the Federal Government Part 1*, LIBRARY OF CONGRESS, <http://www.loc.gov/exhibits/religion/rel06.html#obj145> (last visited Sept. 26, 2015).

¹⁹ MARTIN E. MARTY, *PILGRIMS IN THEIR OWN LAND: 500 YEARS OF RELIGION IN AMERICA* 190 (1984).

Great Awakening cleansed their own homes and their businesses of slavery.²⁰ “As long as slavery survived, how could the awakened know a true millennium, and how could the enlightened truly speak of the pursuit of happiness.”²¹

In the nineteenth century, it was commonplace for American businesses to integrate religious or moral philosophy into business practices and this continued into the early 1900s.²² Concern about working conditions during the Industrial Revolution led preachers to remind proprietors to carry the faith to work.²³ Minister Washington Gladden noted in the late nineteenth century that it was “the primary business of Christianity to define and regulate” the “relations of man to man,” rejecting the argument that “his function [was] the saving of souls and not the regulation of business.”²⁴

By the mid-twentieth century, however, a different approach emerged, that “religion should, for the most part, be zoned out of the marketplace and market relations,”²⁵ and this view took hold in the law itself.²⁶ “The desirability of a religiously neutral workplace received legal manifestation with the passage of Title VII in 1964.”²⁷

Today, many American businesses—particularly small mom-and-pop enterprises—have rejected this trend and attempted to operate their daily transactions in accordance with religious beliefs, viewing “religion not as one isolated aspect of human existence but rather as a comprehensive system more or less present in all domains of the individual’s life.”²⁸ There has been “a religious awakening of sorts,

²⁰ *Id.* at 228.

²¹ *Id.*

²² Colombo, *supra* note 2, at 12.

²³ See *id.* at 9–10; Washington Gladden, *Beginnings of the Social Gospel*, in RELIGION IN AMERICAN LIFE 122 (Conrad Wright ed., 1972).

²⁴ Gladden, *supra* note 23, at 122. Gladden responded, “Let us say that our business is saving souls. Souls are men. How to save men, their manhood, their character—that is our chief problem. Is there any other realm in which character, manhood, is more rapidly and more inevitably made or lost, than this realm of industry?” *Id.* at 124.

²⁵ Paul Horwitz, Comment, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 177 (2014). Professor Horwitz observed this “is still very much the prevailing view within the liberal mainstream, including those holding mainline religious views.” *Id.* at 178.

²⁶ *Id.* at 179.

²⁷ Colombo, *supra* note 2, at 13.

²⁸ *Id.* at 18 (quoting Kenneth D. Wald, *Religion and the Workplace: A Social Science Perspective*, 30 COMP. LAB. L. & POL’Y J. 471, 481 (2009)) (internal quotation marks omitted). “In many parts of the country, this picture of the marketplace as a neutral space . . . has been upended by actual practice. Hobby Lobby itself, with its interweaving of religious views into business decisions about when to open or close, what to stock, and of course what benefits to support or oppose, is now the most prominent example. But it is not alone. Many religious traditions agree that ‘dividing the demands of one’s faith from one’s work in business is a

which has spawned a new breed of religiously serious executives, investors, employees, and customers, all of whom are pulling many business corporations toward a more faith-infused model.”²⁹

III. LAWS CONFLICTING WITH RELIGION

Conducting business pursuant to religious rules has become more difficult. The law has injected secularity into every aspect of economic life as an ever-expanding collection of legal requirements on small businesses is enacted.³⁰ These requirements have inflamed two hot-button moral issues—emergency contraception and same-sex marriage—and raised the question whether religious business owners can be compelled to facilitate actions they believe to be sinful.³¹ The common thread in these cases has been the government argument that when individuals choose to enter into a business, their religious liberties must yield to state interests.³²

A. Federal Controversy

The Patient Protection and Affordable Care Act of 2010 stirred up national controversy about abortion and “reopened a long dormant battle over contraception.”³³ Regulations promulgated pursuant to

fundamental error.” Horwitz, *supra* note 25, at 180 (quoting PONTIFICAL COUNCIL FOR JUSTICE & PEACE, *VOCATION OF THE BUSINESS LEADER: A REFLECTION 6* (3d ed. 2012)).

²⁹ Colombo, *supra* note 2, at 5.

³⁰ *Id.* at 13. In 2012 alone, the federal government promulgated 854 regulations affecting small businesses. Clyde Wayne Crews, Jr., *Small Business Regulations Surge Under Obama*, FORBES (Feb. 6, 2013), <http://www.forbes.com/sites/waynecrews/2013/02/06/small-business-regulations-surge-under-obama/>.

³¹ See Laycock, *supra* note 6, at 877 (“[I]n all but a tiny fraction of these cases, the issue is not whether any other individual can obtain contraception, or whether a same-sex couple can have a wedding with the full panoply of catering, clothes, photographs, flowers, and all the rest. All those things are readily available in the market place in most of the country. The issue is whether the religious conscientious objector must be the one who provides these things.”); Thomas M. Messner, *From Culture Wars to Conscience Wars: Emerging Threats to Conscience*, BACKGROUND, Apr. 13, 2011, at 1–2.

³² Smith, *supra* note 16 (“By definition, a *secular employer* does not engage in any exercise of religion,’ [a government] brief states boldly. Any burden on religion arises out of the ‘choice to enter into commercial activity.’ In other words, business is a religion free zone. Once we enter the stream of commerce ‘even, it would seem, as a sole proprietor’ we leave our religious liberties on the dock.” (internal quotation marks omitted)).

³³ Laycock, *supra* note 6, at 851–52 (“From 1965 to 2011, the situation with respect to contraception nicely illustrated the live-and-let-live solution to such a deep moral disagreement. The great majority thought that contraception is morally permissible, and used it themselves as needed, but they made no effort to force that view on the minority that disagreed. The minority thought that contraception is immoral, and refrained from using it, but they made no effort to force that view on the majority. Each side allowed the other to live by its own values. The Affordable Care Act disturbed that equilibrium.”).

the Act required employers to provide insurance coverage for emergency contraception.³⁴ Religious business owners contested these requirements in federal courts, culminating in the *Burwell v. Hobby Lobby Stores, Inc.* case.

The Act requires employers with more than fifty full-time workers to provide “qualified” health insurance plans to their employees or face penalties.³⁵ Qualified plans must include coverage, without cost-sharing, for preventive care and screening for women.³⁶ The Act left it to the Health Resources and Services Administration to establish guidelines for the particular care and screening required.³⁷ The agency, in turn, delegated this determination to the Institute of Medicine.³⁸ The Institute recommended that the agency require coverage for “[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.”³⁹ The Health Resources and Services Administration accepted this recommendation.⁴⁰ The Food and Drug Administration had approved twenty prescription contraceptives, including two “emergency contraceptives . . . known as Plan B and Ella [that] can function by preventing the implantation of a fertilized egg.”⁴¹ To “much of the pro-life movement . . . emergency contraception is sometimes a way of inducing abortions.”⁴²

³⁴ *Id.* at 852.

³⁵ 26 U.S.C. §§ 4980D(a)–(b) (2013); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762 (2014).

³⁶ 42 U.S.C. § 300gg-13(a)(4) (2013); *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2763.

³⁷ 42 U.S.C. § 300gg-13(a)(4).

³⁸ *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2762.

³⁹ 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, 8725 (Feb. 15, 2012); see *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2762.

⁴⁰ *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2789; *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1123 (10th Cir. 2013); *Women’s Preventive Services Guidelines*, HEALTH RESOURCES & SERVS. ADMIN., <http://www.hrsa.gov/womensguidelines/> (last visited Sept. 26, 2015).

⁴¹ *Hobby Lobby Stores, Inc.*, 723 F.3d at 1123; see *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2762–63.

⁴² Laycock, *supra* note 6, at 852–53 (“For those who believe that a new human life is created at the moment of fertilization, preventing implantation is a form of abortion. It does not matter that these drugs work that way only sometimes, or that the FDA says only that they ‘may’ work that way sometimes, or that some critics say the FDA labels are wrong and that the drugs do not prevent implantation. If I hand you a gun and say that it might be loaded, but not to worry, it probably is not—or even if I say it almost certainly is not—not one of [you] would take the chance and fire that gun at another human being. And for just the same reason, if you really believe that life begins at conception, you will not take the chance. Catholic and evangelical institutions . . . will not pay to make available a drug that ‘may’ act in a way that, in their view, destroys an innocent human life.”).

Religious groups, including Catholic, Orthodox Jewish, and Protestant communities, raised objections to the contraceptive mandate.⁴³ However, if employers with religious objections refused to fund plans that insured any of the required drugs, they faced fines that could put them out of business. The law presented them with three choices: (1) violate their religious principles by providing coverage for contraceptives; (2) refuse to provide coverage for contraceptives and pay crippling fines; or (3) pay less expensive penalties for refusing to provide health insurance at all, but put themselves in a poor competitive position to attract qualified employees.⁴⁴

The religious faithful believed they were entitled to protection against what they saw as religious persecution.⁴⁵ The government response was simple: “[R]eligious beliefs . . . cannot override statutory provisions protecting the interests of . . . employees.”⁴⁶

B. State Controversy

The state-level moral issue for religious business owners is same-sex marriage⁴⁷ in conjunction with nondiscrimination laws.⁴⁸ With

⁴³ Daniel J. Rudary, Note, *Drafting a “Sensible” Conscience Clause: A Proposal for Meaningful Conscience Protections for Religious Employers Objecting to the Mandated Coverage of Prescription Contraceptives*, 23 HEALTH MATRIX 353, 355 & n.5 (2013).

⁴⁴ See *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2775–76.

⁴⁵ See Richard W. Garnett, *The Righteousness in Hobby Lobby’s Cause*, L.A. TIMES, Dec. 5, 2013, at A19 (“Like millions of religious believers and groups, these challengers reject the idea that religious faith and religious freedom are simply about what we believe and how we pray, and not also about how we live, act and work. At the heart of these two cases is the straightforward argument that federal law does not require us to ‘check our faith at the door’ when we pursue vocations in business and commerce.”). A required separation of business owners from their religious values seemed hypocritical at the same time as a drumbeat about corporate responsibility:

At a time when we talk a lot about corporate responsibility and worry about the feeble influence of ethics and values on Wall Street decision-making, it would be strange if the law were to welcome sermonizing from Starbucks on the government shutdown but tell the Greens and Hobby Lobby to focus strictly on the bottom line.

Id.; see also Horwitz, *supra* note 25, at 181 (2014) (“Not everyone has noticed the extent to which many American companies or their owners adopt integralist views of religion and business. But many have noticed that moral considerations, and not just profit maximization, have played an increasingly visible and contested role in the marketplace.”).

⁴⁶ Reply Brief for the Petitioners at 12, *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (No. 13-354).

⁴⁷ See Thomas M. Messner, *Same-Sex Marriage and Threats to Religious Freedom: How Nondiscrimination Laws Factor In*, BACKGROUND, July 29, 2011, at 3. (“[C]onflicts with religious freedom can be expected to arise in jurisdictions that force private citizens to participate in same-sex wedding ceremonies and celebrations . . . because for many people that situation involves ‘religious significance’ that certain other situations do not.”).

⁴⁸ Although the Supreme Court held in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), that state laws barring same-sex marriage violated the United States Constitution, the

same-sex marriage legalized nationwide,⁴⁹ state anti-discrimination laws may be triggered. “Nondiscrimination laws can create

controversy for business owners who objected to providing wedding services at same-sex weddings would remain state-based. *Love v. Beshear*, 989 F. Supp. 2d 536 (W.D. Ky.), *rev'd sub nom.* *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *cert. granted sub nom.* *Bourke v. Beshear*, No. 14-574, 135 S. Ct. 1041 (2015); *Henry v. Himes*, 14 F. Supp. 3d 1036 (S.D. Ohio), *rev'd sub nom.* *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *cert. granted sub nom.* *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015); *Tanco v. Haslam*, 7 F. Supp. 3d 759 (M.D. Tenn.), *rev'd sub nom.* *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *cert. granted sub nom.* *Tanco v. Haslam* 14-562, 135 S. Ct. 1040 (2015). Religious objectors would be running afoul of state and local anti-discrimination laws. Federal law does not bar discrimination by private businesses on the basis of sexual orientation. See Anastasia Niedrich, *Removing Categorical Constraints on Equal Employment Opportunities and Anti-Discrimination Protections*, 18 MICH. J. GENDER & L. 25, 101–02 (2011).

⁴⁹ In *Obergefell*, the Supreme Court held that state bans on same-sex marriage were unconstitutional. *Obergefell*, 135 S. Ct. at 2605. Prior to that decision, same-sex couples could legally marry in thirty-seven states (Alaska, Alabama, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Iowa, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Minnesota, Montana, North Carolina, New Hampshire, New Jersey, New Mexico, Nevada, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Virginia, Vermont, Washington, West Virginia, Wisconsin, and Wyoming) and the District of Columbia. *States*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/states/> (last visited Sept. 26, 2015). In twenty-six states same-sex marriage was legalized by the courts. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659, 2668 (2013), (California); *Bostic v. Schaefer*, 760 F.3d 352, 367 (4th Cir.), *cert denied*, *Schaefer v. Bostic*, 135 S. Ct. 308 (2014) (Virginia); *Baskin v. Bogan*, 766 F.3d 648, 653, 672 (7th Cir.), *cert denied*, 135 S. Ct. 316 (2014) (Indiana and Wisconsin); *Latta v. Otter*, 771 F.3d 456, 464–65 (9th Cir. 2014) (Idaho and Nevada); *Bishop v. Smith*, 760 F.3d 1070, 1074 (10th Cir.), *cert denied*, 136 S. Ct. 271 (2014) (Oklahoma); *Kitchen v. Herbert*, 755 F.3d 1193, 1199 (10th Cir. 2014), *cert denied*, 190 L. Ed. 2d 138 (2014) (Utah); *Searcy v. Strange*, No. 14-0208-CG-N, 2015 U.S. Dist. LEXIS 7776, at *1 (S.D. Ala. Jan. 23, 2015); *Hamby v. Parnell*, No. 3:14-cv-00089-TMB, 2014 U.S. Dist. LEXIS 145876, at *3 (D. Alaska Oct. 12, 2014); *Majors v. Jeanes*, No. 2:14-cv-00518 JWS, 2014 U.S. Dist. LEXIS 127942, at *17 (D. Ariz. Sept. 12, 2014); *Burns v. Hickenlooper*, No. 14-cv-01817-RM-KLM, 2014 U.S. Dist. LEXIS 100894, at *17–18 (D. Colo. July 23, 2014); *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1293 (N.D. Fla. 2014); *Marie v. Moser*, No. 14-cv-02518-DDC/TJJ, 2014 U.S. Dist. LEXIS 157093, at *2 (D. Kan. Nov. 4, 2014); *Rolando v. Fox*, 23 F. Supp. 3d 1227, 1236 (D. Mont. 2014); *Fisher-Borne v. Smith*, 14 F. Supp. 3d 695, 699 (M.D.N.C. 2014); *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1132 (D. Or. 2014); *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 415 (M.D. Pa. 2014); *Bradacs v. Haley*, No. 3:13-cv-02351-JMC, 2014 U.S. Dist. LEXIS 162184, at *39 (D.S.C. Nov. 18, 2014); *McGee v. Cole*, No. 3:13-24068, 2014 U.S. Dist. LEXIS 158680, at *32 (S.D. W.Va. Nov. 7, 2014); *Guzzo v. Mead*, No. 14-CV-200-SWS, 2014 U.S. Dist. LEXIS 148481, at *21–22 (D. Wyo. Oct. 17, 2014); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 482 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 872 (Iowa 2009); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003); *Garden State Equality v. Dow*, 82 A.3d 336, 369 (N.J. Super. Ct. Law Div. 2013), *cert granted*, 79 A.3d 1036 (N.J. 2013). Nine states and the District of Columbia authorized same-sex marriage by statute. DEL. CODE ANN. tit. 13, § 129 (2013); D.C. CODE § 46-401 (2014); HAW. REV. STAT. § 572-1 (LexisNexis 2014); 750 ILL. COMP. STAT. 5/212 (West 2014); ME. REV. STAT. tit. 19-A, § 650-A (2014); MD. CODE ANN., FAM. LAW § 2-201 (LexisNexis 2014); MINN. STAT. § 517.01 (West 2015); N.H. REV. STAT. § 457:1-a (2014); N.Y. DOM. REL. LAW § 10-a (McKinney 2015); R.I. GEN. LAWS § 15-1-1 (2014); VT. STAT. ANN. tit. 15, § 8 (2014); WASH. REV. CODE § 26.04.010 (West 2015). In two states, same-sex marriage was first approved by popular vote. See *Maine*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/states/entry/c/maine> (last visited Sept. 26, 2015); *Washington*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/states/entry/c/washington> (last visited Sept. 26, 2015).

significant conflicts for . . . business owners when a customer requests some service that would violate the owners' religious beliefs."⁵⁰ Religious officials are generally exempted from performing same-sex weddings against their faith, but wedding service providers have no such protection.⁵¹

Thus, business owners of faith who provide wedding related services, such as photographers, cake bakers, florists, and owners of wedding facilities, have been sued and fined for declining to participate in same-sex ceremonies.⁵² The theory is that when a religious believer makes the choice to enter into the commercial world, all laws should apply regardless of religious objections.⁵³

⁵⁰ Messner, *supra* note 47, at 16.

⁵¹ See, e.g., Peter Dolan, Comment, *An Uneasy Union: Same-Sex Marriage and Religious Exemption in Washington State*, 88 WASH. L. REV. 1119, 1121 (2013) ("[T]he Washington Legislature's failure to protect anyone besides religious officials from potential lawsuits may lead to legal issues for wedding service providers with religious objections to same-sex marriage."); John Burnett, *Wedding Vendors that Refuse Customers Often Lose in Court*, NPR (Jun. 28, 2013), <http://www.npr.org/templates/story/story.php?storyId=196691625>. But see Eugene Volokh, *Can Ministers Who Make a Living By Conducting Weddings Be Required To Conduct Same-Sex Weddings?*, WASH. POST (Oct. 18, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/10/18/can-ministers-who-make-a-living-by-conducting-weddings-be-required-to-conduct-same-sex-weddings/>.

⁵² See, e.g., Elane Photography, LLC v. Willock, 309 P.3d 53, 58 (N.M. 2013), *aff'd*, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014); Rex W. Huppke, *Couple's Next Move: Civil Suite \B&B's Rejections of Union Ceremonies Sets Stage for Latest Court Fight Pitting Religious Beliefs, Human Rights*, CHI. TRIB., Sept. 17, 2011 at C1; Messner, *supra* note 31, at 5; Liz Fields, *Judge Orders Colorado Bakery to Cater for Same-Sex Weddings*, ABC NEWS (Dec. 7, 2013), <http://abcnews.go.com/US/judge-orders-colorado-bakery-cater-sex-weddings/story?id=21136505>; Samuel Smith, *NY Christian Couple Fined \$13,000 for Refusing Lesbian Wedding Ceremony on Farm*, CHRISTIAN POST (Aug. 22, 2014), <http://www.christianpost.com/news/ny-christian-couple-fined-13000-for-refusing-lesbian-wedding-ceremony-on-farm-125186>; Todd Starnes, *Oregon Ruling Really Takes the Cake—Christian Bakery Guilty of Violating Civil Rights of Lesbian Couple*, FOX NEWS (Jan. 21, 2014), <http://www.foxnews.com/opinion/2014/01/21/christian-bakery-guilty-violating-civil-rights-lesbian-couple/>; Lornet Turnbull, *Case against Florist Fires Up Gay-Marriage Critics*, SEATTLE TIMES (Apr. 19, 2013), http://seattletimes.com/html/localnews/2020803087_weddingflowersxml.html; *Wedding Cake Battle Brews Between Couple, Baker*, KCCI NEWS (Nov. 12, 2011), <http://www.kcci.com/Wedding-Cake-Battle-Brews-Between-Couple-Baker/7310176>.

⁵³ In 2008, the California Supreme Court held that two physicians with religious objections to performing an artificial insemination procedure for an unmarried lesbian patient violated an antidiscrimination statute applying "to business establishments that offer to the public 'accommodations, advantages, facilities, privileges, or services.'" *N. Coast Women's Care Med. Grp., Inc. v. Super. Ct. of San Diego Cnty.*, 189 P.3d 959, 962, 965, 970 (Cal. 2008) (quoting CAL CIV. CODE § 51(b) (2014)). An attorney for the patient contended: "When [a] doctor is in her church, she can do religion, but not in the medical office." Messner, *supra* note 47, at 17 (alteration in original) (internal quotation marks omitted); see also Vincent Carroll, *Carroll: Civil Unions or a Cloister? Please*, DENVER POST, Feb. 13, 2013, at A25 ("I have supported civil unions for the better part of a decade . . . [and] the First Amendment's protection of the 'free exercise' of religion is vital, and it doesn't merely apply, as Sen. Pat Steadman, D-Denver, suggested . . . within the confines of a cloister. . . . To defenders of traditional marriage, however, Steadman had stern words. 'So, what to say to those who say religion requires them to discriminate. I'll tell you what I'd say. Get thee to a nunnery and

C. Which Businesses Are Affected?

Are “mom-and-pop” businesses run according to religious principles truly affected by these laws or are the laws really aimed at the likes of Exxon and Walmart? Although some provisions may be designed to affect only businesses with a minimum number of employees, even the smallest businesses can be affected.

At first blush, it appears that the Affordable Care Act only covers businesses with over fifty employees. The Act penalizes businesses at least that size if they do not provide qualifying health insurance to their employees; smaller businesses are not required to provide health insurance at all.⁵⁴ However, any business, no matter how small, that chooses to provide health insurance to employees must provide *qualifying* health insurance—that is, insurance that complies with the contraceptive mandate.⁵⁵ Prior to the *Burwell v. Hobby Lobby Stores, Inc.* decision, if a small business that provided health insurance to a few employees objected to the contraceptive mandate, the Affordable Care Act allowed it to either: (a) stop providing insurance and place itself at a competitive disadvantage in attracting employees; or (b) pay crippling fines for providing noncomplying insurance.⁵⁶

Generally, state laws prohibiting discrimination based on sexual orientation in public accommodations apply to businesses of any size performing a wide variety of services.⁵⁷ Small business owners with religious objections to providing services for same-sex weddings will be in violation of most of these statutes and subject to penalties prescribed by law.

live there then. Go live a monastic life away from modern society, away from people you can't see as equal to yourself, away from the stream of commerce where you may have to serve them.' In a single outburst, Steadman thus confirmed the worst fears of orthodox believers—that militant secularists are intent on punishing any belief or behavior that conflicts with gay-rights goals.”)

⁵⁴ See 26 U.S.C. § 4980D(a), (d) (2013).

⁵⁵ See *FAQs about Affordable Care Act Implementation Part XII*, U.S. DEP'T OF LABOR (Feb. 20, 2013), <http://www.dol.gov/ebsa/faqs/faq-aca12.html>.

⁵⁶ See Betty Wang, *What Are Obamacare's Penalties for Small Businesses?*, FREE ENTERPRISE (Sept. 26, 2013), http://blogs.findlaw.com/free_enterprise/2013/09/what-are-obamacare-penalties-for-small-businesses.html.

⁵⁷ See, e.g., CAL. CIV. CODE § 51 (West 2014); COLO. REV. STAT. § 24-34-601 (2015); D.C. CODE § 2-1402.31 (2015); HAW. REV. STAT. § 489-3 (LexisNexis 2014); 775 ILL. COMP. STAT. 5/1-103 (West 2015); IOWA CODE § 216.7 (West 2013); ME. REV. STAT. tit. 5, § 4592 (West 2014); MINN. STAT. § 363A.11 (West 2015); N.J. STAT. ANN. § 10:5-4 (West 2015); N.M. STAT. ANN. § 28-1-7.F (West 2015); OR. REV. STAT. § 659A.403 (West 2015); R.I. GEN. LAWS § 11-24-2 (2015); VT. STAT. ANN. tit. 9, § 4502(a) (2014); WASH. REV. CODE § 49.60.215 (West 2015).

IV. LAWS PROTECTING FREE EXERCISE

Business owners have some legal protections against governmental interference with their religious exercise, but the First Amendment is not the source. The Free Exercise Clause has proved to be of little help when business owners have religious objections to neutral laws of general applicability. The Religious Freedom Restoration Act (RFRA), similar state laws, and state constitutions provide greater assistance.

A. *Free Exercise Clause*

Initially, the Free Exercise Clause of the First Amendment was broadly conceived. The Founders, profoundly religious people, believed the first duty of any citizen was to God and only then to the law:

Madison clearly understood that if individuals are not loyal to their religious conscience, to their God, and to their moral duty as they see it, it is an utterly irrational folly to expect them to be loyal to less compelling moral obligations of legal rules, statutes, judicial orders, abstract principles of “human rights,” the claims of citizenship, and state-imposed civic duties. If you require a person to betray his or her conscience, you have eliminated the only moral basis for his or her fidelity to the rule of law, and have destroyed the moral foundation for democracy.⁵⁸

A century later, the Supreme Court took a much narrower view of the Free Exercise Clause in the polygamy cases. Mormon residents of the Utah and Idaho territories challenged their federal bigamy convictions on First Amendment grounds.⁵⁹ The Court held that allowing the defendants to escape criminal liability on religious grounds would wreak havoc:

Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. 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

⁵⁸ Lynn D. Wardle, *Marriage and Religious Liberty: Comparative Law Problems and Conflict of Laws Solutions*, 12 J. L. & FAM. STUD. 315, 318–19 (2010).

⁵⁹ See *Davis v. Beason*, 133 U.S. 333, 341–42 (1890); *Reynolds v. United States*, 98 U.S. 145, 161–62 (1878).

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? So here . . . it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this 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. Government could exist only in name under such circumstances.⁶⁰

Proponents of a broader reading of the Free Exercise Clause gained comfort in the twentieth century when the Court began imposing a stricter standard for interfering with the religious freedoms of citizens. In a wartime decision, the Court struck down a statute requiring public school students, including objecting Jehovah's Witnesses, to salute the flag on pain of expulsion and parental prosecution:

[F]reedoms of speech and of press, of assembly, and of worship . . . are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.

. . . .

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

⁶⁰ *Reynolds*, 98 U.S. at 166–67. According to the Court, the right to free exercise could not possibly be interpreted to extend this far.

However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation. . . . Probably never before in the history of this country has it been seriously contended that the whole punitive power of the government for acts, recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance.

Davis, 133 U.S. at 342–43.

⁶¹ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639–42 (1943); see Michael W. McConnell, *Why Protect Religious Freedom?*, 123 *YALE L.J.* 770, 779 (2013) (reviewing BRIAN LEITER, *WHY TOLERATE RELIGION?* (2012)).

In *Sherbert v. Verner*,⁶² the Supreme Court initiated a test for governmental interference with religious exercise: “[A]ny incidental burden on the free exercise of . . . religion may be justified by a ‘compelling state interest in the regulation of a subject within the State’s constitutional power to regulate’”⁶³ The Court held that a South Carolina applicant for unemployment benefits could not be denied because she refused Saturday work for religious reasons.⁶⁴ The State could not make her choose between her religion and benefits. “Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.”⁶⁵

The *Sherbert* test required a two-part analysis. Once the Court determined that the plaintiff’s religion had been burdened, it remained to be decided whether the burden was permissible.⁶⁶ For this determination, the Court imposed the stringent “compelling state interest” standard.

We must . . . consider whether some compelling state interest . . . justifies the substantial infringement of appellant’s First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, “only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.”⁶⁷

Following *Sherbert*, the Court held that the state had an insufficiently compelling interest to force Amish children to attend school after the eighth grade in violation of their religious beliefs.⁶⁸ However, Amish employers were required to pay Social Security taxes for their employees despite a religious conflict.⁶⁹

Not all burdens on religion are unconstitutional. The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.

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⁶² *Sherbert v. Verner*, 374 U.S. 398 (1963).

⁶³ *Id.* at 403 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

⁶⁴ *Sherbert*, 374 U.S. at 404, 410.

⁶⁵ *Id.* at 404.

⁶⁶ *Id.* at 406.

⁶⁷ *Id.* (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

⁶⁸ *Wisconsin v. Yoder*, 406 U.S. 205, 234, 236 (1972).

⁶⁹ *United States v. Lee*, 455 U.S. 252, 254, 260–61 (1982).

To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good. Religious beliefs can be accommodated, but there is a point at which accommodation would “radically restrict the operating latitude of the legislature.”⁷⁰

Although the Supreme Court continued to cite the *Sherbert* compelling interest test from time to time, the stringent-sounding test yielded unpredictable results.⁷¹ In several cases, the Court held that religious objections did not excuse failures to comply with neutral laws,⁷² but in others, statutes were held unconstitutional.⁷³ The test was not uniformly applied; in several cases the Court either declined to apply it or failed to mention it at all.⁷⁴

In 1990, the Court attempted to reconcile the inconsistencies in the case law in *Employment Division v. Smith*.⁷⁵ As in *Sherbert*, the plaintiffs in *Smith* sought unemployment benefits, which they said were denied because of their religious exercise.⁷⁶ The distinction to the Court was the *Smith* plaintiffs had violated a generally applicable criminal prohibition against the use of illegal narcotics in their religious exercise.⁷⁷ They were drug counselors who used peyote in Native American religious ceremonies.⁷⁸

According to the Court, other than in unemployment benefits cases like *Sherbert*, it always found a sufficiently compelling governmental interest to justify burdening religious exercise.⁷⁹ The only exceptions were “hybrid” cases, which “involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections.”⁸⁰ In *Smith*, the Court held the compelling interest test would no longer be applied:

The government’s ability to enforce generally applicable

⁷⁰ *Id.* at 257–59, 261 (quoting *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961)).

⁷¹ See Tania Saison, *Restoring Obscurity: The Shortcomings of the Religious Freedom Restoration Act*, 28 COLUM. J. L. & SOC. PROBS. 653, 680–81 (1995).

⁷² See, e.g., *Hernandez v. Comm’r*, 490 U.S. 680, 698–700 (1989); *Lee*, 455 U.S. at 263 (Stevens, J., concurring); *Gillette v. United States*, 401 U.S. 437, 454 (1971).

⁷³ See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 713, 716 (1977); *Wisconsin v. Yoder*, 406 U.S. 205, 221–22, 234 (1972).

⁷⁴ See, e.g., *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 452 (1988); *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987); *Bowen v. Roy*, 476 U.S. 693, 708 (1986); *Goldman v. Weinberger*, 475 U.S. 503, 506 (1986).

⁷⁵ *Emp’t Div. v. Smith*, 494 U.S. 872 (1990).

⁷⁶ *Id.* at 874.

⁷⁷ *Id.* at 874, 882, 890.

⁷⁸ *Id.* at 874.

⁷⁹ *Id.* at 883.

⁸⁰ *Id.* at 881–82.

prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, “cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development.” To make an individual’s obligation to obey such a law contingent upon the law’s coincidence with his religious beliefs, except where the State’s interest is “compelling”—permitting him, by virtue of his beliefs, “to become a law unto himself,”—contradicts both constitutional tradition and common sense.⁸¹

The *Smith* Court held there was no constitutional right to an exemption from a valid, neutral law that happened to infringe upon the exercise of religion.⁸² Of course, if the facial neutrality of a statute disguised a governmental attack on particular religious exercise, that violated the First Amendment.⁸³ But, absent a back door attempt at discrimination, *Smith* said that if the law was generally applicable—it prevented everybody from doing what the religious wanted to do or it required everybody to do what the religious did not want to do—the Free Exercise Clause was not violated.⁸⁴ A religious exemption to a neutral statute might be desirable, but it was not constitutionally required.⁸⁵ Therefore, the Court would not take it upon itself to override the decision of the legislature *not* to grant an exemption.⁸⁶ The *Smith* decision began a hot potato game between the Court and Congress over which would be responsible for protecting free religious exercise.

⁸¹ *Id.* at 885 (quoting *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 451 (1988); *Reynolds v. United States*, 98 U.S. 145, 167 (1878)).

⁸² *Smith*, 494 U.S. at 879, 890.

⁸³ *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993).

⁸⁴ *See Smith*, 494 U.S. at 887–88.

⁸⁵ *Id.* at 890.

⁸⁶ *Id.* (“Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use. But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious belief.”).

B. Religious Freedom Restoration Act (RFRA)

Employment Division v. Smith was greeted with outrage on both ends of the political spectrum,⁸⁷ which led Congress to pass the Religious Freedom Restoration Act of 1993 (RFRA).⁸⁸ Support for RFRA among diverse religious groups,⁸⁹ as well as the political right, left, and center, produced nearly unanimous agreement in Congress.⁹⁰

The purpose of the Act, written into its opening words, was to overrule *Employment Division v. Smith* and restore the *Sherbert v. Verner* compelling interest test.

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*, 494 U.S. 872 (1990) 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

⁸⁷ See Ramesh Ponnuru, *Is the Contraception Mandate Legal?*, NAT'L REV., Dec. 31, 2013, at 18. The “opposition to *Smith* in the legal community was ‘thunderous.’” Christine M. Durham, *What Goes Around Comes Around: The New Relevancy of State Constitution Religion Clauses*, 38 VAL. U. L. REV. 353, 365 (2004).

⁸⁸ See Ponnuru, *supra* note 87, at 18.

⁸⁹ Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 210 & n.9 (1994). Supporters included Catholic, Baptist, Disciples of Christ, Christian Science, Jewish, Mormon, Scientology, Episcopalian, Evangelical Lutheran, Quaker, Seventh-Day Adventist, Mennonite, Unitarian Universalist, Presbyterian, Methodist, Muslim, Sikh, and Humanist groups. *Id.* at 210 & n.9, 212–13.

⁹⁰ Laycock & Thomas, *supra* note 89, at 210–11; McConnell, *supra* note 61, at 772–73 (2013) (“When the Supreme Court narrowed its interpretation of the Free Exercise Clause in 1990, in the so-called ‘Peyote Case,’ *Employment Division v. Smith*, Congress passed the corrective Religious Freedom Restoration Act (RFRA) by unanimous vote in the House and a margin of 97–3 in the Senate. Supporters included the ACLU, the National Association of Evangelicals, People for the American Way, the American Jewish Congress, the Christian Legal Society, and virtually every other religious and civil liberties group.”); Garnett, *supra* note 45, at A19 (“A little more than 20 years ago, Congress did something that, today, is hard to imagine. Lawmakers from both parties and across the political spectrum found common ground and passed . . . the Religious Freedom Restoration Act, which firmly commits the federal government to protecting and promoting our ‘inalienable right’ to freely exercise religion. As President Clinton remarked when he signed the legislation into law, ‘the power of God is such that even in the legislative process, miracles can happen.’”); see Laycock, *supra* note 6, at 845 (2014).

workable test for striking sensible balances between religious liberty and competing prior governmental interests.

The purposes of this Act are—(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) 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.⁹¹

Congress actually made the test stronger in RFRA. Not only was the government required to have a compelling interest before it could substantially burden the exercise of religion, it also had to show it was using the least restrictive means to advance that interest.⁹² Congress made the compelling interest test apply even to neutral laws of general applicability.⁹³ Under RFRA, anyone whose religious exercise had been substantially burdened could assert the RFRA violation as a claim or defense in a judicial proceeding.⁹⁴ The courts, having directed the exemption issue to elected representatives in *Smith*, were back in the business of evaluating individual exemption requests.⁹⁵

The first inquiry under RFRA is whether the law substantially burdens the exercise of religion.⁹⁶ A law meets this requirement when it “put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.”⁹⁷ Burdens held substantial

⁹¹ 42 U.S.C. § 2000bb (2013).

⁹² *Id.* (“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.”).

⁹³ *Id.* § 2000bb-1(a) (“Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).”).

⁹⁴ *Id.* § 2000bb-1(c) (“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.”); Ponnuru, *supra* note 87, at 18 (“If a generally applicable federal law . . . imposed a ‘substantial burden’ on someone’s exercise of religion, judges would have to determine whether applying the law to that person served a ‘compelling governmental interest’ using the ‘least restrictive means’ possible. If the answer was no, the believer would get an exemption. Whether or not the law was right to make this inquiry the job of the courts, it seems hard to dispute that it is the right inquiry.”).

⁹⁵ See *Emp’t Div. v. Smith*, 494 U.S. 872, 890 (1990).

⁹⁶ 42 U.S.C. § 2000bb-1.

⁹⁷ *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 718 (1981).

have included fines,⁹⁸ citation for contempt,⁹⁹ denial of unemployment benefits,¹⁰⁰ threat of criminal prosecution,¹⁰¹ being declared AWOL and having salary cut off,¹⁰² and curtailment of religious expression.¹⁰³

Once a court determines that a religious exercise is substantially burdened, RFRA requires the government to demonstrate a compelling interest.¹⁰⁴ Compelling interests were initially thought to include only threats to public safety and health.¹⁰⁵ Over the years, however, compelling interests have been found in virtually every area of governmental action.¹⁰⁶

A compelling interest is not merely an interest of high importance generally supporting enactment of a statute. The government must show a compelling interest in not granting the individual religious objector an exemption.

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. RFRA expressly adopted the compelling interest test “as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*.” In each of those cases, this Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants.¹⁰⁷

The government has no compelling interest in forcing conformity

⁹⁸ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

⁹⁹ *United States v. Ali*, 682 F.3d 705, 709–11 (8th Cir. 2012).

¹⁰⁰ *Sherbert v. Verner*, 374 U.S. 398, 399, 403 (1963).

¹⁰¹ *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 425–26 (2006).

¹⁰² *Tagore v. United States*, 735 F.3d 324, 327, 330 (5th Cir. 2013).

¹⁰³ *A.A. v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 264–65, 266 (5th Cir. 2010).

¹⁰⁴ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

¹⁰⁵ See *McConnell*, *supra* note 61, at 803–04. This was in line with the original view of the Free Exercise Clause. “Madison wrote that the free exercise of religion should prevail ‘in every case where it does not trespass on private rights or the public peace.’ Most of the early state constitutions protected the exercise of religion up to the point that it endangered public peace and good order.” *Id.*

¹⁰⁶ See, e.g., *United States v. Lee*, 455 U.S. 252, 260 (1982); *Gillette v. United States*, 401 U.S. 437, 460, 462 (1971); *Catholic High Sch. Ass’n of Archdiocese v. Culvert*, 753 F.2d 1161, 1171 (2d Cir. 1985); *Scott v. Rosenberg*, 702 F.2d 1263, 1276 (9th Cir. 1983); *United States v. Kroncke*, 459 F.2d 697, 704 (8th Cir. 1972); *Linscott v. Millers Falls Co.*, 440 F.2d 14, 18 (1st Cir. 1971); *Biklen v. Bd. of Educ.*, 333 F. Supp. 902, 909 (N.D.N.Y. 1971).

¹⁰⁷ *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006).

on every last pocket of dissent no matter how small.¹⁰⁸ If a compelling interest is substantially achieved, “the government does not have a compelling interest in each marginal percentage point by which its goals are advanced.”¹⁰⁹ However, “the Government can demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program.”¹¹⁰

Finally, even if the court finds a compelling interest, RFRA requires the government to use the means least restrictive of religion to achieve its goals.¹¹¹ At the very least, this means if there are different, equally effective methods for accomplishing a governmental objective, the government must choose the one that imposes the lowest burden on religious exercise.¹¹² But, it may imply more—the requirement to select a different method even when it would be less effective.¹¹³ One circuit has expressed the least restrictive means test as “the extent to which accommodation of the [plaintiff] would impede the state’s objectives,” and has indicated that “[w]hether the state has made this showing depends on a comparison of ‘the cost to the government of altering its activity to allow the religious practice to continue unimpeded versus the cost to the religious interest imposed by the government activity.’”¹¹⁴ In short, a balancing of interests is required.¹¹⁵

C. State Religious Exercise Law

At the state level, there are two possible sources of religious exercise protection beyond the First Amendment. Business owners

¹⁰⁸ See, e.g., *id.* at 434–36.

¹⁰⁹ *Brown v. Entm’t Merch. Assoc.*, 131 S. Ct. 2729, 2741 n.9 (2011).

¹¹⁰ *Gonzales*, 546 U.S. at 435.

¹¹¹ See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

¹¹² Alan O. Sykes, *The Least Restrictive Means*, 70 U. CHI. L. REV. 403, 403 (2003).

¹¹³ *Id.*

¹¹⁴ *S. Ridge Baptist Church v. Indus. Comm’n of Ohio*, 911 F.2d 1203, 1206 (6th Cir. 1990) (quoting *United States v. Schmucker*, 815 F.2d 413, 417 (6th Cir. 1987)).

¹¹⁵ See *Sykes*, *supra* note 112, at 403 (“One class of cases seems clear—when an alternative regulation unquestionably achieves a clearly stipulated regulatory objective at equal or lower cost to regulators while imposing a lesser burden on some other valued interest (free speech, free trade, or the like), the alternative is ‘less restrictive.’ But these conditions seem quite narrow, and the question arises whether a challenged regulation will necessarily pass muster when they do not hold. A proposed alternative may be somewhat more costly to implement, for example, or slightly less effective at achieving the stated regulatory objective, yet still seem quite preferable if it is much less burdensome on the interest that is protected by the least restrictive means requirement. One wonders, therefore, whether a least restrictive means analysis will drift toward broader cost-benefit analysis.”)

objecting to state law on religious grounds may be able to seek relief pursuant to state constitutional provisions or, where they exist, state statutes modeled on RFRA.¹¹⁶ In many states, however, neither avenue is effectively available. Many state constitutions have been construed as coextensive with the First Amendment and a number of states do not have RFRA statutes.

1. State Constitutional Law

Prior to the decision in *Employment Division v. Smith*, “when state courts addressed free exercise issues, they tended to view state constitutional provisions as an afterthought, content just to ape the federal standard.”¹¹⁷ After *Smith*, however, “interest in state constitutional protections for religious liberty surged.”¹¹⁸ Although the First Amendment does not require religious exemptions to neutral laws of general applicability, “[s]tate courts are, of course, free to decide questions of religious liberty entirely on state constitutional grounds.”¹¹⁹ Business owners objecting to state or local laws on religious grounds can seek relief under state constitutional free exercise provisions.

All fifty states have their own constitutional religious freedom provisions.¹²⁰ Some are virtually identical to the First

¹¹⁶ See *infra* notes 137–38 and accompanying text.

¹¹⁷ Piero A. Tozzi, *Whither Free Exercise: Employment Division v. Smith and the Rebirth of State Constitutional Free Exercise Clause Jurisprudence?*, 48 J. CATH. LEGAL STUD. 269, 276 (2009).

¹¹⁸ Durham, *supra* note 87, at 366.

¹¹⁹ *Id.* at 367.

All that is required is a willingness to make decisions based on an independent analysis of the state constitutional text, untethered from developments in federal law. Federal strict scrutiny analysis was the norm for more than a generation and had a tremendous impact in shaping state court jurisprudence, but the Supreme Court’s more recent decision to reverse course need not determine the path state courts follow.

Id. at 368.

¹²⁰ ALA. CONST. art. I, § 3; ALASKA CONST. art. 1, § 4; ARIZ. CONST. art. II, § 12; ARK. CONST. art. II, §§ 24–25; CAL. CONST. art. I, § 4; COLO. CONST. art. II, § 4; CONN. CONST. art. I, § 3; DEL. CONST. art. I, § 1; FLA. CONST. art. I, § 3; GA. CONST. art. I, § 1, ¶¶ 3–4; HAW. CONST. art. I, § 4; IDAHO CONST. art. I, § 4; ILL. CONST. art. I, § 3; IND. CONST. art. I, §§ 2–3; IOWA CONST. art. I, § 3; KAN. CONST., Bill of Rights, § 7; KY. CONST., Bill of Rights, §§ 1–5; LA. CONST. art. I, § 8; ME. CONST. art. I, § 3; MD. CONST., Declaration of Rights, art. XXXVI; MASS. CONST. pt. 1, art. II; MASS. CONST. amend. art. XLVI, § 1; MICH. CONST. art. I, § 4; MINN. CONST. art. I, § 16; MISS. CONST. art. III, § 18; MO. CONST. art. I, § 5; MONT. CONST. art. II, § 5; NEB. CONST. art. I, § 4; NEV. CONST. art. I, § 4; N.H. CONST. pt. 1, art. V; N.J. CONST. art. I, ¶ 3; N.M. CONST. art. II, § 11; N.M. CONST. art. XXI, § 1; N.Y. CONST. art. I, § 3; N.C. CONST. art. I, § 13; N.D. CONST. art. I, § 3; OHIO CONST. art. I, § 7; OKLA. CONST. art. I, § 2; OR. CONST. art. I, §§ 2–3; PA. CONST. art. I, § 3; R.I. CONST. art. I, § 3; S.C. CONST. art. I, § 2; S.D. CONST. art. VI, § 3; TENN. CONST. art. I, § 3; TEX. CONST. art. I, § 6; UTAH CONST. art. I, § 4; UTAH CONST. art. III, § 1; VT. CONST. ch. I, art. III; VA. CONST. art. I, § 16; WASH.

Amendment,¹²¹ while the language in others appears more¹²² or less¹²³ protective of religious exercise. Regardless of the actual wording, the highest court in each state has assumed the power to construe these constitutional provisions and the construction is subject to its political and religious sensibilities.¹²⁴ As one state supreme court chief justice put it, the “state courts are unconstrained in their power to interpret their own constitutions to provide greater protections of individual rights.”¹²⁵

Of course, if the state wording differs from the First Amendment, a different interpretation is easily justified.¹²⁶ Whether the wording is the same or different, however, many state courts have traditionally analyzed their own free exercise provisions as coextensive with the federal constitution as interpreted by the United States Supreme Court.¹²⁷ Others, in the harsh light of *Employment Division v. Smith*, have divined more extensive

CONST. art. I, § 11; W. VA. CONST. art. III, § 15; WIS. CONST. art. I, § 18; WYO. CONST. art. I, § 18; WYO. CONST. art. XXI, § 25.

¹²¹ See, e.g., ALASKA CONST. art. I, § 4; HAW. CONST. art. I, § 4; IOWA CONST. art. I, § 3; LA. CONST. art. I, § 8; MONT. CONST. art. II, § 5; S.C. CONST. art. I, § 2; VA. CONST. art. I, § 16.

¹²² See, e.g., ARK. CONST. art. II, §§ 24–25; GA. CONST. art. I, § 1, ¶¶ 3–4; IND. CONST. art. I, § 3; KAN. CONST., Bill of Rights, § 7; KY. CONST., Bill of Rights, §§ 1, 5; MINN. CONST. art. I, § 16; NEB. CONST. art. I, § 4; N.C. CONST. art. I, § 13; OHIO CONST. art. I, § 7; OR. CONST. art. I, § 3; PA. CONST. art. I, § 3; TENN. CONST. art. I, § 3; UTAH CONST. art. I, § 4; VT. CONST. ch. I, art. III; WIS. CONST. art. I, § 18.

¹²³ See, e.g., ALA. CONST. art. I, § 3; ARIZ. CONST. art. II, § 12; ME. CONST. art. I, § 3; MD. CONST., Declaration of Rights, art. XXXVI; MICH. CONST. art. I, § 4; N.H. CONST. pt. 1, art. V; N.J. CONST. art. I, ¶ 3; N.M. CONST. art. II, § 11; N.M. CONST. art. XXI, § 1; N.Y. CONST. art. I, § 3; N.D. CONST. art. I, § 3; OKLA. CONST. art. I, § 2; R.I. CONST. art. I, § 3; S.D. CONST. art. VI, § 3; WASH. CONST. art. I, § 11; W. VA. CONST. art. III, § 15.

¹²⁴ Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence*, 1993 B.Y.U. L. REV. 275, 285 (1993) (“Under principles of federalism, state courts have tremendous interpretive autonomy regarding individual and group rights. Each state has its own constitution, and the state supreme court is the final arbiter of its meaning. The substance of the interpretation can track the federal courts’ interpretation of the comparable federal provision or it can differ significantly.”). But see JOSEPH P. DAILEY, *THE LAST DEMOCRATS: HOW AMERICA FOUGHT AND LOST THE WAR AGAINST JUDICIAL SUPREMACY* 373–74 (2014) (discussing popular sovereignty and the power of voters to determine the meaning of state constitutional provisions).

¹²⁵ Durham, *supra* note 87, at 367; see also Stewart F. Hancock, Jr., *New York State Constitutional Law—Today Unquestionably Accepted and Applied as a Vital and Essential Part of New York Jurisprudence*, 77 ALB. L. REV. 1331, 1332 (2013/2014) (“[I]ndependent state constitutional law is no longer considered novel or unusual. It is now routinely accepted and applied as a matter of course.”).

¹²⁶ Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN’S L. REV. 399, 412 (1987) (“[W]here there are material textual differences between a state constitution and a corresponding provision of the federal Constitution, there is little difficulty concluding that something different may have been intended.”).

¹²⁷ Carmella, *supra* note 124, at 319; see, e.g., *State v. Solomon*, 141 S.E.2d 818, 827 (S.C. 1965) (same wording); *State v. Rogers*, 200 A.2d 740, 743 (N.H. 1964) (different wording); *State v. DeLaBruere*, 577 A.2d 254, 259, 262 (Vt. 1990) (different wording).

protection for religious exercise in their state constitutions.¹²⁸ Even states with free exercise wording identical to the federal constitution have not felt constrained to interpret the words the same way as the Supreme Court.¹²⁹

State constitutional free exercise law is still developing and unpredictable. There is no guarantee that state courts will interpret their own constitutions to offer more protection than the First Amendment; some have adopted the *Smith* standard even though their own constitutional language appears more protective.¹³⁰ Nor is there any guarantee that greater protection will rise to the level of the compelling interest test.¹³¹ In some state courts, however, religious business owners may have an opportunity not afforded under the First Amendment—to force the government to prove that it has a compelling interest in requiring religious objectors to comply with a neutral statute.¹³²

2. State RFRAs

When passed, RFRA applied to federal, state, and local laws.¹³³ Indeed, the Act responded to the *Smith* case, which involved the application of an Oregon criminal statute.¹³⁴ The Court soon held in

¹²⁸ Carmella, *supra* note 124, at 279–84; *see, e.g.*, *Rupert v. Portland*, 605 A.2d 63, 65–66 (Me. 1992); *Soc’y of Jesus v. Boston Landmarks Comm’n*, 564 N.E.2d 571, 572–73 (Mass. 1990); *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990); *State v. French*, 460 N.W.2d 2, 8–9 (Minn. 1990); *First Covenant Church v. City of Seattle*, 840 P.2d 174, 185–86 (Wash. 1992).

¹²⁹ *Tozzi*, *supra* note 117, at 277–78. The Supreme Court of Alaska, for example, declined to follow *Employment Division v. Smith* and continued to follow the *Sherbert v. Verner* compelling interest test instead, even though its state constitutional provision was the same as the First Amendment. *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274, 279–81 (Alaska 1994) (citing *Emp’t Div. v. Smith*, 494 U.S. 872, 884–85 (1990); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963)). “States may justify a particular interpretation that differs from the federal understanding by reference to historical experiences of the state, specific socioeconomic or demographic concerns (such as particular ethnic, racial or religious minorities), matters of particular local interest, or the public attitudes of the state’s citizens.” Carmella, *supra* note 124, at 288; *see* David H. E. Becker, Note, *Free Exercise of Religion Under the New York Constitution*, 84 CORNELL L. REV. 1088, 1131–32 (1999).

¹³⁰ *Durham*, *supra* note 87, at 370 (“Ultimately, while unlikely, reliance on state constitutions could create bodies of religious liberty jurisprudence so distinct from one state to the next that the absence of ‘decisional certainty’ could create a state of flux just as troubling as that arguably generated by *Smith*.”)

¹³¹ In New York, for example, the Court of Appeals adopted a “substantial deference” standard. The Court will defer to the legislature—and deny an exemption to the religious objector—unless an “unreasonable interference” with religious freedom is proven. *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 466 (N.Y. 2006).

¹³² *See* Becker, *supra* note 129, at 1131–32.

¹³³ *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997).

¹³⁴ 42 U.S.C. § 2000bb (2013); *Smith*, 494 U.S. at 882.

City of Boerne v. Flores, however, that Congress lacked the constitutional authority to impose a court-enforced compelling interest test on state and local governments.¹³⁵ According to the Court, RFRA was not tailored to prevent violations of the Free Exercise Clause; it did too much more.¹³⁶

Flores said Congress could not impose the RFRA test upon state and local governments, but it said nothing about state legislatures imposing such a limit on their own powers.¹³⁷ In light of the overwhelming popular support of RFRA, individual states began enacting their own laws modeled after the federal statute. To date, nineteen states have passed their own RFRA statutes.¹³⁸ In those states, government cannot substantially burden religious exercise without a compelling interest, and to achieve the compelling interest government must use the means least restrictive of religion.¹³⁹

In the remaining states, the thirty-one without RFRA statutes, unless the state court invokes the state constitutional free exercise provision, a generally applicable neutral statute will not be subject

¹³⁵ *Flores*, 521 U.S. at 534–36.

¹³⁶ *Id.* at 534–35 (“If ‘compelling interest really means what it says . . . many laws will not meet the test [The test] would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind.’ Laws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise. . . . The substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*. Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion. In most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry.” (alteration in original) (quoting *Smith*, 494 U.S. at 888) (internal quotation marks omitted)).

¹³⁷ *See Boerne*, 521 U.S. at 534–36; *A.A. v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 258–59 (5th Cir. 2010); *St. John’s United Church of Christ v. City of Chi.*, 502 F.3d 616, 631 (7th Cir. 2007) (“[A state] legislature [could] reasonably conclude[] that *Boerne* said nothing about its own ability under [the state’s] Constitution to enact a measure affording special protection to religion . . . using language that mirrors that of the federal RFRA.”).

¹³⁸ ALA. CONST. art. I, § 3.01; ARIZ. REV. STAT. ANN. § 41-1493.01 (2015); CONN. GEN. STAT. § 52-571b (West 2015); FLA. STAT. § 761.03 (West 2015); IDAHO CODE ANN. § 73-402 (2014); 775 ILL. COMP. STAT. ANN. §§ 35/15, 35/25 (West 2015); KAN. STAT. ANN. § 60-5303(a) (West 2015); KY. REV. STAT. § 446.350 (West 2015); LA. REV. STAT. ANN. § 13:5233 (2014); MISS. CODE ANN. § 11-61-1(5) (2014); MO. REV. STAT. § 1.302 (West 2015); N.M. STAT. ANN. § 28-22-3 (West 2014); OKLA. STAT. tit. 51, § 253 (2015); 71 PA. CONST. STAT. § 2404 (West 2014); R.I. GEN. LAWS § 42-80.1-3 (2014); S.C. CODE ANN. § 1-32-40 (2013); TENN. CODE ANN. § 4-1-407(c) (2014); TEX. CIV. PRAC. & REM. CODE ANN. § 110.003 (West 2013); VA. CODE ANN. § 57-2.02B (2014).

¹³⁹ *See supra* note 138. In Kentucky, the government must prove “by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest.” KY. REV. STAT. § 446.350.

to a high level of scrutiny—even when it substantially burdens religion.¹⁴⁰ The Free Exercise Clause as interpreted in *Smith* may be the sole protection. Recently, however, efforts to strengthen state RFRA laws have met with protest because they have been interpreted as giving license to discriminate.¹⁴¹

V. RELIGIOUS FREEDOM LAWS APPLIED

The next question is what rights business owners of faith have under religious exercise laws to refrain from the recent government mandates they believe to be sinful. When religious business owners objected to the contraceptive mandate under the Affordable Care Act, the *Hobby Lobby* Court held the mandate to be unlawful.¹⁴² If a business owner objected on religious grounds to facilitating a same-sex wedding ceremony, would religious exercise law grant an exemption from discrimination laws?

A. *Free Exercise Clause*

If the *Hobby Lobby* case rested on First Amendment grounds, then state and local authorities would be equally constrained, but the Supreme Court never reached the constitutional argument.¹⁴³ The Free Exercise Clause remains as interpreted in *Smith* with little protection for religious business owners.¹⁴⁴ Under *Smith*, even if it were assumed in both the Affordable Care Act and same-sex marriage cases that the religious exercise of the business owners was substantially burdened, in neither case is the law anything but neutral and generally applied to all business owners.¹⁴⁵ Therefore, the First Amendment compelling interest test would not apply.¹⁴⁶ Absent that heightened scrutiny, government would only be

¹⁴⁰ See Keirsten G. Anderson, Note, *Protecting Unmarried Cohabitants from the Religious Freedom Restoration Act*, 31 VAL. U. L. REV. 1017, 1040–41 (1997).

¹⁴¹ See Jaime Fuller, *The Arizona Religious Rights Bill Is Dead. So, What's the Next Arizona?*, WASH. POST (Feb. 27, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/02/27/now-that-arizonas-bill-is-dead-what-states-are-still-considering-similar-legislation/>.

¹⁴² *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2766, 2785 (2014).

¹⁴³ *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2785.

¹⁴⁴ See Rudary, *supra* note 43, at 372.

¹⁴⁵ See Alan E. Garfield, *The Contraception Mandate Debate: Achieving a Sensible Balance*, 114 COLUM. L. REV. SIDEBAR 1, 6 (2014); Ariel Y. Graff, *Free Exercise and Hybrid Rights: An Alternative Perspective on the Constitutionality of Same-Sex Marriage Bans*, 29 U. HAW. L. REV. 23, 54 (2006).

¹⁴⁶ See Rochelle Swartz, Note, *Bearing the Burden of Contraception: Why For-Profit Businesses Must Comply with the "Contraceptive Mandate,"* 18 FORDHAM J. CORP. & FIN. L. 1049, 1062 (2013).

required to reach the low bar of a rational basis.¹⁴⁷ There is little doubt that the government could do so in both cases.

The Free Exercise Clause would not require a religious exemption to the contraceptive mandate under *Employment Division v. Smith*.¹⁴⁸ The law is neutral and generally applicable.¹⁴⁹ If there were so many exemptions written into the statute that it was, in effect, only a law prohibiting religious exercise, it would not be considered generally applicable.¹⁵⁰ The secular exemptions (such as those for employers of less than fifty full-time workers and for grandfathered noncomplying plans), however, did not appear to mask a governmental attack on religion.¹⁵¹ The only question, then, would be whether there was a rational basis for the contraceptive mandate. The government argued that the contraceptive mandate was designed to promote the health of women by providing access to preventive healthcare, including contraceptives.¹⁵² Specifically, it contended in the Supreme Court that

the link between the contraceptive-coverage provision and women's health is supported by ample empirical evidence demonstrating that providing women access to contraceptives without cost-sharing can have significant health benefits for them and their children, and, conversely, that financial barriers to such access can result in significant health problems.¹⁵³

There is little doubt that the Court would find the mandate met the rational basis test.

Religious business owners objecting to facilitating same-sex marriage would fare no better under the Free Exercise Clause in states that prohibit discrimination based on sexual orientation. The state laws are neutral toward religion and generally applicable.¹⁵⁴ Jurisdictions with these laws argue that they are necessary to uphold the basic dignity of same-sex couples.¹⁵⁵ Courts would find laws prohibiting discrimination based on sexual orientation rationally related to that goal.

¹⁴⁷ *Id.*

¹⁴⁸ *See* *Emp't Div. v. Smith*, 494 U.S. 872, 880, 890 (1990); Rudary, *supra* note 43, at 358.

¹⁴⁹ Rudary, *supra* note 43, at 358.

¹⁵⁰ *See* *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534 (1993).

¹⁵¹ *See* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014).

¹⁵² Reply Brief for the Petitioners, *supra* note 46, at 16.

¹⁵³ *Id.*

¹⁵⁴ *See, e.g.*, N.Y. DOM. REL. § 13 (McKinney 2014).

¹⁵⁵ *See* *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 37 (D.C. 1987).

B. Religious Freedom Restoration Act (RFRA)

For the contraceptive mandate, the federal Religious Freedom Restoration Act (RFRA) determined the outcome in *Hobby Lobby*.¹⁵⁶ RFRA offered broader protection than the Free Exercise Clause to the religious employer.¹⁵⁷ For businesses objecting to facilitating same-sex marriages, the federal RFRA is no help because it does not apply to state and local laws.¹⁵⁸

In the *Hobby Lobby* case, RFRA required a three-question analysis: *first*, did the contraceptive mandate impose a substantial burden on the religious employer?¹⁵⁹ *Second*, if so, did the government have a compelling interest in applying the contraceptive mandate to the objecting religious employer?¹⁶⁰ *Third*, if so, in attempting to accomplish the compelling interest, was the government using the alternative least restrictive to religious exercise?¹⁶¹

In the lower courts, the ruling on the substantial burden element was a bellwether for the outcome. Those that rejected challenges to the contraceptive mandate generally found no substantial burden on religious exercise;¹⁶² courts that sustained challenges agreed that requiring an employer to provide insurance coverage for drugs or procedures over religious objection was a substantial burden.¹⁶³ In the Supreme Court, the government argued that the obligation to provide coverage was too attenuated from the decision female employees might or might not make with their doctors to use the religiously objectionable drugs.¹⁶⁴ The Supreme Court said it had “little trouble concluding” that the contraceptive mandate

¹⁵⁶ *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2759.

¹⁵⁷ *Id.* at 2767–68.

¹⁵⁸ See *City of Boerne v. Flores*, 521 U.S. 507, 532–36 (1997).

¹⁵⁹ *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2780.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² See, e.g., *Mersino Mgmt. Co. v. Sebelius*, No. 13-cv-11296, 2013 U.S. Dist. LEXIS 96588, at *52 (E.D. Mich. July 11, 2013); *Annex Med., Inc. v. Sebelius*, No. 12-2804 (DSD/SER), 2013 U.S. Dist. LEXIS 2699, at *5 (D. Minn., Jan. 8, 2013), *vacated in part*, 2014 U.S. App. LEXIS 19073 (8th Cir. Oct. 6, 2014); *O'Brien v. U.S. Dep't of Health & Human Serv.*, 894 F. Supp. 2d 1149, 1160 (E.D. Mo. 2012).

¹⁶³ *Korte v. Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013), *cert denied sub nom.*, *Burwell v. Korte*, 134 S. Ct. 2903 (2014); see *Grote v. Sebelius*, 708 F.3d 850, 854 (7th Cir. 2013); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1141 (10th Cir. 2013), *aff'd sub nom.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Beckwith Elec. Co. v. Sebelius*, 960 F. Supp. 2d 1328, 1347 (M.D. Fla. 2013); *Monaghan v. Sebelius*, 931 F. Supp. 2d 794, 806 (E.D. Mich. 2013).

¹⁶⁴ See *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2777.

substantially burdened the exercise of religion.¹⁶⁵ It credited the sincerity of the objection and eschewed questioning its validity under religious dogma.¹⁶⁶

Whether the government had a compelling interest was the subject of much disagreement. The government supported the contraceptive mandate as satisfying compelling interests in public health and gender equality.¹⁶⁷ To some, these interests appeared too general to satisfy the test.¹⁶⁸ Others questioned whether there really was a critical need that the government was addressing in the contraceptive mandate.¹⁶⁹ Although the Court noted that the government posited a narrower interest—ensuring that all women have access to all FDA-approved contraceptives without cost sharing—it reiterated that RFRA “contemplates a ‘more focused’ inquiry . . . to look to the marginal interest in enforcing the contraceptive mandate in these cases.”¹⁷⁰

¹⁶⁵ *Id.* at 2775.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 2779.

¹⁶⁸ See *Gilardi v. U.S. Dep’t of Health & Human Serv.*, 733 F.3d 1208, 1220 (D.C. Cir. 2013), *vacated*, 134 S. Ct. 2902 (2014) (“[A]s a standalone principle, ‘safeguarding the public health’ seems too broadly formulated to satisfy the compelling interest test. It has been used to justify all manner of government regulations in other contexts. And here, the government relies on the broad sweep of that interest once more, citing *Mead v. Holder*, 766 F. Supp. 2d 16, 43 (D.D.C. 2011), an individual-mandate case in which a district court found the public health interest sufficient. But the invocation of the interest in *Mead* seems empty, reflexive, and talismanic. The government cites *Mead* as if to say, ‘once a compelling interest, always a compelling interest.’ It fails to recognize that ‘safeguarding the public health’ is such a capacious formula that it requires close scrutiny of the asserted harm.” (citing *Roe v. Wade*, 410 U.S. 113, 154 (1973); *Loxley v. Chesapeake Hosp. Auth.*, No. 97-2539, 1998 U.S. App. LEXIS 30551, at *11–12 (4th Cir. Dec. 1, 1998); *Dunagin v. City of Oxford*, 718 F.2d 738, 747 (5th Cir. 1983)).

¹⁶⁹ Edward Whelan, *Non-Discrimination Principles Versus Civil Liberties*, ETHICS & PUB. POL’Y CTR. (Mar. 1, 2013), <http://www.eppc.org/publications/non-discrimination-principles-versus-civil-liberties/> (“The question whether the government can demonstrate that application of the burden to the objecting employer is in furtherance of a compelling governmental interest involves a more complicated analysis, but the answer in the end is clearly no. For starters, by HHS’s own account, there is already widespread access to contraceptives, via pre-existing employer-based insurance plans, community health centers, and public clinics (as well as the countless pharmacies and doctors who dispense contraceptives). No one can seriously maintain that there is a general problem of lack of access to contraceptives.”) Since eighty-five to ninety percent of employer plans already included contraceptive coverage before the Affordable Care Act, unemployed women faced the greatest risk of unplanned pregnancy; these women would not be helped by a mandate that employers provide no-cost coverage of contraceptives. *High Court Clash Over ObamaCare Contraceptive Mandate*, FOXNEWS.COM (Mar. 25, 2014), <http://www.foxnews.com/politics/2014/03/25/supreme-court-to-take-up-obamacare-contraceptive-mandate-in-landmark-case/>; Rudary, *supra* note 43, at 379; Susan J. Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 HARV. J.L. & PUB. POL’Y 741, 771 (2005).

¹⁷⁰ *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2779; see Laycock, *supra* note 6, at 872 (“The

The government argued that it had a compelling interest in the uniform application of the Affordable Care Act; it should not be required to allow religious exemptions to the contraceptive mandate because they would lead to exemptions for employers with religious objections to an uncontrollable assortment of medical procedures and prescription drugs.¹⁷¹ The Supreme Court, however, has required more than a slippery slope argument; RFRA by its terms requires a case-by-case evaluation of possible exemptions.¹⁷²

The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to "rule[s] of general applicability."¹⁷³

If the government had no compelling interest, RFRA would have prohibited the government from forcing religious objectors to provide coverage for emergency contraceptives.¹⁷⁴ On the other

interest groups now arrayed against religious liberty tend to assume that any interest they care about is compelling, and to state those interests at the grandest level of generality. There is a compelling interest in women's health, or even more broadly, in public health; there is a compelling interest in nondiscrimination. Such sweeping claims avoid the proper inquiry, which is whether enforcement of the government's interest *as applied* to the particular religious claimant—and to all others whose similar claims cannot be fairly distinguished—is necessary to serve a compelling government interest.”)

¹⁷¹ Brief for the Petitioners, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354), 2014 WL 173486, at *38, *45.

¹⁷² *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436, 439 (2006).

¹⁷³ *Id.* at 436 (quoting 42 U.S.C. § 2000bb-1(a) (2013)); see *Emp't Div. v. Smith*, 494 U.S. 872, 917 (1990) (Blackmun, J., dissenting) (“Behind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe.” (quoting Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 947 (1989) (internal quotation marks omitted)). As one opponent to the mandate put it:

Defenders of the law . . . usually end up making some sort of slippery-slope case: Let employers with religious objections opt out of the contraceptive mandate, for example, and pretty soon you'll be letting other employers opt out of covering blood transfusions, or medical coverage altogether. Or letting Quakers get out of paying taxes to support the military. If religions that believe in human sacrifice make a comeback, should they get an exemption from murder laws?

The more outlandish scenarios ignore the terms of the Religious Freedom Restoration Act and thus state the principle behind the lawsuits too broadly. The principle isn't “Never impose a burden on the practice of faith.” It's “Don't impose a substantial burden on the practice of faith unless you have to, that is, unless it's the least restrictive way to advance a compelling governmental interest.” No neo-Aztecs can take shelter against the murder laws under that principle.

Ponnuru, *supra* note 87, at 18.

¹⁷⁴ See *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2759.

hand, if a compelling interest were found, the government would have been required to use the least restrictive means to achieve its goal.¹⁷⁵ Because the *Hobby Lobby* Court held the government failed to use the least restrictive means, the compelling interest question became academic.¹⁷⁶ The Court “assume[d] that the interest in guaranteeing cost-free access to the four challenged contraceptive methods [was] compelling within the meaning of RFRA, and . . . proceed[ed] to consider the final prong of the RFRA test, *i.e.*, whether . . . the contraceptive mandate [was] ‘the least restrictive means of furthering that compelling governmental interest.’”¹⁷⁷

In an attempt to show that the government failed to meet this test, religious objectors suggested a number of alternatives to forcing employers to violate their religious principles.¹⁷⁸ The government, in turn, argued that alternatives suggested would “not adequately ‘further[]’ the government’s interests.”¹⁷⁹ The Supreme Court held the “least-restrictive-means standard is exceptionally

¹⁷⁵ *See id.*

¹⁷⁶ *See id.* at 2780.

¹⁷⁷ *Id.* (quoting 42 U.S.C. § 2000bb-1(b)(2) (2013)).

¹⁷⁸ *Korte v. Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013), *cert denied sub nom.*, *Burwell v. Korte*, 134 S. Ct. 2903 (2014) (“[T]here are many ways to increase access to free contraception without doing damage to the religious-liberty rights of conscientious objectors. The plaintiffs have identified a few: The government can provide a ‘public option’ for contraception insurance; it can give tax incentives to contraception suppliers to provide these medications and services at no cost to consumers; it can give tax incentives to consumers of contraception and sterilization services. No doubt there are other options.”); *Laycock*, *supra* note 6, at 877–78 (“If it is thought to be essential to provide contraception to all for free, or very inexpensively, there are other ways to do it. The *Final Rules* seem likely to work for religious institutions. Or government could provide it directly. Or we could require the pharmaceutical companies to sell contraceptives to individuals at the same prices they charge to group plans. Any proposed solution will pose political issues of its own, but the First Amendment does not say that government may interfere with the free exercise of religion whenever churches have less political clout than some other interest group. The Free Exercise Clause exists precisely because religious minorities often do not have the clout to protect their liberty politically.”); *Whelan*, *supra* note 169 (“There are lots of alternative means by which the government could increase access to contraceptives without conscripting objecting employers: for example, direct government provision of contraceptives, government payment to third-party providers, mandates on contraceptive providers, and tax credits or deductions or other financial support for contraceptive users. Instead of pursuing any of these alternatives, the . . . administration has adopted the single means that is *most* restrictive of the religious liberty of objecting employers.”); *Ponnuru*, *supra* note 87, at 18 (“It cannot be seriously maintained that forcing employers who object to contraception to provide it is the least restrictive means of advancing a compelling governmental interest. The government could, for example, increase its direct subsidies for the distribution of contraception, involving objectors only to the extent that they pay taxes to the general federal pot. Or the government could allow oral contraception to be purchased over the counter, without a prescription, involving objectors not at all.”)

¹⁷⁹ Reply Brief for Petitioners, *supra* note 46, at 24 (alteration in original) (quoting 42 U.S.C. § 2000bb-1(b)(2) (2013)).

demanding, and it is not satisfied here.”¹⁸⁰

C. State Constitutions and RFRA

Business owners with religious objections to participating in same-sex weddings will seek relief from state discrimination laws under state constitutional free exercise provisions and, where they exist, state RFRA. State RFRA laws are modeled on the federal RFRA and the analysis ought to follow the same structure.¹⁸¹ State constitutional free exercise clauses, when they are construed to offer more protection than the federal constitution, at most provide a compelling interest analysis akin to RFRA,¹⁸² if the construction is based on *Sherbert v. Verner*, they may not require the least restrictive means element.¹⁸³

The blueprint for state RFRA may be the same as the federal RFRA, but the judges interpreting the statutes are not. In at least one state, New Mexico, the highest court held that a state RFRA did not apply when a same-sex couple sued a religious business owner under state discrimination laws; the law was only triggered in actions against the government, not those between private parties.¹⁸⁴ Under this analysis, a state legislature could easily avoid RFRA requirements by delegating enforcement of its discrimination laws to private parties as New Mexico did.¹⁸⁵

Assuming a state RFRA does apply or the state court uses a compelling interest test under its own constitution, the first question is whether a legal requirement to facilitate same-sex marriage constitutes a substantial burden on the religious exercise of those who consider such marriages sinful. The government may argue that one who provides services for a wedding is not responsible for the purportedly sinful behavior, but there is little to be gained by questioning the religious underpinnings of the

¹⁸⁰ *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2780.

¹⁸¹ See Teresa Wiltz, ‘Religious Freedom’ or a ‘License to Discriminate’?, PEW CHARITABLE TRUSTS (Dec. 12, 2014), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2014/12/12/religious-freedom-or-a-license-to-discriminate>.

¹⁸² See *supra* note 131 and accompanying text. The New York Court of Appeals ruled its constitution provided more free exercise protection than the First Amendment, but did not require a compelling interest analysis. See *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 466 (N.Y. 2006).

¹⁸³ *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); see *supra* notes 91–95 and accompanying text.

¹⁸⁴ *Elane Photography, LLC v. Willock*, 309 P.3d 53, 76–77 (N.M.), *aff’d*, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014).

¹⁸⁵ Religious protection important to one session of legislators could be easily circumvented by another session of legislators that valued different legislative goals more highly.

objection; many religions impose vicarious responsibility when a believer facilitates sin or even fails to do anything to stop it.¹⁸⁶ Clearly, subjecting a business owner to monetary penalties for a religion-based refusal to render services at a same-sex wedding constitutes a substantial burden on the exercise of religion. The discrimination laws force a choice upon the religious business owner—violate principles of faith or face fines. This is a prototypical substantial burden.¹⁸⁷

The next question is whether the state or local government has a compelling interest in forcing the religious business owner to participate in a same-sex wedding. This question is the most controversial. Jurisdictions with statutes prohibiting discrimination based on sexual orientation consider the need for them pressing:

The compelling interests . . . that any state has in eradicating discrimination against the homosexually or bisexually oriented include the fostering of individual dignity, the creation of a climate and environment in which each individual can utilize his or her potential to contribute to and benefit from society, and equal protection of the life, liberty and property that the Founding Fathers guaranteed to us all.

....

“As long as homosexual men and women, as well as other groups of people who are simply seen as ‘different’ from the majority of American citizens, continue to be viewed through stereotypical thinking, our society will pay the price inevitably exacted by fear and ignorance.”

¹⁸⁶ See Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and State*, 53 B.C. L. REV. 1417, 1462–63 (2012).

¹⁸⁷ *A Bill for an Act Relating to Equal Rights: Hearing on S. Bill 1 Before the S. Comm. on Judiciary and Labor*, 2013 Leg., 2nd Special Sess. 9–10 (Haw. 2013) (statement of William Bassett, et al. on Religious Freedom Implications of Proposed Hawaii Marriage Equality Act of 2013) (“The proposed legislation does not protect individuals who for sincerely held religious reasons prefer no role in a same-sex marriage ceremony. Thus, a religious individual who runs a small business, e.g., a baker who makes wedding cakes; a wedding photographer; a caterer; a florist; a reception hall owner; or a seamstress or a tailor, receives *no protection at all* from the current draft. The failure to protect such individuals puts them to a cruel choice: their conscience or their livelihood.”); see also Laycock, *supra* note 6, at 873–74 (“Just as all government interests are compelling in this view, no burdens on religion are substantial. Driving religious minorities out of their chosen occupation or profession is said not to be a burden on religion, because their religions do not require them to be a wedding planner, or a marriage counselor, or an obstetrician. Never mind that excluding Catholics from the professions was a time-honored means of persecution, well known to the Founders.”)

....

We consider that the Council of the District of Columbia acted on the most pressing of needs when incorporating into the Human Rights Act its view that discrimination based on sexual orientation is a grave evil that damages society as well as its immediate victims. The eradication of sexual orientation discrimination is a compelling governmental interest.¹⁸⁸

On the other hand, proponents of religious exemptions argue that the “marginal interest” in requiring individual religious objectors to participate in same-sex weddings¹⁸⁹ is not compelling enough to allow the burden on religion. They contend that any analogy to other types of discrimination is inapt.¹⁹⁰

The purpose of an antidiscrimination statute is to remedy a prevailing condition of discrimination.¹⁹¹ A court determining whether a state had a compelling interest would examine the history and whether a national consensus had developed about that type of discrimination.¹⁹² Same-sex couples have clearly faced discrimination.¹⁹³ Before the Supreme Court decision in *Obergefell*

¹⁸⁸ *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 37–38 (D.C. 1987) (quoting ALAN P. BELL & MARTIN S. WEINBERG, *HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN* 25 (1978)). It has even been suggested that “[a]nother possible approach would be to simply take the legislature’s passage of the law as evidence that the discrimination is undesirable, and therefore as proof that the state has a compelling interest in preventing the discrimination.” Jack S. Vaitayanonta, Note, *In State Legislatures We Trust?: The “Compelling Interest” Presumption and Religious Free Exercise Challenges to State Civil Rights Laws*, 101 COLUM. L. REV. 886, 912 (2001).

¹⁸⁹ *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006).

¹⁹⁰ Dolan, *supra* note 51, at 1148 (“[T]he extension from racial discrimination to discrimination on the basis of sexual orientation should not be assumed, as, ‘the Court’s description in *Bob Jones* of the ‘consistent’ efforts to eliminate racial discrimination—even by military force—has no counterpart with same-sex marriage.” (quoting Douglas W. Kmiec, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion*, in *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* 103, 109–10 (Douglas Laycock et al. eds., 2008)).

¹⁹¹ *See* Ellen D. Katz, *Engineering the Endgame*, 109 MICH. L. REV. 349, 350–51 (2010).

¹⁹² Vaitayanonta, *supra* note 188, at 910.

¹⁹³ *Gay Rights Coal. of Georgetown Univ. Law Ctr.*, 536 A.2d at 35–36 (“Despite its irrelevance to individual merit, a homosexual or bisexual orientation invites ongoing prejudice in all walks of life, ranging from employment to education, and for most of which there is currently no judicial remedy outside the District of Columbia or the State of Wisconsin. Illustrative is a 1950 Senate investigation into the employment of homosexual persons and ‘other moral perverts’ in the federal government. It concluded that even one ‘sex pervert in a government agency tends to have a corrosive influence upon his fellow employees One homosexual can pollute a government office.’ As a result of this reasoning it was not until 1975 that the federal government lifted its ban on the employment of homosexual workers. Erupting into violence, social prejudice sometimes takes the form of unprovoked

v. Hodges, they could not legally marry in thirteen states.¹⁹⁴ It does not follow, however, that same-sex couples will be subjected to systematic discrimination by wedding vendors.¹⁹⁵ “Individuals who object on religious grounds to facilitating same-sex marriages have . . . incurred significant wrath in the marketplace,”¹⁹⁶ and commentators suggest that most businesses will look upon same-sex marriage as an opportunity.¹⁹⁷

A compelling interest in not granting an exception to the individual religious objector is required.¹⁹⁸ Religious objectors ask whether the government has such a compelling interest if alternative services from other vendors are readily available. They contend there is a difference between using antidiscrimination laws to remedy a condition of unavailability of services¹⁹⁹ and using them to ferret out those with religious objections and put them out of business.²⁰⁰

Once the compelling interest question is resolved, the state RFRA and constitutional analyses diverge. If the governmental interest were found to be compelling, this would likely be the end of a state constitutional analysis under a *Sherbert v. Verner* approach.²⁰¹ The

attacks on those perceived to be gay. Such discrimination has persisted throughout most of history. In perhaps its most virulent form, prejudice against gay people led to the Nazi concentration camps. There, homosexual prisoners were distinguished, like their unfortunate fellows, by a cloth badge, in their case one which singled them out for unusual atrocities. . . . This country has a ‘long and unfortunate history’ of discrimination based on sexual orientation.” (citation omitted).

¹⁹⁴ *Should Gay Marriage Be Legal?*, PROCON.ORG, <http://gaymarriage.procon.org/> (last visited Sept. 26, 2015).

¹⁹⁵ Wilson, *supra* note 186, at 1485–86 (2012).

¹⁹⁶ *Id.* at 1451.

¹⁹⁷ Burnett, *supra* note 51 (“For some perspective, there are fewer than a dozen of these Christian-vendor-rejects-gay-wedding cases that have made the news. Many more wedding vendors . . . see same-sex marriage as a business opportunity rather than a crucible of their religious principles.”).

¹⁹⁸ See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006).

¹⁹⁹ See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252–53 (1964).

²⁰⁰ See Laycock, *supra* note 6, at 872–73; Wilson, *supra* note 186, at 1446 (“[R]eligious objectors, when left no choice . . . have often chosen to exit the market rather than violate their religious beliefs.”). Arguably, a quest for religious objectors to put them out of business would be counterproductive; it would stiffen the resolve of objectors to same-sex marriage and alienate the undecided. See Dolan, *supra* note 51, at 1122; Jonathan Rauch, *The Majority Report*, ADVOCATE.COM (Nov. 19, 2010), <http://www.advocate.com/politics/commentary/2010/11/19/majority-report?page=full>; Lornet Turnbull, *State’s Case Against Florist Fires Up Gay-Marriage Critics*, SEATTLE TIMES (Apr. 17, 2013), http://seattletimes.com/html/localnews/2020803087_weddingflowersxml.html (“There’s concern that as a handful of states seek to legalize gay marriage, a case like this could well provoke resentment among the so-called ‘movable middle’ as well as live-and-let-live types who don’t like being told how to run their businesses.”).

²⁰¹ *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

burden on religious exercise would be acceptable; the religious business owner would be required to participate in the same sex wedding.²⁰²

Under a state RFRA, however, forcing the religious objector to render services for a same-sex ceremony would also have to be the least restrictive means for accomplishing the governmental purpose.²⁰³ That depends on the purpose of the statute. If the purpose is to ensure that same-sex couples have access to services, commentators have suggested a less restrictive alternative: a religious exemption except when substitute services are unavailable.²⁰⁴ This alternative would ensure same-sex couples the services they needed while protecting the religious exercise of the vast majority of faith-based objectors.²⁰⁵ On the other hand, if the purpose is to remove any possible indignity to same-sex couples, the courts might reach a different result.²⁰⁶

VI. SEPARATION OF CHURCH AND COMMERCE

Constitutional free exercise and RFRA protections were not specifically designed for the commercial context. Is there anything

²⁰² See *United States v. Lee*, 455 U.S. 252, 257–59 (1982).

²⁰³ See, e.g., CONN. GEN. STAT. § 52-571b (West 2015).

²⁰⁴ Laycock, *supra* note 6, at 879; Wilson, *supra* note 186, at 1485; Dolan, *supra* note 51, at 1150–51; *Hearing on S. Bill 1*, *supra* note 187.

²⁰⁵ Wilson, *supra* note 186, at 1485–86 (“In the commercial realm, our proposal gives more latitude to say “no” because the objector does not control access to the status of marriage. The wedding photographer and cake decorator are classic examples of commercial actors associated with marriage. Even the protection for these commercial actors is not unqualified, however. An objector in the stream of commerce may object only if a “substantial hardship” would not result. This provision allows them to step aside only when other providers can do the job. Because same-sex marriage laws remain largely a “blue state” phenomenon, the number of refusals should be vanishingly small. As Professor Laycock has explained: ‘Few same-sex couples . . . will have to go far to find merchants, professionals, counseling agencies, or any other desired service providers who will cheerfully meet their needs and wants. And same-sex couples will generally be far happier working with a provider who contentedly desires to serve them than with one who believes them to be engaged in mortal sin, and grudgingly serves them only because of the coercive power of the law. Religious exemptions could also be drafted to exclude the rare cases where these suppositions are not true, such as a same-sex couple in a rural area that has reasonably convenient access to only one provider of some secular service. Such cases are no reason to withhold religious exemptions in the more urban areas where most of the people—and most of the same-sex couples—actually live.’ (quoting Letter from Douglas Laycock to Gov. John Baldacci, in SHANNON GILREATH, THE END OF STRAIGHT SUPREMACY: REALIZING GAY LIBERATION 261 (2011)).

²⁰⁶ Wilson, *supra* note 186, at 1487 (“Professor Laycock notes, ‘[t]he larger problem for same-sex couples is the insult, the pointed reminder that some fellow citizens vehemently disapprove of what they are doing. But same-sex couples know that anyway, and the American commitment to freedom of speech ensures that they will be reminded of it from time to time.’” (quoting Douglas Laycock, *Afterword*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, *supra* note 190, at 198)).

different about that context that suggests different treatment? Do business owners give up the right to free exercise at the door of the shop? This idea—often posited by the government—has had some success in the courts,²⁰⁷ but *Hobby Lobby* expressly disposed of it at the federal level. That it has gained traction at all renders the religious exercise rights of business owners in particular more unpredictable in the states.

The theory is that since religious believers choose to open businesses, their religious exercise can be subjected to all manner of limitations in that sphere.²⁰⁸ Although no such exception appears in the text of the Free Exercise Clause, the notion of a religion-free commercial zone finds its genesis and support in *United States v. Lee*, where the Supreme Court signaled a willingness to allow more governmental intrusion on religious exercise in the commercial context.²⁰⁹ “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.”²¹⁰

This led to a government refrain in Free Exercise Clause and RFRA cases that religious individuals must leave their beliefs outside the marketplace,²¹¹ a view endorsed by some courts.²¹²

²⁰⁷ See, e.g., *Autocam Corp. v. Sebelius*, 730 F.3d 618, 625–26 (6th Cir. 2013), *vacated sub nom.* *Autocam Corp. v. Burwell*, 134 S. Ct. 2901 (2014); *Conestoga Wood Specialties Corp. v. Sec’y of the U.S. Dep’t of Health & Human Servs.*, 724 F.3d 377, 385 (3d Cir. 2013), *rev’d by Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

²⁰⁸ See *Beckwith Elec. Co. v. Sebelius*, 960 F. Supp. 2d 1328, 1344 (M.D. Fla. 2013) (“Clearly, an individual employed by a secular corporation has the right to exercise religion concomitantly with her employment. But, following the government’s logic, that same individual would lose the right to exercise religion merely by changing hats and becoming the *employer* instead of *employee*. Hypothetically, that same individual (acting now as an employer) would not be able to challenge—on religious freedom grounds—a federal law that compelled (by threat of substantial fines) all ‘secular,’ for-profit businesses to remain open seven days a week. The Court sees no reason to distinguish religious freedom rights based upon the manner and form that one chooses to make a living.” (citation omitted)).

²⁰⁹ *United States v. Lee*, 455 U.S. 252, 261 (1982).

²¹⁰ *Id.*

²¹¹ See, e.g., *Korte v. Sebelius*, 735 F.3d 654, 681 (7th Cir. 2013), *cert denied sub nom.* *Burwell v. Korte*, 134 S. Ct. 2903 (2014); Transcript of Oral Argument, *supra* note 3, at 81.

²¹² See, e.g., *Bethel Baptist Church v. United States*, 629 F. Supp. 1073, 1082 (M.D. Pa. 1986) (“Plaintiffs are correct in distinguishing *Lee* on the basis of its commercial setting. Certainly, the Supreme Court was concerned there about the effect of permitting a taxpayer to bring his religious beliefs into the marketplace.”); *State v. French*, 460 N.W.2d 2, 14–15 (Minn. 1990) (“The distinction between public and private activities underlies freedom of religion cases. . . . ‘Sports and Health . . . is not a religious corporation—it is a Minnesota business corporation engaged in business for profit. By engaging in this secular endeavor, appellants have passed over the line that affords them absolute freedom to exercise religious beliefs. . . . [W]hen appellants entered into the economic arena and began trafficking in the

These courts reasoned that business owners had to “accept the reasonable regulations and restrictions imposed upon the conduct of their commercial enterprise despite their personal religious beliefs that may conflict with these governmental interests”²¹³—far from a compelling interest standard. Others rejected a reading of *Lee* that purported to give the government “*carte blanche* to substantially burden the religious exercise” of business owners.²¹⁴

At bottom, the government’s argument is premised on a far-too-narrow view of religious freedom: Religious exercise is protected in the home and the house of worship but not beyond. Religious people do not practice their faith in that compartmentalized way; free-exercise rights are not so circumscribed.

If the government’s view is correct, commonplace religious practices normally thought protected would fall outside the scope of the free-exercise right. The Jewish deli is the usual example. On the government’s understanding of religious liberty, a Jewish restaurant operating for profit could be denied the right to observe Kosher dietary restrictions. That cannot be right. There is nothing inherently incompatible between religious exercise and profit-seeking.²¹⁵

At the federal level, the separation of church and commerce

market place, they . . . subjected themselves to the standards the legislature has prescribed . . .” (quoting *State ex rel. McClure v. Sports & Health Club Inc.*, 370 N.W.2d 844, 853 (Minn. 1985)).

²¹³ *Elane Photography, LLC v. Willock*, 284 P.3d 428, 443 (N.M. Ct. App. 2012), *aff’d*, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014).

²¹⁴ *Conestoga Wood Specialties Corp. v. Sec’y of the U.S. Dep’t of Health & Human Servs.*, 724 F.3d 377, 411 (3d Cir. 2013) (Jordan, J., dissenting), *rev’d by Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Donahue v. Fair Emp’t & Hous. Comm’n*, 2 Cal. Rptr. 2d 32, 33 (Cal. Ct. App. 1991) (“[N]either *Lee* nor any other case holds . . . that a person loses the constitutional right to the free exercise of religion just because the clash between religious duty and governmental regulation occurs in a commercial context. Rather, as the court in *Lee* acknowledged, even in a commercial context, the state must justify a governmental regulation or ‘limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.’ . . . Religion may properly be viewed as not merely the performance of rituals or ceremonies, limited to one’s home and place of worship, but as also a system of moral beliefs and ethical guideposts which regulate one’s daily life. Religion thus does not necessarily end where society begins. We acknowledge that religious liberty embraces the freedom to believe, which is absolute, and the freedom to act, which in the nature of things cannot be absolute. . . . [D]epending upon the governmental interest at stake, not all burdens on religion are unconstitutional. However, people do not lose their freedom of religion and ‘liberty of conscience’ when they engage in worldly activities. The burden imposed upon the freedom to act consistent with one’s religious beliefs, even in a commercial or societal context, can constitute a burden on the free exercise of religion which is far from incidental.” (citations omitted) (quoting *Lee*, 455 U.S. at 257).

²¹⁵ *Korte*, 735 F.3d at 681.

doctrine was rejected in *Hobby Lobby*. The Court expressly declined to exclude commercial activities from RFRA protection. “Under RFRA, when followers of a particular religion choose to enter into commercial activity, the Government does not have a free hand in imposing obligations that substantially burden their exercise of religion. Rather, the Government can impose such a burden only if the strict RFRA test is met.”²¹⁶

At the state and local level, the government will continue to press the separation of church and commerce theory because it has achieved some success. Some state courts have independently adopted the separation of church and commerce doctrine in construing their own constitutions. These courts accept the notion that since no one is forced to go into business, anyone who does must follow all the rules:

[The landlord] has made no showing of a religious belief which requires that he engage in the property-rental business. Additionally, the economic burden, or “Hobson’s choice,” of which he complains, is caused by his choice to enter into a commercial activity that is regulated by anti-discrimination laws. [The landlord] is voluntarily engaging in property management. The law and ordinance regulate unlawful practices in the rental of real property and provide that those who engage in those activities shall not discriminate on the basis of marital status. Voluntary commercial activity does not receive the same status accorded to directly religious activity. . . . Because [the landlord’s] religiously impelled actions trespass on the private right of unmarried couples to not be unfairly discriminated against in housing, he cannot be granted an exemption from the housing anti-discrimination laws. Therefore, we conclude that enforcement of [the anti-discrimination laws] against [the landlord] does not violate his right to free exercise of religion under the Alaska Constitution.²¹⁷

If a state court carves out a commercial-setting exception to the state constitutional free exercise provision, a religious business owner has no recourse other than a state RFRA or a constitutional amendment.

²¹⁶ *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2784 n.43.

²¹⁷ *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274, 283–84 (Alaska 1994) (citations omitted).

VII. WHO WILL DECIDE THESE QUESTIONS?

The *Smith* Court concluded the proper solution to a generally applicable, neutral statute that infringes on free exercise is a legislative exemption for religious objectors.²¹⁸ Statutory solutions to moral issues reflect prevailing moral values. They represent a balancing between the goal of the statute and conflicting interests. In the area of religious exemptions, the balancing of social policies ought to be done by the legislature.

Legislative exemptions for religious objectors are not foolproof against determined judges, however. The Alaska Supreme Court, for example, held that the state constitution protected the right to an abortion and it could not be overridden by a legislative conscience exemption for hospitals or healthcare workers who objected to performing them.²¹⁹ In such circumstances, the only protection would be a state constitutional amendment.

Legislators may believe they have successfully skirted drawing boundaries on moral issues by assigning them to the courts in RFRAs, but the outcomes for religious objectors are unreliable. Individual business owners can seek exemptions under the federal or state RFRAs from complying with laws they find religiously objectionable, but they are at the mercy of the courts. What one court may consider a substantial burden may seem too attenuated to be substantial to another. What seems a compelling governmental interest to one court may seem a flimsy interest to another. The district court cases challenging the contraceptive mandate exemplify this.²²⁰

Also, in the absence of statutory religious exemptions, courts are

²¹⁸ See *Emp't Div. v. Smith*, 494 U.S. 872, 890 (1990).

²¹⁹ *Valley Hosp. Ass'n, Inc. v. Mat-Su Coal. for Choice*, 948 P.2d 963, 971–72 (Alaska 1997); Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS*, *supra* note 190, at 77, 91–92. The Alaska decision ought to be an outlier. A constitutional right does not imply a coordinate right to force a private business or person to provide the means of exercising it; the First Amendment does not give the author of this article a constitutional right to publish it in this journal. The Sixth Amendment protects the right to counsel, but individual attorneys may decline representation. *Wheat v. U.S.*, 486 U.S. 153, 159 (1988); see Model Rules of Prof'l Conduct r. 1.16 (2015).

²²⁰ Compare *Beckwith Elec. Co. v. Sebelius*, 960 F. Supp. 2d 1328, 1349 (M.D. Fla. 2013) (holding the government failed to meet its burden demonstrating that contraception mandate furthers a compelling government interest), with *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1293–96 (W.D. Okla. 2012), *rev'd* 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (holding that the challenged regulations were rationally related to a legitimate government objective).

reluctant to impose them;²²¹ the lack of a statutory exemption might indicate a legislative decision not to include one after a balancing of all the relevant societal interests. Court imposed exemptions under RFRA were designed to be, and ought to be, the last resort when the political process fails religious minorities.

VIII. CONCLUSION

The United States has a long history and tradition of religious free exercise that includes business activities. However, in the last thirty years, government has been advocating a separation of church and commerce doctrine to avoid making any religious exceptions to federal, state, and local laws affecting business. Two of the latest obligations imposed on business owners—the contraceptive mandate under the Affordable Care Act and the obligation in some states and localities to participate in same-sex weddings—have tested the boundaries of religious free exercise in the commercial context.

The Free Exercise Clause, as interpreted by the Supreme Court, does not afford business owners religious exemptions to neutral laws of general applicability, such as these.²²² In the *Hobby Lobby* case, the federal RFRA assisted business owners objecting to the contraceptive mandate.²²³ State constitutional law or state RFRA, where they exist, may allow those with religious objections to decline participating in same-sex weddings.²²⁴ Relief, however, is unpredictable, even in states where a compelling interest test is required: individual judges are left to determine what is a “substantial burden” on religion; whether a governmental interest is “compelling”; and, in RFRA cases, whether the government has used the alternative least restrictive of religious exercise.

Representatives should be striking the balance between neutral, generally applicable laws affecting business and religious free exercise, but the RFRA laws abdicate that politically perilous role to the courts. Without religious exemptions written into a statutory scheme, courts can be reluctant to impose them under RFRA. Unless state legislatures begin imposing RFRA standards upon

²²¹ See *Hobby Lobby Stores, Inc.*, 870 F. Supp. 2d at 1295.

²²² See *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2761–62.

²²³ *Id.* at 2767.

²²⁴ See, e.g., Beth Walton, *Bill Would Allow Magistrates to Refuse to Preside at Same-sex Weddings*, CITIZEN-TIMES (Feb. 24, 2015), <http://www.citizen-times.com/story/news/local/2015/02/24/lawmakers-say-court-officials-able-avoid-marriage-duties-due-religious-beliefs/23939067/>.

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themselves, the separation of church and commerce doctrine could continue to gain momentum in the states.