

JUSTICE SCALIA WAS RIGHT: WE’VE GONE TOO FAR IN PROTECTING THE EXERCISE OF RELIGIOUS BELIEFS

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INTRODUCTION

Writing for the majority in *Employment Division v. Smith*¹ in 1990, Justice Antonin Scalia concluded that two Native American drug counselors did not qualify for Oregon’s state unemployment compensation benefits after they were fired for smoking peyote, an outlawed drug, as part of a religious ceremony.² Concerned about individuals becoming laws unto themselves, he determined that laws that are applied neutrally to everyone do not violate the First Amendment even if their application incidentally burdens the exercise of some people’s religious beliefs.³

The reaction to the Court’s opinion was swift and furious. Congress passed the Religious Freedom Restoration Act of 1993 (RFRA),⁴ which essentially overturned the Supreme Court’s decision in *Smith*.⁵ RFRA rejects the concept that neutral laws that only incidentally adversely impact religion should be obeyed, replacing it with the principle that the government cannot pass a law that “substantially burden[s]” religion unless it can be shown that the law serves a “compelling governmental interest” and that it is the “least restrictive” way to promote that interest.⁶

This “compelling interest” test is very difficult for the government to satisfy,

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1. 494 U.S. 872 (1990).

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

3. *Id.* at 885, 890.

4. Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2012)), *invalidated in part* by *City of Boerne v. Flores*, 521 U.S. 507 (1997).

5. 42 U.S.C. § 2000bb-1 (2012). Marci Hamilton argues in a provocative article that circumventing the Supreme Court’s interpretation of the First Amendment in this way is unconstitutional since the only way to legally overrule the Supreme Court’s interpretation of the Constitution is via an amendment to the Constitution, not the enactment of a statute. See Marci A. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1, 3 (1998) (“With this sweeping Act, Congress attempted to usurp both the courts’ role and Article V’s amendment procedure.”). Unfortunately, this argument has not held sway, in part because there is no obvious advocate with standing to promote it.

6. See 42 U.S.C. § 2000bb-1(b). Since RFRA’s passage in 1993, and after the Supreme Court held in *City of Boerne v. Flores*, 521 U.S. 507 (1997), that RFRA was unconstitutional as applied to the states, *id.* at 535–36, twenty-one states have passed their own RFRAs. *State Religious Freedom Restoration Acts*, NAT’L CONF. ST. LEGISLATURES (Oct. 15, 2015), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes>.

making it very likely that any law that a plaintiff claims substantially burdens her religious practices is likely to be found to violate the plaintiff's rights to exercise her religious beliefs. The Court itself made this point in *City of Boerne v. Flores*.⁷ Moreover, the point has become especially salient after *Burwell v. Hobby Lobby Stores, Inc.*⁸ established that the only thing a plaintiff must do for the Court to conclude that a regulation imposes a substantial burden on the plaintiff is for the plaintiff simply to make a statement to that effect.⁹

RFRA established protections for religion that arguably went beyond anything envisioned by the First Amendment. The Court made this point in *City of Boerne*, where it noted that RFRA's "least restrictive means" requirement was never a part of pre-*Smith* jurisprudence,¹⁰ notwithstanding Congress's assertion that it passed RFRA merely to reinstate the Court's pre-*Smith* interpretation of the First Amendment in the context of religious rights.¹¹

Despite his positions in both *Smith* and *City of Boerne*,¹² Justice Scalia's

7. 521 U.S. 507, 534 (1997) ("Claims that a law substantially burdens someone's exercise of religion will often be difficult to contest. Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law. 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." (omissions in original) (alteration in original) (citations omitted) (quoting *Smith*, 494 U.S. at 888)).

8. 134 S. Ct. 2751 (2014).

9. See *Hobby Lobby*, 134 S. Ct. at 2779 ("[The plaintiffs] and their companies sincerely believe that providing the insurance coverage demanded by the [Health and Human Services] regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial."). *Hobby Lobby* also broadened the potential coverage of religious exemptions since it expanded potential plaintiffs beyond individuals to corporations. See *id.* at 2759 ("In holding that the HHS mandate is unlawful, we reject HHS's argument that the owners of the companies forfeited all RFRA protection when they decided to organize their businesses as corporations rather than sole proprietorships or general partnerships. The plain terms of RFRA make it perfectly clear that Congress did not discriminate in this way against men and women who wish to run their businesses as for-profit corporations in the manner required by their religious beliefs.").

10. *City of Boerne*, 521 U.S. at 535 ("In addition, the Act imposes in every case a least restrictive means requirement—a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify—which also indicates that the legislation is broader than is appropriate if the goal is to prevent and remedy constitutional violations."). In fact, the Court implied that Congress's passage of RFRA exceeded its authority under the Constitution since it was a blatant attempt to intrude into the Court's constitutional mission:

When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed. RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.

Id.

11. See *id.* at 515 (citing 42 U.S.C. § 2000bb(b)(1)).

12. See *infra* notes 44–48 and accompanying text for a summary of *City of Boerne*.

participation in the majority opinion in *Hobby Lobby* seems to suggest that his thinking on this issue changed over the years. In *Hobby Lobby*, he joined the majority's opinion upholding the right of the owners of a closely held corporation to refuse (on the basis of their Christian beliefs) to provide contraceptive health insurance coverage to its employees.¹³ Ironically, the language used by Justice Ginsburg in her dissent in *Hobby Lobby* mimicked Scalia's reasoning in *Smith*.¹⁴ In their opinions, the Justices each noted that upholding the right of individuals to disobey generally applicable laws based upon their religious beliefs would require federal courts to allow a host of claims from litigants seeking exemptions from all types of general laws.¹⁵ Justice Ginsburg asked whether an employer would be able to deny coverage of vaccines, or to deny women equal pay, based on its religious beliefs.¹⁶ Similarly, in the majority opinion in *Smith*, Justice Scalia listed a variety of regulations that potentially would be overturned under the compelling interest test, ranging from compulsory military service to drug laws and laws providing equal opportunity to people of different races.¹⁷

This Article explores whether Scalia's reasoning in *Smith* and the Court's subsequent decision in *City of Boerne* should be adopted by the Court, thus rejecting the heightened religious protections afforded by RFRA and the flurry of religious protection laws that were enacted both before and after the Court upheld the right of same-sex couples to marry in *Obergefell v. Hodges*.¹⁸ It goes on to discuss the potential implications RFRA protections might have on the individual rights of others. As a solution, it proposes a reversal of the burden of proof: neutrally enacted, generally applicable laws would be presumptively valid. It would be the religious plaintiff's responsibility to demonstrate that the enactment of the law was motivated by antireligious bias and had no rational connection to the government's legitimate interest.

SCALIA'S REASONING IN *SMITH*

The question before the Court in *Smith* was whether the Free Exercise

13. *Hobby Lobby*, 134 S. Ct. at 2785.

14. *See id.* at 2784–85 (“In its final pages, the principal dissent reveals that its fundamental objection to the claims of the plaintiffs is an objection to RFRA itself. The dissent worries about forcing the federal courts to apply RFRA to a host of claims made by litigants seeking a religious exemption from generally applicable laws, and the dissent expresses a desire to keep the courts out of this business. In making this plea, the dissent reiterates a point made forcefully by the Court in *Smith*.”).

15. *See id.* at 2804–06 (Ginsburg, J., dissenting) (“[The plaintiffs] surely do not stand alone as commercial enterprises seeking exemptions from generally applicable laws on the basis of their religious beliefs. . . . Would RFRA require exemptions in cases of this ilk? And if not, how does the Court divine which religious beliefs are worthy of accommodation, and which are not?”); *Emp’t Div. v. Smith*, 494 U.S. 872, 888–89 (1990) (“The [compelling interest test] would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind . . .”).

16. *Hobby Lobby*, 134 S. Ct. at 2805.

17. *Smith*, 494 U.S. at 888–89.

18. 135 S. Ct. 2584 (2015).

Clause of the Federal Constitution permitted the State of Oregon to deny unemployment benefits to two drug rehabilitation counselors who illegally used peyote as part of their religious rituals.¹⁹ Scalia observed that “[w]e have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”²⁰ This was because “[t]he mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.”²¹ Importantly, Scalia emphasized that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”²²

Scalia distinguished *Sherbert v. Verner*²³—in which the Court held that a state could not condition the availability of unemployment insurance on an individual’s willingness to forgo conduct required by his religion²⁴—because unlike the respondents’ behavior in *Smith*, the conduct at issue in *Sherbert* was not prohibited by law.²⁵ He went on to cite several cases in which the Court rejected an individual’s argument that his religious beliefs superseded a neutral, generally applicable law.²⁶ In *Prince v. Massachusetts*,²⁷ the Court found that a mother could be prosecuted under child labor laws for using her children to dispense literature in the streets, notwithstanding her religious motivation.²⁸ Similarly, in *Gillette v. United States*,²⁹ the Court sustained the military selective service system against a claim that it violated the Free Exercise Clause by conscripting persons who opposed a particular war on religious grounds.³⁰ Scalia’s reasoning became clearer in his discussion of *United States v. Lee*,³¹ in which an Amish employer could be forced to pay Social Security taxes notwithstanding his assertion that his faith prohibited participation in governmental support programs.³² Scalia noted that “[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.”³³ Thus, at

19. *Smith*, 494 U.S. at 874.

20. *Id.* at 878–79.

21. *Id.* at 879.

22. *Id.* (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)).

23. 374 U.S. 398 (1963).

24. *Sherbert*, 374 U.S. at 409.

25. *Smith*, 494 U.S. at 876.

26. *Id.* at 879–80.

27. 321 U.S. 158 (1944).

28. *Prince*, 321 U.S. at 170–71.

29. 401 U.S. 437 (1971).

30. *Gillette*, 401 U.S. at 561–63.

31. 455 U.S. 252 (1982).

32. *Lee*, 455 U.S. at 258–61.

33. *Emp’t Div. v. Smith*, 494 U.S. 872, 880 (1990) (quoting *Lee*, 455 U.S. at 260) (internal

least in part, Scalia was concerned with the political and sociological effects of a rule permitting people to use their religion to shield them from an obligation to comply with the law.

According to Scalia, the only decisions in which the Court had held that the Free Exercise Clause prohibited the application of a neutral, generally applicable law were those in which more than one constitutionally protected action was involved.³⁴ Thus, for example, the Court had previously ruled in favor of Amish parents challenging compulsory school attendance on religious grounds because it involved both the Free Exercise Clause and the right of parents to direct the education of their children.³⁵ Moreover, Scalia specifically rejected the *Smith* respondents' argument that the compelling interest test should be applied in their case.³⁶ He observed that the Court's previous decisions applying the test had never been used to invalidate "an across-the-board criminal prohibition on a particular form of conduct."³⁷ He concluded:

The government's ability to enforce generally applicable 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.³⁸

Justice Scalia also rejected introducing into the compelling interest test a "centrality of beliefs" test: "Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.'"³⁹ He specifically noted that "[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' interpretation of those creeds."⁴⁰ Thus, Justice

quotation mark omitted).

34. *Id.* at 881.

35. *Id.* at 881, 881 n.1 (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

36. *Id.* at 882–90.

37. *See id.* at 884–85 ("[The decisions] have nothing to do with an across-the-board criminal prohibition on a particular form of conduct. Although, as noted earlier, we have sometimes used the *Sherbert* test to analyze free exercise challenges to such laws, we have never applied the test to invalidate one." (citations omitted)).

38. *Id.* at 885 (citations omitted) (first quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988); then quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878)).

39. *Id.* at 887 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring in the judgment)).

40. *Id.* (alteration in original) (quoting *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989)). This position may come back to haunt the Court; without insisting upon a centrality of beliefs test, the assertion of *any belief* (even one that is *inconsistent* with the central tenets of a religion) may be sufficient to trigger the compelling interest test. At least one state's RFRA statute explicitly provides that a person's assertion regarding his or her religious belief need not be central to a particular religious belief system, thus leaving the door open to claims based on beliefs that are inconsistent with or unrelated to the central tenets of a particular religion. *See* MO. ANN. STAT. § 1.302.2 (West 2016)

Scalia concluded that if the compelling interest test is to be used, it must be applied “across the board” to all religious actions:

Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society’s diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because “we are a cosmopolitan nation made up of people of almost every conceivable religious preference,” and precisely because we value and protect that religious divergence, 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.⁴¹

Scalia went on to list a wide range of civic obligations from which religious actors would be exempt if a compelling interest test were adopted, including child neglect laws, drug laws, traffic laws, minimum wage laws, and environmental protection laws.⁴² While he acknowledged that states were permitted to enact religious exemptions from otherwise generally applicable laws, he pointed out that they were not constitutionally required to do so.⁴³ Justice Scalia did not address what would happen when a state enacted a law to protect religious beliefs that, at the same time, discriminated against minorities.

THE COURT’S REASONING IN *CITY OF BOERNE*

Justice Scalia reaffirmed his position in *Smith* several years later in his concurring opinion in *City of Boerne v. Flores*.⁴⁴ In *City of Boerne*, local zoning authorities denied the Archbishop of San Antonio a building permit to enlarge a church under an ordinance governing historic preservation.⁴⁵ The Archbishop brought an action challenging the statute under RFRA.⁴⁶ Relying substantially on Scalia’s language in *Smith*, the Court concluded:

[RFRA’s] [s]weeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. . . . RFRA has no termination date or termination mechanism. Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion.

. . . .

. . . RFRA’s substantial-burden test . . . is not even a

(defining “exercise of religion” as “an act or refusal to act that is substantially motivated by religious belief, *whether or not the religious exercise is compulsory or central to a larger system of religious belief*” (emphasis added)).

41. *Id.* at 888 (citations omitted) (quoting *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961)).

42. *Id.* at 888–89.

43. *Id.* at 890.

44. 521 U.S. 507, 537–44 (1997) (Scalia, J., concurring in part). Scalia wrote his concurrence primarily to rebut Justice O’Connor’s dissent, in which she criticized the holding of *Smith*. *See id.* at 537.

45. *Id.* at 511–12 (majority opinion).

46. *Id.* at 512.

discriminatory-effects or disparate-impact test. It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs.⁴⁷

Having deep misgivings about the authority of Congress to pass such sweeping legislation, at least insofar as it applied to state laws, the Court invalidated RFRA as it applied to the states.⁴⁸

Whatever his misgivings about RFRA in 1997, Justice Scalia seemed to make an about face when he enthusiastically joined the majority opinion in *Hobby Lobby*. In that case, corporate plaintiffs challenged contraceptive mandate of the Affordable Care Act (ACA) on the basis that the requirement violated RFRA.⁴⁹ Finding in favor of the plaintiffs, the Court applied RFRA's compelling interest test.⁵⁰ A cynical conclusion might be that the facts of each case directed Scalia's conclusion, rather than a change in his stance on neutral laws that incidentally impact religious practice. In other words, Justice Scalia may not have wanted to support the right of Native Americans to smoke peyote in contravention of state law but did want to support the right of evangelical Christian owners of a family corporation to refuse to pay for contraceptive health insurance as required by the ACA, a law with which he profoundly disagreed, both legally and personally.

STATE RELIGIOUS FREEDOM LAWS

City of Boerne invalidated the application of RFRA to the states, on the basis that it exceeded Congress's enforcement powers under Section 5 of the Fourteenth Amendment.⁵¹ In its place, numerous states have enacted their own versions of RFRA.⁵² For example, Illinois's RFRA prohibits the government from substantially burdening the free exercise of religion, even if the burden results from a law of general applicability, unless the restriction is "in furtherance of a compelling governmental interest" and is the "least restrictive means" of furthering that interest.⁵³ Notably, the Illinois legislature specifically cited *Smith* and *City of Boerne* in justifying the need for the legislation.⁵⁴ Even before the Supreme Court's same-sex marriage decision in *Obergefell v. Hodges*,⁵⁵ at least two states attempted to modify their state RFRA's to permit

47. *Id.* at 532, 535.

48. *Id.* at 536.

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

50. *Id.*

51. *City of Boerne*, 521 U.S. at 536.

52. *See generally State Religious Freedom Restoration Acts*, *supra* note 6.

53. 775 ILL. STAT. COMP. ANN. 35/15 (West 2016).

54. *Id.* at 35/10(a)(4)-(5).

55. 135 S. Ct. 2584 (2015) (holding that the Fourteenth Amendment protects the rights of same-sex couples to marry).

private parties to defend their right to discriminate against gay people.⁵⁶ Many similar bills have been proposed in Texas that would modify its constitution to further protect religious freedoms.⁵⁷

Obergefell inspired numerous states in the South and Midwest to enact additional laws to reaffirm the right of individuals to refuse to provide services to gay people based on religious beliefs.⁵⁸ More than 100 bills attempting to protect the rights of religious individuals and organizations to discriminate against gay people have been proposed notwithstanding the *Obergefell* decision.⁵⁹ Many states have introduced so-called “First Amendment Defense Acts” that prohibit the government from taking action against any person on the basis of his or her belief that marriage is the union of one man and one woman.⁶⁰ Georgia’s version prohibited the government from penalizing anyone for exercising their religious belief that “marriage is or should be recognized as the union of one man and one woman or that sexual relations are properly reserved to such a marriage.”⁶¹ If the bill had become law, an individual could have denied a job, the rental of a house, or any kind of service not only to gay people, but to unmarried heterosexual people who are living together. Lawmakers in some states went beyond proposing new statutes: in Missouri, senators proposed a ballot measure

56. Indiana’s bid was initially successful, although the law was later amended to add more protections for LGBT individuals after a large public outcry. See Tony Cook & Brian Eason, *Gov. Mike Pence Signs RFRA Fix*, INDYSTAR (Apr. 1, 2015, 10:37 AM), <http://www.indystar.com/story/news/politics/2015/04/01/indiana-rfra-deal-sets-limited-protections-for-lgbt/70766920/>. The North Carolina legislature has considered a law similar to Indiana’s. Tim Funk & Jim Morrill, *NC Considers Indiana-like Religious Objection Legislation*, CHARLOTTE OBSERVER (Mar. 30, 2015, 8:54 PM), <http://www.charlotteobserver.com/news/politics-government/article16956950.html>.

57. See John Wright, “License to Discriminate” Bills Pile up in Texas Legislature, TEX. OBSERVER (Dec. 11, 2014, 11:04 AM), <http://www.texasobserver.org/license-discriminate-bills-pile-texas-legislature/>.

58. See Ray Sanchez, *Why the Onslaught of Religious Freedom Laws?*, CNN (Apr. 7, 2016, 10:22 AM), <http://www.cnn.com/2016/04/06/us/religious-freedom-laws-why-now/> (attributing the resurgence of religious freedom legislation to an “invigorated religious resistance” against the LGBT movement after *Obergefell*); Richard Wolf, *Gay Marriage Victory at Supreme Court Triggering Backlash*, USA TODAY (May 29, 2016, 4:32 PM), <http://www.usatoday.com/story/news/politics/2016/05/29/gay-lesbian-transgender-religious-exemption-supreme-court-north-carolina/84908172/> (“For nearly a year [after *Obergefell*], seesaw battles over religious exemptions and transgender rights have replaced what had been the gay rights movement’s steady progress in winning protections against discrimination in states and cities. Legislative and legal skirmishes have been triggered by an intransigent Alabama chief justice and a defiant Kentucky county clerk, a Colorado baker and a Washington State florist, and most recently a conservative backlash that has traveled east from Texas to Mississippi to North Carolina.”).

59. See Jennifer Bendery & Michelangelo Signorile, *Everything You Need to Know About the Wave of 100+ Anti-LGBT Bills Pending in States*, HUFFINGTON POST (Apr. 15, 2016), http://www.huffingtonpost.com/entry/lgbt-state-bills-discrimination_us_570ff4f2e4b0060ccda2a7a9.

60. Memorandum from the Public Rights/Private Conscience Project at Columbia Law Sch. on State & Fed. Religious Accommodation Bills: Overview of the 2015-2016 Legislative Session 2 (Sept. 20, 2016) [hereinafter PRPCP Memorandum], http://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/prpcp_exemption_overview_-_9.20.16.pdf.

61. First Amendment Defense Act of Georgia, S.B. 284, 153rd Gen. Assemb., Reg. Sess. (Ga. 2016).

to amend the state's constitution so as to bar the government from imposing "a penalty on a religious organization on the basis that the organization believes or acts in accordance with a sincere religious belief concerning marriage between two persons of the same sex."⁶²

Some post-*Obergefell* bills have succeeded. In Tennessee, a law was passed that permits therapists to refuse to treat gay people based on the therapists' religious beliefs.⁶³ Mississippi passed the Protecting Freedom of Conscience from Government Discrimination Act, which permitted individuals and organizations to deny gay people adoption services, refuse to employ them, decline to rent or sell them property, and even permitted healthcare professionals to refuse to participate in certain procedures because of their religious beliefs.⁶⁴ Before the law was to take effect, however, a federal district court issued an injunction against it, finding that it violated both the Fourteenth Amendment Equal Protection Clause and the First Amendment Establishment Clause.⁶⁵ The district judge did not mince words:

In physics, every action has its equal and opposite reaction. In politics, every action has its predictable overreaction. Politicians reacted to the Hawaiian proceedings with DOMA and mini-DOMAs. *Lawrence* and *Goodridge* birthed the state constitutional amendments. And now *Obergefell* has led to [the Mississippi law]. The next chapter of this back-and-forth has begun.⁶⁶

RFRA: JUST THE "ICING ON THE CAKE"

RFRA added another layer to the statutory protections already afforded to religious practices by a multitude of laws that protect "freedom of conscience." After *Roe v. Wade*,⁶⁷ the federal government and many states passed laws that protect individuals and institutions that fail to comply with laws that interfere

62. S.J. Res. 39, 98th Gen. Assemb., Reg. Sess. (Mo. 2016). The resolution died in committee in April 2016. PRPCP Memorandum, *supra* note 60, at 5.

63. See TENN. CODE ANN. § 63-22-302 (West 2016).

64. Protecting Freedom of Conscience from Government Discrimination Act, MISS. CODE ANN. §§ 11-62-1 to -19 (West 2017); see also Emma Green, *When Doctors Refuse to Treat LGBT Patients*, ATLANTIC (Apr. 19, 2016), <http://www.theatlantic.com/health/archive/2016/04/medical-religious-exemptions-doctors-therapists-mississippi-tennessee/478797/> (noting that laws like Mississippi's "offer legal cover to people of faith who don't want to provide certain goods or services to LGBT people, especially when doing so might seem like a tacit endorsement of their relationships and sex lives").

65. *Barber v. Bryant*, 193 F. Supp. 3d 677, 711-16 (S.D. Miss. 2016). Before issuing the injunction against the whole law, the same court first blocked a portion of the law that permitted court clerks to recuse themselves from issuing same-sex marriage licenses. See *Campaign for S. Equal. v. Bryant*, 197 F. Supp. 3d 905, 912-17 (S.D. Miss. 2016). Both cases have been consolidated and are pending appeal before the Fifth Circuit. See *Barber v. Bryant*, 833 F.3d 510, 511-12 (5th Cir. 2016).

66. *Barber*, 193 F. Supp. 3d at 691. In the early 2000s, the Supreme Court's decision invalidating sodomy laws in *Lawrence v. Texas*, 539 U.S. 558 (2003), and the Massachusetts Supreme Court's decision allowing same-sex couples to marry in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), led many states to amend their constitutions to ban same-sex marriage. *Barber*, 193 F. Supp. 3d at 690. Mississippi voters approved such an amendment "by the largest margin in the nation." *Id.*

67. 410 U.S. 113 (1973).

with their religious (and sometimes moral) beliefs.⁶⁸ Among the federal laws passed was the Church Amendment, enacted in 1973, that prohibited requiring individuals or institutions receiving federal funds from being required to participate in abortions or sterilizations, or for that matter, “any part of a health service program” if doing so would violate their religious beliefs.⁶⁹

Eight years later, Congress extended protection to health insurers who, for religious reasons, did not want to cover contraception.⁷⁰ In 1996, Congress passed the Coats Amendment, which prohibited the government from discriminating against medical residency programs that refuse to provide training in abortion services.⁷¹ In 1997, Congress enacted legislation enabling Medicare managed care plans to refuse to cover various health care services if they objected based upon their religious convictions.⁷² Following the federal government’s lead, virtually all states have refusal clauses that enable health care workers to refuse to provide medical services if they have religious objections.⁷³ Among the types of services covered are “abortion, contraception, insurance to cover contraception, family planning services or referrals, sterilization, assisted reproduction, human cloning, fetal experimentation, euthanasia, and termination of life support.”⁷⁴

Laws that protect individuals and institutions that assert religious beliefs as a way to circumvent professional responsibilities—as well as those laws that prevent the government from regulating activities in a way that interferes with religious practices—expand the already existing body of legislation that excuses these religious individuals and institutions from otherwise mandatory compliance. For example, most states have enacted religious exemptions that permit parents to refuse vaccinations for their children.⁷⁵ Other state laws excuse parents from parental neglect allegations if they justify their refusal to provide medical care to their children due to their religious beliefs.⁷⁶ The ACA permits individuals with religious objections to participating in the health insurance

68. See Martha Swartz, “Conscience Clauses” or “Unconscionable Clauses”: *Personal Beliefs Versus Professional Responsibilities*, 6 YALE J. HEALTH POL’Y L. & ETHICS 269, 279–97 (2006) (canvassing the development of these laws after *Roe*).

69. 42 U.S.C. § 300a-7 (2012).

70. Swartz, *supra* note 68, at 282 (“In 1981, Congress again addressed the issue of the right to refuse to participate in certain types of medical care, expanding that right to cover health insurers.”).

71. 42 U.S.C. § 238n.

72. 42 U.S.C. § 1395w-22(j)(3)(B).

73. See Swartz, *supra* note 68, at 285–96 (providing examples of these laws).

74. *Id.* at 285 (footnotes omitted).

75. *States with Religious and Philosophical Exemptions from School Immunization Requirements*, NAT’L CONF. ST. LEGISLATURES (Aug. 23, 2016), <http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx> (showing that at least forty-seven states have enacted statutes that permit parents to refuse to provide immunizations for their children based on their religious beliefs).

76. NAT’L DIST. ATTORNEYS ASS’N, RELIGIOUS EXEMPTIONS TO CHILD NEGLECT 1 (2015), <http://www.ndaa.org/pdf/2-11-2015%20Religious%20Exemptions%20to%20Child%20Neglect.pdf> (noting that, as of February 2015, at least 39 states had statutes that offered religious exemptions to criminal laws regarding child abuse or neglect).

mandate to circumvent the mandate.⁷⁷ An especially unusual exemption appears in a Pennsylvania statute that provides religious exemptions from the requirement that children wear bicycle helmets, a common sense public health requirement.⁷⁸

Most federal antidiscrimination laws contain exemptions for religious organizations.⁷⁹ Even a proposed law that would add gender identity and sexual orientation as a protected status—joining race, religion, gender, national origin, age, and disability—would exempt some religious organizations from being covered by certain employment nondiscrimination laws.⁸⁰ While current federal antidiscrimination laws do not address sexual orientation, they do address discrimination against race, sex, and age, and most of them also contain exemptions for religious institutions and individuals.⁸¹

The exemptions are both constitutional and statutory.⁸² A constitutional exemption from antidiscrimination laws for religious organizations was recognized by the Court in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*.⁸³ In *Hosanna-Tabor*, the Court held that there is a “ministerial exception” that protects religious institutions from employment discrimination claims asserted by their ministers.⁸⁴ The rationale for this exception is that “[t]he Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.”⁸⁵ Circuit courts have applied this principle to all kinds of discrimination cases, including those asserting religious, race, and gender discrimination.⁸⁶

Statutory exemptions based on religion go far beyond the area of public health, affecting employment, education, and housing discrimination. Title VII of the Civil Rights Act of 1964 permits religious organizations to employ people only of certain religions.⁸⁷ The Fair Housing Act permits religious organizations to sell or rent buildings that they own or operate only to persons of a certain

77. See 26 U.S.C. § 5000A(d)(2) (2012) (providing religious exemptions from the requirement to maintain minimum essential health insurance coverage).

78. 75 PA. STAT. AND CONS. STAT. ANN. § 3510(b.3) (West 2016); see also Martha Swartz, *Religious Exemptions from Health Care Laws: Have We Gone Overboard?*, 2014 RUTGERS U. L. REV. COMMENTARIES 1, 3–4 (providing examples of religious exemptions from antidiscrimination laws).

79. See Alex J. Luchenitser, *A New Era of Inequality? Hobby Lobby and Religious Exemptions from Anti-Discrimination Laws*, 9 HARV. L. & POL’Y REV. 63, 75–79 (2015) (providing an overview of existing constitutional and statutory exemptions from federal antidiscrimination laws).

80. Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 6; see also Luchenitser, *supra* note 79, at 79.

81. See Luchenitser, *supra* note 79, at 76–79 (providing an overview of statutory exemptions granted to religious institutions and individuals).

82. *Id.* at 75.

83. 132 S. Ct. 694 (2012).

84. *Hosanna-Tabor*, 132 S. Ct. at 705–06.

85. *Id.* at 703.

86. Luchenitser, *supra* note 79, at 75.

87. 42 U.S.C. § 2000e-1(a) (2012). The Civil Rights Act also provides similar exceptions for religious schools. 42 U.S.C. § 2000e-2(e)(2); see also Luchenitser, *supra* note 79, at 76.

religion.⁸⁸ Title I of the Americans with Disabilities Act (ADA), which prohibits employment discrimination on the basis of disability, allows religious organizations to preferentially hire individuals of a certain religion and to require that they conform to the religious tenets of the religion.⁸⁹ Furthermore, Title III of the ADA exempts religious organizations from the requirement that they not discriminate on the basis of disability in places of public accommodation.⁹⁰ Finally, Title IX of the Education Amendments of 1972, which prohibits sex-based discrimination in educational programs or activities that receive federal financial assistance, exempts educational institutions controlled by religious organizations if the application of the law “would not be consistent with the religious tenets of such organization.”⁹¹ Thus, a religious school presumably is permitted to refuse to teach science and math to girls if its religion frowns on girls being educated for any career other than motherhood.⁹²

NONGOVERNMENTAL DEFENDANTS: USING RFRA AS A DEFENSE

Where there is no statutory religious exemption or it is not broad enough to apply, *Hobby Lobby* will encourage defendants to raise RFRA as a shield.⁹³ There have already been numerous cases where individuals have either (1) brought a RFRA claim against a private party that acted in accordance with

88. 42 U.S.C. § 3607. Because this exemption only relates to nonprofit rentals, *Hobby Lobby* might prove to have an additional impact on antidiscrimination in the for-profit housing area. Luchenitser, *supra* note 79, at 77 (“Given that this exemption does not cover for-profit rentals or for-profit corporations that are controlled by religious organizations, *Hobby Lobby*’s expansion of RFRA to for-profit entities may have an important impact in the housing area too. Indeed, there have been some pre-*Hobby-Lobby* cases where defendants asserted that RFRA exempted them from the Fair Housing Act or analogous state laws, though in none of those cases was the RFRA argument successful.”).

89. 42 U.S.C. § 12113(d).

90. 42 U.S.C. § 12187.

91. 20 U.S.C. § 1681(a)(3) (2012).

92. In 1985, Baylor University was exempted from portions of Title IX because it decided that it conflicted with its sincerely held religious beliefs, such as condemnation of “premarital unchastity.” Marc Tracy, *Baylor Demotes President Kenneth Starr over Handling of Sex Assault Cases*, N.Y. TIMES (May 26, 2016), <http://www.nytimes.com/2016/05/27/sports/ncaafotball/baylor-art-briles-kenneth-starr-college-football.html>. In 2016, a report by an outside law firm on sexual assaults at the university found that Baylor’s religious outlook on premarital sex “made accusers fearful of coming forward.” *Id.*

93. Luchenitser, *supra* note 79, at 78. Luchenitser notes that *Hobby Lobby* is most likely to be used to attempt to avoid statutes that do not have religious exemptions:

Such statutes include the Civil Rights Act of 1866 (which prohibits private discrimination on the basis of race or national origin with regards to contracts or property), Title II of the Civil Rights Act of 1964 (which prohibits discrimination in places of public accommodation on the basis of race, color, religion, or national origin), the Age Discrimination in Employment Act (“ADEA,” which prohibits employment discrimination on the basis of age), the Equal Pay Act (which prohibits wage discrimination on the basis of sex), the Immigration Reform and Control Act (which prohibits employment discrimination on the basis of national origin or the citizenship status of citizens or lawfully admitted aliens), and the Genetic Information Nondiscrimination Act (which prohibits employment discrimination on the basis of employee genetic information).

Id. (footnotes omitted).

federal law, or (2) raised RFRA as a defense to a private cause of action created by federal statute.⁹⁴ Many private RFRA suits thus far have involved the former situation, in which a private plaintiff argues that a private defendant's compliance with federal law violated the plaintiff's rights under RFRA, effectively arguing that RFRA should exempt it (the plaintiff) from the application of the federal law at issue.⁹⁵

However, there is a split in the circuits as to whether RFRA may be used as a defense in private lawsuits.⁹⁶ In *Hankins v. Lyght*,⁹⁷ the Second Circuit concluded that RFRA could be used by a church as a shield from a lawsuit filed by one of its employees alleging that the church had violated the Age Discrimination in Employment Act (ADEA) by terminating him because of his age.⁹⁸ On the other hand, the Seventh Circuit in *Tomic v. Catholic Diocese of Peoria*⁹⁹ disagreed, finding the Second Circuit's reasoning "unsound."¹⁰⁰ The Seventh Circuit found that RFRA applies only in cases where the government is a party, quoting the statute's directive that an aggrieved person could "obtain appropriate relief against a government."¹⁰¹ The circuit courts continue to be divided with the Eighth and District of Columbia Circuits siding with the Second Circuit and the Fifth and Sixth Circuits agreeing with the Seventh Circuit.¹⁰²

The reasons for this disagreement are twofold and lie in the ambiguity of RFRA's language. First, § 2000bb-3(a) states that RFRA "applies to all [f]ederal law, and the implementation of that law."¹⁰³ This implies that a private plaintiff may invoke RFRA any time a federal law burdens his religious practices, even if the government is not a party.¹⁰⁴ On the other hand, then Circuit Judge Sotomayor argued in her dissent in *Hankins* that the reference to "all [f]ederal law" merely means that federal law must be applied where the government is a

94. Sara Lunsford Kohen, *Religious Freedom in Private Lawsuits: Untangling when RFRA Applies to Suits Involving Only Private Parties*, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 43, 49 (2011).

95. See, e.g., *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826 (9th Cir. 1999). In *Sutton*, an individual plaintiff filed suit against his private employer alleging a RFRA violation when the employer, in accordance with federal law, refused to hire him after he claimed that his religion forbade him from providing his Social Security number. *Id.* at 829–30. The court held that RFRA cannot be used against a private defendant when that defendant merely acts as compelled by federal law. *Id.* at 838–39.

96. Kohen, *supra* note 94, at 49.

97. 441 F.3d 96 (2d Cir. 2006).

98. *Hankins*, 441 F.3d at 103–06.

99. 442 F.3d 1036 (7th Cir. 2006), *abrogated by* *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012)

100. *Tomic*, 442 F.3d at 1042; see also Steven M. Shepard, Comment, *Hankins v. Lyght: The RFRA Defense to Federal Discrimination Claims*, 26 YALE L. & POL'Y REV. 359, 359 (2007) (noting the disagreement between the Second and Seventh Circuits). The Seventh Circuit reached the RFRA issue in noting its disagreement with *Hankins's* assertion that RFRA replaced the ministerial exception to the ADEA. *Tomic*, 442 F.3d at 1042.

101. *Tomic*, 442 F.3d at 1042 (quoting 42 U.S.C. § 2000bb-1(c) (2012)).

102. Kohen, *supra* note 94, at 49–54, 49 nn.35–36.

103. 42 U.S.C. § 2000bb-3(a) (2012).

104. Kohen, *supra* note 94, at 56.

party.¹⁰⁵ Second, § 2000bb-1(c) provides that “[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.”¹⁰⁶ Because the statute appears to grant relief only against government entities, it suggests that relief against private parties was not envisioned by Congress.

In view of this uncertainty, one could easily imagine an employer who professes to believe on religious grounds that a woman’s place is in the home—or that women should otherwise be subordinate to men—using RFRA to justify his failure to comply with the Equal Pay Act. An employer who clothes racial supremacist beliefs in religious faith could raise a RFRA defense to laws that directly prohibit race discrimination. Indeed, it does not take much imagination to conceive of many other kinds of arguments that could be made under RFRA to justify an individual’s failure to adhere to various federal antidiscrimination laws.

SCALIA’S *SMITH* OPINION IS RESURRECTED

Although Scalia himself seemed to have reversed his position on the constitutionality of neutrally enacted laws that incidentally burden religious practices (at least in the context of RFRA), the Supreme Court recently denied certiorari in a Ninth Circuit case that resurrected the holding in *Smith*. In *Stormans, Inc. v. Wiesman*,¹⁰⁷ the Ninth Circuit held that Washington’s pharmacy rules, which required pharmacists to promptly deliver lawfully prescribed drugs, did not violate the Free Exercise, Equal Protection, or Due Process Clauses when applied to pharmacies whose owners refused, based on their religious beliefs, to fill prescriptions for emergency contraceptives.¹⁰⁸

The district court had concluded that the state board of pharmacy rules were motivated by a discriminatory intent and failed to survive strict scrutiny.¹⁰⁹ However, citing *Smith* and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,¹¹⁰ the Ninth Circuit stated that “a neutral law of general application need not be supported by a compelling government interest even when ‘the law has the incidental effect of burdening a particular religious practice.’”¹¹¹ The Ninth Circuit found that the evidence failed to support the district court’s conclusion that enforcement of the rules was motivated by a discriminatory intent.¹¹² Moreover, because it determined that the rules operated neutrally and

105. *Id.* at 57 (quoting *Hankins v. Lyght*, 441 F.3d 96, 115 (2d Cir. 2006) (Sotomayor, J., dissenting)).

106. 42 U.S.C. § 2000bb-1(c).

107. 794 F.3d 1064 (2015), *cert. denied*, 136 S. Ct. 2433 (2016).

108. *Stormans*, 794 F.3d at 1075–88.

109. *Id.* at 1074 (“The court again held that the rules were neither neutral nor generally applicable and that they did not survive strict scrutiny.”).

110. 508 U.S. 520 (1993).

111. *Stormans*, 794 F.3d at 1075 (quoting *Lukumi*, 508 U.S. at 531).

112. *Id.* at 1071.

were generally applicable, the Ninth Circuit concluded that they should be reviewed using the rational basis (rather than the strict scrutiny) test.¹¹³ The court noted that under the rational basis test, it was the plaintiff's burden to negate "every conceivable basis" which might support the state's pharmacy rules—a burden that they failed to meet.¹¹⁴ The court held that the state's rules were rationally related to its "legitimate interest in ensuring that its citizens have safe and timely access to their lawful and lawfully prescribed medications."¹¹⁵

The *Stormans* case illustrates just how crucial a court's decision is to apply the rational basis test (in which a court will uphold a law so long as its rationally related to a legitimate government purpose) rather than the strict scrutiny test (which requires that the government have a compelling interest). Most laws fail to survive strict scrutiny.¹¹⁶ In contrast, when rational basis is applied, the plaintiff has an almost insurmountable burden to prove that there is no rational basis for the law's enactment.¹¹⁷

THE EFFECT OF EXPANDED PROTECTION OF RELIGIOUS EXERCISE

Laws that afford special carve-outs and protections to religious individuals and institutions contribute to a climate in which individuals feel free to flout all sorts of laws or responsibilities on the basis of religion. This expectation of special treatment on the basis of religion can range from the humorous to the severe. For example, a stewardess filed a discrimination complaint against her employer when she was suspended for refusing to serve alcoholic beverages, claiming that the serving of alcohol interfered with her religious beliefs.¹¹⁸ A pediatrician asserted that treating the child of lesbian parents offended her religion.¹¹⁹ A county clerk refused to issue marriage licenses to same-sex couples because it was against her religion.¹²⁰ Numerous businesses have refused to provide contraceptive coverage to their employees because it offended their

113. *Id.* at 1084.

114. *Id.* (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)).

115. *Id.*

116. *See Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011) (noting that regulations restricting speech on the basis of content are rarely permissible because such regulations are subject to the "demanding standard" of strict scrutiny).

117. *See Beach Commc'ns*, 508 U.S. at 313 ("[A] statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is *any reasonably conceivable* state of facts that could provide a rational basis for the classification." (emphasis added)).

118. Associated Press, *Alabama: Flight Attendant Complains of Religious Bias*, N.Y. TIMES, Sept. 8, 2015, at A15.

119. Abby Phillip, *Pediatrician Refuses to Treat Baby with Lesbian Parents and There's Nothing Illegal About It*, WASH. POST (Feb. 19, 2015), <http://www.washingtonpost.com/news/morning-mix/wp/2015/02/19/pediatrician-refuses-to-treat-baby-with-lesbian-parents-and-theres-nothing-illegal-about-it/>.

120. Brakkton Booker, *Kentucky Clerk Again Accused of Interfering with County Marriage Licenses*, NPR (Sept. 22, 2015, 3:24 PM), <http://www.npr.org/sections/thetwo-way/2015/09/22/440860617/kentucky-clerk-again-accused-of-interfering-with-county-marriage-licenses>.

religious beliefs.¹²¹ A prisoner in Massachusetts, professing Wiccan beliefs, successfully sued the prison under Religious Land Use and Institutionalized Persons Act, a law related to RFRA, for failing to permit him to pray during phases of the moon.¹²² The list could go on.

To underscore the potential outrageousness of expanding legal protection in this way, a group in Massachusetts formed the Satanic Temple, a satirical Satanic “religion,” in order to mock the special treatment granted to traditional organized religions.¹²³ The group has plans to use RFRA to challenge abortion waiting periods, claiming that they violate “Satanic doctors’ belief in the sanctity of good science.”¹²⁴ They are also looking to challenge school punishments that violate “the Satanic Temple principle of sovereignty of body and mind.”¹²⁵

In a more serious vein, both Justice Scalia in *Smith* and Justice Ginsberg in her *Hobby Lobby* dissent speculated about the possible ramifications of giving inordinate deference to religious practices by imposing a compelling interest requirement on all laws that impact religious exercise. Justice Scalia worried about the breadth of such a requirement:

[Such a rule] 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 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.¹²⁶

Similarly, Justice Ginsburg questioned the bounds of RFRA’s religious exemptions:

Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah’s Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)? According to counsel for Hobby Lobby, “each one of these cases . . . would have to be evaluated on its own . . . apply[ing] the compelling

121. See, e.g., *Zubik v. Burwell*, 136 S. Ct. 1557, 1559–60 (2016) (remanding cases from four circuit courts, consolidated on appeal, in which religious businesses asserted RFRA objections to the ACA).

122. *LaPlante v. Mass. Dept. of Correction*, 89 F. Supp. 3d 235, 241–44 (D. Mass. 2015). The plaintiff argued that the prison burdened his religious exercise by denying him access to, among other things, ritual teas and certain varieties of nuts, fruits, and cakes. *Id.* at 247–51.

123. Mark Oppenheimer, *A Mischievous Thorn in the Side of Conservative Christianity*, N.Y. TIMES (July 10, 2015), <http://www.nytimes.com/2015/07/11/us/a-mischievous-thorn-in-the-side-of-conservative-christianity.html>.

124. *Id.*

125. *Id.* (internal quotation mark omitted).

126. *Emp’t Div. v. Smith*, 494 U.S. 872, 888–89 (1990) (citations omitted).

interest-least restrictive alternative test.” Not much help there for the lower courts bound by today’s decision.¹²⁷

Justice Scalia warned in *Smith* of the discord that the compelling interest test would bring, noting that society could not “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.”¹²⁸ It is time to reconsider the potential balkanizing impact of RFRA and the various conscience and religious exemptions that have led to laws being applied differently to different people depending on their religious beliefs. Scalia described this potential impact eloquently: “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.”¹²⁹

WHERE WE GO FROM HERE

There are numerous problems with RFRA’s compelling interest test, not the least of which is the difficulty of challenging an individual’s assertion that a particular regulation imposes a “substantial burden” on his or her religious practices. The Court has backed itself into a corner in this regard since it has repeatedly refused to question the centrality of a person’s religious beliefs before applying the compelling interest test.¹³⁰ Thus, for example, the *Hobby Lobby* Court was unwilling to analyze whether the religious appellants’ belief that certain forms of contraception were abortifacients was either scientifically valid or a central tenet of their religion.¹³¹ In addition, the Court left it unclear—and thus subject to dispute amongst the circuit courts—whether an alternative provided to religious nonprofit organizations that involved notifying their insurers of their objections would in itself be a “substantial burden” on their religious beliefs.¹³² Since the *Hobby Lobby* decision, the Court has granted review to seven cases brought by religious nonprofits challenging the

127. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2805 (2014) (Ginsburg, J., dissenting) (omission in original) (alteration in original) (footnote omitted) (citation omitted) (quoting Transcript of Oral Argument at 11, *Hobby Lobby*, 134 S. Ct. 2751 (Nos. 13-354 & 13-356)).

128. *Smith*, 494 U.S. at 888.

129. *Id.* at 885 (citation omitted) (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878)).

130. *Id.* at 887 (noting that “[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” (alteration in original) (quoting *Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989)) (internal quotation mark omitted)).

131. *See Hobby Lobby*, 134 S. Ct. at 2799 (Ginsburg, J., dissenting) (commenting that the majority’s decision “elides entirely the distinction between the sincerity of a challenger’s religious belief and the substantiality of the burden placed on the challenger”); Swartz, *supra* note 78, at 5–6 (noting that the *Hobby Lobby* Court made no distinction between philosophical beliefs and mistaken facts).

132. *Hobby Lobby*, 134 S. Ct. at 2782 (majority opinion) (noting that the Court did not decide whether such an alternative would comply with RFRA for purposes of all religious claims).

contraceptive requirement of the ACA.¹³³ However, the Court again refused to decide the issue, instead sending the cases back to the lower courts to give the parties an opportunity to arrive at a compromise.¹³⁴

Similarly, the Court has been unclear in its interpretation of just how far the government must go to show that its regulation is the least restrictive means of achieving its compelling governmental interest, as required by RFRA.¹³⁵ Several circuit courts of appeal have tried to define this requirement in a manner that does not impose an inordinate burden on the government.¹³⁶ For example, the Second Circuit has noted that RFRA does not require that the government exhaust every possible means of furthering its interest, but merely demonstrate that its interest cannot be achieved in a significantly less restrictive manner.¹³⁷ This solution is in stark contrast to the Court's position in *Hobby Lobby*, in which it seemed willing to entertain the possibility that the government should be forced to establish a new program in which it would pay for contraceptives itself.¹³⁸

As Justice Scalia put it, the compelling interest test deems presumptively invalid most regulations that have any impact on religion.¹³⁹ We need to return to the principle that neutrally developed regulations are presumptively valid, leaving the burden of proving their interference with protected religious practices on the religious plaintiff. Justice Scalia in *Smith* and the Ninth Circuit in *Stormans* had it right: where a generally applicable law is enacted without discriminatory intent, it should be the religious plaintiff's burden to show that the law is not rationally related to a legitimate state interest.

133. Lyle Denniston, *Court to Hear Birth-Control Challenges (Updated)*, SCOTUSBLOG (Nov. 6, 2015, 2:15 PM), <http://www.scotusblog.com/2015/11/court-to-hear-birth-control-challenges/>.

134. *Zubik v. Burwell*, 136 S. Ct. 1557, 1559–60 (2016). The cases, consolidated on appeal, were remanded by the Court after the parties acknowledged in their supplemental briefs that such a compromise—which would involve petitioners' insurers providing contraceptive coverage directly to petitioners' employees—was feasible. *Id.* at 1560 (stating that, “[g]iven the gravity of the dispute and the substantial clarification and refinement in the positions of the parties,” the petitioners and the government should be given an opportunity on remand “to arrive at an approach going forward that accommodates petitioners’ religious exercise” while providing fair access to healthcare for their employees).

135. See Luchenitser, *supra* note 79, at 69 (noting that the *Hobby Lobby* Court “did not set down categorical rules for applying RFRA’s ‘least restrictive means’ prong”).

136. *Id.*

137. *Id.* (citing *Tabbaa v. Chertoff*, 509 F.3d 89, 105–07 (2d Cir. 2007)).

138. *Id.* at 69–70 (citing *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780–82 (2014)).

139. *Emp’t Div. v. Smith*, 494 U.S. 872, 888 (1990).