[This is a Word version of the posts that I put up at <http://www.volokh.com/category/hobby-lobby/>. Please note that the posts were composed during one week, and, being blog posts, weren’t substantially edited or even proofread. There are therefore doubtless more wording errors, and more substantive errors, than would normally appear in a published article of this length.]

***Hobby Lobby*, the Employer Mandate, and Religious Exemptions**

By [Eugene Volokh](http://www.volokh.com/author/volokh/) on December 2, 2013 12:40 am

Last week, the Supreme Court agreed to decide two new religious exemption cases, *Sebelius v. Hobby Lobby Stores, Inc.* and *Conestoga Wood Specialty Store v. Sebelius*. There are a lot of moving parts in the legal analysis of those cases, so I thought I’d blog several posts about them, one on each of the main issues in the case. The two cases will be consolidated, so I’ll just speak about “*Hobby Lobby*,” rather than mentioning both case names. I hope the posts will be useful both for people who want to read them all this week, and for future reference when the questions get discussed again in the coming months, as Hobby Lobby is briefed, argued, and decided.

First, a general roadmap. Hobby Lobby and Conestoga Wood are closely held, family-owned corporations. The owners of the corporations believe for religious reasons that it is wrong to use any devices or products that sufficiently risk killing a fertilized embryo, including by preventing implantation of the embryo. (To my knowledge, they are unanimous on this within each family.)

They also believe that it is wrong for them to be complicit in such killing of embryos, including by providing insurance plans for their employees that cover those contraceptives that prevent implantation. They are thus not opposed to all contraception methods — their beliefs are essentially a sort of life-begins-at-conception Protestant, not Catholic — but they are opposed to some.

They thus claim that the federal [Religious Freedom Restoration Act of 1993](http://www.law.cornell.edu/uscode/text/42/2000bb-1) entitles them to an exemption from the contraceptive insurance requirement imposed by the Affordable Care Act and its implementing regulations. (Hobby Lobby also argues that the Free Exercise Clause also entitles them to such an exemption, but I won’t focus on this argument.) Under that law,

Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person ... is the least restrictive means of furthering [a] compelling governmental interest.

I’d like to discuss this in several sets of posts, with each post focusing on a separate topic:

1. RFRA: What are RFRA claims, and how do they relate to Free Exercise Clause claims? This is background material, which many readers might already know, but which I suspect many others don’t. And there are also some potentially surprising twists here, such as the possibility that — precisely because they are statutory rather than constitutional — RFRA claims may enjoy a friendlier reception among the Justices than Free Exercise Clause claims did from 1963 to 1990, when the Court held that there is a constitutional right to some religious exemptions. I’ll have a few posts on this today.

2. Commerce: There are two separate issues here, which I plan on discussing Tuesday.

First, do religious exemption rights extend to commercial behavior? Some have argued that the challengers should lose on the grounds that religious exemption rights don’t apply to commercial endeavors. I think that argument is not consistent with the way religious accommodation claims have generally been treated in American courts, and is also inconsistent with the logic of those rights.

Second, should the challengers’ claims lose because the businesses here are corporations rather than sole proprietorships? News coverage of the case has focused on the question whether corporations can assert RFRA rights. There is also a related question of whether, even if corporations can’t assert such rights, the owners of closely held corporations can assert their own RFRA rights and argue that burdens on the corporations are actually burdens on them as owners. I think that any discussion of corporate rights should recognize that corporations are legal fictions, and that they should have rights only to the extent that such rights protect the rights of actual humans. Nonetheless, I think that corporations and corporate rights are often useful legal fictions, precisely because they help protect actual humans. And in this context of closely held corporations, the business owners should be entitled to be protected either through their own claims, or through their corporations’ claims.

3. Burden: There are two separate questions here, too, which I plan on discussing Wednesday. First, does the requirement that the businesses provide health insurance coverage “substantially burden” the challengers’ rights? Indeed, no-one is being required to actually use the implantation-preventing contraceptives; businesses are only required to provide health insurance that helps their employees use such contraceptives. Nonetheless, the law has long recognized that (a) requiring someone to do something that he sincerely sees as sinful is a “substantial burden” on his religion, and (b) people’s definition of “sinful” often includes sins of complicity and not just sins of direct action. Thus, if the challengers believe that even helping supply instruments of killing — whether they are abortion-preventing devices or, for that matter, tanks or parts that go into making tanks — is a sin, it’s not for courts to second-guess their judgments, or to say “no, you’re not *really* being required to do anything wrong.

Second, some people have asked whether granting such an exemption to for-profit businesses would violate the Establishment Clause, because it excessively burdens the businesses’ employees. The argument is that it’s unconstitutional to have exemptions that relieve burdens on religious objectors but impose undue burdens on third parties. I think that’s mistaken, though the Supreme Court caselaw on this is rather complex; I’ll talk briefly about the leading cases in this area.

4. Strict scrutiny: Thursday and perhaps even Friday, I hope to blog about what I think should be the central issue in the case — even if the contraceptive mandate substantially burdens the religious observers, is it still justifiable as the least restrictive means of serving compelling government interests? Lots of people have lots of religious beliefs that are substantially burdened by various laws, but for most of them the government interest trumps the religious freedom claim; we see this with tax law, many forms of antidiscrimination law, many drug bans, copyright law, and a wide range of other laws. (You might or might not agree that the government interest should trump in these cases, but courts have found that it does.) That’s why RFRA has a provision for denying exemptions when doing so is the least restrictive means to serve a compelling government interest.

But what counts as a compelling government interest, and what exactly is meant by least restrictive means? I think the law here is extremely unclear, and indeed deliberately so: This aspect of RFRA is essentially a Congressional mandate for courts to use their own moral and empirical judgments in deciding which interests are important enough, and whether exemptions would cause enough practical problems. So it’s hard to tell how the Court will decide this, and I’m not sure myself how it should decide it. Still, I’ll offer some observations on the kinds of arguments that are involved here.

5. Mutual accommodations: Finally, I’ll briefly step away from RFRA as it is, and ask a broader question about the degree to which the legal system might expect accommodation from religious observers, as well as religious observers might expect accommodation from the legal system. I won’t have that much to say on the subject, but I thought I’d offer some tentative observations that are based on the particulars of this case, and that indirectly relate to the “substantial burden” / complicity question I’ll be discussing Wednesday.

**1A. What Is the Religious Freedom Restoration Act?**

By [Eugene Volokh](http://www.volokh.com/author/volokh/) on December 2, 2013 7:43

1. Say that you feel a religious obligation to use a prohibited drug — hoasca (the drug at issue in [*Gonzales v. O Centro Espírita Beneficente União do Vegetal* (2006)](http://scholar.google.com/scholar_case?case=7036734975431570669)), peyote, marijuana, or LSD.

Or say that you’re a landlord who [feels a religious obligation not to rent to unmarried couples](http://www.law.ucla.edu/volokh/relfree.htm#N_191_) (or same-sex couples), even though state law bars marital status discrimination or sexual orientation discrimination in housing.

Or say that you [feel a religious obligation to help someone commit suicide](http://www.law.ucla.edu/volokh/relfree.htm#N_203_), in violation of state law — or a [religious obligation not to testify](http://www.law.ucla.edu/volokh/intermed.htm#N_20_) against your parent, your child, or a coreligionist, even when you have a legal duty to do so.

Should you be entitled to an exemption from the generally applicable law, because of your religious beliefs? Or should the government be free to apply the law to you just as it does to others?

Until about 1960 (more or less), the rule was what one might call the statute-by-statute exemption model — religious objectors got exemptions if and only if the statute provided for one, as, for instance, draft law historically had. Judges got into the act only insofar as they created common-law exemptions from judge-made common-law rules, and these exemptions were trumpable by statute. The clergy-penitent privilege, which is an exception from the duty to testify, was one example.

But then in *Braunfeld v. Brown* (1961) the Supreme Court seemed to suggest that the Free Exercise Clause might sometimes constitutionally mandate exemptions. And in *Sherbert v. Verner* (1963), the Court expressly adopted the constitutional exemption model, under which sincere religious objectors had a presumptive constitutional right to an exemption. *Wisconsin v. Yoder* (1972) reaffirmed this, and the period from 1963 to 1990 is often labeled the *Sherbert*/*Yoder* era of Free Exercise Clause law.

Of course, a constitutional exemption model can never simply say “religious objectors get an exemption.” A wide range of generally applicable laws — murder law, theft law, rape law, and so on — must be applicable even to religious objectors. Even as to more controversial cases, such as bans on race discrimination in education, or generally applicable tax laws, the Court has found (even under the *Sherbert*/*Yoder* regime) that religious objectors’ claims must yield.

To distinguish cases where religious objectors win from those in which they lose, the *Sherbert*/*Yoder*-era Court used what it called “strict scrutiny” when the law imposed a “substantial burden” on people’s religious beliefs (e.g., when it banned behavior that the objectors saw as religiously compelled, or mandated behavior that the objectors saw as religiously prohibited). Under this strict scrutiny, religious objectors were to be given an exemption, unless denying the exemption was the least restrictive means of serving a compelling government interest.

But while the strict scrutiny test in race and free speech cases was generally seen as “strict in theory, fatal in fact” (Gerry Gunther’s phrase), almost always invalidating the government law, in religious freedom cases it was “strict in theory, feeble in fact” (Larry Sager and Chris Eisgruber’s phrase). The government usually won, and religious objectors won only rarely.

Then in 1990, the Court changed course: In Employment Division v. Smith, a 5-Justice majority returned to the statute-by-statute exemption regime, and rejected the constitutional exemption regime. So long as a law doesn’t discriminate against religious objectors, but generally applies to people regardless of their religiosity, it’s constitutionally valid. If religious objectors want an exemption, they need to go to the legislature. (This is an oversimplification, but let’s go with it for now.)

Smith was broadly condemned, both by the Left and the Right. That coalition has since largely fallen apart, but it was strong back then: In 1993, Congress enacted the Religious Freedom Restoration Act, which gave religious objectors a statutory presumptive entitlement to exemption from generally applicable laws (subject to strict scrutiny). “Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person ... is the least restrictive means of furthering [a] compelling governmental interest.” The vote in the House was unanimous, and in the Senate was 97-3.

RFRA was meant to apply to all branches of government, and both to federal and state law. In *City of Boerne v. Flores* (1997), the Supreme Court held that RFRA exceeded federal power when applied to state laws, but didn’t touch it as to federal law. Since 1997 (and in some measure before), about a dozen states enacted similar state-level RFRAs as to state law, and about a dozen more interpreted their state constitutions to follow the *Sherbert* model rather than the Smith model.

Therefore, the rule now is that there is a religious exemption regime as to federal statutes (under the federal RFRA), and as to state statutes in the about half the states that have state RFRAs or state constitutional exemption regimes. Religious objectors in those jurisdictions may demand exemptions from generally applicable laws that substantially burden the objectors’ practice, which the government must grant unless it can show that applying the laws is the least restrictive means of serving a compelling government interest.

Hobby Lobby involves a federal statute and federal regulations, so therefore the federal RFRA is what matters. Still, I thought it would be helpful to mention the state RFRAs, since they come up in all sorts of other religious exemption controversies; here is a map of which states are covered by state RFRAs or by state constitutional exemption regimes: <http://www.volokh.com/wp-content/uploads/2013/12/religionmap2013.jpg>.

2. In interpreting the terms of RFRA — such as “substantial burden,” “compelling government interest,” and “least restrictive means” — courts look to *Sherbert*/*Yoder*-era Free Exercise Clause caselaw. The “findings” section of RFRA states that “the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests” (emphasis added), and cites *Sherbert* and *Yoder* favorably. And the whole point of RFRA was to “restor[e]” a body of rulings that were overturned by Smith — rulings that recognized a constitutional right to presumptive exemptions from generally applicable laws.

Unfortunately, this body of preexisting caselaw is not terribly broad or deep. As we’ll see later, for instance, it tells us less than we’d like to know about what counts as a compelling interest. But what counts as a substantial burden is somewhat clearer; we’ll see this in more detail in a later post, but for now, note that the following all constitute a substantial burden:

* The government’s compelling someone to do something that violates his religious beliefs, or prohibiting someone from doing something that is mandated by his religious beliefs.
* The government’s denying someone a tax exemption or unemployment compensation unless he does something that violates his religious beliefs, or refrains from something that is mandated by his religious beliefs.
* As to state and federal constitutional regimes, it’s not clear whether the above also applies when the objector’s conduct is merely motivated by his religious beliefs (e.g., the objector thinks it’s a religiously valuable thing for him to stay home on the Sabbath, rather than a religious commandment) and not actually mandated by those beliefs. The federal RFRA, many state RFRAs, and RLUIPA expressly apply to “any exercise of religion, whether or not compelled by ... a system of religious belief.”
* The beliefs need not be longstanding, central to the claimant’s religious beliefs, internally consistent, consistent with any written scripture, or reasonable from the judge’s perspective. They need only be sincere.

Recall, though, that a finding of substantial burden on sincere religious beliefs simply shifts the burden to the government: The government may still justify the burden by showing that applying the law to the objectors is the least restrictive means of serving a compelling government interest.

**1B. Why Have RFRA-Like Religious Exemption Regimes?**

By [Eugene Volokh](http://www.volokh.com/author/volokh/) on December 2, 2013 12:02 pm

The [previous post](http://www.volokh.com/?p=79999) in this series has explained what RFRA is, and what general rules it sets forth. For nearly all the remaining posts, I’ll take RFRA as given, and not deal with the broader question of whether having such a statute is a good idea. (That’s a perfectly sensible question to ask, but it’s not one that the Court will have to confront in *Hobby Lobby*.) Still, I think it’s helpful to think a bit about what the main arguments for RFRA are — whether you accept them or not — since this may help us understand how the Court will interpret RFRA.

RFRA begins with the findings that, “the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution,” and “laws ‘neutral’ toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.” To this point, this might sound like a justification for massive protection. Does your religion require you not to pay any taxes to what you see as a corrupt, un-Godly government? Well, tax laws may burden this religious exercise as surely as laws intended to discriminate against your religion, and, hey, your free exercise of religion is an “unalienable right.”

But of course our legal system has never accepted any such view of free exercise. Likewise if your religion requires you to make pilgrimages to a visitation of the Virgin Mary on my property, or to take my property and give it to the poor, or to kill me for blaspheming, or to do many other things that the legal system forbids with no regard for religious objections.

Even if we set aside religious actions that infringe on long-recognized common-law private rights (life, property, and the like), RFRA’s drafters can’t have been trying to protect all “exercise of religion” — in the sense of all conduct or abstention from conduct mandated by one’s religion — as an “unalienable right.” Say, for instance, that your religion requires you not to pay certain kinds of taxes, or to refuse to hire members of certain races at your factory, or to refuse to fight in unjust wars (a broader exemption claim than that allowed by the statutory conscientious objector exemption, which only applies to people who object to all wars). Courts even during the *Sherbert*/*Yoder* constitutional exemption era largely rejected such religious exemption claims, and there’s no reason to think that Congress wanted to allow such claims.

Indeed, the very next provision in the RFRA findings section, coupled with the body of the statute, confirms that religious exemption claims are always subject to override by “compelling government interest[s].” “[G]overnments should not substantially burden religious exercise without compelling justification.” “[T]he compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.” “Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person ... is the least restrictive means of furthering [a] compelling governmental interest.” And the *Sherbert*/*Yoder*-era cases that RFRA is aiming to restore didn’t even set the “compelling interest” bar at that high a level.

The rationale of RFRA then isn’t really that free exercise of religion is truly “unalienable,” in the sense that the government cannot take it away. Rather, I think it is best framed as roughly this:

1. It is good — both for religious observers and for civil peace — to shape our laws in a way that lets people live in a way that is consistent with their felt religious obligations.

2. Of course, some civil obligations will have to be imposed on all, without regard to their religious views.

3. But in some situations, accommodating religious objectors will actually not be particularly costly either for society as a whole or for other citizens. Religious objectors should therefore be exempted in those situations, so long as any “compelling government interests” can still be served effectively despite the exemption.

And these situations are particularly common when a law imposes only a relatively modest burden on most citizens, but is felt as imposing a great burden indeed on religious observers. (That’s not the RFRA statutory test, but rather my description of cases where an exemption is especially likely to be granted, and has an especially strong argument in its favor.) For instance, a requirement that people take off their headgear in court, as a customary acknowledgment of the importance of the proceedings, is generally only a slight burden to most people. But it is a huge burden to Orthodox Jews, Sikhs, and Muslim women who wear headscarves. Granting religious objectors an exemption from the rule won’t do much to undermine the decorum of the courtroom, but it will let the religious objectors live normal civic lives without violating either what they see as religious law or the secular law.

(Note that much the same argument could be used for deeply held secular philosophical objections. I largely set aside here the question whether RFRA should be interpreted to cover such objections as well as religious objections, though I touch on it very briefly in [this article](http://www2.law.ucla.edu/volokh/relfree.htm). Follow that link for cases — dealing with the religious objection to draft law and with the religious accommodation provision of Title VII — that have indeed interpreted religious exemptions to cover secular philosophical exemptions, and see the start of Part II of *Wisconsin v. Yoder* for a contrary view.)

This also helps explain why a legislature might want to enact a RFRA, rather than just specifically considering possible religious objections at the time each law is enacted, and enacting statute-by-statute exemptions. Usually, religious exemptions will be low-cost precisely when they are rare — when the law will apply to the great bulk of the public, and only a few idiosyncratic religious objectors will get exemptions. In such situations, the legislature often won’t want to spend time and effort debating a rare exemption. Indeed, sometimes the potentially objecting religious group won’t be well-known or even present in the jurisdiction at the time the law is enacted.

A legislature might thus want to leave these decisions to courts, to be decided as exemptions arise, rather than having to make the decisions on a statute-by-statute basis whenever any statute is enacted. (The legislature might also think that the judicial process will be fairer to dissenting religious groups than the legislative process, and yield decisions that are more driven by principled analysis and less by raw political power, though I’m not sure how optimistic we should be about that.) That, at least, is the theory of the RFRAs.

Of course, the problem is that deciding whether accommodating religious objectors will indeed be not particularly costly, either for society as a whole or for other citizens, often involves hotly contested moral and pragmatic judgments. Should Amish children, for instance, be exempted from compulsory education after age 14, as the Court held in *Wisconsin v. Yoder* (1972)? A lot depends on whether you think that, as a moral matter, children should have a right to be exposed to more ideas and concepts, in case they want to eventually leave their religious community. (That was Justice Douglas’s objection in dissent.) A lot also depends on whether you think that, as an empirical matter, Amish children who do leave the community will have a hard time making up for the lost years of school — two years in *Yoder*, since Wisconsin only mandated education up to age 16.

Likewise, should landlords who don’t want to rent to unmarried couples be exempted from bans on marital status discrimination in housing, if they believe that it is sinful for them to thus assist in what they see as fornication? (This issue came up in several lower court cases in the 1990s.) A lot depends on whether you think that, as a moral matter, unmarried couples have a moral right to equal treatment in any housing transactions, or whether you think that unmarried couples have at most a right to reasonable access to affordable housing. And a lot also depends on whether you think that, as an empirical matter, allowing religious landlords to refuse to rent to unmarried couples would indeed substantially interfere with the couples’ access to affordable housing.

Because of this, I think the Court was right in *Smith* to conclude that courts ought not be making such decisions as a constitutional matter, in deciding whether to carve out exemptions from drug laws, antidiscrimination laws, compelled testimony rules, assisted suicide bans, animal cruelty laws, and a vast range of other laws. (I discuss this in much more detail in [this article](http://www.law.ucla.edu/volokh/relfree.pdf), and also explain how religious freedom claims differ from claims, such as free speech claims, in which courts do make such constitutional judgments.) If the legislature really does think that a religious exemption would violate someone else’s rights, or would substantially interfere with pragmatic legislative goals, courts shouldn’t trump this legislative judgment.

But RFRA doesn’t put courts in the position of trumping such a legislative judgment. Precisely because RFRA is a statute, the legislature can always exclude future statutes from RFRA — either when it passes the statutes, or after a court decision granting an exemption. So if, for instance, Congress thinks that there shouldn’t any religious exemptions from the employer mandate, it could enact a statute saying, “the employer mandate shall not be subject to RFRA.” (Of course, as a political matter this is unlikely, given the Democrats’ loss of their Congressional majority, but that simply reflects the fact that Congress likely wouldn’t want to overturn any such decision — it still could do so if it wanted to.) The legislature thus still retains the last word on when religious exemptions should be allowed.

**1C. How RFRA May Make Religious Exemption Claims *More* Appealing to Courts Than They Were in the Constitutional Exemption Era**

By [Eugene Volokh](http://www.volokh.com/author/volokh/) on December 2, 2013 6:44 pm

The RFRA religious exemption regime may seem less exemption-friendly than the *Sherbert*/*Yoder*-era constitutional exemption regime, precisely because it is only statutory. If Congress (or, for a state RFRA, a state legislature) dislikes an exemption that courts have recognized, it can pass a new statute rejecting that exemption. Congress can even block such exemptions proactively, for instance by saying up front that some statutes won’t be subject to religious exemptions. (Some state legislatures have indeed done that.)

The 1993 Congress could not bind future Congresses — only a constitutional amendment can do that — and it didn’t purport to try. RFRA makes clear that future statutes could be excluded from RFRA’s scope if “such law explicitly excludes such application by reference to [RFRA].” It also seems likely that they would also be excluded if “[the plain import of a later statute](http://scholar.google.com/scholar_case?case=2638727143462084395) directly conflicts with an earlier statute” (though courts are reluctant to find such direct conflicts because of the “[powerful presumption](http://scholar.google.com/scholar_case?case=2638727143462084395) against implied repeals”). As a result, exemptions recognized under RFRA, unlike exemptions recognized under the Free Exercise Clause in the *Sherbert*/*Yoder* era, are at the mercy of the legislature.

It’s possible, though, that the RFRA regime may sometimes prove to be *more* religious-exemption-friendly than the old constitutional exemption regime, *precisely because* it is statutory. A court may be reluctant to accept a close constitutional claim precisely because accepting it would permanently bind the legislature. Even a judge who thinks that granting a religious exemption from (say) a peyote ban might not cause that much harm, and who thinks the legislature might not have considered this particular question when it banned peyote, may be hesitant to tie the legislators’ hands by declaring that religious use of peyote is categorically protected. This might help explain why, under the supposedly forceful *Sherbert*/*Yoder* constitutional exemption regime, few religious exemption claims actually prevailed, either in the Supreme Court or in lower courts.

But under a RFRA regime, a judge may be more willing to decide close cases in a claimant’s favor, precisely because the decision isn’t final. “We think that granting the religious exemption won’t much undermine any compelling government interest — but if we’re mistaken, the legislature can easily correct us.” [UPDATE: Just to be clear, of course the legislature often won't correct the courts, for instance because the correction can't get past one of the houses of the legislature, or past an executive veto; but the point is that the legislature can correct the courts if it really does take the view -- to a degree sufficient to lead to legislative action -- that the grant of the religious exemption was a mistake.]

Second, while *Sherbert*/*Yoder*-era religious exemption decisions involved the courts overturning a legislative judgment (at least as to religious objector), RFRA decisions involve the courts *implementing* a legislative judgment. The rhetoric isn’t “Legislatures / regulators are barred by our interpretation of the Constitution from doing this, at least as to religious objectors.” Rather, the rhetoric is “The legislature has asked us to sometimes carve out exemptions from statutes / regulations, and we have followed the legislature’s request.”

I’m not sure to what extent courts will indeed take this view. There aren’t many lower court decisions applying the federal and state RFRAs, and there is only one Supreme Court decision applying the federal RFRA, *Gonzales v. O Centro Espírita Beneficente União do Vegetal* (2006). But *Gonzales* nonetheless provides interesting (though limited) evidence on this.

*Gonzales* involved the UDV, “a Christian Spiritist sect based in Brazil, with an American branch of approximately 130 individuals. Central to the ... faith is receiving communion through *hoasca* ..., a sacramental tea made from two plants unique to the Amazon region. One of the plants ... contains dimethyltryptamine (DMT), a hallucinogen ... [that] is listed in Schedule I of the [federal] Controlled Substances Act. § 812(c), Schedule I(c).” The UDV sought a religious exemption from the drug ban.

Now the UDV is not exactly a mainstream, popular, well-regarded group. Its sacramental practice — the use of hallucinogens — isn’t particularly likely to appeal to most Supreme Court Justices. If the case had come up during the *Sherbert*/*Yoder* era, there is good reason to think that many of the Justices would have been reluctant to hold that an exemption from federal drug law was constitutionally mandated. Recall that in *Smith*, Justice O’Connor disagreed with the majority’s rejection of constitutional exemptions generally, but held that the Oregon peyote ban was nonetheless the least restrictive means of serving a compelling interest in fighting drug abuse. Moreover, drug-related claims have not fared well in recent litigation involving other constitutional claims.

Nonetheless, the Court voted 8-0 in favor of the exemption. (Justice Alito, who wasn’t on the Court when the case was argued, didn’t participate.) And the Court’s rhetoric was chock full of talk about how the Court was just *following* Congressional will, rather than trumping it.

“We conclude that the Government has not carried the burden expressly placed on it by Congress in the Religious Freedom Restoration Act.” “RFRA makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress.” “The Government repeatedly invokes Congress’ findings and purposes underlying the Controlled Substances Act, but Congress had a reason for enacting RFRA, too.” “We have no cause to pretend that the task assigned by Congress to the courts under RFRA is an easy one. Indeed, the very sort of difficulties highlighted by the Government here were cited by this Court in deciding that the approach later mandated by Congress under RFRA was not required as a matter of constitutional law under the Free Exercise Clause. But Congress has determined that courts should strike sensible balances, pursuant to a compelling interest test that requires the Government to address the particular practice at issue.”

If the Court does accept Hobby Lobby’s exemption argument, expect more quotes like this from the decision. We’re just following Congress’s will, the Court would say; we’re not trumping Congress’s will. The 2009 Congress could have exempted the ACA and any implementing regulations from the RFRA passed by the 1993 Congress. But it didn’t.

**2A. Do Religious Exemption Rights Extend To Commercial Behavior?**

By [Eugene Volokh](http://www.volokh.com/author/volokh/) on December 3, 2013 2:14 am

Let us turn now more closely to the issues raised by *Hobby Lobby*, but take them one at a time. The first issue is: Should religious exemption rights even be seen as applicable to commercial activity, or should they be limited to objectors’ noncommercial activities (such as Amish parents’ not sending their children to school past age 14, or people’s consumption of hallucinogens for religious purposes)? I think the answer is that the Court shouldn’t, and likely won’t, recognize any “noncommercial activities” limitation on the Religious Freedom Restoration Act.

1. To begin with, let’s consider some hypotheticals that don’t invoke the hot political passions generated by the employer mandate, or by questions related to abortion. In all of them, assume that we are in a jurisdiction in which the federal Religious Freedom Restoration Act or one of its state analogs applies. And assume, for now, that the store is owned by the owner directly, rather than by a corporation that is owned by the person. (I’ll turn to the corporation question in the next post.)

Imagine that a newly enacted law requires all markets to sell state lottery tickets — an attempt by the legislature to raise more money for the state. And say that a particular market is owned by a United Methodist who believes it’s [against his religion](http://www.umc.org/site/c.lwL4KnN1LtH/b.1691605/k.A8EB/Gambling_Overview.htm) for any business that he owns to sell lottery tickets. (Some Mormons and Muslims also believe gambling is sinful.)

Or imagine the same as to a law requiring all markets to sell beer and wine — though I realize this is probably politically less likely — and a Methodist or a Muslim market owner objects to this because he thinks selling wine is sinful. Or say that a law requires all gas stations to operate seven days a week, and say that a particular gas station is owned by a Jew or Seventh-Day Adventist who believe that it is wrong for any business that he owns to operate on the Sabbath. All the store owners sue, seeking an exemption from the lottery ticket mandate, alcohol mandate, or the seven-day-a-week mandate.

2. Should the claims be rejected, on the grounds that they relate to the store owners’ commercial activity? I don’t think so.

The premise of RFRAs is that “laws ‘neutral’ toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise,” and that “governments should not substantially burden religious exercise without compelling justification.” Those conclusions are just as applicable to laws that tell people what they may or may not do in commerce as to laws that people what they may or may not do outside it.

Many religious behavior codes, after all, purport to govern all aspects of their adherents’ lives, not just the domestic or ritual aspects. The commandment not to work on the Sabbath, for instance, is largely focused on economic activity, especially for Christian Sabbatarians. Muslims restrict the charging of interest on loans, and historically many Christian groups have taken the same view. Jewish law has [still more commandments](http://www.jewfaq.org/613.htm) specifically focused on business practices. And even rules that don’t focus on economic activity, but that ban participating in gambling or alcohol distribution, may come into play in people’s economic lives.

Indeed, many secular people take the same view as to secular moral codes; consider calls (often coming from the Left) for businesspeople to act in a “socially responsible” way when running their businesses. It should be unsurprising that religious people believe that their religious views should govern their economic lives. And it would be surprising to see RFRA interpreted as drawing a commercial activity / noncommercial activity line (a line that appears nowhere in the statute).

Of course, commercial activity often affects third parties, and regulations of such activity are often aimed at protecting third parties. There may thus be good reason to reject some requests for exemptions from such regulations, because the regulations may be seen as the least restrictive means of serving the compelling interest in serving those parties.

But of course regulations of noncommercial activity are often aimed at protecting third parties, too. Concern about third party effects, under the text and logic of RFRA, is accommodated by the compelling interest provision, not by categorically excluding commercial regulations from RFRA’s scope.

To be sure, an owner or a co-owner of a business could often avoid the burden on his religious beliefs by selling the business and going into a different line of business that is not bound by the law. But that itself would be a substantial burden.

First, it would often require a substantial financial sacrifice. Selling a business isn’t cheap, and the owner may have occupation-specific skills that don’t translate well into other fields — and financial burdens count as substantial burdens for RFRA purposes. Second, it would often require the person to leave an occupation that he may find especially rewarding, whether for emotional reasons (e.g., because it lets him be his own boss, or because the business has been in his family for generations) or other personal reasons (e.g., because it lets him work close to home).

3. The Supreme Court’s *Sherbert*/*Yoder*-era constitutional exemption precedents, which RFRA incorporates by reference, also seemed to take the view that religious exemptions apply to commercial activity as well as to other activity. The unemployment compensation cases — *Sherbert v. Verner* (1963), *Thomas v. Review Bd.* (1981), *Hobbie v. Unemployment Appeals Comm’n* (1987), and *Frazee v. Illinois Dep’t of Econ. Sec.* (1989) — all held that fired employees had the constitutional right to get unemployment compensation from the government based on the employees’ decisions in the economic sphere: refusing to work on the Sabbath, and refusing to work on military production. Selling one’s labor is of course more important to more people’s economic lives than selling goods, but both are commercial activity.

Likewise, *Braunfeld v. Brown* (1961) entertained a religious exemption claim brought by businesspeople based on their decision to close their stores on Saturdays. The claim was unusual by today’s standards: there was no law barring Saturday closing, but there was a law mandating Sunday closing, so the challengers claimed that the law indirectly undermined their bottom line (since they couldn’t be open either day of the weekend), rather than compelling them to do what their religion forbade. Partly because of that, the Court rejected the claim.

But *Braunfeld* didn’t suggest that commercial activities couldn’t form the basis for religious exemption claims, simply because of their commercial nature. And when the Court distinguished *Braunfeld* two years later in *Sherbert*, the Court didn’t suggest that *Braunfeld* was inapplicable because it involved commerce (again, perhaps because *Sherbert* itself involved commercial activity, namely employment).

4. The one case often pointed to by the “no exemptions for commercial activity” arguments is *United States v. Lee* (1982). In *Lee*, Amish employers claimed that it was against their religion to contribute money to the social security system (or to get social security benefits). The Court *agreed* that the law imposed a substantial burden on the objectors:

We ... accept appellee’s contention that both payment and receipt of social security benefits is forbidden by the Amish faith. Because the payment of the taxes or receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights.

It then concluded that this burden was nonetheless constitutional under strict scrutiny, because “[t]he state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.” It reasoned that there was a compelling interest in maintaining “mandatory and continuous participation in and contribution to the social security system.” And it concluded that, given the nature of the tax system, any exemption “will unduly interfere with fulfillment of the governmental interest”:

Unlike the situation presented in *Wisconsin v. Yoder* [where the Court held that the Amish were constitutionally entitled to an exemption from a state law compelling education of children past age 14], it would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs. The obligation to pay the social security tax initially is not fundamentally different from the obligation to pay income taxes .... There is no principled way ..., for purposes of this case, to distinguish between general taxes and those imposed under the Social Security Act. If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax.

The 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. Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax.

So to this point, *Lee* is just like the other religious exemption cases. It asks whether a law substantially burdens religious practice. It concludes that requiring people to do something that their religious beliefs forbid is indeed a substantial burden.

It then asks whether the law serves a compelling government interest, and whether granting the exemption would inevitably and substantially undermine the government interest. If the answer to those two questions is yes, it concludes that the exemption should be rejected — not because of the commercial nature of the conduct, but because the exemption necessarily undermines a compelling government interest.

But then, after *Lee* explained why no exemption must be granted, the Court went on to add a separate section:

Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer’s religious faith on the employees. Congress drew a line in § 1402(g) [a limited statutory exemption, which Lee could not take advantage of], exempting the self-employed Amish but not all persons working for an Amish employer. The tax imposed on employers to support the social security system must be uniformly applicable to all, except as Congress provides explicitly otherwise.

I’m inclined to doubt that this language — when read in the context of prior decisions (such as *Braunfeld*, *Sherbert*, and *Thomas*) and later decisions (*Hobbie* and *Frazee*) — means that, once one chooses to “enter into commercial activity,” religious exemption claims are no longer available. The language comes after the Court in *Lee* applied the normal religious exemption analysis. It stresses one aspect of that normal analysis (that the tax “must be uniformly applicable to all,” which is the reason the Court concluded that granting exemptions would undermine the compelling interest).

Moreover, *Lee* has been treated as generally rejecting religious objections to tax obligations, regardless of whether the taxes stem from taxpayer decisions to engage in traditional commercial activity. See *Hernandez v. Commissioner* (1989) and various lower court cases.

But in any event, *Lee* is the strongest support for the “no religious exemptions as to commercial activity” argument. I doubt the Court will accept this argument, but of course it’s hard to be certain.

**2B. Does RFRA Allow Exemptions from Burdens Imposed on Corporations?**

By [Eugene Volokh](http://www.volokh.com/author/volokh/) on December 3, 2013 11:15 am

Much of the recent debate about *Hobby Lobby* and similar cases has focused on whether RFRA allows exemptions from burdens imposed on corporations. As before, let me approach this question by considering some hypotheticals that don’t invoke the hot political passions generated by the employer mandate, or by questions related to abortion. In all of them, assume that we are in a jurisdiction in which the federal Religious Freedom Restoration Act or one of its state analogs applies.

Let us focus on the three examples mentioned in the preceding post, but tied to closely held corporations. Imagine that a newly enacted law requires all markets to sell state lottery tickets, and say that a particular market is owned by a corporation that is wholly owned by members of a United Methodist family, who believe it’s [against their religion](http://www.umc.org/site/c.lwL4KnN1LtH/b.1691605/k.A8EB/Gambling_Overview.htm) for any business that they own, directly or indirectly, to sell lottery tickets. Or imagine the same as to a law requiring all markets to sell beer and wine, and owners of a Methodist or a Muslim family corporation object to this because they think selling wine is sinful. Or say that a law requires all gas stations to operate seven days a week, and say that a particular gas station is owned by a corporation owned by members of a Jewish or Seventh-Day Adventist family, who believe that it is wrong for any business that they own to operate on the Sabbath.

All the store-owning corporations, together with the individual owners of those corporations, sue, seeking an exemption from the lottery ticket mandate, alcohol mandate, or the seven-day-a-week mandate. Should all these claims be rejected, on the theory that (1) corporations lack RFRA rights, and (2) the owners of the corporations can’t raise RFRA claims because the burdens are imposed on the corporations and not on them?

1. Let us begin with the precedents, which turn out to be scanty. The issue is not new, but neither has it been resolved. The one time it came before for the Court was in *Gallagher v. Crown Kosher Super Market of Mass., Inc.* (1961), a companion to *Braunfeld v. Brown* (which I discussed in [the preceding post](http://www.volokh.com/2013/12/03/2a-religious-exemption-rights-extend-commercial-behavior/)). In both *Gallagher* and *Braunfeld*, businesspeople sued based on their religious decision to close their stores on Saturdays. As I noted in the previous post, the claims were unusual by today’s standards: there was no law barring Saturday closing, but there was a law mandating Sunday closing, so the challengers were claiming that the law indirectly undermined their bottom line (since they couldn’t be open either day of the weekend), rather than compelling them to do what their religion forbade.

Partly because of that, the Court rejected the claims both of the individual store owners and the corporate store owners, and therefore did not have to decide whether religious exemption claims could be made as to the corporations. (“Since the decision in *Braunfeld* rejects the contentions presented by these appellees on the merits, we need not decide whether appellees have standing to raise these questions.”) Three Justices, though — Justices Douglas, Brennan, and Stewart, who were hardly corporation-loving extremists — would have ruled for the incorporated market, and thus must have concluded that the corporate ownership of the market was irrelevant.

There are plenty of precedents as to corporations when it comes to the freedom of expression. Some people use *Citizens United* as shorthand for the proposition that corporations have First Amendment rights, but of course the Court has been treating corporations as having First Amendment rights for many decades. The Court upheld such rights as to a media business corporation in 1936 (*Grosjean*), and spoke of the free speech rights of a nonmedia business corporation in 1941 (*Virginia Electric & Power Co.*). The 1941 case was somewhat ambiguous, but later cases routinely cited it for the proposition that employers, clearly including corporate employers, had free speech rights (e.g., *Thomas v. Collins* (1945)).

There remained some uncertainty about the matter in the 1940s, but then by the 1960s the First Amendment rights of nonmedia business corporations became well-settled, and in *First National Bank of Boston v. Bellotti* (1978) the Court made this explicit. The debate on the Court since *First National Bank of Boston* has generally been whether corporate free speech rights can be limited for speech regarding elections, not whether corporations have free speech rights at all — both conservative and liberal Justices have routinely concluded that they do have free speech rights.

This having been said, the free speech cases are not directly applicable to religious exemption cases. For instance, free speech rights are justified partly based on the interests of individual listeners, not just the corporate speakers; that doesn’t necessarily carry over as to religious exemption cases. And indeed the Court has at times treated corporate rights differently in different constitutional areas. So the corporate speech line of cases is not necessarily helpful here.

2. We should never make the mistake of [actually believing our legal fictions](http://www.volokh.com/posts/1253648474.shtml). The law often labels corporations “persons,” and that is a useful label. But it is a [legal fiction](http://www.volokh.com/posts/1156357629.shtml). We use it because it is convenient, but we should not forget that corporations really aren’t people. As some critics of the corporate religious exemption claims point out, corporations cannot believe; they cannot pray; they have no souls to be saved or damned.

At the same time, if we see through the fiction of the “corporation” when it comes to rights, we should do the same when it comes to burdens. If you and your sister co-own a corporation that owns a market, and you believe it wrong for lottery tickets to be sold on your property, saying “there’s no burden on *you*, because only the corporation is required to sell the tickets” is a legal fiction, too. When people consider their moral or religious obligations, they don’t (I hope) let such fictions affect their sense of their duties. Neither should the legal system let such fictions obscure the burden that legal commands can impose on the owners of closely held corporations.

Indeed, all the talk in recent years of “corporate social responsibility” reflects this. I doubt that anyone thinks that “corporate social responsibility” stems from the social or moral obligations of a fictional legal entity as such. Rather, the theory is that the owners and managers of a corporation have moral duties to make sure that the corporation is run in an ethical, “responsible” way (with what constitutes ethical of course turning on the views of the person making the social responsibility arguments).

The moral obligations of human beings, the argument goes — correctly, at that level of generality — do not stop when the legal fiction of the corporation intervenes. Corporate owners can’t say, “Hey, it wasn’t me who created these social harms, it was the corporation that I own.” The same, I think, applies when we analyze the religious burden on owners when a law prevents them from doing what they see as part of their religious social and moral responsibility. Cf. [Steven J. Willis, *Corporations, Taxes, and Religion: The Hobby Lobby and Conestoga Contraceptive Cases* Part IV.D.1](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2254936).

So to determine the proper scope of corporations’ religious freedom rights (or other rights, such as free speech, constitutional property rights, or freedom from self-incrimination) one needs to go behind the legal fiction. One needs to ask: to what extent does government action with respect to a corporation burden the rights of real people?

Often the answer is “a lot.” Consider, for instance, the Takings Clause and the property component of the Due Process Clause. If the government takes a corporation’s property without due process or without just compensation, it is in reality hurting the corporation’s owners, by reducing the value of their asset (the shares in the corporation). If I own 25% of a corporation with a value of $10 million, and the government takes a $1 million piece of land from that corporation, that’s the economic equivalent of the government’s taking $250,000 from me.

Moreover, the rationales behind the constitutional prohibitions apply as much to takings of corporate property — once one recognizes that the takings harm individuals — as to takings of individual property. Both kinds of taking involve the government imposing burdens on a few that should justly be borne by society generally. Both involve the risk of the government wastefully taking too much property, since goods that are underpriced are overconsumed.

And having the claim be brought by the corporation would be more practical than insisting that the claim be brought by the shareholders. The corporation can sue just as one plaintiff, rather than having to join all the co-owners. Giving the compensation to the corporation will also fairly compensate the shareholders. Indeed, considerations such as this are precisely why the law has found it so useful to employ the legal fiction of the corporation being an artificial “person,” whether as to property law, tort law, contract law, or constitutional law.

Likewise, the Court’s conclusion that corporations have free speech and free press rights make similar sense. (Again, note that the controversy in *Citizens United* was over how far these rights extend, not over whether the rights exist.) Corporations are associations of human beings. The speech of corporations is valuable to human beings as listeners. The ability to speak through a corporation is valuable to human beings as speakers. It is valuable to people who pool their resources using a nonprofit corporation, such as the ACLU or the NRA. It is valuable to people who run and fund newspapers.

The ability to speak through a corporation is likewise valuable to people who pool their resources to form a business corporation, when those people’s agents lobby on behalf of the corporation (which is to say the corporation’s owners), or advertise the corporation’s products. (Commercial advertising is less protected than other speech, but not because of the corporate source of the advertising; private individuals’ advertising, such as advertising by sole practitioner lawyers, is also less protected.) And it is valuable to people who pool their resources to form a business corporation, when those people’s agents speak out against ballot measures that they think are bad for the owners’ interests, or against candidates or parties whose election they think would be bad for the owners’ interests. So burdens on the speech of corporations burden the rights of individuals to pool their resources in a way that facilitates speech.

Do restrictions on corporations sometimes burden the religious practice of individuals? Sometimes, the answer is uncontroversially yes. Churches don’t believe or pray, either, but restrictions on churches interfere with the ability of individuals to participate in collective religious exercise.

Likewise, though for a different reason, with closely held corporations. If such a corporation is required to do something, the owners of the corporation may believe that this is obligating them to participate in that thing — as a matter of reality and of moral and religious obligation, setting aside the legal fiction. If they so believe, and they believe that this violates their religious beliefs, then the law substantially burdens their religious beliefs, even though it does that through imposing an obligation on a corporation. They face the same choice that sole proprietors or partners face: violate their religious obligations, violate the law and face the penalties for violating the law, or sell off their share of the business, which may be a very grave financial burden.

(For a slightly different approach, see my colleague Stephen Bainbridge’s [*Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of Incorporated Employers*](http://www.greenbag.org/v16n3/v16n3_articles_bainbridge.pdf). I agree with a good deal of what Steve says, but I focus on the religious beliefs of the owners of the corporation, and think it is not relevant whether, for instance, “the corporation’s articles of incorporation include a statement of purpose referencing religious beliefs and goals,” or “religious practices such as devotions, prayer, scripture reading, or worship services [are] routinely made a part of corporate meetings.”)

The matter is different, I think, with regard to shareholders in publicly traded corporations. Generally speaking, a public company stockholder could sell his stock with little cost, so the law won’t impose a substantial burden on him. To be sure, little cost isn’t no cost; but here is where the *substantial* burden requirement comes into play. (I realize that some people own stock through retirement funds and other mechanisms in which divestment is difficult; I’m inclined to say that this shouldn’t change the analysis, partly because such difficulty usually stems from private contractual constraints and not governmental obligations, but this is one area where my thinking is especially tentative.)

The matter may also be more complicated when only a minority of shareholders believes that having the corporation obey a particular law causes them to violate their religious beliefs, though of course that problem arises not only for corporations but also for common-law partnerships. I’m inclined to say that the application of the law could indeed burden the minority shareholders’ religious views. (The majority shareholders’ voluntary decision to do the same thing, uncoerced by the law, would not constitute such a burden — the corporate bylaws or partnership agreement will likely constitute an agreement by the minority shareholders to let the majority shareholders take actions in the corporation’s or partnership’s interests.) But often, as in *Hobby Lobby*, the religious objections will be shared by all the shareholders in a closely held corporation, or at least by the majority shareholders.

3. We can now return to the text of the RFRA. RFRA speaks generally of the rights of “persons,” and the [Dictionary Act](http://www.law.cornell.edu/uscode/text/1/1) provides that, “unless the context indicates otherwise,” the word “person” “include[s] corporations ... as well as individuals.” The context of RFRA — religious freedom — does indicate that the *underlying* rights being protected must be the rights of human beings, who can actually feel religious obligations.

But this context is quite consistent with the normal legal practice of protecting corporate rights *as a means* of protecting the underlying rights of human beings. When it comes to closely held corporations, letting the corporation stand in for its owners — when the owners object that a law requiring the corporation to do something will require them to violate their own religious beliefs — makes good sense.

And even if the courts conclude otherwise, and say that the corporation cannot itself bring the religious exemption claim, the owners should be free to raise their own claims. If we see through the legal fiction of the corporation in concluding that corporations lack RFRA rights, then we should likewise see how obligations imposed on a closely-held corporation can oblige its owners to be complicit in what they see as sinful behavior.

**3A. Does Requiring Employers to Provide Insurance Covering Certain Behavior Substantially Burden Employers’ Religious Practice?**

By [Eugene Volokh](http://www.volokh.com/author/volokh/) on December 4, 2013 10:46 am

1. Some people have argued that RFRA shouldn’t apply in *Hobby Lobby* because the employer mandate doesn’t require employers to actually do anything they see as sinful. The employers aren’t required to use the implantation-preventing contraceptives that they see as immoral. They aren’t required to administer them, or even handle them. They are just required to provide insurance policies that their employees may then choose to use to buy those contraceptives. (Note that this argument would apply to employers who are sole proprietors as well as to employers who own the business through a corporation, so I largely won’t focus on the corporation point in this post; for more on that, see [this post](http://www.volokh.com/2013/12/03/rfra-allow-exemptions-burdens-imposed-corporations/). [UPDATE: I did add a few sentences to the post below that touch briefly on the corporation / substantial burden interaction, but the bulk of the corporation discussion remains in the earlier post.])

And this argument would be perfectly valid if a RFRA claim is brought by an employer who thinks the only relevant sin is actually using the implantation-preventing contraceptives. If the employer is called to the stand and was asked, “Do you think that it is religiously wrong for you to provide this insurance?,” and the employer says, “no, that’s fine, only using the contraceptives is sinful,” then the employer has admitted that the employer mandate does not impose a substantial burden on his beliefs.

But, unsurprisingly, many people believe that, when some behavior is wrong, many sorts of complicity with that behavior are wrong, too. Many secular people believe this. The law takes this view, in all sorts of contexts. Religious people believe it, too.

True, people disagree about when complicity stops. Some people think that race discrimination itself is wrong, and thus didn’t want to do business in South Africa if they had to discriminate in hiring to do so. Others thought they shouldn’t do business in South Africa even if they could do so without discriminating. Others thought they shouldn’t do business with South African companies. Others may have thought they shouldn’t buy any products made in South Africa. Some people might have thought their complicity would be cut off by the use of the corporate form (“I’m not the one who’s doing business with South African companies, it’s just the corporation that I own that’s doing that”), though I suspect many people would not have taken that view. Where the connection becomes too attenuated, and morally or religiously culpable complicity stops, is a question on which reasonable people will differ.

But for purposes of RFRA, the question isn’t whether a judge or jury agrees with a person’s claim that a law requires him to engage in behavior is sinful — it is whether the person sincerely believes that the behavior is sinful. Likewise, when the person believes that complicity itself is sinful, the question is not whether our secular legal system thinks that he has drawn the right line as to complicity; it is whether he sincerely believes that the complicity is sinful.

2. *Thomas v. Review Board* (1981) is the classic illustration of this. Thomas had been working at a machinery company, and was transferred to a department that produced tank turrets. Thomas refused to work on such military production, and was fired. Under the Court’s Free Exercise Clause jurisprudence, whether Thomas could claim unemployment compensation turns on whether his refusal to work on war production was an exercise of his religion. The lower court had said that it wasn’t, but the Court reversed (emphasis added):

[The Indiana Supreme Court noted] that Thomas admitted before the referee that he would not object to “working for United States Steel or Inland Steel ... produc[ing] the raw product necessary for the production of any kind of tank ... [because I] would not be a direct party to whoever they shipped it to [and] would not be ... chargeable in ... conscience ....” The court found this position inconsistent with Thomas’ stated opposition to participation in the production of armaments. But Thomas’ statements reveal no more than that he found work in the roll foundry sufficiently insulated from producing weapons of war. *We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one.*

Thomas wasn’t, of course, being required to kill anyone using a tank, to fire a tank gun, to ride in a tank helping the gunner, or to assemble a completed tank. But he thought that the religious prohibition went further than that. Even making tank turrets — though not making steel that would go into a tank — was, he thought, itself sinful complicity with sin.

And the Court held that it was for him, not for the secular courts, to figure out where he thought God wanted him to draw a line. The “substantial burden” requirement didn’t require that the connection be “substantial” enough in the secular legal system’s understanding of complicity. (A burden might be insubstantial because it imposes too small a secular cost to count, not because outsiders to a religion think that a causal connection is too weak to count as sinful complicity.)

Likewise, the Hobby Lobby owners drew a line: Providing health insurance — including through their closely held corporation — that covers what they see as tools for homicide is sinful complicity with sin. Providing salaries that employees may use to buy the same tools, or hiring employees who use those tools, is not.

Many of us might draw the line elsewhere (even if we agreed with the judgment that the potentially implantation-preventing contraceptives are sinful). But it is for the owners of Hobby Lobby to draw the line, and not for the courts to second-guess it. Perhaps there is a compelling interest that justifies the substantial burden that the law imposes on the owners — more on that tomorrow — but courts cannot say that the burden is insubstantial simply because they think the complicity is too attenuated.

3. And this should look especially sensible, I think, given how wide an array of judgments our own American legal system has on the subject of complicity.

If you help someone with the purpose of helping him commit his crimes, you’re guilty of the crime itself, as an accomplice. If you help someone knowing that your actions are helping him commit the crime, you aren’t an accomplice under the laws of most states — but you are under the laws of some states.

What’s more, the rules differ for different kinds of conduct. For instance, informing a particular person how to make a bomb, knowing that he plans to make a bomb (even if you have no specific purpose to help him do so), is a crime under federal law. Likewise, knowingly providing assistance to a foreign terrorist organization is a crime even if you don’t have the purpose of advancing the organization’s terrorist goals, but are just trying to promote the organization’s supposedly humanitarian wing, or are trying to teach the organization’s members about international law.

Knowing distribution and even possession of child pornography is banned, chiefly on the grounds that such distribution and possession tend to cause the making of child pornography by creating and sustaining a market for such material. The causal connection between possession of child pornography and the production of child pornography is quite indirect (though real). But the law criminalizes possession nonetheless, based on that connection.

And that’s just the criminal law. If you know *or have reason to know* that your actions are materially helping someone infringe copyright, you are guilty of contributory copyright infringement. And in some situations, you can be vicariously liable for copyright infringement even if you weren’t negligent — for instance, if a band performs a song in a bar that you own and it turns out that (despite their assurances to the contrary) they weren’t licensed by the owner of the copyright in the song.

Beyond copyright law, people can be liable for negligently facilitating another’s criminal conduct. Landlords can have their property seized if they negligently allowed it to be used for drug transactions. And the list could go on.

Given this widely varying array of judgments about complicity in a single secular legal system, it’s not surprising that people would have still more varied judgments about religious obligation to avoid complicity. And it’s also not surprising that people might feel that God’s demands that they distance themselves from sin would be broader than Caesar’s demands.

And some of the legal system’s judgments about complicity are actually not that different from the judgments that the Hobby Lobby owners make. I suspect that if, for instance, a company had a policy of reimbursing employees for contributions they make to charitable groups that were on a particular list, and one of those groups was known to be a foreign terrorist organization, the company owners and not just the employees could be held criminally liable for providing material support to that organization.

The legal system views the foreign terrorist organization’s crimes as so bad that even indirect financial support for those crimes is felonious complicity. I suspect the same would be true if corporate owners and managers knowingly provided for this payment to a foreign terrorist organization via a corporation, and prosecutors went after the owners and managers directly. Authorization by corporate owners and managers of criminal action makes them criminally complicit in that action. Likewise, the Hobby Lobby owners view the use of certain contraceptives as so evil that even indirect financial support for that evil is sinful complicity that they have a religious obligation to avoid.

Again, this doesn’t mean that Hobby Lobby should win — perhaps there is a compelling interest justifying the substantial burden that the employer mandate imposes. But, under RFRA, the question whether there is such a substantial burden should be based on the Hobby Lobby owners’ sincere judgment about what constitutes culpable complicity with sin, and not on our judgment.

**3A2 [extra]. A Brief Note on the “Substantial Burden” Requirement**

By [Eugene Volokh](http://www.volokh.com/author/volokh/) on December 5, 2013 1:08 pm

I’ve argued [below](http://www.volokh.com/2013/12/04/3a-requiring-employers-provide-insurance-covering-certain-behavior-substantially-burden-employers-religious-practice/) that, if someone believes that it’s religiously wrong for him to be complicit in certain behavior, requiring him to act in such a way is a “substantial burden” on his religious practice under RFRA. This is true even if you and I might define complicity differently, and might view the particular actions involved in the case as too indirect to constitute complicity. Some readers have asked: What then does the qualifier “substantial” do?

Here’s a general summary of how the Court has defined “substantial burden”:

1. Requiring people to do something that “is forbidden by [their] faith” qualifies as a substantial burden on religious practice. See, e.g., *United States v. Lee* (1982); *Hernandez v. Commissioner* (1989). So does requiring people not to do something that is required by their faith. Indeed, even requirements that people do something forbidden by their faith in order to get important benefits (such as unemployment compensation) are generally a substantial burden. *Thomas v. Review Bd.* (1981). Requirements that people do something forbidden by their faith to avoid punishment, including fines, are at least as clearly substantial burdens.

2. “While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.” *Thomas*. And that is so even where the relevant “conduct proscribed by a religious faith” is indirect complicity in other conduct, and the complicity line that the religious claimant draws appears inconsistent or unsound to the reviewing court. *Id.*. “It is not for [secular courts] to say that the line [the claimant] drew was an unreasonable one.” *Id.*

3. What, then, is not a substantial burden? To give one example, “to the extent that imposition of a generally applicable tax merely decreases the amount of money appellant has to spend on its religious activities, any such burden is not constitutionally significant.” *Jimmy Swaggart Ministries v. Board of Equalization* (1990); *Hernandez v. Commissioner* (1989). Requiring someone to pay a tax that he thinks it sinful to pay is thus a substantial burden, *Lee*, though one that passes strict scrutiny. But in the absence of such a religious belief in the impropriety of paying the tax, there is no substantial burden.

4. To give another example, the interference with religious practices caused by the government’s diminishing the privacy offered to American Indian religious sites on government land doesn’t count as a substantial burden. *Lyng v. Northwest Indian Cemetery Protective Ass’n* (1988). Likewise, the interference caused by the government’s referring to a person using a social security number, which the person or her parents believe will “‘rob the spirit’ of [the person] and prevent her from attaining greater spiritual power,” doesn’t count as a substantial burden. *Bowen v. Roy* (1986). Even if the government action “interfere[s] significantly with private persons’ ability to pursue spiritual fulfillment according to their own religious beliefs,” *Lyng*, it is not a substantial burden, so long as it doesn’t “affirmatively compel appellees, by threat of sanctions, to refrain from religiously motivated conduct or to engage in conduct that they find objectionable for religious reasons,” *Bowen* (see item 1).

So the requirement of a “substantial” burden does have force. But, under the Court’s precedents, it focuses on the nature of the government restraint. It doesn’t distinguish claims of sinful complicity in sin (even when the complicity seems to secular observers to be attenuated) from claims of supposedly more direct sinful action. Some may think that’s not a sound definition of “substantial” — but it is the definition that the Court adopted, and that RFRA apparently seeks to “restor[e].”

**3B. Would Granting an Exemption from the Employer Mandate Violate the Establishment Clause?**

By [Eugene Volokh](http://www.volokh.com/author/volokh/) on December 4, 2013 5:11 pm

In the [preceding post](http://www.volokh.com/2013/12/04/3a-requiring-employers-provide-insurance-covering-certain-behavior-substantially-burden-employers-religious-practice/), I’ve argued that Hobby Lobby might well prevail on the claim that the employer mandate substantially burdens its owners’ religious practice. This means that Hobby Lobby would be presumptively entitled to an exemption under RFRA, though that presumption could be rebutted if denying the exemption is the least restrictive means of serving a compelling government interest. (I’ll turn to that tomorrow.)

But for now, let me discuss the argument that *granting* such an exemption would violate the Establishment Clause, “[b]ecause exempting large, for-profit corporations from the contraception mandate would significantly burden female employees, along with all the wives and daughters covered by the policies of male employees.” (I quote here [a *Slate* piece by Micah Schwartzman & Nelson Tebbe](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/11/obamacare_birth_control_mandate_lawsuit_how_a_radical_argument_went_mainstream.html), though the argument was also made in much more detail in [this law review article by Fred Gedicks & Rebecca Van Tassell](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2328516).)

If the argument is right, then not only is Hobby Lobby (alongside similar employers) not entitled to a RFRA exemption — it couldn’t get an exemption even if Congress or the Administration were eager to create such an exemption. Thus, for purposes of this post I will assume that Hobby Lobby and similar employers are statutorily given this exemption, and I will ask whether that would be constitutional. I won’t ask whether RFRA calls for the exemption; that is a story for tomorrow.

1. To begin with, let’s be precise about the effect of an employer mandate exemption would have on employee: If the employees want certain implantation-preventing contraceptives, they would have to buy them with their own funds, rather than getting them for free through an employer-provided health insurance plan. They would thus be in essentially the same legal position as all employees are today, before the employer mandate kicks in, and as some employees will be in the future, if their employers are exempted from the mandate (for instance, because they have grandfathered plans). The employer isn’t forbidding its employees from using certain contraceptives. It’s just not paying for them.

The burden on employees would thus be a burden *relative to what the ACA would provide in the absence of an exemption*. The employees of a business that would get a religious exemption wouldn’t get a benefit (free implantation-preventing contraceptives) — apparently worth several hundred dollars per year — to which employees of most other businesses will be legally entitled. Keep this in mind, because it will be relevant when we compare it to what happens with other religious exemptions that are generally believed to be constitutional.

2. Religious exemptions often leave nonbeneficiaries worse off than they would have been but for the exemption. A few examples:

Giving conscientious objectors an exemption from the draft means that others will be drafted in their place. This imposes a huge burden on those others, under the definition of “burden” used above: They have to give up years of their lives, risk death or serious injury, and quite likely be required to kill or injure the enemy. To be sure, the particular person being burdened may be hard to identify. But for every objector who is relieved from fighting (and apparently [170,000 c.o. deferments were given during the Vietnam War](http://www.swarthmore.edu/library/peace/conscientiousobjection/co%20website/pages/HistoryNew.htm), for instance), more or less one other person will have to fill that spot.

Giving the clergy exemptions from the duty to testify means that litigants who might want the clergy’s testimony — for instance, about what a penitent confessed to the clergy — will lose valuable evidence for the case, and may lose their case. This too imposes a huge burden on those litigants, under the definition of “burden” used above; they may lose millions of dollars to which they would be entitled if only the normal duty to testify were imposed on the clergy. (To be sure, if the privilege were struck down, some people wouldn’t talk to the clergy in the first place, but others still might, especially if they feel they need to unburden themselves, and even more especially if they feel that such confession is a religious necessity. So the privilege does on net cause some litigants to be worse off than if the privilege doesn’t exist.)

Letting churches discriminate based on religion in hiring and firing — even as to clearly nonclergy employees, such as janitors or bus drivers — leaves employees and prospective employees of other religions (or of the same religion who lapse) worse off than if Title VII’s religious discrimination ban applied to the church, without the exemption. This too imposes a substantial burden on those employees, under the definition of “burden” used above; they may lose their jobs, or may feel substantial economic pressure to stay within the church, and hide any change of beliefs they may have had. Yet the Court upheld this exemption against such a challenge, in [*Corporation of Presiding Bishop v. Amos* (1987)](http://scholar.google.com/scholar_case?case=18010264432732834038).

Say, then, there are two people. Anita works for an employer who (by hypothesis) has been exempted from the usually applicable (with some secular exemptions) employer mandate as a result of a statutory religious objector exemption. As a result, she doesn’t get, say, $500/year worth of contraceptive benefits that she would have been legally entitled to but for the employer mandate.

Barbara is suing Don Defendant for $500,000. She has reason to think that Don has confessed to Carl Clergyman that Don is indeed liable, so she wants Carl to be ordered to testify about the communication. But Carl has been exempted from the usually applicable (with some secular exemptions) duty to testify as a result of a statutory clergy-congregant privilege. As a result, she doesn’t win the $500,000 that she would have been legally entitled to but for the clergy-congregant privilege.

I don’t know of any court that has taken the view that applying the clergy-congregant exemption from the duty to testify in Barbara’s case would violate the Establishment Clause violation, despite the likely burden this would impose on Barbara; nor do I think it likely that a court would so decide. But given that this is so, then how would the application of the hypothetical exemption from the employer mandate constitute an Establishment Clause violation in Anita’s case?

Now perhaps the burdens imposed by these exemptions are unfair. And quite likely these particular exemptions aren’t required by RFRA. (Recall that this isn’t the question we’re discussing in this post.) But it seems pretty well-settled that the exemptions are constitutionally *permissible*, notwithstanding these burdens.

Some distinctions could be drawn between these cases and the employer mandate, but I don’t generally find them particularly persuasive. Some have argued, for instance, that the draft exemption is inapposite because the particular person who had to serve in the objectors’ place couldn’t be easily identified. And I agree that the law does sometimes treat burdens on easily identifiable third parties differently from burdens on harder-to-identify third parties. But I doubt such a distinction is really mandated by the Establishment Clause. It can’t be that the government is free to impose such a massive burden — conscription for years, the possibility of having to kill, and the possibility of dying — on hard-to-identify but indubitably real third parties (tens of thousands of them), but that the Establishment Clause at the same time blocks the government from imposing a several-hundred-dollar-per-year burden on more readily identifiable employees.

Gedicks & Van Tassell argued that the draft exemption is different because it wouldn’t “be a factor in the decision of nonpacifists to comply with or evade the draft,” while the employer mandate exemption might be a factor in a person’s decision whether to work for Hobby Lobby and similar employers. But this too strikes me as constitutionally irrelevant, when the question is substantiality of burden. Perhaps nonpacifists had to comply with the draft in any event, because they’d go to prison otherwise — but I don’t see how that makes an Establishment Clause difference, if the essence of the harm is the burden of the exemption on nonbeneficiaries.

*Amos* involved nonprofits, and the concurrences stressed that point. But if denying employees a certain benefit is an Establishment-Clause-violating burden, then I don’t think that it becomes any less of a burden when the employees work for nonprofits (such as the Mormon Church gymnasium involved in *Amos*). And I’ve heard some defend the clergy-penitent privilege on the grounds that it exists alongside other secular privileges, such as the doctor-patient privilege, lawyer-client privilege, and so on.

But the hypothetical religious exemption for the employer also exists alongside other secular exemptions, such as for grandfathered plans and for employers with fewer than 50 employees (who do have to provide the contraceptive coverage if they provide an insurance plan, but who aren’t obligated to provide such a plan). To be sure, the secular exemptions are different from the religious exemption. But the clergy-penitent privilege is likewise quite a bit broader than most other privileges, both because it lacks the exceptions that the other privileges have, and because it applies not just to government-licensed (and therefore usually quite expensive) professionals. For unmarried people, or people who don’t want to confide in a spouse, the clergy-penitent privilege is often the only one they can afford.

I should note that the conscientious objector cases did read “religion” very broadly, including [deeply held conscientious beliefs](http://scholar.google.com/scholar_case?case=14424655082031578465) — including ones unrelated to God or any higher power — held “with the strength of more traditional religious convictions.” It is possible that, absent such a saving construction, the conscientious objector privilege would have been struck down.

But only one of the eight Justices who participated in the case (Justice Harlan) concluded that a religious-objector-only exemption would have indeed violated the Establishment Clause. Even Justice Harlan solved the problem by slightly broadening the exemption to include such philosophical conscientious objectors rather than by saying that the burden imposed on third parties warranted striking down the exemption altogether. In *Amos*, the Court expressly rejected the view that the religion-only nature of the exemption made it unconstitutional. And the clergy-penitent privilege is likewise generally assumed to be constitutional, with no indication that it has to be broadened to include secular analogs of the clergy (and, as I noted, psychotherapists aren’t really secular analogs of the clergy).

But in any event, say that the loss of benefits caused by the employer mandate exemption is indeed unconstitutional *because secular philosophical counterparts of the employer aren’t covered* (think someone who is deeply opposed to any destruction of embryos for secular philosophical reasons) — the analog to Justice Harlan’s argument in *Welsh*. If so, then I would think that the way to avoid such unconstitutionality is, as in *Welsh*, to read “religion” as covering deeply held philosophical beliefs.

Indeed, the term “religion” in the other comprehensive federal accommodation scheme, the Title VII religious accommodation requirement, has generally been [interpreted to cover such deeply held philosophical beliefs](http://www.law.ucla.edu/volokh/relfree.htm#N_80_). (Title VII is narrower than RFRA in that it applies only to employment and only mandates reasonable accommodation, but it is also broader, in that it applies to private employers as well as to the government.) To be sure, the term “religion” for Free Exercise Clause purposes was read narrowly, to exclude nontheistic philosophical beliefs, in *Wisconsin v. Yoder*, but the term was read broadly, to include such beliefs, in *Welsh*. And if the broader reading is necessary to avoid unconstitutionality (which, again, is not clear), I would think that such a reading is preferable.

3. So religious accommodations do often leave nonbeneficiaries worse off, as a result of giving the benefits to the beneficiaries. And, as I noted, they can leave nonbeneficiaries worse off to a considerably greater degree than requiring them to pay several hundred dollars per year out of pocket.

But there are indeed some precedents that suggest that excessive burdens on nonbeneficiaries do indeed pose Establishment Clause problems. The one precedent that squarely stands for this proposition is [*Estate of Thornton v. Caldor, Inc.* (1985)](http://scholar.google.com/scholar_case?case=6063739020713384162).

In *Thornton*, a Connecticut statute *legally required* private employers to give any employee a day off on the employee’s Sabbath: “No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee’s refusal to work on his Sabbath shall not constitute grounds for his dismissal.” And the Court held that this was unconstitutional.

“Under the Religion Clauses,” the Court reasoned, “government ... must take pains not to compel people to act in the name of any religion.” “[T]he Connecticut statute imposes on employers and employees an absolute duty to conform their business practices to the particular religious practices of the employee by enforcing observance of the Sabbath the employee unilaterally designates.” “[T]here is no exception when honoring the dictates of Sabbath observers would cause the employer substantial economic burdens or when the employer’s compliance would require the imposition of significant burdens on other employees required to work in place of the Sabbath observers.” “This unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses, so well articulated by Judge Learned Hand: ‘The First Amendment ... gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.’”

But in *Amos*, two years later, the Court made clear that *Thornton* was limited. Recall that there, too, the statute had an “unyielding weighting in favor of” churches that wanted to hire only coreligionists, with no exceptions when the firing of someone who had strayed from the faith would impose an especially grave burden on him. But the Court said *Thornton* was inapplicable:

This is a very different case than *Estate of Thornton v. Caldor, Inc.*.... In effect, Connecticut had given the force of law to the employee’s designation of a Sabbath day and required accommodation by the employer regardless of the burden which that constituted for the employer or other employees. In the present cases, appellee Mayson was not legally obligated to take the steps necessary to qualify for a temple recommend, and his discharge was not required by statute.

As I read it, this limits *Thornton* to situations where the government imposes a highly burdensome *legal obligation* on private parties, such as employers, to take steps to accommodate someone. It doesn’t apply in situations where, as in *Amos*, the government is *lifting a legal obligation* from private parties — even when this lifting of the legal obligation means that other private parties will be worse off than if the legal obligation remained in place.

The one other Supreme Court case potentially supporting the “employer mandate exemption would violate the Establishment Clause” argument is *Cutter v. Wilkinson*, which did cite *Thornton* in discussing the government’s lifting legal obligations from private parties. *Cutter* did say that “tak[ing] adequate account of the burdens a requested accommodation may impose on nonbeneficiaries” while “alleviat[ing] exceptional government-created burdens on private religious exercise” (and not discriminating among denominations) was sufficient to make a law constitutional, and did say that “[o]ur decisions indicate that an accommodation must be measured so that it does not override other significant interests”; both times the Court cited *Thornton*.

But the Court didn’t explain what should be done in cases like *Amos*, where the accommodation didn’t take account of the burdens imposed on nonbeneficiaries (such as the fired employee). Moreover, *Cutter* involved RLUIPA, a federal law that, in relevant part, mandated religious exemptions in *state prisons* (and similar institutions), and the opinion closed by saying, “Should inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition. In that event, adjudication in as-applied challenges would be in order.” Inmate requests that impose unjustified burdens on other inmates might (like the law in *Thornton* but unlike an employer mandate exemption or the law in *Amos*) involve legally coercive constraints imposed on other inmates. And inmate requests that jeopardize the effective functioning of a state prison would involve federal constraints on a state government, which again are different from the federal government simply lifting burdens on religion imposed by its own law.

In any event, that’s the somewhat uncertain state of the precedent. I think that on balance the argument that any employer mandate exemption would be *constitutionally forbidden* is unpersuasive — given the other exemptions I mentioned above — but I agree that *Thornton* and especially *Cutter* leave some doubt on the matter.

Tomorrow, I will turn to what I think is the much thornier question, which is whether an employer mandate exemption is *required by RFRA*. And there the arguments about the loss of benefits to third parties become, I think, much more serious.

**4A. RFRA Strict Scrutiny: The Slippery Slope Question**

By [Eugene Volokh](http://www.volokh.com/author/volokh/) on December 5, 2013 11:39 am

So far, I’ve argued that Hobby Lobby likely has a good case as to the claim that the employer mandate substantially burdens religious exercise, because the mandate requires Hobby Lobby to do something — fund potentially implantation-preventing contraceptives — that Hobby Lobby’s owners believe is religiously forbidden. But of course not all substantial burdens on religious exercise require an exemption under RFRA. RFRA provides that “[g]overnment may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person ... is the least restrictive means of furthering [a] compelling governmental interest.” And this “compelling interest test” (also known as “strict scrutiny”) seems to refer to the test “set forth in prior Federal court rulings” decided under the Free Exercise Clause during the *Sherbert*/*Yoder* era.

This, I think, is the most unpredictable part of the *Hobby Lobby* case, because prior rulings are largely unclear on what constitutes a “compelling governmental interest,” and what the “least restrictive means” requirement means. Moreover, while the strict scrutiny test in race and free speech cases has generally been seen as “strict in theory, fatal in fact” (Gerry Gunther’s phrase), almost always invalidating the government law, this hasn’t been so in religious exemption cases.

Larry Sager and Chris Eisgruber labeled the religious exemption strict scrutiny test “strict in theory, feeble in fact,” and while the Court’s one RFRA case — *Gonzales v. O Centro Espírita Beneficente União do Vegetal* (2006) — seemed to use strict scrutiny in a moderately muscular way, the most we can say is that religious objectors will sometimes win under the test and sometimes lose. In the coming posts, I’ll try to mine the religious exemption precedents for what insight they can give us; but it isn’t much.

Let me begin, though, with a couple of posts on general RFRA principles, the first being how RFRA deals with the slippery slope question. When I’ve discussed religious exemption claims, people often object to them because of worry about the slippery slope, or, if you prefer, the supposed absence of limitations on the legal principle. If employers can refuse to comply with the employer mandate as to implantation-preventing contraceptives, what if they claim a right to start firing people who they think use such contraceptives? What if they refuse to hire women? What if they refuse to hire blacks? What if they refuse to pay taxes altogether, on the grounds that paying taxes is complicity with a fetus-slaughtering government?

These are perfectly sensible arguments, and indeed versions of these arguments were used by the majority in *Employment Division v. Smith* (1990), when the Court held that the Free Exercise Clause didn’t authorize courts to carve out religious exemptions from generally applicable laws. “The rule respondents favor,” Justice Scalia’s majority opinion reasoned, “would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind.”

To be sure, the majority didn’t think that courts would necessarily accept all those arguments. “[We do not] suggest that courts would necessarily permit harmful exemptions from these laws (though they might).” Still, the majority thought it would be bad to have “courts ... constantly be in the business of determining whether the ‘severe impact’ of various laws on religious practice ... suffices to permit us to confer an exemption. It is a parade of horribles because it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.” I generally take such arguments quite seriously myself, see [this article supporting *Smith*](http://www.law.ucla.edu/volokh/relfree.pdf) and [this article about slippery slope arguments generally](http://www.law.ucla.edu/volokh/slipperyshorter.pdf).

But Congress rejected these arguments in enacting RFRA. RFRA is Congress’s instruction to the courts: carve out religious exemptions, and don’t worry too much about the slippery slope — the exception for laws that are the least restrictive means for serving a compelling government interest will suffice to prevent the slippage. (Moreover, any slippage that Congress sufficiently dislikes could be cured through a new statute that exempts some exemption claims from RFRA’s scope, though Congress didn’t expressly say this in the RFRA text.) And RFRA is also Congress’s instruction to the courts to “regularly balance against the importance of general [federal] laws the significance of religious practice,” even if courts might be reluctant to do this on their own, using only the Free Exercise Clause as support.

In *Gonzales v. O Centro*, the Court unanimously embraced this principle (some paragraph breaks added):

[T]he Government’s argument for uniformity ... rests not so much on the particular statutory program at issue as on slippery-slope concerns that could be invoked in response to any RFRA claim for an exception to a generally applicable law.

The Government’s argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I’ll have to make one for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to “rule[s] of general applicability.” Congress determined that the legislated test “is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.” ...

We reaffirmed just last Term the feasibility of case-by-case consideration of religious exemptions to generally applicable rules. In *Cutter v. Wilkinson* (2005), we held that the Religious Land Use and Institutionalized Persons Act of 2000, which allows federal and state prisoners to seek religious accommodations pursuant to the same standard as set forth in RFRA, does not violate the Establishment Clause. We had “no cause to believe” that the compelling interest test “would not be applied in an appropriately balanced way” to specific claims for exemptions as they arose. Nothing in our opinion suggested that courts were not up to the task....

We have no cause to pretend that the task assigned by Congress to the courts under RFRA is an easy one. Indeed, the very sort of difficulties highlighted by the Government here were cited by this Court in deciding that the approach later mandated by Congress under RFRA was not required as a matter of constitutional law under the Free Exercise Clause. See *Smith*. But Congress has determined that courts should strike sensible balances, pursuant to a compelling interest test that requires the Government to address the particular practice at issue.

So whatever arguments the Court will entertain in *Hobby Lobby*, the argument that this exemption request should be rejected because of the slippery slope to (say) refusals to hire women or refusals to pay ordinary taxes is unlikely to work. The Court has already used the compelling interest test to reject claimed exemptions from tax obligations (*United States v. Lee* (1982), as interpreted by *Hernandez v. Commissioner* (1989)). The Court has held that there’s a compelling government interest in banning race discrimination in government-supported education (*Bob Jones Univ. v. United States* (1983)); lower courts have held the same as to sex discrimination in employment.

These lines are hard to draw in any principled way. Indeed, RFRA’s unelaborated reference to “compelling governmental interests” leaves open the door to judges considering their own moral judgment in drawing the lines. This is something many observers and many judges might be hesitant about, though in fact judges necessarily do consider their moral judgment in developing common-law tort, contract, and property rules (and those common-law rules are similar to RFRA exemptions in that judges have the first word as to those rules but legislatures can revise the judge-made rules). But, in any event, that’s what judges are in effect instructed by Congress to do under RFRA.

**4B. RFRA Strict Scrutiny: The Argument from Secular Exceptions**

By [Eugene Volokh](http://www.volokh.com/author/volokh/) on December 5, 2013 4:52 pm

On then to another general argument — the argument that, regardless of the specific interests the government asserts in support of the employer mandate, those interests don’t count because the law has secular exceptions. One version of the argument is that such exceptions make the law “underinclusive,” and thus prove that the government interest can’t be compelling. A related version is that, under RFRA, religious exemption claims are entitled to be treated as well as the most favored other claims for exemption. Here is how the Tenth Circuit en banc majority opinion in *Hobby Lobby* put it:

The government asserts two interests here: “the interests in [1] public health and [2] gender equality.” We recognize the importance of these interests. But they nonetheless in this context do not satisfy the Supreme Court’s compelling interest standards....

[T]he interest here cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people. As noted above, this exempted population includes those working for private employers with grandfathered plans, for employers with fewer than fifty employees [who don’t have to provide any health insurance -EV], and, under a proposed rule, for colleges and universities run by religious institutions. As the Supreme Court has said, “a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited.” *Lukumi*; see also *O Centro* (citing *Lukumi* as instructive in determining whether exemptions undermine a compelling government interest for purposes of RFRA). The exemptions at issue here would yield precisely this result: they would leave unprotected all women who work for exempted business entities.

Now it’s not clear to me that all the exceptions “leave[] appreciable damage to [both] supposedly vital interest[s] unprohibited.” As I understand it, the exception for employers with fewer than fifty employees wouldn’t single out contraceptives (and it is this singling out that is said to implicate the “gender equality” interest); those employers just don’t have to provide health insurance for their employees at all, but if they do, they too have to cover contraceptives. And as I understand the [college and university exception](http://www.gpo.gov/fdsys/pkg/FR-2013-07-02/html/2013-15866.htm), it assures employees coverage for the contraceptives through the insurance companies, though with no direct payment for it by the employers; that exception thus wouldn’t implicate either interest. Still, I agree that one large exception — for grandfathered plans — at least temporarily “leaves appreciable damage to [both] supposedly vital interest[s] unprohibited,” and the other one, for smaller employers, does the same as to the public health interest.

But let’s set all this aside, because the problem with the “cannot be regarded as protecting an interest of the highest order” argument is deeper than that.

1. Nearly all important laws have a large set of exceptions. Those laws, even when they serve compelling interests, leave appreciable damage to the interests unprohibited. Yet this can’t mean that religious exemptions must be granted from such laws.

Let’s begin with tax laws. Some people have religious objections to paying particular kinds of taxes, or taxes that would go to particular activities. They don’t get exemptions, though, because of the “broad [and compelling] public interest in maintaining a sound tax system” (*Hernandez v. Commissioner* (1989), relying on *United States v. Lee* (1982)).

Yet of course the tax system is chock full of a vast range of exceptions — many more than the employer mandate has. That doesn’t entitle objectors to a religious exemption from tax obligations, or make the interest in tax collection less than compelling. “The fact that Congress has already crafted some deductions and exemptions in the Code ... is of no consequence, for the guiding principle is that a tax ‘must be uniformly applicable to all, except as *Congress* provides explicitly otherwise.’” *Hernandez* (emphasis in original).

Or consider draft law. *Gillette v. United States* (1971) rejected the claim that people who had a religious objection to fighting in what they saw as unjust wars were constitutionally entitled to a draft exemption. (The statutory conscientious objector exemption applies only to people who object to fighting in all wars.) *Gillette* has since been cited (for instance, by *Bob Jones Univ. v. U.S.* (1983)) as an example of the application of *Sherbert*/*Yoder* strict scrutiny, based on the compelling interest of raising manpower for the military. That the draft likewise had many secular exceptions that covered many people didn’t lead the Court to view the interest as any less compelling.

Likewise for a vast range of other laws that the Court hadn’t considered during the *Sherbert*/*Yoder* era, but that I think should clearly withstand RFRA exemption claims. Federal employment discrimination laws have various exemptions, such as for small employers (which implicates millions of employees), for certain bona fide occupational qualifications, and more. The duty to testify when subpoenaed is subject to many exceptions in the form of testimonial privileges, privileges that people routinely use.

Statutory rape laws often except acts committed by someone who is close enough in age to the minor (which likely covers millions of acts each year), or acts committed by the minor’s spouse. Breach of contract law has exceptions galore. The Copyright Act contains one operative section followed by more than a dozen sections of exceptions, many of which are taken advantage of constantly. The list could go on.

All these laws do, I think, serve government interests that the legal system would view as compelling. But they contain exceptions because *most laws serve multiple interests*. Accurate factfinding at trial, for instance, is very important, and people shouldn’t get an exemption just because they feel a religious obligation to, for instance, [not testify](http://www2.law.ucla.edu/volokh/intermed.htm#N_20_) in a way that may harm a relative, a coreligionist, or someone who the witness thinks is innocent. And this is so despite the present of various secular exceptions to that duty. Those exceptions don’t undermine the significance of the government interest — they merely reflect the fact that the legal system also tries to serve other interests, such as (for instance) also encouraging candid disclosures to spouses, psychiatrists, and lawyers.

Interpreting RFRA as embodying the view that, whenever a law “leaves appreciable damage to [an] interest unprohibited,” the interest can’t be compelling, would require granting religious exemptions to all these laws. Yet I don’t think that’s right. I don’t think the Court is likely to do this. And I don’t think it would be consistent with *Lee* and *Gillette*, two of the precedents from the *Sherbert*/*Yoder* era that Congress was trying to restore.

2. Now I agree that the Court has indeed held that the underinclusiveness of a law may make it fail strict scrutiny. This, though, has happened with the nearly-fatal-in-fact strict scrutiny used in cases involving discrimination based on [the content of speech](http://scholar.google.com/scholar_case?case=12960598670321445636) or [the religiosity of conduct](http://scholar.google.com/scholar_case?case=975414503455261754). The Court expects such discrimination to be extremely rare, and any content-based or religion-based discrimination is thus extremely hard to justify, and raises grave suspicions about the government’s motivation.

But secular exceptions from generally applicable laws are extremely common, and are generally seen by the Court as legitimate and well-intentioned. That’s why, even when generally applicable laws were subject to Free Exercise Clause scrutiny, the presence of such secular exceptions wasn’t seen as casting doubt on the strength of the government’s interests.

The *Hobby Lobby* Tenth Circuit decision called on *Gonzales v. O Centro* (2006) for support:

On this question, *O Centro* is particularly instructive. In that case, a religious group sought an exemption for the sacramental use of hoasca, a hallucinogen classified as a Schedule I(c) controlled substance under the Controlled Substances Act. The question in *O Centro* was limited to whether the government could show a compelling governmental interest under RFRA to justify what was indisputably a substantial burden on the plaintiffs’ exercise of religion. The government in part relied on its interest in promoting public health and safety and upon Congress’s determination that hoasca “‘has a high potential for abuse,’ ‘has no currently accepted medical use,’ and has ‘a lack of accepted safety for use ... under medical supervision.’”

The Supreme Court refused to credit this argument, however, in part because the CSA and related regulations contained an exemption for the religious use of another substance categorized as a Schedule I hallucinogen, peyote. As the Court reasoned, “Everything the Government says about the [dangerous chemicals] in hoasca ... applies in equal measure to the [dangerous chemicals] in peyote.” Because both the Executive Branch and Congress had decreed a religious exemption for Native American use of peyote, the Court concluded that “it [was] difficult to see how” those same concerns could “preclude any consideration of a similar exception for” the religious use of hoasca. If the peyote exemption in *O Centro*, which applied to “hundreds of thousands of Native Americans” was enough to undermine the government’s compelling interest argument in that case, we conclude the exemption for the millions of individuals here must dictate a similar result.

But this, I think, misreads *O Centro*. In *O Centro*, the government argued that denying a religious exemption to the ban on the hallucinogen contained in hoasca was necessary to serve compelling interests in “protecting the health and safety of UDV members” and “preventing the diversion of hoasca from the church to recreational users.” The lower court held that the government didn’t prove the factual predicate for these claims; the court “concluded that the evidence on health risks was ‘in equipoise,’ and similarly that the evidence on diversion was ‘virtually balanced.’” The Court relied on these factual findings as to those interests.

The government, though, sought to avoid these factual findings by arguing that “there is no need to assess the particulars of the UDV’s use [of hoasca] or weigh the impact of an exemption for that specific use, because the Controlled Substances Act serves a compelling purpose *and simply admits of no exceptions*” (emphasis added). It is this claim that uniformity was absolutely necessary that led to the Court’s discussion of peyote:

Congress’ determination that DMT should be listed under Schedule I simply does not provide a categorical answer that relieves the Government of the obligation to shoulder its burden under RFRA.... The fact that the Act itself contemplates that exempting certain people from its requirements would be “consistent with the public health and safety” indicates that congressional findings with respect to Schedule I substances should not carry the determinative weight, for RFRA purposes, that the Government would ascribe to them.

And in fact an exception has been made to the Schedule I ban for religious use [as to peyote].... Everything the Government says about the DMT in hoasca — that, as a Schedule I substance, Congress has determined that it “has a high potential for abuse,” “has no currently accepted medical use,” and has “a lack of accepted safety for use ... under medical supervision” — applies in equal measure to the mescaline in peyote, yet both the Executive and Congress itself have decreed an exception from the Controlled Substances Act for Native American religious use of peyote. If such use is permitted in the face of the congressional findings in § 812(b)(1) for hundreds of thousands of Native Americans practicing their faith, it is difficult to see how those same findings alone can preclude any consideration of a similar exception for the 130 or so American members of the UDV who want to practice theirs. See *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547 (1993) (“It is established in our strict scrutiny jurisprudence that ‘a law cannot be regarded as protecting an interest ‘of the highest order’ ... when it leaves appreciable damage to that supposedly vital interest unprohibited’”)....

The Government argues that the existence of a *congressional* exemption for peyote does not indicate that the Controlled Substances Act is amenable to *judicially crafted* exceptions. RFRA, however, plainly contemplates that courts would recognize exceptions — that is how the law works. Congress’ role in the peyote exemption — and the Executive’s, see 21 CFR § 1307.31 (2005) — confirms that the findings in the Controlled Substances Act do not preclude exceptions altogether; RFRA makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress.

So the Court was rejecting the government’s argument that the whole strict scrutiny analysis, with its factual inquiries about harm and less restrictive alternatives, could be avoided simply on the grounds that drug laws must be uniform. Drug laws already aren’t uniform, the Court said; Congress concluded that uniformity isn’t necessary. The government needs to actually prove why denying this exemption request is the least restrictive means of serving a compelling government interest. It can’t just rely on the compelling government interest behind the Controlled Substances Act as a whole, coupled with a claim that this interest applies to all possible applications of the Act.

Indeed, it’s noteworthy how the Court deals with the rejection of claimed exemptions from tax laws, and the argument that uniformity *is* necessary there:

The Government points to some pre-*Smith* cases relying on a need for uniformity in rejecting claims for religious exemptions under the Free Exercise Clause, but those cases strike us as quite different from the present one. Those cases did not embrace the notion that a general interest in uniformity justified a substantial burden on religious exercise; they instead scrutinized the asserted need and explained why the denied exemptions could not be accommodated. In *United States v. Lee*, 455 U.S. 252 (1982), for example, the Court rejected a claimed exception to the obligation to pay Social Security taxes, noting that “mandatory participation is indispensable to the fiscal vitality of the social security system” and that the “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.” See also *Hernandez v. Commissioner*, 490 U.S. 680, 700 (1989) (same).... These cases show that the Government can demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program.

Here the Government’s argument for uniformity is different; it rests not so much on the particular statutory program at issue as on slippery-slope concerns that could be invoked in response to any RFRA claim for an exception to a generally applicable law.

So read in context, the *O Centro* decision doesn’t generally hold that a law can’t serve a compelling interest if it has broad secular exceptions (despite the quote from *Lukumi*). Rather, such exceptions simply help show that the government can’t categorically rely on the need for uniformity. Courts are still “obligat[ed] ... to consider whether exceptions are required under the test set forth by Congress.” Indeed, the government can even rely on the uniformity interest, in the face of secular exceptions, if it “offer[s] evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program.”

*O Centro* is thus consistent with *Lee* and *Hernandez*, which it cites and treats as authoritative for RFRA purposes. A law may serve a compelling interest, so that exemption requests from it may be denied, even if it has many secular exceptions.

Yes, the employer mandate excludes employers with grandfathered plans. But this doesn’t itself give other employers a RFRA right to reject the mandate, just as the fact that tax law has many exceptions doesn’t give nonexcepted taxpayers a RFRA right to not pay certain taxes.

Yes, the employer mandate excludes small employers. But this doesn’t itself give large religious employers a RFRA right to reject the mandate, just as the fact that Title VII excludes small employers doesn’t itself give large religious employers a RFRA to reject the ban on race discrimination. (Church and religious schools employers do have a right under *Hosanna-Tabor Evangelical Lutheran Church & School* (2012) to discriminate in choice of clergy and other religion-propagating employees, but that’s a First Amendment for a narrow set of employers and a narrow set of employees, not a general RFRA right applicable to all employers who religiously object to antidiscrimination law.)

All this doesn’t mean, of course, that Hobby Lobby should necessarily lose. It just means that the Tenth Circuit’s rationale, based on the secular exceptions from the law, doesn’t itself make Hobby Lobby win. The government may still try to demonstrate that denying the religious exemption request is the least restrictive means of serving a compelling government interest — albeit a compelling government interest that the employer mandate serves alongside other interests (e.g., in preventing excessive disruption, or excessive burden on small employers). More on that argument tomorrow.

**5A. RFRA Strict Scrutiny: The Interest in Protecting Health**

By [Eugene Volokh](http://www.volokh.com/author/volokh/) on December 6, 2013 1:02 pm

We can now get to what I think should be the heart of the case: whether denying Hobby Lobby an exemption from the requirement of providing potentially implantation-preventing contraceptives is the “least restrictive means” of serving a particular “compelling governmental interest.” I don’t know what the answer to that is, because this test is so undefined; my thinking here is also quite tentative, and I’m certainly open to being persuaded. But I thought I’d post today about three possible interests — protecting health, providing for sex equality, and protecting newly created private rights — and say a few words about them.

1. This post focuses on the interest in protecting health. Under RFRA, it’s not enough for the government to point to how the Affordable Care Act writ large supposedly protects health. Nor is it enough for the government to point to how the coverage for contraceptives generally would protect health. Rather, the question is whether denying the limited religious exemption that is being sought here — the exemption for the particular potentially implantation-preventing contraceptives to which the claimants object — would undermine a compelling interest in protecting health, so that denying the exemption would be the “least restrictive means” of protecting health. “RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law ‘to the person’ — the particular claimant whose sincere exercise of religion is being substantially burdened.”

Moreover, the “least restrictive means” requirement shows that the existence of a compelling interest isn’t enough. Under RFRA, the government must consider creative ways of serving its compelling interests while at the same time accommodating, to the extent feasible, religious objections.

2. It seems to me that a compelling interest in protecting health is indeed implicated here. Preventing unwanted pregnancy helps prevent a wide variety of possible health problems. Protecting physical health seems likely to be seen as a compelling interest. And making these contraceptives available to people with no out-of-pocket cost to them will make it more likely that they will be used, and the health problems will be avoided.

Moreover, particular contraceptives are particularly effective in dealing with particular conditions. Plan B is particularly effective at preventing pregnancy post-intercourse. IUDs are particularly effective for women who have bad reactions to oral contraceptives. So I expect that the Court will indeed say that the government’s attempt to make *these particular contraceptives* available to employees of Hobby Lobby and similar employers furthers a compelling interest in protecting health.

3. The difficulty is with whether there are “less restrictive means” of serving this interest than a total denial of the religious exemption request. One can certainly say there are: The government, which is to say the taxpayers, could just buy all Hobby Lobby employees free contraceptives, or otherwise pay for them in ways that are basically tantamount to that. (The taxpayers already pay for lots of contraceptives; they can just pay for some more, the argument would go.) That solution wouldn’t impose any legal burden on Hobby Lobby, so it would be less restrictive of religious exercise. And it would still serve the government interest, because everyone would still have the contraceptives they need to protect their health.

The obvious response, of course, is that RFRA can’t be seen as requiring taxpayers to pay potentially many millions of dollars in extra costs. And indeed the logic of *United States v. Lee* (1982) and its rejection of a religious exemption from tax law has to support that. After all, the government could grant exemptions from a wide range of taxes — e.g., to pacifists who don’t want to support the draft, the Amish who don’t want to support the social security system, and so on — and serve the compelling interest in raising revenue by the “less restrictive means” of making all other taxpayers make up the shortfall.

But that can’t be, it would appear given *Lee*, what the “less restrictive means” test demands. It would seem that “less restrictive” must mean “less restrictive, without forcing taxpayers to bear substantial extra costs in compensating for the exempted people’s refusal to pay.” (Another way of articulating that would be that the compelling government interest may be reframed as “an interest in \_\_, without creating extra costs for taxpayers.”)

At the same time, the unemployment compensation cases — *Sherbert v. Verner* (1963), *Thomas v. Review Bd.* (1981), *Hobbie v. Unemployment Appeals Comm’n* (1987), and *Frazee v. Illinois Dep’t of Econ. Sec.* (1989) — all held that employees fired because of their religious conduct have the Free Exercise Clause to get unemployment compensation from the government. Those cases thus did require the government to pay out money to religious objectors. They didn’t say that refusing to pay unemployment compensation was the least restrictive means of preventing taxpayers from having to pay for the consequences of religious objectors’ beliefs (though the dissent made a version of this argument).

To be sure, some opinions have treated the unemployment compensation cases as being focused on equal treatment. To quote Justice Stevens’ concurrence in *Hobbie*, when a state “provides unemployment benefits to those persons who become ‘unemployed through no fault of their own,’ but singles out the religiously motivated choice that subjected [a person] to dismissal as her fault and indeed as ‘misconduct connected with ... work,’” the state treats “religious claims less favorably than other claims.” “In such an instance, granting unemployment benefits is necessary to protect religious observers against unequal treatment.”

But it’s far from clear that all the unemployment cases did involve such unequal treatment. For instance, in *Thomas* I expect that pretty much anyone fired because he refused to work on certain products — whether for religious reasons or any other reasons — would have been treated by Indiana authorities as having been at fault in the dismissal, and would have been denied unemployment compensation. Thomas was thus being given a financial benefit to which a pure equality rationale would not have entitled him. (Indeed, Justice Rehnquist’s dissent in *Thomas* argued that the state courts had “construed the State’s unemployment statute to make every personal subjective reason for leaving a job a basis for disqualification.”)

And beyond that, all the opinions that sought to characterize *Sherbert* as being an equal treatment case — *Smith*, plus some non-majority opinions, such as Justice Stevens’ *Hobbie* concurrence — were written by Justices who were trying to reject *Sherbert*’s broader role as securing a right to religious exemptions. That is not the position, I think, that Congress was trying to “restor[e]” with RFRA.

Another possible way of limiting *Sherbert* is that it likely involved only a fairly modest financial burden on the government. My sense is that not a lot of people quit work for religious reasons, or even did in 1963, back when employers had no duty to accommodate relatively low-cost religious objections. Nonetheless, the aggregate cost of such unemployment compensation (on top of the unemployment compensation that would be paid out quite apart from any religious objections) is likely pretty significant — maybe not that far from the aggregate cost of providing free contraceptives of certain kinds to employees whose employers refuse to pay for them (on top of the government spending on contraception that would be paid out quite apart from any religious objections).

So it’s just not settled whether “least restrictive means” for RFRA purposes can include means that are quite expensive to the government, so that taxpayers have to pay a good deal of money to accommodate religious objectors. How the Court will decide this, and how it should decide this in trying to faithfully apply RFRA, is not at all clear.

4. As I understand it, the Administration created [a possible accommodation for some religious nonprofits](http://www.gpo.gov/fdsys/pkg/FR-2013-07-02/html/2013-15866.htm), which I’ll call the “insurer supplement mandate.” It appears that coverage of contraceptives [apparently doesn’t impose any net cost on insurers](http://aspe.hhs.gov/health/reports/2012/contraceptives/ib.shtml): contraceptives cost money, but they tend to decrease the insurer’s need to spend more money on health care stemming from pregnancy. The Administration therefore set up a system through which certain nonprofits who object to coverage of some or all contraceptives could buy insurance policies that don’t ostensibly cover them, but then the insurers would be obligated to pay for the contraceptives without any charge to the policyholders (or any direct charge to the employers).

If (a) such an accommodation were indeed basically no-cost for employees, insurers, and taxpayers — other than some modest administrative costs, which are likely for any religious exemption system from any law — and if (b) the employer thought this would avoid religiously culpable complicity on its part, then providing the accommodation probably would be a less restrictive means of serving the compelling interest in protecting health. Health would still be protected, taxpayers, insurers, and employees wouldn’t have to pay, and the Hobby Lobby owners wouldn’t have to violate their religious beliefs.

Indeed, this might be a classic case for the application of RFRA, because it would involve such a low-cost accommodation. The government wouldn’t be able to just apply the employer mandate directly to Hobby Lobby, because of RFRA, but it could accomplish its goals by implementing this workaround.

But I don’t think this would work for Hobby Lobby, which is self-insured, and would thus have to pay for the potentially implantation-preventing contraceptives in any [case]. And it wouldn’t work even for some non-self-insured companies, if they think that such an insurer supplement mandate doesn’t remove them from complicity in what they see as homicide. (This, again, is a question of [what they sincerely believe](http://www.volokh.com/2013/12/04/3a-requiring-employers-provide-insurance-covering-certain-behavior-substantially-burden-employers-religious-practice/) about the moral consequences of the workaround, not of what secular courts believe.) In such a case, the alternative isn’t really a less restrictive alternative — it’s just as restrictive of the religious objectors’ religious exercise.

5. There is, however, one other possible alternative related to the preceding one, which I’ll call the “objector compensatory assessment.” The government could (a) calculate the cost of separate coverage for the contraceptives that an employer doesn’t want to cover, (b) require the employer to pay that amount to the government as a special assessment, and (c) make available free contraceptives to that employer’s employees, using those collected funds. This alternative would involve no cost to taxpayers (except administrative cost, though potentially even that could be charged to the employer). It would involve no payments by employees.

And *if* the employer thinks this is religiously acceptable, then it would be a less restrictive means of serving the government interest. It would still be somewhat restrictive: The employer would have to pay extra because of his religious refusal to provide the normal health insurance plan. But this would be a much smaller payment (likely a few hundred dollars per year per employee), and one that might not be prohibitive to many employers. If there is a compelling government interest, after all, RFRA potentially authorizes substantial burdens on religious observers — the burdens just have to be as little restrictive as possible. A $500 per year payment per employee is less restrictive than a $100 per day payment.

One analogy, though a somewhat distant one, for this scheme might be what [courts created](http://scholar.google.com/scholar_case?case=10494414497283589255) when some Seventh-Day Adventist employees at union shops sued under the Title VII religious accommodation mandate, claiming — apparently sincerely — that they had a religious objection to paying union dues: the employees were required to pay the equivalent of the union dues to a suitably chosen charity, so that they wouldn’t have to violate their religious beliefs, but also wouldn’t have an incentive to fake such beliefs, and wouldn’t get an unfair advantage over other employees who lacked such beliefs.

The purpose of that exemption was of course different than the purpose of this hypothetical objector compensatory assessment. Courts were concerned about preventing unfair advantage to the objector — something that isn’t in play here, given that employers apparently gain nothing from refusing to provide coverage for these particular contraceptives. In *Hobby Lobby*, the Court would be concerned about preventing unfair loss to employees or taxpayers. But my point here is simply that courts can set up special payment requirements as accommodations for religious objectors, accommodations that avoid the religious burden on the objector though still involve some modest financial burden on the objector.

Another analogy might be historical religious accommodations that required draft objectors pay money so that the government may hire a substitute instead of the objector. Again, the analogy is imperfect, but an objector compensatory assessment should if anything be less objectionable than the draft exemption. The objector wouldn’t be buying himself out of physical danger, and paying someone else to risk his life, but would simply compensate the taxpayers for the financial cost imposed by the objection. Nor would the assessment, which should be fairly modest, discriminate against poor objectors the way as much as the draft payments had done.

Of course, it remains unclear whether Hobby Lobby’s owners, and the other owners in such a position, would find this means to be religiously acceptable. As I noted above, if they think this solution is still religiously forbidden to them, then the solution doesn’t count as the less restrictive means. In such a situation, entirely denying any exemption might well be the least restrictive means of serving the compelling government interest (subject to the discussion in item 3 above). But if the objector find this compensatory assessment scheme to be tolerable, then perhaps this will be the compromise that the government would have to use.

**5B. RFRA Strict Scrutiny: The Interest in Sex Equality**

By [Eugene Volokh](http://www.volokh.com/author/volokh/) on December 6, 2013 5:57 pm

Today, I’m blogging about what I think should be the heart of the *Hobby Lobby* case: whether denying Hobby Lobby an exemption from the requirement of providing potentially implantation-preventing contraceptives is the “least restrictive means” of serving a particular “compelling governmental interest.” This post focuses on the interest in sex equality. (The post also assumes that an objector compensatory assessment, of the sort described in [the previous post](http://www.volokh.com/2013/12/06/5a-rfra-strict-scrutiny-interest-protecting-health/), isn’t available; if it is available as a less restrictive means of protecting health, then it would also be available as a less restrictive means in protecting sex equality, since it would provide women employees with the same benefits as they would get under the unmodified employer mandate.)

1. One version of this interest is in preventing intentional sex discrimination. When an employer refuses to cover contraceptives that can only be used by women, the argument would go, it is engaged in sex discrimination, just as if it paid women less — even only a bit less — than men. The Court would likely find the interest in preventing such sex discrimination in employment to be compelling. See *Bob Jones Univ. v. United States* (1983); *Roberts v. U.S. Jaycees* (1983).

The problem with this argument is that the Court has never treated regulations of abortion as tantamount to sex discrimination, even though only women can get abortions. (I don’t want to focus here on whether that’s right or wrong; I’m just speaking of what the majority view on the Court has been, and is likely to be.) Indeed, the Court rejected such an argument in *Bray v. Alexandria Women’s Health Center* (1993). It rejected an Equal Protection Clause challenge to the exclusion of abortion from federal funding in *Maher v. Roe* (1977) and *Harris v. McRae* (1980), after the Court had already concluded that sex discrimination (including in funding) generally violates the Equal Protection Clause. And it has analyzed abortion restrictions that don’t impose an “undue burden” on abortion under the rational basis test, see *Planned Parenthood v. Casey* (1992), not the quite demanding intermediate scrutiny called for in sex classification cases.

Indeed, even distinctions based on pregnancy aren’t treated as tantamount to sex discrimination under the Equal Protection Clause, *Geduldig v. Aiello* (1974), *reaffirmed by Bray*, though Congress has statutorily treated pregnancy discrimination as covered by the Title VII sex discrimination ban. This is one reason why special benefits that *favor* pregnant women don’t pose constitutional problems, even though discrimination against men is generally as constitutionally suspect as discrimination against women.

Of course, federal law generally doesn’t treat potentially implantation-preventing contraceptives the same as abortions. For instance, federal law generally bans federal funding of abortions, but this ban doesn’t apply to such contraceptives. Moreover, the substantive legal rules governing the Equal Protection Clause and sex discrimination by the government need not be the same as the legal rules governing private sex discrimination under RFRA.

But the questions whether (a) exclusion of abortion in government funding *is intentional sex discrimination* and whether (b) exclusion of potentially implantation-preventing contraceptives in private employer funding is intentional sex discrimination are essentially the same. In *Bray*, the Court rejected the argument that, “since voluntary abortion is an activity engaged in only by women, to disfavor it is ipso facto to discriminate invidiously against women as a class.” This rejection would likely apply equally to employer actions that disfavor the use of implantation-preventing contraceptives.

2. Of course, this leaves the interest in preventing what the law sometimes calls “disparate impact” on women. Even if exclusion of these contraceptives isn’t intentional discrimination based on sex (but is instead discrimination based on the potential to cause what the employer views as tantamount to abortion), the argument would go, the exclusion has a greater effect on women than on men, and the government has a compelling interest in preventing such disparate impact.

The complicating factor here is that the Affordable Care Act already appears to create a disparate impact *in favor of* women. According to Judge Rovner’s dissent in *Korte v. Sebelius* (7th Cir. 2013) (paragraph breaks added) — a dissent that was generally hostile to the religious exemption claim, and that stressed the sex equality rationale –

The Women’s Health Amendment to the ACA, spearheaded by U.S. Senator Barbara Mikulski, expanded the range of requisite preventive care to include a separate set of preventive services for women. In proposing the amendment, Senator Mikulski noted that many women forego preventive screenings for the conditions that statistically are most likely to result in their death — breast, cervical, colorectal, ovarian and lung cancer, and heart and vascular disease — either because they lack insurance, the services are not covered by their insurance plans, or because the large copayments required by their insurance companies for these screenings are beyond their financial means.

“Women of childbearing age incur 68 percent more out of pocket health care costs than men,” she pointed out. “My amendment guarantees access to critical preventive screening and care for women to combat their number one killers and provides it at no cost. This amendment eliminates a big barrier of high copayments.” Press release: Mikulski Puts Women First in Health Care Debate (November 30, 2009), available at http://www.mikulski.senate.gov/media/pressrelease/11-30-2009-2.cfm (last visited Nov. 7, 2013); see also Jessica Arons & Lindsay Rosenthal, Center for American Progress, Facts About the Health Insurance Compensation Gap (June 2012) (“Even with employer-based coverage, women have higher out-of-pocket medical costs than men. Overall, women of reproductive age spend 68 percent more out of pocket than men on health care, in part because their reproductive health care needs require more frequent health care visits and are not always adequately covered by their insurance. Among women insured by employer-based plans, oral contraceptives alone account for one-third of their total out-of-pocket health care spending.”), available at http://www.american progress.org/issues/healthcare/news/2012/06/01/11666/facts-about-the-health-insurance-compensation-gap/ (last visited Nov.7, 2013).

If this is right, then under the ACA, women would get considerably more benefits than men (because their expenses are greater). I take it that this would be true even with Hobby Lobby’s proposed exemption, given that Hobby Lobby wants to avoid funding only a small fraction of all available preventing services. So even Hobby Lobby’s proposal would still leave the law with a disparate impact *in favor* of women.

3. The strongest argument for the Women’s Health Amendment, I think, then isn’t so much that employers who don’t fund certain services are creating a disparate impact against women. Rather, it’s that *life* creates greater medical burdens on women of childbearing age than on men. “Overall, women of reproductive age spend 68 percent more out of pocket than men on health care, in part because their *reproductive health care needs require more frequent health care visits* and are not always adequately covered by their insurance” (emphasis added). See also, for instance, [U.S. Center for Medicare & Medicaid Services, National Health Care Spending By Gender and Age: 2004 Highlights](http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/Downloads/2004GenderandAgeHighlights.pdf) (concluding that, as to total per capita spending, both out-of-pocket and otherwise, “Females 19-44 years old spent 73 percent more per capita than did males of the same age”), and a [2010 *New York Times* article](http://www.nytimes.com/2010/03/30/health/30women.html?_r=0) with the telling title, “Overhaul Will Lower the Costs of Being a Woman.”

Now I certainly see the case for giving women coverage for such greater expenses. If it wasn’t for women’s reproduction, I wouldn’t be writing this today. And the premise of the ACA is that health insurance should be made available to people in large measure without regard to their expected health care costs, and in particular without regard to sex. (Consider the exclusion for preexisting conditions, for instance.)

But nonetheless, the interest here isn’t in preventing intentional sex discrimination by employers, or even employer provision of benefits that are worth less to women than to men. Rather, it appears to be an interest in making sure that employers compensate women for the health care cost inequality that largely stem from the biological differences between men and women. I don’t know of any precedents resolving whether that is a compelling interest for RFRA purposes, or even suggesting an answer to that question.

**5C. RFRA Strict Scrutiny: The Interest in Protecting Newly Created Private Rights**

By [Eugene Volokh](http://www.volokh.com/author/volokh/) on December 6, 2013 7:34 pm

Today, I’m blogging about what I think should be the heart of the *Hobby Lobby* case: whether denying Hobby Lobby an exemption from the requirement of providing potentially implantation-preventing contraceptives is the “least restrictive means” of serving a particular “compelling governmental interest.” This post focuses on an interest that is little talked about in the briefing of the various employer mandate exemption cases, but that I think strikes a chord with many people who have expressed concern about the exemption requests. (The post also assumes that an objector compensatory assessment, of the sort described in [the previous post](http://www.volokh.com/2013/12/06/5a-rfra-strict-scrutiny-interest-protecting-health/), isn’t available; if it is available as a less restrictive means of protecting health, then it would also be available as a less restrictive means in protecting employee private rights, since it would provide employees with the same benefits as they would get under the unmodified employer mandate.)

1. Let me start by approaching the question indirectly. Say that someone feels religiously motivated to make a pilgrimage to a particular place — for instance, a supposed visitation of the Virgin Mary. And say that this place happens to be on an unimproved parcel of land you own somewhere. That would normally be a trespass, but the pilgrim sues for an exemption from trespass law under RFRA.

I take it that courts wouldn’t, and shouldn’t, create such an exemption. Indeed, the compelling interest test provides a means for courts to avoid creating such an exemption — the compelling interest would be in preventing intrusion on your property rights. And it doesn’t matter that the intrusion would actually cause only modest harm to you, or that allowing the intrusion would cause only modest harm to the social interests served by property law (e.g., the interest in encouraging people to invest in improving land, something you hadn’t done). Even a slight intrusion on your rights is still an injury that a person’s religious beliefs do not entitle him to inflict.

The same, I take it, would apply as to other private rights. (By “private rights” I mean rights of private individuals that are secured against other private parties, not constitutional rights that are protected against the government.) If someone feels a religious obligation to do something that would constitute a common-law private nuisance, I don’t think he should or would get a RFRA exemption. This isn’t because protecting people’s enjoyment of their land is such a “compelling” interest in the abstract. Rather, it’s because once something is recognized as a person’s right — such as the right to enjoyment of property without unreasonable interference — the law has a compelling interest under RFRA in protecting such private rights against intrusion.

And I think this should apply not just to longstanding common-law rights, but also to other rights that legislatures create as social views change. That’s true, for instance, as to copyright (the sounder rationale, I think, for [*Worldwide Church of God v. Philadelphia Church of God* (9th Cir. 2000)](http://scholar.google.com/scholar_case?case=1847543716100356974)), as to antidiscrimination law, as to minimum wage law, maximum hours law, and so on. If the democratic process reaches a judgment (whether or not we think it wise) that, for instance, every employee has a right to get paid at least $7.25/hour, and to get paid time and a half for overtime, these rights would include a compelling interest in denying religious employers the ability to violate those rights.

Moreover, these private rights merit protection even when the law makes them applicable only in some situations, or only with limitations. Nuisance law, for instance, is necessarily limited in scope — many intrusions on your enjoyment of land are allowed because they are on balance viewed as not “unreasonable.” But it doesn’t follow that a person should be free to intrude on your property in a way that the law normally views as a nuisance simply because he feels a religious motivation to do so.

Likewise, employment discrimination bans often exclude many employers — Title VII, for instance, doesn’t apply to small employers. My sense, though, is that they are generally indeed seen as recognizing a private right (though one that was relatively novel when Title VII was enacted) to equal treatment for those employees who are covered. And the government would have a compelling interest in protecting this right against employers who seek an exemption solely because they feel a religious motivation to discriminate. (As I noted before, church and religious schools employers do have a *constitutional* right under *Hosanna-Tabor Evangelical Lutheran Church & School* (2012) to discriminate in choice of clergy and other religion-propagating employees, but that’s a First Amendment for a narrow set of employers and a narrow set of employees, not a general RFRA right applicable to all employers who religiously object to antidiscrimination law.)

Indeed, it’s unsurprising that religious freedom rights are often articulated as a right to do what your religion motivates you to do, simply because of your religious motivation, but *only so long as it doesn’t harm the rights of others*. Jefferson’s defense of religious freedom, for instance, was justified by the argument that someone’s “say[ing] there are twenty gods, or no God ...neither picks my pocket nor breaks my leg.” Madison wrote that religion should be “immun[e] ...from civil jurisdiction, in every case where it does not trespass on private rights or the public peace.” Similarly, Michael McConnell, one of the leading authors on free exercise law, has argued that we should be “free to practice our religions so long as we do not injure others.” When the law declares that some action is an injury to others — even something that, as with paying low wages or discriminating in employment, is a newly defined right rather than a traditional common-law right — there arises a compelling interest for RFRA purposes in preventing such injuries.

And this interest arises even if the legislature *could have* constitutionally created religious exemptions to these laws, if it had expressly so chosen. I argued earlier that [it wouldn’t violate the Establishment Clause for there to be a religious exemption to the employer mandate](http://www.volokh.com/2013/12/04/3b-granting-exemption-employer-mandate-violate-establishment-clause/). Likewise, it doesn’t violate the Establishment Clause to create at least certain kinds of religious exemptions from antidiscrimination law. See *Corporation of Presiding Bishop v. Amos* (1987). But just because the *legislature* is allowed to create exemptions that limit the scope of private rights — or define those private rights narrowly — doesn’t mean that courts, applying RFRA, should likewise limit the scope of private rights.

2. On then to the employer mandate. One way of seeing the mandate is simply as a way of serving some general public goals in providing people health coverage. Congress could have served this goal, if there was political support, through single payer, or through some other scheme. But for political reasons it chose to use the existing employer-based system.

But another way of seeing the mandate is as an allocation of private rights. Federal law has long provided employees with rights to be paid a minimum wage, be protected against having to work excessive hours, be paid extra for overtime (at least in many job categories), bargain collectively, and more. Many people may think such rights don’t rest on a sound moral or practical footing, but the democratic process has disagreed.

Now the democratic process has provided that employees are entitled to health insurance coverage (at least in many places of employment), and health insurance coverage that includes a broad range of contraceptives. The law has created a new private right of employees. And, as with other private rights, there is now — or so the argument would go — a compelling government interest in making sure that this right won’t be restricted simply because the employer has a religious objection to employees getting what they now have a right to get.

The question, as with trespass, nuisance, copyright, and so on, isn’t just whether the country as a whole would greatly suffer if religious exemptions were granted. Rather, the question is whether a claimant’s conduct would violate a (newly recognized) private right of third parties, here employees. And even if it deprives the third parties of this right only to the tune of, say, $500/year, there is a compelling government interest in preventing even relatively low-level violations of private rights.

This is related, I think, to a passage in *United States v. Lee* (1982), the case that rejected a claimed religious exemption from the duty to pay social security taxes. As I mentioned in [an earlier post](http://www.volokh.com/2013/12/04/3b-granting-exemption-employer-mandate-violate-establishment-clause/), the Court began by holding that a religious exemption would inevitably undermine the compelling government interest in collecting revenue. But then it went on to talk in terms that were suggested a focus on the private rights of third parties (the claimants’ employees):

Granting an exemption from social security taxes to an employer operates to impose the employer’s religious faith on the employees. Congress drew a line in § 1402(g), exempting the self-employed Amish but not all persons working for an Amish employer. The tax imposed on employers to support the social security system must be uniformly applicable to all, except as Congress provides explicitly otherwise.

As I mentioned in [the earlier post](http://www.volokh.com/2013/12/04/3b-granting-exemption-employer-mandate-violate-establishment-clause/), the Court wasn’t saying that a hypothetical statute expressly granting a religious exemption to employers who object to the social security tax would unconstitutionally establish religion. (In a footnote, the Court specifically said that it wasn’t deciding that question.) Nonetheless, I think the Court was implicitly taking the view that social security law creates a private right on the part of employees. If you work for an employer, part of what you’re entitled to is a social security contribution. And an employer can’t assert a Free Exercise Clause right — what today would be a RFRA right — to take that entitlement away from you simply on the grounds that he has religious objections to providing you with this federally guaranteed private right.

3. The question, of course, is whether the right to get the full ACA insurance — including all the preventative care options — through one’s employer should indeed be treated as a private right. Some people will say yes, because it represents part of the package to which, according to the democratic process, most employees are generally entitled as compensation for their toil.

Others will say no. Trespass and nuisance, they would likely say, are different, whether because they have long common-law pedigrees, or because they are rights to be free from intrusion rather than rights to get valuable benefits. They might even say that minimum wage rights, overtime pay rights, and the like aren’t true private rights of the sort that the government always has a compelling interest in protecting.

Or they might argue that minimum wage rights and the like are indeed reflections of moral, rights-based judgment on Congress’s part — a judgment that an employer wrongs an employee by paying him less than some defined decent wage, or by not compensating the employee for taking away too much of his leisure — while the employer mandate is just a technocratic means of providing certain goods and services to the public. This, they would argue, means that there’s no true private right being protected by the law, and courts should feel free to use RFRA as a means of cutting back on Congress’s technocratic planning, at least so long as any such exemption doesn’t excessively undermine any broader compelling societal interests.

An analogy might be the controversy about marital status discrimination in housing. This issue came up in [several cases](http://www.law.ucla.edu/volokh/relfree.htm#N_191_) in the 1990s, under RFRAs and state constitutional provisions that had been interpreted as following the *Sherbert*/*Yoder* model. We believe that renting to unmarried couples is sinful complicity with sinful fornication, some landlords said. We therefore want a religious exemption from the ban on marital status discrimination in housing. No, said government agencies and would-be tenants — there’s a compelling government interest in preventing such discrimination.

But there are two ways of articulating the government interest: (a) an interest in protecting an asserted private right not to be discriminated against in housing based on marital status, and (b) an interest in making sure that people have a reasonable ability to find some decent and convenient place to live.

If courts accept the first interest, either because they themselves believe that such a private right reflects an important moral entitlement, or because they think they should accept the private right as given because of the Legislature’s enactment of antidiscrimination law, then every instance of prohibited housing discrimination would be a violation of a private right. Thus, I think, there would be a compelling interest in protecting this private right against those who claim an entitlement to violate it simply because of their religious views. And no less restrictive means of serving the right would be available.

On the other hand, if courts conclude that the first interest isn’t in play, and that the law can be justified only by the second interest, exemptions might be available. Few landlords seem likely to claim a religious exemption from the ban on marital status discrimination in housing. To my knowledge, even of those people who believe that premarital sex or premarital cohabitation is sinful, relatively few believe that *renting* to unmarried couples is sinful. Nor is it likely that many people who lack such a belief will nonetheless fake it for selfish reasons — refusing to rent to eligible tenants is usually against the landlord’s economic interests. Therefore, in most communities, unmarried couples will find many places to live, even if a few landlords refuse to rent to them because of their marital status.

It’s possible, of course, that in some communities, so many landlords claim the exemption that unmarried couples won’t be able to find reasonable housing. But, under the particularized analysis that RFRA calls for (see *Gonzales v. O Centro*), this would only justify denying the exemption in *those* areas, rather than throughout the whole state. So in deciding on the exemptions, courts would have to hear factual evidence about the amount of housing discrimination based on marital status in the particular community, and decide if there’s enough such discrimination that the exemption request must be denied in order to adequately serve the interest.

And as it happens, courts were split. Some courts accepted the law as a private-rights-protecting law, and rejected any exemption requests. Others seemed not to treat it as private-rights-protecting, and thus either accepted the exemption request or remanded for more factfinding. Federal religious exemption caselaw didn’t provide any precedents clearly resolving this question.

So how is a court to decide whether the employer mandate is a private-rights-protecting law — which, I’ve argued, cuts in favor of finding a compelling interest in protecting such a private right, even as to relatively minor deprivations — or just a technocratic scheme that doesn’t implicate third parties’ private rights? Again, the precedents don’t really tell us.

4. UPDATE [12/7/2013]: A reader makes an interesting point — violating the employer mandate leads to the employer being liable for a tax penalty, but does not lead to any private right to sue (or even to file an administrative claim) on the part of the allegedly shortchanged employees. This is unlike common-law private rights as well as rights under job discrimination laws, minimum wage laws, and the like, which do give rise to a private right to sue, as well as to the possibility of Executive Branch enforcement.

Might that justify treating the employer mandate as *not* securing a newly created private right, given that in our legal system private rights are usually enforceable by litigation filed by the rightsholder (whether before courts or before administrative bodies)? I’m not sure whether this is so, but the theory seemed quite plausible, so I thought I’d blog it.

**6. Beyond RFRA: What Should We Think of Mutual Duties of Accommodation?**

By [Eugene Volokh](http://www.volokh.com/author/volokh/) on December 7, 2013 10:45 am

Whew. That was a lot of writing on *Hobby Lobby* last week, and a lot of reading. I hope it was helpful, interesting, or both. Now, fortunately, I’m finishing up, but I wanted to close with one broader thought, going beyond the purely legal RFRA question. (I should also note that this thought is even more tentative than some of the ones in the earlier posts, precisely because it’s about pragmatic and moral matters on which I’m not expert, rather than on legal matters.)

One common argument in favor of religious exemptions is that, if possible, people should be able to live full lives as Americans without having to violate their religious beliefs — even if that means that our legal system will change in some measure to accommodate those beliefs. In large measure, the American legal system has provided such accommodations. Indeed, at least throughout much of America’s history, it provided them far more than nearly all other countries.

This willingness, I think, has been a source of American strength. It has brought people of all religions to our shores, at a time when such immigration was vital to our prosperity. (I think [immigration remains vital to our prosperity even today](http://www.volokh.com/2011/09/26/immigration-and-the-future-of-the-united-states/), but let’s set that debate aside for now.) It has helped America harness the energy of all its residents, minimizing the sense of alienation that religious minorities have felt.

And it has helped America largely avoid the religious conflicts of Europe, conflicts that the Framers were keenly aware could lead even to civil wars. The beneficiaries of such accommodations have been many and varied: Quakers, Catholics, Jews, and many more. I myself am not religious, but I think this tradition of accommodation is worth preserving (recognizing, of course, that not all practices should be accommodated, for the reasons I discussed throughout the past week).

But one source of our nation’s strength, I think, has also been the human tendency to accommodate one’s practices to the demands of a democratic legal system. Of course, many religious beliefs have been famously resistant to change. But many others have indeed shifted over time, including in response to legal pressure, and I think many of the shifts have been for the better.

The most famous example in American history, of course, has been mainstream Mormons’ 1890 renunciation of polygamy. I’m not an expert on the history of Mormonism in the 19th century; my sense is that there were plenty of misdeeds to go around back then, both from Mormons and from non-Mormons. But whether or not it was right (or constitutional under modern standards) for the federal government to pressure Mormons to abandon polygamy, my sense is that the Mormon Church and the nation as a whole is stronger as a result of the Church’s accommodation to mainstream American norms on this subject.

And beyond this, I think there’s been a far deeper accommodation of religious people to American law, which touches on the issue of complicity that I discussed as a legal matter [a few days ago](http://www.volokh.com/2013/12/04/3a-requiring-employers-provide-insurance-covering-certain-behavior-substantially-burden-employers-religious-practice/).

If you live in a religious pluralistic country — indeed, even if you are a conservative Christian living in a country that is mostly Christian but not in quite the same way that you are — you have to accept that your government will do some things that you disagree with. Indeed, it will do some things that you think are evil. Your fellow citizens will do the same.

Moreover, you will always have some degree of possible complicity with such evil, if you define complicity broadly enough. Most obviously, you will pay taxes. They can be used to fund killing people in what you think are unjust wars (or in any war, if you oppose all war). They can be used to fund killing fetuses through abortions, which you see as murder. They can be used to fund what you see as killing embryos through implantation-preventing contraceptives.

They can be used to fund contraceptives, which you might think are against God’s plan. They can be used to fund blasphemy, the production of idols, labor on the Sabbath, “marriages” that you view as abominations, or whatever else.

Likewise, you (or some of your coreligionists, unless all of you largely retreat from normal economic life) will have employees. Those employees may do things that you think are evil — blasphemous, immoral, murderous — using the salaries you pay them. And if you try to avoid such complicity by firing the employees, the government may (in some circumstances) step in to prevent that, because of the public view that employees have some rights not to lose their jobs based on certain behavior (e.g., their own religious practices, in many states certain political activities, in many states their sexual practices or marital decisions, in some states lawful off-duty activities, and so on).

Necessarily, pretty much all religious groups that still live (at least in law-abiding ways) in America have had to accommodate themselves to this sort of complicity. Perhaps they never had a broad enough view of sinful complicity to lead them to object to, say, paying taxes. But if they did, they either accommodated this obligation or left the country. (Even if they can manage to avoid having to pay income taxes, it’s very hard to live without paying any taxes, including property taxes, sales taxes, excise taxes, and so on.) And it’s good that they have seen their way clear to living law-abiding taxpaying lives in their and our country, even if they condemn some of the things the country does.

Likewise, even employers who oppose abortion or potentially implantation-preventing contraception are generally fine with paying salaries to employees who then use some of the salaries to get abortions or to buy IUDs, and don’t view this as sinful complicity. That’s good, too, for them, for the employees, and more broadly for the nation.

As I mentioned in [my post on the substantial burden threshold](http://www.volokh.com/2013/12/04/3a-requiring-employers-provide-insurance-covering-certain-behavior-substantially-burden-employers-religious-practice/), RFRA doesn’t authorize courts to decide what sort of complicity is “really” sinful and what sort of complicity isn’t really sinful. If people sincerely believe that some degree of complicity — including that involved in paying taxes — is religiously forbidden, then requiring such complicity counts as a “substantial burden” for legal purposes (though exemption requests may still be rejected if such a rejection is the least restrictive means of serving a compelling government interest). “[They] [drew a line](http://scholar.google.com/scholar_case?case=4040736983898309892), and it is not for [secular courts] to say that the line [they] drew was an unreasonable.”

At the same time, when we as citizens — and potentially as voters deciding when to craft religious exemptions — consider the moral weight of religious objectors’ objections, maybe we might rightly pay some attention to where people draw lines. If objectors define complicity broadly enough, to the point that they become harder and harder to accommodate without substantial losses to taxpayers or substantial interference with others’ private rights, I sympathize less with their claims.

If someone says, “I refuse, for religious reasons, to perform abortions,” I sympathize a lot. There are indeed already laws that let people opt out of direct participation in performing abortions. One can debate whether those laws are a good idea when they bar private employers from insisting that their employees participate in abortions, but I agree that at least the government generally shouldn’t threaten to take away doctors’ licenses (for example) for refusing to perform abortions. Likewise, if someone says, “I refuse, for religious reasons, to [fill prescriptions for morning-after contraceptive pills](http://www.volokh.com/archives/archive_2004_02_01-2004_02_07.shtml#1075929087),” I sympathize in considerable measure; some accommodation in such situations may be quite sensible.

But, to go to the other end of the spectrum, if someone says, “I refuse, for religious reasons, to pay any taxes that might end up paying for abortions or morning-after pills,” that person has drawn the line of complicity at a level that puts him beyond feasible accommodation. If that’s his sincere religious belief, then I suppose he’ll have to comply with what he sees as God’s law. But secular law won’t, and needn’t, yield to those beliefs. His rigidity has put him outside the zone of accommodations that our legal system ought to provide.

Likewise, if a pharmacist not only refuses to fill prescriptions for morning-after pills, but refuses to even call over another pharmacist to help that too might be beyond the scope of accommodation. The same might be true if a doctor not only refuses to perform abortions, but refuses to inform a patient that an abortion may be medically called for in the view of secular authorities. (The details of what should be done might vary considerably, depending on whether the pharmacist’s or doctor’s action leads to loss of employment or loss of a license to practice, on whether the action is likely to materially interfere with the patient’s health, and so on.)

And if the person asks, “How can the legal system put me to such a horrible choice, between sinful complicity and punishment?,” the answer may be, “The more broadly you define complicity, the less sympathy we will have for your predicament. The less your views about religious law accommodates the practices of others, the less secular law will accommodate your practices.”

Where exactly the Hobby Lobbies of the world fall on this continuum, I leave to others to decide. More generally, I stress again that I speak here about pragmatic and moral matters on which I have no special expertise, and not about how our current law of religious exemptions operates. But I thought I’d close this series of posts on this slightly broader note, for whatever it might be worth.