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Who Decides Conscience? RFRA's Catch 22

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WHO DECIDES CONSCIENCE? RFRA'S CATCH-22

*Priscilla J. Smith**

INTRODUCTION

This Article examines application of the Religious Freedom Restoration Act (“RFRA”) in cases challenging the contraception coverage rules under the Affordable Care Act.¹ I will discuss a problem with the application of RFRA’s statutorily mandated strict scrutiny test in this context that has not received attention—

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¹ Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4 (2012). In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court held that the RFRA was unconstitutional *as applied to state laws*. It remains applicable to federal laws, like the Affordable Care Act. *See also, e.g.*, *O’Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003) (holding that RFRA is a valid exercise of congressional authority under the necessary and proper clause); *Guam v. Guerrero*, 290 F.3d 1210, 1221 (9th Cir. 2002); *Kikumura v. Hurley*, 242 F.3d 950, 958 (10th Cir. 2001); *Henderson v. Kennedy*, 265 F.3d 1072 (D.C. Cir. 2001); *Christians v. Crystal Evangelical Free Church*, 141 F.3d 854, 856 (8th Cir. 1998).

a problem I'll call the RFRA Catch-22. The Court first confronted the identical Catch-22 in *Employment Division v. Smith*,² a case I discuss in detail below, when it attempted to apply strict scrutiny to the constitutional free exercise claims of Native Americans whose ceremonial peyote use was proscribed by state law.³ On the one hand, the Court recognized that the First Amendment prohibits judicial review of the “centrality” of conduct to an individual’s religion, the “relative merits of differing religious claims,” or “the determin[ation] of the place of a particular belief in a religion or the plausibility of a religious claim.”⁴ On the other hand, “[d]ispensing with a ‘centrality’ inquiry is utterly unworkable,” said the Court.⁵ It would require courts to grant all claims, and to equate burdens on throwing rice at church weddings to burdens on getting married in church,⁶ or, more relevant to today’s cases, the “burden” of having one’s employees covered by insurance that includes coverage for contraception with the “burden” of being forced to use contraception oneself. Faced with this Catch-22, this choice between an all or nothing approach to free exercise claims seeking accommodation from generally applicable nondiscriminatory laws, in *Smith* the Court chose nothing, and rejected application of the strict scrutiny test to claims under the Free Exercise Clause. The Court wrote, “[t]he government’s ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of

² 494 U.S. 872 (1990).

³ *Id.* The plaintiffs in *Smith* were denied unemployment compensation benefits for “misconduct” when they violated the state’s drug laws by using peyote. *Id.*

⁴ *Smith*, 494 U.S. at 886–87 (“Nor is it possible to limit the impact of respondents’ proposal by requiring a ‘compelling state interest’ only when the conduct prohibited is ‘central’ to the individual’s religion. [A]s we reaffirmed only last Term, ‘[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.’” (internal quotation marks and citations omitted)).

⁵ *Id.* at 887 n.4.

⁶ *Id.*

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public policy, ‘cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development.’”⁷

Under RFRA, however, courts are again required to apply the strict scrutiny test in challenges to federal government conduct claimed to burden “religious exercise,”⁸ requiring precisely the sort of judicial measurement of religious tenets and impact on spiritual matters that the *Smith* Court recognized are precluded by the Establishment Clause.⁹ Therefore, the U.S. Supreme Court will have to grapple with this familiar Catch-22 as it considers the expansive interpretations of “religious exercise” and “substantial burden” under RFRA promoted by the plaintiffs in *Conestoga Wood Specialties Corp. v. Sebelius*¹⁰ and *Sebelius v. Hobby Lobby Stores*,¹¹ challenges to the contraceptive coverage rules being heard by the Court this term. As Georgetown Law Professor Marty Lederman’s detailed writings revealing the

⁷ *Id.* at 885 (internal quotation marks omitted).

⁸ 42 U.S.C. § 2000bb(b)(1) (2012).

⁹ See *infra* Part II; *Smith*, 494 U.S. at 887 (equating evaluation of centrality with, *inter alia*, substantiality, discussing “unacceptable ‘business of evaluating the relative merits of differing religious claims,’” and citing Justice Stevens’ warning in *United States v. Lee* that this type of judicial evaluation of religious tenets would create “the risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another” (citing *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring))); *id.* at 889 n.5, 887 n.4. See also Samuel J. Levine, *Rethinking the Supreme Court’s Hands-Off Approach to Questions of Religious Practice and Belief*, 25 FORDHAM URB. L.J. 85, 122–23 (1997) (noting that RFRA’s substantial burden test “appear[s] to require courts to engage in the kind of investigation into religious beliefs that Supreme Court Justices have increasingly and nearly uniformly rejected”).

¹⁰ 724 F.3d 377 (3d Cir. 2013); see also *Conestoga Wood Specialties Corp. v. Sebelius*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/conestoga-wood-specialties-corp-v-sebelius/> (last visited Mar. 25, 2014) (list of briefs filed for this case).

¹¹ 723 F.3d 1114 (10th Cir. 2013); see also *Sebelius v. Hobby Lobby Stores, Inc.*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/sebelius-v-hobby-lobby-stores-inc/> (last visited Mar. 25, 2014) (list of briefs filed for this case).

minimal burden on Hobby Lobby Executives' religious exercise establish,¹² in order to find for Hobby Lobby the Court would have to adopt a broad hands-off view of RFRA's protections. Under this view, it is the RFRA claimant, not the court, who decides if something is a "substantial burden" on "religious exercise" under RFRA. This broad interpretation was articulated clearly by counsel for the University of Notre Dame in a recent oral argument in a related case in the Seventh Circuit in which counsel stated that it is enough if Notre Dame believes something is a "substantial burden" under RFRA. As counsel argued, "[i]t is up to the believer to draw the line."¹³

I won't hide my views of these broad claims. Better to confess them now. If the Court upholds the plaintiffs' RFRA claims and the broad hands-off interpretation of "religious exercise" and "substantial burden" they necessitate, rather than finding a way to limit RFRA's scope constitutionally to deny accommodations in these cases,¹⁴ RFRA will have no boundaries.¹⁵ A broad RFRA, read as the Court must read it—and to read it fairly and in accordance with the Establishment Clause—will mean a vastly different society, but that's not necessarily a bad thing. If I were confident that the courts would

¹² See *infra* note 22.

¹³ See, e.g., Oral Argument at 27:23, Univ. of Notre Dame v. Sebelius, (7th Cir. argued Feb. 12, 2014) (No. 13-3853), available at http://media.ca7.uscourts.gov/sound/2014/rs.13-3853.13-3853_02_12_2014.mp3 [hereinafter *Notre Dame* Oral Argument]. This case involves the even more fantastical claim that even invoking a statutorily-granted accommodation from the contraceptive coverage requirements for non-profit religious institutions, who self-certify, was a "substantial burden." See *infra* notes 109–10 and accompanying text.

¹⁴ I discuss possible narrowing techniques below. See *infra* Part III.

¹⁵ *Smith*, 494 U.S. at 888–89 (“The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service, . . . to the payment of taxes, . . . [to] manslaughter and child neglect laws, . . . compulsory vaccination laws . . . drug laws, [to] environmental protection laws, . . . and laws providing for equality of opportunity for the races.”).

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in fact review RFRA claims equitably, showing equal respect to *all* claims of religious exercise, I could allow myself to see a silver lining in a dark cloud—one that could be brought to bear in challenges to numerous federal laws under the aegis of federal RFRA. The broad interpretation of “religious exercise” and “substantial burden” being promoted in these cases could even be persuasive in challenges brought under state versions of RFRA that prohibit state restrictions that “substantially burden” “religious exercise.” Defined as broadly as the plaintiffs in these contraceptive coverage challenges advocate, requiring a hands-off judicial approach to evaluating burdens, RFRA’s protections could mean a new birth of freedom—freedom from draconian limits on reproductive choice, limits on sexual expression, limits on drug possession and drug use, requirements of service on juries, requirements that certain taxes be paid and census questions answered, and limitations on who and how many one may marry.

Unfortunately, though, I am not confident of the courts’ ability to apply a broad RFRA fairly. In rejecting strict scrutiny in *Smith*, the Court admitted that it cannot apply the unbounded strict scrutiny test equitably or in a manner in accordance with the Establishment Clause. Dueling opinions of two panels of the Seventh Circuit—one insisting on judicial evaluation of the “substantiality” of burden and the other limiting review of “substantiality” drastically—confirm this view.¹⁶

By reimposing the strict scrutiny test rejected in *Smith*, Congress has put the Court into the same untenable position it faced in *Smith*. The Court can choose “nothing” again, insisting that conducting these determinations is beyond the “judicial ken.”

¹⁶ The *Notre Dame* panel rejected the broad hands-off view, but another panel of the Seventh Circuit appears to endorse it. *Compare* *Notre Dame v. Sebelius*, No. 13-3853, slip op. at 21 (7th Cir. Feb. 21, 2014) (noting that “substantiality . . . is for the court to decide”), *with* *Korte v. Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013) (noting that “substantial burden inquiry” must be limited to the evaluation of “the coercive effect of the government pressure” to act against beliefs). *See also infra* notes 109–19 and accompanying text.

It could choose “all,” deferring to the plaintiffs’ characterization of religious “exercise” and the “substantiality” of burden, as Notre Dame’s counsel urged. Or it could, as I expect it to, *claim* to be evaluating the substantiality of the burden in this case but in practice conduct no real evaluation at all, ignoring its earlier warnings about the discriminatory results that have occurred under this standard and are likely to occur again in the future. Thus, the most likely result is a broad and protective RFRA for some, those with religious exercise claims with which judges are most familiar, and a weak RFRA for the rest of us.

In Part I below, I will outline the relevant RFRA standards and ACA requirements, and briefly discuss arguments made by others that RFRA violates the Establishment Clause on its face, or alternatively, that RFRA would be unconstitutional “as applied” if applied to grant accommodations in *Hobby Lobby* and *Conestoga Wood*. In Part II, I will discuss judicial review of free exercise claims, explain the Catch-22 the Court faced in *Employment Division v. Smith*, how RFRA creates the same Catch-22, and how the breadth of the claims in *Hobby Lobby* and *Conestoga Wood* traps the Court in the Catch-22. Finally, in Part III, I will suggest two ways for the Court to limit RFRA and avoid the Catch-22 at least in these cases, and then close with a discussion of the ramifications of granting accommodations in these cases, either by granting all accommodations requested under RFRA or by conducting only a perfunctory examination of “substantial burden.”

I. THE RELIGIOUS FREEDOM RESTORATION ACT AND THE AFFORDABLE CARE ACT

The question of how to balance competing claims of religious conscience and equality mandates imposed by secular authority is currently being played out most prominently in the ongoing battle over the Affordable Care Act (“ACA”).¹⁷ The ACA requires

¹⁷ Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, *amended by* Pub. L. No. 111-152, 124 Stat. 1029 [hereinafter ACA]. *See also* *Conestoga Wood Specialties Corp. v. Sec’y of U.S. Dep’t of Health & Human Servs.*,

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employers with fifty or more employees, who are not otherwise exempt from the Act's requirements,¹⁸ to provide their employees with a minimum level of health insurance or pay an assessment to the Internal Revenue Service.¹⁹ Nonexempt group plans must provide coverage without cost-sharing for preventive care and screening for women²⁰ that includes "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity."²¹ Notably, employers do not have to pay for contraception themselves because contraception is a cost-saving preventive service and is therefore routinely offered at no additional cost. Moreover, as Professor Lederman has explained in detail, although this provision of the law has been widely described as a contraception "mandate," this term is a misnomer, both because of the numerous accommodations and exemptions from the requirements granted by statute and regulation to religious institutions and nonprofit organizations, and because the statute also provides objectors with a way to avoid the contraception coverage requirements altogether.²² If these entities

724 F.3d 377, 381 (3d Cir. 2013) ("ACA requires non-exempt group plans to provide coverage without cost-sharing for preventative care and screening for women in accordance with guidelines created by the Health Resources and Services Administration ('HRSA'), a sub-agency of HHS.").

¹⁸ The ACA provides broad exemptions for religious institutions and nonprofit organizations who self-certify that they oppose providing contraception. In such circumstances, health plans will provide the coverage without the involvement of the employer. *See, e.g.*, 45 C.F.R. § 147.131 (2012).

¹⁹ *Conestoga Wood*, 724 F.3d at 381.

²⁰ *Id.* (citing 42 U.S.C. § 300gg-13(a)(4) (2012)).

²¹ *Id.* (quoting 77 C.F.R. 8725 (2012)).

²² Marty Lederman, *Hobby Lobby Part III: There Is No "Employer Mandate,"* BALKINIZATION (Dec. 16, 2013, 9:36 AM), <http://balkin.blogspot.com/2013/12/hobby-lobby-part-iii-theres-no-employer.html> [hereinafter Lederman, *Hobby Lobby Part III*] (citing 26 U.S.C. § 4980H(a) (2012), which provides that a large employer must make an "assessable payment" to the IRS if it chooses not to offer its full-time employees participation in an employer-sponsored health insurance plan); Marty Lederman, *Hobby Lobby Part III-A: Does Federal Law Substantially*

object to providing the health insurance package outlined in the Affordable Care Act, they can choose not to provide health insurance and instead pay an assessment to the IRS.²³

Despite this alternative, numerous cases have been filed throughout the country challenging the requirement in different postures.²⁴ In March 2014, the Court heard arguments in two of those cases, *Sebelius v. Hobby Lobby Stores*,²⁵ and *Conestoga Wood Specialties Corp. v. Sebelius*,²⁶ both of which involve objections of for-profit businesses to the contraceptive coverage requirement of the ACA. In *Hobby Lobby*, the plaintiff is a for-profit corporation that claims the contraceptive coverage requirements violate the *corporation's* right to religious exercise

Pressure Employers to Offer Health Insurance Coverage in Violation of Religious Obligations, Even Though There is No "Employer Mandate"?, BALKINIZATION (Dec. 28, 2013, 9:22 AM), <http://balkin.blogspot.com/2013/12/hobby-lobby-part-iii-adoes-federal-law.html> [hereinafter Lederman, *Hobby Lobby Part III-A*]. See also, e.g., Marty Lederman, *Hobby Lobby Part I – Framing the Issues*, BALKINIZATION (Dec. 11, 2013, 10:28 PM), <http://balkin.blogspot.com/2013/12/hobby-lobby-part-i-framing-issues.html> [hereinafter Lederman, *Hobby Lobby Part I*]; Marty Lederman, *Not Quite Hobby Lobby: The Nonprofit Cases, and Opting Out as Complicity*, BALKINIZATION (Jan. 1, 2014, 5:24 PM), <http://balkin.blogspot.com/2014/01/not-quite-hobby-lobby-nonprofit-cases.html> [hereinafter Lederman, *Not Quite Hobby Lobby*] (explaining cases involving plaintiffs who object to the procedures for making use of the exemptions granted to nonprofit organizations).

²³ For a full description of the alternative to providing a plan with the required services and its implications, see Lederman, *Hobby Lobby Part III-A*, *supra* note 22.

²⁴ For updates on these cases, see *Challenges to the Federal Contraceptive Coverage Rule*, ACLU, <https://www.aclu.org/reproductivefreedom/challenges-federal-contraceptive-coverage-rule> (last updated Mar. 13, 2014).

²⁵ 723 F.3d 1114 (10th Cir. 2013); see also *Sebelius v. Hobby Lobby Stores, Inc.*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/sebelius-v-hobby-lobby-stores-inc/> (last visited Mar. 25, 2014) (list of briefs filed for this case).

²⁶ 724 F.3d 377 (3d Cir. 2013); see also *Conestoga Wood Specialties Corp. v. Sebelius*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/conestoga-wood-specialties-corp-v-sebelius/> (last visited Mar. 25, 2014) (list of briefs filed for this case).

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under RFRA because of the religious objections of the corporation's owners.²⁷ In *Conestoga Wood*, the Plaintiffs include the individual "religious owners" of the "family business" as well as the for-profit corporation itself. They assert the claims of the individuals and the for-profit corporation under both RFRA,²⁸ as well as the Constitution's Free Exercise Clause.²⁹

It is extremely unlikely that the Court will consider the free exercise claim in *Conestoga Wood* because the standard applicable to constitutional free exercise claims is lower than the RFRA standard.³⁰ This means that if the plaintiffs prevail on their RFRA claims, there will be no need to look to the constitutional claim; and if the plaintiffs lose their RFRA claim under an application of RFRA's strict scrutiny standard, it is "virtually inconceivable" that they'd win under the less stringent Free Exercise Clause claim, or even under a Free Exercise Clause reinterpreted to require application of strict scrutiny.³¹ Therefore, assuming the Court disregards, as have the lower courts,³² the plaintiffs' option to avoid the requirement to provide health insurance that includes contraception by declining to offer any health insurance at all, the Court will be faced with difficult questions about how to evaluate the claims of conscience in these cases. While much has been written about RFRA generally³³ and

²⁷ *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013).

²⁸ 42 U.S.C. §§ 2000bb to 2000bb-4 (2012).

²⁹ *Conestoga Wood Specialties Corp. v. Sec'y of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013).

³⁰ In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Court rejected the strict scrutiny standard of review for reasons discussed more fully below. See *infra* notes 37-40 and accompanying text.

³¹ See, e.g., Lederman, *Hobby Lobby Part I*, *supra* note 22 (predicting that "the constitutional question, as such, will consume only a tiny fraction of the total briefing, and virtually none of the Court's attention.").

³² See Lederman, *Hobby Lobby Part III*, *supra* note 22.

³³ See, e.g., Caroline M. Corbin, *The Contraception Mandate*, 107 NW. U. L. REV. 1469 (2013) (contraception coverage requirement does not violate Free Exercise Clause, the Free Speech Clause or the Religious Freedom Restoration Act); Caroline M. Corbin, *Corporate Religious Liberty* (Jan. 24, 2014) (manuscript at 3 n.22), available at <http://papers.ssrn.com/>

the contraceptive mandate challenges in particular,³⁴ one issue

sol3/papers.cfm?abstract_id=2384963 [hereinafter Corbin, *Corporate Religious Liberty*] (citing numerous articles discussing whether corporations are protected under RFRA); Caroline M. Corbin & Steven D. Smith, *Debate: The Contraception Mandate and Religious Freedom*, 161 U. PENN L. REV. ONLINE (June 14, 2013), <http://www.pennlawreview.com/debates/index.php?id=48> [hereinafter Corbin & Smith, *Debate*] (debating status of contraceptive coverage requirement under RFRA and arguing that corporations are not eligible “persons” under RFRA); Christopher L. Eisgruber & Lawrence G. Sager, *Protecting Without Favoring Religiously Motivated Conduct*, 2 NEXUS J. OP. 103 (1997) [hereinafter Eisgruber & Sager, *Protecting Without Favoring*]; Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994) [hereinafter Eisgruber & Sager, *Why RFRA is Unconstitutional*]; Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions From the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. (forthcoming 2014); Marci A. Hamilton, *Employment Division v. Smith at the Supreme Court: The Justices, The Litigants, and the Doctrinal Discourse*, 32 CARDOZO L. REV. 1671 (2011) [hereinafter Hamilton, *Smith at the Supreme Court*]; Marci A. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1, 3 (1998) [hereinafter Hamilton, *Religious Freedom Restoration Act*]; Kara Loewentheil, *When Free Exercise Is a Burden: Protecting “Third Parties” in Religious Accommodation Law*, 62 DRAKE L. REV. 433 (2014).

³⁴ I will not discuss here, but will refer the interested reader to, excellent literature analyzing claims that the contraceptive coverage requirements violate the Free Exercise Clause, the Free Speech Clause, or RFRA under current doctrine. For example, Caroline Corbin has written a series of articles outlining many flaws in the arguments of those who claim their free exercise rights are violated by the contraceptive coverage requirements. *See, e.g.*, Caroline M. Corbin, *The Contraception Mandate*, 107 NW. U. L. REV. 1469 (2013) (contraception coverage requirement does not violate Free Exercise Clause, the Free Speech Clause, or the Religious Freedom Restoration Act); *id.* at 1477 (citing *Zelman v. Simmon-Harris*, 536 U.S. 639 (2002) (availability of federal funds to religious schools through voucher programs was too indirect to create Establishment Clause problem)) (pointing out that any “burden” of providing health insurance that includes coverage for contraception is not “substantial” because it is so “indirect”); Corbin & Smith, *Debate*, *supra* note 33 (debating status of contraceptive coverage requirement under RFRA and arguing that corporations are not eligible “persons” under RFRA). For the argument that for-profit corporations are not “persons” under

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that has not received attention is the impact that the Court's analysis in *Smith*³⁵ should have on its method of review of the contraceptive coverage challenges brought under RFRA and the potential Catch-22 that the RFRA revives.

A. The Religious Freedom Restoration Act: A Response to Employment Division v. Smith

RFRA was enacted in 1993 with broad bipartisan support in response to the U.S. Supreme Court's decision in *Employment Division v. Smith*.³⁶ In *Smith*, the Court held that the Free Exercise Clause did not prohibit application of Oregon drug laws to the use of peyote during the religious ceremony of Native Americans and, therefore, the state could deny claimants unemployment compensation for work-related "misconduct" based on their use of the drug. In rejecting the free exercise claims of the Native Americans, the Court also rejected the strict scrutiny standard it had previously claimed was applicable to free exercise claims,³⁷ writing:

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

RFRA, see generally Corbin, *Corporate Religious Liberty*, *supra* note 33 (citing articles on the subject).

³⁵ 494 U.S. 872 (1990). *But see* Levine, *supra* note 9, at 122–23 (noting that RFRA's substantial burden test "appear[s] to require courts to engage in the kind of investigation into religious beliefs that Supreme Court Justices have increasingly and nearly uniformly rejected").

³⁶ 494 U.S. 872 (1990). For a description of the bipartisan movement to enact RFRA as a response to *Smith*, see, for example, Eisgruber & Sager, *Why RFRA is Unconstitutional*, *supra* note 33, at 438–41.

³⁷ In Eisgruber & Sager, *Why RFRA is Unconstitutional*, *supra* note 33, at 446–47, the authors argue that in rejecting the strict scrutiny standard, *Smith* was actually just bringing doctrine in line with past results. While in other constitutional areas the compelling state interest test has been "'strict' in theory and fatal in fact," in the pre-*Smith* religious exemption cases, they point out that the test was "strict in theory but feeble in fact." *Id.* (noting the Court had only applied the test to mandate accommodations from generally applicable laws in the unemployment compensation cases and *Yoder*).

is “compelling”—permitting him, by virtue of his beliefs, “to become a law unto himself”—contradicts both constitutional tradition and common sense.³⁸

As a result, the Court held that “if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.”³⁹

Reflecting a concern that the decision in *Smith* put religious exercise at risk, Congress enacted RFRA and reinstated the strict scrutiny standard.⁴⁰ RFRA requires that “[g]overnment shall not *substantially burden* a person’s exercise of religion even if the burden results from a rule of general applicability,” unless “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*.”⁴¹ But while some who supported RFRA may have been motivated by a reaction to the Court’s inconsistency in and seemingly discriminatory pattern with which the Court had applied the Free Exercise doctrine generally—and by the rejection of a “minority” religious claim in *Smith* in particular—enactment of RFRA simply reimposed the standard the courts had applied inconsistently in the past.⁴² Moreover,

³⁸ *Smith*, 494 U.S. at 885 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878)).

³⁹ *Id.* at 878.

⁴⁰ Eisgruber & Sager, *Why RFRA is Unconstitutional*, *supra* note 33, at 438 (describing “self-congratulatory hoopla” from both sides of the aisle that accompanied enactment of RFRA).

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

⁴² *Compare* *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (granting an accommodation from compulsory school-attendance laws to Amish parents who refused on religious grounds to send their children to school and discussing the Amish’s generally civilized behavior); *Sherbert v. Verner*, 374 U.S. 398 (1963) (granting Seventh Day Adventist an exemption from laws requiring her to make herself available to work on a Saturday), *with* *Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990) (rejecting application of the

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RFRA did nothing to solve the Catch-22 at the heart of the jurisprudence that led the Court to walk away from the strict scrutiny standard in *Smith*.

B. RFRA—Unconstitutional on its Face?

Law Professors Christopher Eisgruber and Lawrence Sager⁴³ have argued that RFRA is unconstitutional on its face because it improperly privileges religion in violation of the Establishment Clause.⁴⁴ This argument has been presented to the Court in an amicus brief filed on behalf of the Freedom from Religion Foundation and others.⁴⁵ Justice Stevens adopted this view in his concurrence in *City of Boerne v. Flores*,⁴⁶ where he argued that RFRA required granting an exemption from a generally applicable neutral civil law to religious practice, something that no atheist or agnostic could obtain, thus establishing a governmental preference for religion that is forbidden by the First

Sherbert test to peyote ban that prevented Native Americans from performing a religious ritual that was widely acknowledged to be central to their religious practice); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (sustaining, without mentioning the *Sherbert* test, a prison's refusal to excuse Muslim inmates from work requirements to attend worship services); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (rejecting application of the *Sherbert* test to military dress regulations that forbade the wearing of yarmulkes).

⁴³ Professor Eisgruber was a Professor of Law at NYU Law School, and is currently the President of Princeton University. *News at Princeton*, PRINCETON UNIV. (Apr. 21, 2013), <http://www.princeton.edu/main/news/archive/S36/65/54C75/index.xml?section=featured>. Lawrence Sager is Professor of Law at University of Texas School of Law. *See UT Law Faculty – Lawrence Sager*, UT LAW, <http://www.utexas.edu/law/faculty/sager/> (last visited Mar. 25, 2014).

⁴⁴ *See* Eisgruber & Sager, *Protecting Without Favoring*, *supra* note 33; Eisgruber & Sager, *Why RFRA is Unconstitutional*, *supra* note 33.

⁴⁵ Brief of the Freedom for Religion Foundation et al., *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S. Jan. 27, 2014), *available at* <http://sblog.s3.amazonaws.com/wp-content/uploads/2014/01/Hamilton-brief-Hobby-Lobby.pdf>.

⁴⁶ 521 U.S. 507 (1997).

Amendment.⁴⁷ Other than Justice Stevens though, no other Justice was persuaded by the argument, or even commented on it, in *Boerne*. Moreover, in *Cutter v. Wilkinson*,⁴⁸ the Court explicitly rejected a facial Establishment Clause challenge to a law quite similar to RFRA, section 3 of the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”). That statute mandates application of the RFRA strict scrutiny standard to patients or inmates confined to a federal institution.⁴⁹ In *Cutter*, state officials mounted a facial challenge to RLUIPA under the Establishment Clause after prisoners who were members of nontraditional religions claimed that their rights were violated under the Act. The Court held that while “[a]t some point, accommodation may devolve into ‘an unlawful fostering of religion,’”⁵⁰ section 3 of RLUIPA did not cross this line.⁵¹

There are certainly ways to distinguish *Cutter* and the

⁴⁷ *City of Boerne*, 521 U.S. at 537 (Stevens, J., concurring) (citing *Wallace v. Jaffree*, 472 U.S. 38, 52–55 (1985)).

⁴⁸ 544 U.S. 709 (2005).

⁴⁹ Compare 42 U.S.C. § 2000cc-1(a)(1)–(2) (2012) (providing in part: “[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution,” unless the burden furthers “a compelling governmental interest” and does so by “the least restrictive means”) with 42 U.S.C. §§ 2000bb-1 (providing “(a) [g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability [unless] . . . (b) . . . 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”). See also 42 U.S.C. § 2000cc (preventing implementation of land use regulation in a manner that “imposes a substantial burden on . . . religious exercise,” unless the government demonstrates that the burden “is in furtherance of a compelling governmental interest” and “is the least restrictive means” of furthering that interest).

⁵⁰ *Cutter*, 544 U.S. at 714 (citing *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334–35 (1987)).

⁵¹ *Id.* The Sixth Circuit had agreed with the state officials, holding that RLUIPA violated the Establishment Clause on its face because it “impermissibly advances religion by giving greater protection to religious rights than to other constitutionally protected rights” *Id.* at 709 (discussing *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003)).

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RLUIPA from RFRA that could support a holding that RFRA violates the Establishment Clause in *Hobby Lobby* and *Conestoga Wood*, despite *Cutter*. First, and most obviously, RLUIPA is much “less sweeping” than RFRA. It targets two specific areas, land-use regulation and religious exercise by institutionalized persons, while RFRA is a seemingly unlimited mandate to privilege religious exercise over nonreligious conduct, and in *Cutter*, the Court emphasizes RLUIPA’s targeted nature.⁵² The Court made much of Congress’s extensive documentation in hearings spanning three years of the specific problems of institutionalized persons and the “frivolous or arbitrary,” “egregious and unnecessary” barriers to their religious exercise that they faced that could limit its holding to the narrow situation of institutionalized persons.⁵³

Second, the *Cutter* decision is quite narrow in other ways. The Court has recognized that the Free Exercise Clause “requires governmental respect for, and noninterference with, the religious beliefs and practices of our Nation’s people.”⁵⁴ In upholding

⁵² *Id.* at 715, 720–21 (“Section 3 covers state-run institutions—mental hospitals, prisons, and the like”); *see also id.* at 722 (citing appropriate accommodation of religion in military context where it did not interfere with “military duties”).

⁵³ *Id.* at 716 (noting that “[b]efore enacting [section] 3, Congress documented, in hearings spanning three years, that . . . ‘some institutions restrict religious liberty in egregious and unnecessary ways’”) (quoting 146 Cong. Rec. 16698, 16699 (2000) (joint statement of Sen. Orrin Hatch and Sen. Edward M. Kennedy on RLUIPA)).

⁵⁴ *Id.* at 719. *See also* *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S.Ct. 694, 706 (2012) (noting that the First Amendment “gives special solicitude to the rights of religious organizations”). While some saw the Court’s recent decision in *Hosanna*—agreeing with Lutheran Church that application of employment discrimination statutes to its choice of “minister” violated the First Amendment and approving the judicially created “ministerial” exemption from state and federal employment discrimination prohibitions for religious institutions—as a sign of the Court’s deference to religion claims, the case is quite limited in ways that diminish its precedential value as a skipper guiding our course here.

First, the Court acknowledges in *Hosanna-Tabor* the special status of the “ministerial exception” granted to religious institutions in constitutional law,

RLUIPA, though, the Court treads carefully, navigating a narrow path between the “conflicting pressures” of the Free Exercise and the Establishment Clauses.⁵⁵ As the Court explained in *Hosanna Tabor*, the Religion Clauses must be interpreted in concert to both protect against government action that promotes the majority’s favored brand of religion (Establishment Clause) and government action that impedes religious practices not favored by the majority (Free Exercise Clause).⁵⁶ On the one hand, if legislatures and judges were precluded by the Establishment Clause from adopting or granting, respectively, exemptions from

and that the exception survived *Smith* as a self-contained, rarely invoked, narrow exception, much like *Marsh v. Chambers*, 463 U.S. 783, 792–94 (1983) (finding that “the practice of opening legislative sessions with prayer has become part of the fabric of our society,” and holding that selection of a Presbyterian minister for 16 years who is paid from the public fisc and whose prayers are only in the Judeo-Christian tradition, does not in itself conflict with the Establishment Clause, absent proof that his reappointment stemmed from an impermissible motive). Moreover, in *Hosanna-Tabor*, rather than exerting competing pressures—the Free Exercise Clause pressing proaccommodation and the Establishment Clause pressing antiaccommodation—both clauses pressed towards accommodation.

While recognizing that the ADA’s prohibition on retaliation was a valid and neutral law of general applicability like the prohibition on peyote use at issue in *Dep’t of Human Res. of Or. v. Smith*, the Court distinguished the two cases, noting that a “church’s selection of its ministers is unlike an individual’s ingestion of peyote.” *Hosanna-Tabor*, 132 S.Ct. at 707. Regulation of “physical acts,” like the use of drugs, is unlike review of selection of ministers which would have involved “government interference with an internal church decision that affects the faith and the mission of the church itself,” which is an Establishment Clause no-no akin to “lend[ing Government] power to one or the other side in controversies over religious authority or dogma.” *Id.* at 707 (quoting *Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990)).

⁵⁵ *Id.* at 719–20 (citing *Smith*, 494 U.S. at 890; *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 329–30 (1987) (approving federal exemption for religious organizations from Title VII’s prohibition on religious discrimination)) (noting that the Religion Clauses are “cast in absolute terms,” and “if expanded to a logical extreme, would tend to clash with each other”); *Walz v. Tax Comm’n of N.Y.C.*, 397 U.S. 664, 668–69 (1970)).

⁵⁶ *Hosanna-Tabor*, 132 S.Ct. at 730.

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generally applicable laws at least in some circumstances, then much of the protection the Free Exercise Clause is designed to provide—the “special solicitude” to religious practice it endorses⁵⁷—could be nullified by generally applicable laws that proscribe religious practices. The danger to religious exercise rights would be particularly acute in the institutions whose inhabitants RLUIPA was designed to protect. In those contexts, “government exerts a degree of control unparalleled in civilian society and severely disabling to private religious exercise.”⁵⁸ On the other hand, this ability to grant accommodations in honor of the Free Exercise guarantees has never been, nor should it be, unlimited, lest the accommodations tilt too far into Establishment Clause territory.⁵⁹

In *Cutter*, the Court stressed three important aspects of RLUIPA that established it, at least in a facial challenge, as a permissive legislative accommodation that fits between the Scylla and Charybdis⁶⁰ of the Religion Clauses, demonstrating solicitude

⁵⁷ See *id.* at 706 (noting that the First Amendment “gives special solicitude to the rights of religious organizations”). Surely, though privileging of individual religions or the privileging of religion over non-religion is not allowed, some solicitude to religious exercise is required. *Smith*, 494 U.S. at 890 (“[A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation . . .”).

⁵⁸ *Hosanna-Tabor*, 132 S.Ct. at 720–21.

⁵⁹ Even proaccommodationist Michael McConnell argues for “rigorous limitations” on accommodations. Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 687–88 (1992) (“[A]ccommodations . . . sometimes required and, *within rigorous limitations* . . . are always permitted. That does not mean, of course, that every benefit to religion masquerading as an accommodation is constitutional, but it does mean that the principle of accommodation, when properly applied, is consistent with the requirements of the Religion Clauses.” (emphasis added)).

⁶⁰ In Greek mythology, Scylla and Charybdis were two monsters living on either side of the waterway between Italy and Sicily. Scylla was a six-headed beast who was said to eat ships and their sailors, while Charybdis was a whirlpool who would suck the boats and men down into her watery abyss. *Scylla and Charybdis*, MYTH ENCYCLOPEDIA, <http://www.mythencyclopedia.com/Sa-Sp/Scylla-and-Charybdis.html>. Ships rarely made it

to religious exercise, an appropriate protection of religious freedom, rather than an inappropriate privileging of religion. First, to be permissive, an accommodation must “alleviate[] exceptional government-created burdens on private religious exercise.”⁶¹ A legislative act that protects religious expression by *removing government-imposed* burdens rather than creating privilege where no burden existed is more likely to be perceived as “an accommodation of the exercise of religion rather than as a Government endorsement of religion.”⁶² As a response to burdens imposed in government-run institutions, RLUIPA met this part of the test.

Second, courts must be satisfied that the permissive accommodation will be “administered neutrally among different faiths.”⁶³ Noting there was no reason on the face of RLUIPA to believe that it would not be applied neutrally, the Court found this second aspect of the test satisfied.⁶⁴ Third, in evaluating accommodations, the Court noted that courts “must take adequate account of the burdens a requested accommodation may impose on non-beneficiaries,” and, in granting an accommodation, courts must not “override other significant interests.”⁶⁵ The Court held that RLUIPA must be applied so as not to elevate accommodation of religious observances over an institution’s need to maintain order and safety, and so found this third aspect of the permissive accommodation test satisfied as well.

RFRA is expected to survive on its face, not least because the government has not pressed a facial challenge.⁶⁶ It is, after all, a

between the two unscathed. *Id.*

⁶¹ *Cutter*, 544 U.S. at 720.

⁶² *Id.* (quoting *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 349 (1987)).

⁶³ *Id.* (citing *Bd. of Ed. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 705 (1994)) (statute that created special school district for one religious enclave and excluded all others violated the Establishment Clause).

⁶⁴ *Cf. Kiryas Joel*, 512 U.S. at 705.

⁶⁵ *Cutter*, 544 U.S. at 720. For further discussion of “significant interests” that must be considered, see Gedicks & Van Tassel, *supra* note 33.

⁶⁶ *See, e.g., id.* (arguing that “it is likely that RFRA facially complies with the Establishment Clause”). *But see* Hamilton, *Religious Freedom*

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legislative accommodation that allows plaintiffs of all religions to seek relief from a government imposed burden, and thus seems to meet the first, and perhaps the second, part of the test that the Court lays out in *Cutter*. However, the third criterion should create problems when analyzing whether RFRA is constitutional *as applied* to the case of contraceptive coverage requirements as discussed next.

C. RFRA—Unconstitutional As Applied to For-Profit Employers Seeking an Accommodation from the Contraceptive Coverage Requirements

Applying RFRA to grant accommodations from the contraceptive coverage requirements to for-profit employers, as requested in the two cases before the Court, is constitutionally problematic because it would not “take adequate account of the burdens a requested accommodation may impose on non-beneficiaries,” and thus would “override other significant interests”⁶⁷ in violation of the Court’s limitations on permissive accommodations set out in *Cutter*. Professors Gedicks and Van Tassel argue that Establishment Clause doctrine prohibits “accommodations that shift the costs of an accommodated religion from those who practice it to those who don’t.”⁶⁸ As they note,

employees who do not share their employer’s

Restoration Act, *supra* note 33.

⁶⁷ *Cutter*, 544 U.S. at 720.

⁶⁸ *See* Gedicks & Van Tassel, *supra* note 33. Professors Gedicks and Van Tassel argue, “Neither courts nor commentators seem aware that a line of permissive-accommodation prohibits shifting of material costs of accommodating anticontraception beliefs from the employers who hold them to the employees who do not. The impermissibility of cost-shifting under the Establishment Clause is a threshold doctrine whose application is logically prior to all of the RFRA issues on which the courts are now focused.” *Id.* This argument is before the Court in the form of an amicus brief. *See* Brief for Amici Curiae Church-State Scholars Frederick Mark Gedicks et al., *Sebelius v. Hobby Lobby Stores, Inc.*, Nos. 13-354 and 13-356, 2014 WL 333891 (U.S. Jan. 27, 2014).

anticontraception beliefs would be denied their statutory and regulatory entitlement to contraception coverage without cost sharing, and thus would be directly saddled with material costs they would not incur in the absence of the exemption. Employees and their families would be deprived of the benefits of the Mandate to which they are otherwise legally entitled. The RFRA exemption would require that they pay the out-of-pocket expense of contraceptives and related services that they ought to receive at no expense beyond their monthly health care insurance premium. This is a direct burden that would not exist without the permissive accommodation of RFRA exemption.⁶⁹

Applying RFRA to grant exemptions from the mandate in the cases before the Supreme Court, the authors argue, would exceed the Establishment Clause's "limits on permissive accommodation."⁷⁰ Drawing from current doctrine, Gedicks and Van Tassel suggest a limitation on the right to free exercise that ends where the rights of nonadherents begin.

Kara Loewentheil takes this argument one step further.⁷¹ Like Gedicks and Van Tassel, she focuses on *Cutter's* third limitation, the requirement that the courts consider the impact of accommodations on third parties. She argues that the current doctrine applicable to religious accommodation claims, under

⁶⁹ Gedicks & Van Tassel, *supra* note 33, at 47–48 (noting that “[t]he externalized cost will be material for most employees. Effective oral contraceptive drugs cost between \$180 and \$960 per year, depending on the drug prescribed and the area of the country where the prescription is filled”).

⁷⁰ *Id.* Yet, another “as-applied” Establishment Clause problem would arise if the RFRA was not “administered neutrally among different faiths.” See *Cutter*, 544 U.S. at 720. For example, if courts granted accommodations under the RFRA for one religion, like Christian practices for example, but for few or no others, one could argue that this mosaic of accommodations added up to a preference for Christianity over other religions in violation of the Establishment Clause. See *id.*

⁷¹ See Loewentheil, *supra* note 33.

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both the First Amendment and the Religious Freedom Restoration Act, is ill-suited to cases—like the contraceptive coverage requirement cases—in which the “primary conflict lies between different sets of non-state rights-holders: specifically religious objectors and existing rights-holders whose interests or rights would be negatively impacted (or completely blocked) by a grant of religious accommodation to an objector, particularly when such [existing rights-holders] have equality-implicating rights at stake.”⁷² For these cases, Loewentheil argues, a framework is needed that would “vindicate[e] the purpose of religious accommodation rights [while also] protecting [existing rights-holders] from the negative impact of accommodations.”⁷³ While Loewentheil argues that “current doctrine can be argued to obliquely support an emphasis on the[] interests” of existing rights holders, she also proposes “a framework that places a positive obligation on the state to respect *all* the substantial rights involved when possible—and that prioritizes equality-implicating rights when not possible.”⁷⁴ If the Supreme Court is brave enough in the *Conestoga Wood* and *Hobby Lobby* cases to deny the exemptions, an unlikely but vaguely possible outcome,⁷⁵ the

⁷² *Id.* at 501.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ If the Court’s recent action in *Little Sisters of the Poor* is any indication, the Court is intent on avoiding any serious examination of these issues. *Little Sisters of the Poor Home for the Aged v. Sebelius*, No. 13A691, 2014 WL 272207 (U.S. Jan. 24, 2014). In *Little Sisters of the Poor*, the plaintiffs were eligible for a statutory exemption from the contraceptive coverage requirement. Nonetheless, they filed suit against the requirement and refused to comply with the administrative procedures created to notify the government and the insurance companies that they were eligible for the exemption, complaining that doing so would enable the insurance companies to provide the coverage on its own, thus making Little Sisters complicit in someone else’s sin. The Court simply created a different administrative mechanism that required the plaintiffs to inform the government in writing that they qualified for the exemption, relieved them of the responsibility of filling out the government form, and required the government to inform the insurance company on behalf of the objectors. Filling out the government form and sending that form to the insurance companies was apparently a “substantial

Court is most likely to deny them based on the harm to third party interests under either the Gedicks/Van Tassell or Loewentheil framework.

II. JUDICIAL REVIEW OF FREE EXERCISE CLAIMS

There remains a larger question at issue about the nature of “religious exercise” for which legislatures and courts are granting exemptions, a question that Loewentheil has pointed out is “a neglected and under-theorized area in accommodation law, with no satisfactory framework yet advanced.”⁷⁶ Although this general question has always been at the heart of the Court’s difficulty and inconsistency in evaluating free exercise claims, as well as claims under RFRA, no one has adequately grappled with the specific question of when something constitutes an “exercise” of religion. This inquiry—including an inquiry into the “substantiality” of a burden on religious exercise required under RFRA—if it is to be meaningful, requires that questions be asked about the nature of the religious practice at issue, about what has been termed the “centrality” of a practice to religious belief. The problem for the courts is that these inquiries are precluded by Establishment Clause principles. Without examining the nature of religious “exercise,” however, there can be no meaningful limitation on what can be claimed as religious exercise. Unless some other limitation on RFRA claims is adopted, such as the requirement that third party interests not be harmed, there will be no

burden” under the RFRA, but informing the government in writing of the same information and having the government inform the insurance companies was not. Of course, all this was done at the preliminary injunction stage and so “should not be construed as an expression of the Court’s views on the merits.” *Id.*

⁷⁶ Loewentheil, *supra* note 33, at 451 n.89. *See also, e.g.*, Eisgruber & Sager, *Why RFRA is Unconstitutional*, *supra* note 33. *Cf.* Edward Whelan, *The HHS Contraception Mandate v. The Religious Freedom Restoration Act*, 87 NOTRE DAME L. REV. 2179, 2182 (2012) (claiming that “there can be no serious dispute that a person engages in an ‘exercise of religions . . . when, for religious reasons, he performs, or abstains from performing, certain actions’”).

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limitation on what must be accommodated using the strict scrutiny test required by RFRA. This is exactly the Catch-22 the Court found itself in in *Smith*.

A. *Smith's Catch-22*

The First Amendment's free exercise doctrine has always struggled with questions about the nature of religious exercise that should be protected, with miserable results that tend to undermine the mandate for religious equality embodied in the Religion Clauses.⁷⁷ The ultimate problem with application of strict scrutiny to free exercise claims, such as the ones in *Smith*, *Conestoga Wood*, and *Hobby Lobby*, is the difficulty of governing a society where a claim that a law interfered with one's religious exercise mandates, almost automatically, that the person be granted an exemption from that law.⁷⁸ By demanding the highest standard of review—requiring that governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest⁷⁹—the strict scrutiny standard creates a presumption of invalidity for any regulation of conduct that is claimed to interfere with religious exercise.⁸⁰ The *Smith* Court recognized that in the past it had applied the strict scrutiny standard—and thus the presumption of invalidity—inconsistently, striking down regulations in the face of complaints in very limited circumstances, without limiting the standard's reach in the context of religion in any principled way. The reason it should be impossible to turn down a claim under strict scrutiny? Because of the First Amendment's separate prohibition on judicial review of the “centrality” of conduct to an individual's religion, the “relative merits of differing religious claims,” or “the determin[ation] of the place of a particular belief in a religion or

⁷⁷ See Eisgruber & Sager, *Why RFRA is Unconstitutional*, *supra* note 33.

⁷⁸ *Smith*, 494 U.S. at 888.

⁷⁹ See *id.* at 883 (citing *Sherbert v. Verner*, 374 U.S. 398 (1963)).

⁸⁰ *Id.* at 888 (“We cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.” (emphasis in original)).

the plausibility of a religious claim.”⁸¹ As the Court notes in *Smith*:

It is no more appropriate for judges to determine the “centrality” of religious beliefs before applying a “compelling interest” test in the free exercise field, than it would be for them to determine the “importance” of ideas before applying the “compelling interest” test in the free speech field.⁸²

In support of its position that courts must not examine the centrality of religious belief, the Court in *Smith* cites a string of cases grounding the prohibition against judicial scrutiny of centrality of religious belief in the First Amendment and, in one case, specifically in the Establishment Clause.⁸³ The Court cites

⁸¹ *Id.* at 887, 886 (“Nor is it possible to limit the impact of respondents’ proposal by requiring a ‘compelling state interest’ only when the conduct prohibited is ‘central’ to the individual’s religion.”).

⁸² *Id.* at 886–88.

⁸³ *Smith*, 494 U.S. at 886–88 (citing *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989)) (“It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds. We do, however, have doubts whether the alleged burden imposed by the deduction disallowance on the Scientologists’ practices is a substantial one.”); *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring); *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 715–16 (1981) (“One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.”); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 450 (1969) (refusing to conduct inquiry “to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion,” because “[p]lainly, the First Amendment forbids civil courts from playing such a role”); *Jones v. Wolf*, 443 U.S. 595, 602 (1979) (noting that “the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes Most importantly, the First

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footnote number two of Justice Stevens's concurrence in *United States v. Lee* in which Justice Stevens explained that the principal reason for avoiding this inquiry

is the overriding interest in keeping the government—whether it be the legislature or the courts—out of the business of evaluating the relative merits of differing religious claims. The risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude.⁸⁴

Because the Establishment Clause precludes the Court from reviewing the validity of a claim of religious interference, if a compelling interest test *was* to be applied, *it must be applied across the board*, to all actions claimed to be religiously commanded. This is different, as the Court seemed to be admitting, from how the Court had applied the compelling interest test piecemeal, read discriminatorily, in the past. The Court then listed a number of important statutes, such as manslaughter and child-abuse statutes, from which exemptions could be sought. Importantly, the purpose of this list was not to suggest that the courts *would* necessarily grant exemptions from these eminently reasonable statutes, but to point out that denial of *any* of these exemptions would require denial of all exemptions. Any grant of one exemption but not another put the Court in violation of the Establishment Clause because it risked that the Court was itself comparing the weight of the burden on one person's religious belief as against the weight of the burden on

Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice"); *United States v. Ballard*, 322 U.S. 78, 86 (1944) ("We do not agree that the truth or verity of respondents' religious doctrines or beliefs should have been submitted to the jury. Whatever this particular indictment might require, the First Amendment precludes such a course, as the United States seems to concede. 'The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.'").

⁸⁴ *Lee*, 455 U.S. at 263 n.2 (Stevens, J., concurring). *See also Smith*, 494 U.S. at 887 (discussing the "unacceptable 'business of evaluating the relative merits of differing religious claims'").

another person's religious belief, a comparison that required prohibited inquiry into the centrality of a practice under religious law.⁸⁵

Thus, the real problem that the Court faced in *Smith* is the impossibility of evaluating the extent of a burden on religious exercise without inquiring into the "centrality" of the religious belief being claimed.⁸⁶ In *Smith*, Justice Scalia writing for the Court recognized the Catch-22 that this created. On the one hand, courts cannot inquire into centrality because of the risk of creating a widespread perception of favoritism that will lead to internecine conflicts between individuals of different faiths and faith traditions. On the other hand, "[d]ispensing with a 'centrality' inquiry is utterly unworkable."⁸⁷ As Justice Scalia wrote for the Court:

[i]t would require, . . . the same degree of "compelling state interest" to impede the practice of throwing rice at church weddings as to impede the practice of getting married in church. There is no way out of the difficulty that, if general laws are to be subjected to a "religious practice" exception, *both* the importance of the law at issue *and* the centrality of the practice at issue must reasonably be considered."⁸⁸

As the Court in *Smith* recognized, if strict scrutiny is indeed to be applied, "it must be applied across the board, to all actions thought to be religiously commanded."⁸⁹ This is to say it must be applied consistently and fairly. But "if 'compelling interest' really

⁸⁵ *Smith*, 494 U.S. at 888–89 (listing compulsory military service, payment of taxes, manslaughter and child neglect laws, compulsory vaccination laws, traffic laws, minimum wage legislation, child-labor and animal-cruelty laws, laws protecting the environment, and equality of opportunity for the races).

⁸⁶ *Id.* at 886–87.

⁸⁷ *Id.* at 887 n.4.

⁸⁸ *Id.* (emphasis in original).

⁸⁹ *Id.* at 888.

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means what it says, . . . many laws will not meet the test.”⁹⁰ In *Smith*, the Court was distressed at the prospect of applying a real strict scrutiny test⁹¹ that would require courts to grant accommodations from all sorts of “reasonable” laws, such as laws prohibiting drug use to laws prohibiting murder and mayhem, all in the service of religious belief. In the face of this crisis, the Court throws up its hands and passes the buck to the legislature. Categorically unable to adjudicate such claims in a manner that does not create the appearance of establishing some religions as favored and some as disfavored, the Court in *Smith* concluded it was proscribed from deciding whose claims to individual religious exemptions were valid and whose were invalid under the Free Exercise Clause by independent counterforce embodied in the Establishment Clause.⁹²

The Justices struggle with their inability to review religious practice to determine the scope of Free Exercise claims throughout the opinions in *Smith*. However, while swearing off such inquiries in writing, in practice the Courts have been unable to resist making these determinations in Free Exercise cases. For example, Justice O’Connor in her concurrence repeats the Court’s constant refrain that “it is not within the judicial ken to question the centrality of particular beliefs or practices to a faith,”⁹³ and states that the determination of the constitutionality

⁹⁰ *Id.*

⁹¹ *Id.* (noting that because “we are a cosmopolitan nation made up of people of almost every conceivable religious preference,” the compelling interest standard would require exemptions “from civic obligations of every conceivable kind” (quoting *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961))).

⁹² This is not a wholly unusual situation in Constitutional law. The Court has held that the Constitution’s commitment to equality means that race-conscious measures to remedy racially-disparate impacts must also be narrowly circumscribed to avoid embroiling courts in a process of enacting the very inequality they seek to remedy. *See Ricci v. DeStefano*, 557 U.S. 557 (2009). Courts are limited in their powers to enjoin and limit speech to protect the privacy of individuals in legal proceedings lest they themselves violate the First Amendment, even though privacy is generally regarded as itself protected by the First Amendment at least to some extent.

⁹³ *Smith*, 494 U.S. at 906 (quoting *Hernandez v. Comm’r of Internal*

of the ban on peyote use “cannot, and should not, turn on the centrality of the particular religious practice at issue.”⁹⁴ On the other hand, Justice O’Connor proposes,

the sounder approach—the approach more consistent with our role as judges to decide each case on its individual merits—is to apply [the compelling state interest test] in each case to determine whether the burden on the specific plaintiffs before us is constitutionally significant and whether the particular criminal interest asserted by the State before us is compelling.⁹⁵

Justice O’Connor would allow the courts to make factual findings “as to whether a claimant holds a sincerely held religious belief that conflicts with, and thus is burdened by, the challenged law.”⁹⁶ Admitting that “[t]he distinction between the question of centrality and questions of sincerity and burden” is “fine,” Justice O’Connor nonetheless insists that “it is one that is an established part of our Free Exercise doctrine, and one that courts are capable of making.”⁹⁷ She then determines that the prohibition of peyote places a severe burden on the respondents’ religious practice, and that the state has a compelling interest in controlling use of illegal drugs.⁹⁸ Finally, while claiming she is not questioning the centrality of the peyote use to the church, Justice O’Connor appears to do just that, questioning whether the claimant holds a “sincerely held religious belief that conflicts with, and thus is burdened by, the challenged law.”⁹⁹

Justice Blackmun writing in dissent similarly demonstrates the problem with review of the sincerity of religious belief or the

Revenue., 490 U.S. 680, 699 (1989)) (internal quotation marks omitted).

⁹⁴ *Id.* at 906–07.

⁹⁵ *Id.* at 899.

⁹⁶ *Id.* at 907.

⁹⁷ *Id.* (citing *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 303–05 (1985); *United States v. Ballard*, 322 U.S. 78, 85–88 (1944)).

⁹⁸ *Id.* at 903–04 (O’Connor, J., concurring) (citing scholarly work on Peyote Religion).

⁹⁹ *Id.* at 907.

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centrality of a belief to religious practice. Justice Blackmun, like Justice O'Connor, applied strict scrutiny, but weighed the importance of the peyote ritual differently than Justice O'Connor and so would have granted an exemption from the peyote ban.¹⁰⁰ Like the other Justices, Blackmun begins by agreeing that "courts should refrain from delving into questions whether, as a matter of religious doctrine, a particular practice is 'central' to the religion."¹⁰¹ He goes on, though, to advocate that courts do just that, citing to *Yoder's* determination that "education is inseparable from and a part of the basic tenets of the [Amish] religion . . . [, just as] baptism, the confessional, or a Sabbath may be for others," noting "I do not think this means that the courts must turn a blind eye to the severe impact of a State's restrictions on the adherents of a minority religion."¹⁰² He then finds that "[w]ithout peyote, [the Respondents] could not enact the essential ritual of their religion."¹⁰³

Justice Scalia writing for the Court explicitly rejects the approaches of both Justice O'Connor and Justice Blackman. In response to Justice O'Connor, he dismisses the "fine" distinction between judicial review of the centrality of religious belief and review of the "significance" of a burden, noting that "'[c]onstitutionally significant burden' would seem to be 'centrality' under another name."¹⁰⁴ To Justice Blackmun he similarly replies that there is no difference between inquiry into "severe impact" and inquiry into "centrality" of a religious belief and notes that Blackmun's evaluation of the impact of the peyote ban demonstrates this fact. Justice Scalia declares that Justice Blackmun "has merely substituted for the question 'How

¹⁰⁰ *Id.* at 919 (Blackmun, J., dissenting).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 919–20 (Blackmun, J., dissenting) (citing a brief filed by the Association on American Indian Affairs et al., a scholarly history of the peyote religion, and a popular mystery novel by Tony Hillerman, describing ritual in which the "sacrament Peyote is the means for communicating with the Great Spirit").

¹⁰⁴ *Id.* at 887 n.4 (majority opinion).

important is X to the religious adherent?’ the question ‘How great will be the harm to the religious adherent if X is taken away?’ There is no material difference.”¹⁰⁵

It is into *Smith*’s breach that Congress—emboldened by support from left, right, and middle—inserted RFRA, leaving the Court in the untenable position of reviewing the “substantiality” of the burden on “religious exercise,” the inquiry the Court rejected in *Smith* as precluded by the Establishment Clause.¹⁰⁶ Under RFRA, Congress demands the “horrible” result the Court decried in *Smith*, mandating that “federal judges will regularly balance against the importance of general laws the significance of religious practice.”¹⁰⁷

B. Breadth of the Hobby Lobby and Conestoga Wood Claims

One could argue that there are cases that would not require the Court to evaluate the significance of certain behaviors and their importance to religious practice in a way that implicates the concerns articulated in *Smith*. For example, challenges to laws that so obviously burden clear and well-established rules of a given religion, such as a law that prevents a person from becoming a minister to her chosen congregation, a law that prevents a person from using the sacramental wine, a law that prevents a person from using peyote in a religious ceremony, these might not test the court or require it to evaluate religious doctrine in a threatening way. These all seem obviously burdensome in a substantial way, even though the last was not

¹⁰⁵ *Id.*

¹⁰⁶ It could be argued that “substantiality” of a burden is a different inquiry than “centrality” of a burdened religious belief, but determining the extent of a burden requires an interpretation of the importance of a burdened practice to one’s overall religious life. This sort of judicial review of doctrine creates the risk of an appearance of impartiality with which the *Smith* Court was concerned.

¹⁰⁷ *Smith*, 494 U.S. at 889 n.5. See Levine, *supra* note 9, at 122–23 (noting that RFRA’s substantial burden test “appear[s] to require courts to engage in the kind of investigation into religious beliefs that Supreme Court Justices have increasingly and nearly uniformly rejected”).

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obvious to the Court in *Smith*. One could argue that because these laws directly contradict central aspects of the actual ceremonial “celebration” of religion, the courts can avoid the Catch-22 because they need not enter into a prohibited area of review to hold that these laws violate RFRA.

But in *Hobby Lobby* and *Conestoga Wood* the claims are more complicated. These plaintiffs are not claiming that how they celebrate their religion is burdened. Rather, they claim that by offering plans that include the means to obtain contraception, they are somehow complicit in what they see as the sin of the person who chooses to use contraception, even if the person who uses the contraception does not see it as a sin, and indeed, even if the person who uses contraception sees it as religiously mandated. They argue that their “religious exercise” will be “substantially burden[ed]” under RFRA if the insurance plans provided to their employees include contraceptives as part of a package of preventive services, even if the employer does not pay anything for the contraception, and even though the employee’s choice to use or not use contraception stands between the employer and the employee’s alleged “sin.” Furthermore, they claim this chain of causation between sin and employer is not broken in this circumstance, but that it is broken where the employee uses other financial benefits they receive from their employers, i.e., salary, to pay for contraception. Moreover, the plaintiffs in *Hobby Lobby* make this claim even though the health insurance plans they offered before the ACA *required* contraceptives to be covered, covered contraception. Hobby Lobby only dropped coverage for contraceptives when federal law required coverage, a fact that should lead the Court to question the substantiality of the burden imposed.¹⁰⁸ The breadth of these claims puts the Court squarely in forbidden waters.

This Catch-22 came to a head recently in the oral argument and subsequent decision in *Notre Dame v. Sebelius*, a case which involves the more “fantastic” claim that even requiring Notre

¹⁰⁸ See *Eden Foods, Inc. v. Sebelius*, 733 F.3d 626 (8th Cir. 2013) (questioning sincerity of the plaintiff’s claimed religious belief); see also *infra* note 124.

Dame to *invoke* the statutory exemption granted under ACA from the contraception coverage requirements violates RFRA.¹⁰⁹ As Notre Dame's counsel stated, if Notre Dame believes it is a substantial burden on its religious exercise to even apply for the accommodation, the court must grant an accommodation *from applying for the accommodation*, no questions asked: "It is up to the believer to draw the line."¹¹⁰

¹⁰⁹ Univ. of Notre Dame v. Sebelius, No. 13-3853, slip op. at 20 (7th Cir. Feb. 21, 2014) ("What makes this case and others like it involving the contraception exemption paradoxical and virtually unprecedented is that the beneficiaries of the religious exemption are claiming that the exemption process itself imposes a substantial burden on their religious faiths.").

¹¹⁰ See, e.g., *Notre Dame* Oral Argument 27:23, *supra* note 13. The full colloquy went as follows:

Judge Hamilton: We have a long history in this country of accommodating religious faith in various ways that are not required by free exercise or prohibited by the Establishment Clause, there's some play in the joints, we know Can you point me to any other example in our legal history where the accommodation *itself* has been challenged as a burden on free exercise?

Mr. Kairys: You mean other accommodations? This mandate is new.

Judge Hamilton: This mandate is new, yes, I'm trying to understand though

Mr. Kairys: I cannot your honor

Judge Hamilton: [h]ow complying with minimal . . . I mean, to provide an accommodation at all requires at least some minimal invocation, say "yes I want to take advantage of the accommodation."

Mr. Kairys: Right, but it is up to the believer to draw that line. And Notre Dame has made that religious determination and *Korte* says it is not for you to engage in this issue of minimal or not minimal.

Judge Hamilton: It sounds like what you are telling us is that the entire U.S. Code then is subject to strict scrutiny any time somebody raises a sincere religious objection.

Id.; see also *id.* at 18:50 (where counsel for Notre Dame argues that under RFRA, "It is not for the Court to determine what is 'meaningful' or what's 'insignificant.' [Notre Dame has] made their own religious determination that

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The *Notre Dame* panel rejected this position, holding that the burden of invoking a statutory exemption was minimal, and that though “Notre Dame may consider the process a substantial burden, but substantiality—like compelling governmental interest—is for the court to decide.”¹¹¹ Notably, though, the court escaped the Catch-22 because the minimal nature of the burden claimed made the claim practically ridiculous in its eyes. The court distinguished a different Seventh Circuit case, *Korte v. Sebelius*,¹¹² in which the panel had an opposite reaction to the RFRA Catch-22,¹¹³ taking the hands-off approach in the more difficult case of two individual owners of a for-profit business that was not entitled to the *statutory* exemption, and who, like the plaintiffs in *Hobby Lobby* and *Conestoga*, sought an accommodation under RFRA. In *Korte*,¹¹⁴ the panel upheld the plaintiffs’ RFRA claims, and contradicting the *Smith* Court’s determination, wrote:

[i]mportantly, the substantial-burden inquiry does *not* invite the court to determine the centrality of the religious practice to the adherent’s faith; RFRA is explicit about that. And free-exercise doctrine makes it clear that the test for substantial burden does not ask whether the claimant has correctly interpreted his religious obligations. Indeed, that inquiry is prohibited It is enough that the

the role required of it from signing the form to maintaining a contractual relationship [violates its religious tenets.]”).

¹¹¹ *Notre Dame*, No. 13-3853, slip op. at 21. The Court held that the paperwork burden is “the opposite of cumbersome,” *id.* at 13, and while expressing skepticism of the second burden, the “triggering” burden, by writing “[t]hat seems a fantastic suggestion,” *id.* at 18, the court ultimately finds it unconvincing as a factual matter, *id.* at 15 (“Notre Dame’s signing the form no more ‘triggers’ Meritain’s obligation to provide contraceptive services than a tortfeasor’s declaring bankruptcy ‘triggers’ his co-tortfeasors’ joint and several liability for damages.”).

¹¹² 735 F.3d 654 (7th Cir. 2013).

¹¹³ *Notre Dame*, No. 13-3853, slip op. at 21 (distinguishing *Korte*, 735 F.3d at 654).

¹¹⁴ *Korte*, 735 F.3d at 654.

claimant has an “honest conviction” that what the government is requiring, prohibiting, or pressuring him to do conflicts with his religion.¹¹⁵

The *Korte* panel attempted to draw a distinction between “sincerity” and “religiosity,” both factual inquiries it claimed are within the court’s authority and competence, and the “substantial-burden” inquiry which the panel argues, along with the Tenth Circuit, is “primarily” an evaluation of the “intensity of the coercion applied by the government to act contrary to [religious] beliefs.”¹¹⁶ By defining the substantial burden inquiry as an evaluation of the “coercive effect of the governmental pressure on the adherent’s religious practice,” as the adherent defines the religious practice, *Korte* intends to steer the substantial burden inquiry “well clear of deciding religious questions.”¹¹⁷ While the *Notre Dame* panel declined to state its disagreement with the *Korte* panel on this view of the substantial burden inquiry explicitly, if the “coercive effect” of the government pressure were the only issue, the result would have been the same in both cases, because the penalty for failure to comply is the same. Instead, in *Notre Dame*, the panel refuses to abdicate its role of reviewing substantial burden, but it still appears to leave open the possibility that abdication of judicial review of the burden must occur where the question is harder.¹¹⁸ If the hands-off view of judicial review of burden prevails under *Hobby Lobby* and *Conestoga Wood*, as it did in *Korte*, the courts’ role under RFRA will simply be to decide whether the plaintiffs are forced to do something *they claim* violates their religious beliefs, something they oppose other people doing because it contrasts with their moral beliefs as religious people. The courts will not be conducting a meaningful review of whether or not the action burdens, in any significant way, *their exercise* of religion. As Judge Hamilton warns during oral argument in *Notre Dame*, “It

¹¹⁵ *Id.* at 683 (citations omitted).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Notre Dame*, No. 13-3853, slip op. at 21 (distinguishing *Korte*, 735 F.3d at 654).

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sounds like what you are telling us is that the entire U.S. Code then is subject to strict scrutiny any time somebody raises a sincere religious objection.”¹¹⁹

III. AVOIDING THE CATCH-22

The Court recently heard argument in *Hobby Lobby* and *Conestoga Wood* and may issue decisions before this essay goes to print. I conclude here by discussing three possible outcomes of these cases.

A. Limiting RFRA

There are two ways the Court in *Hobby Lobby* and *Conestoga Wood* could limit RFRA to avoid the Catch-22 altogether. First, the Court could recognize that accommodations may not be granted in these cases, because the harm to third parties is too great, under either the Gedicks/Van Tassell or the Loewentheil theory.¹²⁰ If the Court adopts this approach, it will not be called upon to address the substantiality of the burden on religious exercise under RFRA. Second, the Court could interpret “religious exercise” under RFRA strictly to mean only those actions that constitute religious “practice.” Limiting “religious exercise” to actions such as, for example, celebrating religion or wearing religious garb identifying one’s religious affiliation, would allow the Court to avoid the issue in this case because the attenuated claims of harm here would not qualify as this type of religious exercise.¹²¹

¹¹⁹ *Notre Dame* Oral Argument at 27:23, *supra* note 13.

¹²⁰ See *supra* notes 66–75 and accompanying text.

¹²¹ See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S.Ct. 694, 711–12 (2012) (“The First Amendment protects the freedom of religious groups to engage in certain key religious activities, including the conducting of worship services and other religious ceremonies and rituals, as well as the critical process of communicating the faith.”) (Alito and Kagan, JJ., concurring).

B. Choosing “All” or Choosing “Some”

If the Court does consider the merits of the claims here, it strays into the area of considering claims for exemptions from secular mandates because the mandates prevent someone from living one’s life “in accordance with one’s religious belief.” Consideration of such claims leads the Court into the dangerous waters between Scylla and Charybdis. Either the Court will choose “all,” accepting at face value any claim that a secular rule conflicts with a religious belief, or it will choose “some,” and evaluate whether being tangentially involved in giving a third party the freedom to act or not act in a way that would conflict with one’s own religious belief is itself in violation of the plaintiff’s religious belief.

The Court could agree with the *Korte* panel and the position of the University of Notre Dame and hold that it is the believer who draws the line. It may be that the Court will distinguish RFRA’s requirement that the Court conduct a review of the substantiality of a burden and the same inquiry conducted under the Free Exercise Clause, based on the former being a legislatively mandated review while the latter was a judicially created standard. The Court could then conduct a perfunctory review of “substantial burden,” applying a very limited inquiry into the burden the attenuated claims place on the plaintiffs in these cases. It is also *possible* that the Court will hold that the connection here between government action and religious exercise is simply too attenuated to amount to a substantial burden on religious exercise.

In any case, application of RFRA’s standard to *allow* for-profit businesses an exemption from the ACA contraceptive coverage requirement, like application of the strict scrutiny standard to free exercise claims under the Constitution, would, as the Court warned in *Smith*:

open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service, . . . to the payment

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of taxes . . . to health and safety regulation such as manslaughter and child neglect laws, . . . compulsory vaccination laws, . . . , drug laws, . . . , and traffic laws . . . ; to social welfare legislation such as minimum wage laws, . . . , child labor laws, . . . , animal cruelty laws, . . . environmental protection laws, . . . and laws providing for equality of opportunity for the races,¹²²

Given that many think the Court will grant the exemptions in this case, we should prepare ourselves to use RFRA to enforce equal protection for our own religious freedom, and to challenge restrictions on actions mandated by our consciences in our relationships with our own “divinities.” Courts have rejected the claims of the Church of Marijuana,¹²³ but the claims of many religious people, for example, religious people who were integrally involved in the movement for reproductive freedoms in the 1960s and 1970s will not be so easily sloughed off. Moreover, if the Court grants the exemptions in these cases, any attempt to deny claims brought under RFRA by those whose religious beliefs lead them to choose abortions or contraceptives, or those whose religious beliefs mandate they make abortions or contraceptives available to others, would be an unconstitutional application of RFRA under the Establishment Clause. We await the Court’s move.

CONCLUSION

I am not optimistic that the Court will follow these suggestions. In defending the contraceptive coverage requirements, the federal government has been extremely reticent to criticize RFRA from what I imagine is a political desire to avoid seeming hostile to any religious claims. They have

¹²² *Emp’t Div. v. Smith*, 494 U.S. 872, 889 (1990) (citations omitted).

¹²³ *United States v. Meyers*, 95 F.3d 1475, 1484 (10th Cir. 1996) (denying RFRA claim of adherent of the Church of Marijuana as espousing a philosophy and/or way of life rather than a “religion”).

studiously avoided questioning the sincerity of religious beliefs and tried to avoid anything that would entangle the Court in questioning the claimed burdens on religious exercise. The government has done this despite ample evidence in this and other challenges to the contraceptive mandates that these claims are being made only as part of a broader objection to federal power, and/or as an effort to prevent women from accessing contraception.¹²⁴ Nor has anyone questioned Catholic plaintiffs'

¹²⁴ In its recent decision in *Eden Foods, Inc. v. Sebelius*, 733 F.3d 626 (8th Cir. 2013), the Eighth Circuit questioned the sincerity of the plaintiff's claimed religious belief. The court notes that the plaintiff Michael Potter, a Roman Catholic, claims that he

follows the teachings of the Catholic Church, and has "deeply held religious beliefs" "that prevent him from participating in, paying for, training others to engage in, or otherwise supporting contraception, abortion, and abortifacients." In fact, Potter claims that "these procedures almost always involve immoral and unnatural practices."

Id. at 629. The court then notes in a footnote:

Interestingly, in a conversation with salon.com's Irin Carmon, Potter's "deeply held religious beliefs," more resembled a laissez-faire, anti-government screed. Potter stated to Carmon, "I've got more interest in good quality long underwear than I have in birth control pills." Carmon then asked the Eden Foods chairman why he didn't seem to care about birth control when he had taken the step to file a lawsuit over the contraceptive mandate. Potter responded, "Because I'm a man, number one[,] and it's really none of my business what women do." The article continued: So, then, why bother suing? "Because I don't care if the federal government is telling me to buy my employees Jack Daniel's or birth control. What gives them the right to tell me that I have to do that? That's my issue, that's what I object to, and that's the beginning and end of the story." He added, "I'm not trying to get birth control out of Rite Aid or Wal-Mart, but don't tell me I gotta pay for it."

Id. at 629 n.3 (citation omitted). Similarly, in the *Hobby Lobby* case, the plaintiff's "religious exercise" only became "substantially burdened" when the federal government adopted the contraceptive coverage requirement. *See, e.g.*, Jaime Fuller, *Here's What You Need to Know About the Hobby Lobby Case*, WASH. POST (Mar. 24, 2014),

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objections to providing access to all contraceptions despite the approval by the Catholic Church of these medications when used therapeutically, not as a form of contraceptive.¹²⁵ In fact, unless the Court follows the path recommended by Gedicks and Van Tassell or Loewentheil in implementing an alternative limitation on the grant of accommodations under RFRA, I suspect that the Court will grant an accommodation in the contraception cases, while refusing accommodations in future cases to those whose religions are less palatable to them,¹²⁶ like mine.¹²⁷ This will

fix/wp/2014/03/24/heres-what-you-need-to-know-about-the-hobby-lobby-case/. Until that point, the health plans offered contraceptive coverage without objection from the plaintiffs.

¹²⁵ The *Humanae Vitae*, the document setting out the Roman Catholic Church's position on contraception, permits therapeutic uses of contraceptives to treat organic diseases, even though they have a contraceptive effect. PAUL VI, *HUMANAЕ VITAE* (1968), available at http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html ("On the other hand, the Church does not consider at all illicit the use of those therapeutic means necessary to cure bodily diseases, even if a foreseeable impediment to procreation should result there from—provided such impediment is not directly intended for any motive whatsoever.").

¹²⁶ See, e.g., *Meyers*, 95 F.3d at 1484 (denying RFRA claim of adherent of the Church of Marijuana as espousing a philosophy and/or way of life rather than a "religion.").

¹²⁷ See *Planned Parenthood v. Casey*, 505 U.S. 833, 850 ("Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage); *id.* at 916 ("[a]s the joint opinion so eloquently demonstrates, a woman's decision to terminate her pregnancy is nothing less than a matter of conscience") (Stevens, J., concurring in part and dissenting in part); see also, e.g., Lawrence B. Finer, et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSPECTIVES ON SEXUAL & REPRODUCTIVE HEALTH 110 (2005); Rachel K. Jones et al., "I Would Want to Give My Child, Like, Everything in the World": How Issues of Motherhood Influence Women Who Have Abortions, 29 J. OF FAMILY ISSUES 79, 86 (2008); Rachel K. Jones & Lawrence B. Finer, *Who has Second-Trimester Abortions in the United States?* 85 CONTRACEPTION 544 (2012); Priscilla J. Smith, *Responsibility for Life: How Abortion Services Women's Interests in Motherhood*, 17 J.L. & POL'Y 97 (2008) (exploring the ways women's respect for the importance of motherhood and "bonds of love" with their children sometimes inform their decisions to

produce exactly the Establishment Clause violation the Court rejected in *Smith* and Justice Stevens warned against in *Lee*. If this is the route the Court takes, it should expect that its religious neutrality will be tested, and the religious underpinnings of civil rights movements will rise again.

obtain abortions); Phoebe Day Danziger, *A Peaceful Death: Aborting My Son Was Not About When Life Begins, But How to End it Humanely*, SLATE (Feb. 5, 2014), http://www.slate.com/articles/double_x/doublex/2014/02/abortion_as_end_of_life_care_why_i_chose_a_peaceful_life_and_death_for_my.html.