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## THE HOBBY LOBBY MOMENT

Paul Horwitz\*

American religious liberty is in a state of flux and uncertainty. The controversy surrounding *Burwell v. Hobby Lobby Stores, Inc.*<sup>1</sup> is both a cause and a symptom of this condition. It suggests a state of deep contestation around one of the key markers of the church-state settlement<sup>2</sup>: the accommodation of religion.

The problem is social and political, not judicial, although judges are obviously influenced by those larger forces. Courts are rarely at the forefront of significant social change.<sup>3</sup> Judges are constrained by their function: to decide specific cases, based primarily on a finite (if malleable) set of materials such as prior precedents and statutes.<sup>4</sup> *Hobby Lobby* itself turned not on the vagaries of the Religion Clauses, but on the directions laid down by Congress in the Religious Freedom Restoration Act of 1993<sup>5</sup> (RFRA). The Court is routinely criticized for the incoherence of its Religion Clause jurisprudence.<sup>6</sup> Inevitably, there are doctrinal disagreements among judges on these issues. On the whole, however, the judicial treatment of the American church-state settlement has been relatively stable.

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<sup>1</sup> 134 S. Ct. 2751 (2014).

<sup>2</sup> See, e.g., Paul Horwitz, *Act III of the Ministerial Exception*, 106 NW. U. L. REV. 973, 981 (2012) (discussing the “Western church-state settlement”).

<sup>3</sup> Professor Michael Klarman puts the point more strongly, arguing that “courts are *never* at the vanguard of social reform.” Michael J. Klarman, *Social Reform Litigation and Its Challenges: An Essay in Honor of Justice Ruth Bader Ginsburg*, 32 HARV. J.L. & GENDER 251, 290 (2009) (emphasis added).

<sup>4</sup> See, e.g., ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 78 (2013) (noting that “courts are supposed to make their decisions on the basis of the law, not the full range of reasons that any human being might have for acting,” and specifying the legal sources they rely on in constitutional cases). As *Hobby Lobby* illustrates, statutes are another key decisional resource.

<sup>5</sup> 42 U.S.C. §§ 2000bb–2000bb-4 (2012), *invalidated in part* by *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>6</sup> See, e.g., PAUL HORWITZ, THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION, at xii–xiii (2011) (collecting examples).

Conditions are much more fraught outside the courts. In public discussion and in the scholarly community, the very notion of religious liberty — its terms and its value — has become an increasingly contested subject.<sup>7</sup> In the space of a few short years, the basic terms of the American church-state settlement have gone, in Professor Lawrence Lessig’s useful terms, from being “taken for granted” to being “up for grabs.”<sup>8</sup> Once a fairly “uncontested” issue that remained in the “background of public attention,” religious accommodation has become a “contested” issue occupying the forefront of public debate.<sup>9</sup> The change has been sudden, remarkable, and unsettling. The Court’s decision in *Hobby Lobby* will influence the debate outside the courts. But the decision will not resolve that debate. If anything, it seems more likely to heighten and prolong the public tension than to calm it.

Unsurprisingly, given the polarized nature of the larger debate over religious accommodation, most discussions of *Hobby Lobby* and the contraception mandate have been equally polarized. On one side of

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<sup>7</sup> See, e.g., STEVEN D. SMITH, *THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM* 11, 140–41, 168–69 (2014); Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. DET. MERCY L. REV. 407, 407 (2011). For prominent examples of recent work questioning whether religion deserves special treatment, albeit more as a matter of theory than of doctrine, see BRIAN LEITER, *WHY TOLERATE RELIGION?* (2013); and Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012).

<sup>8</sup> Lawrence Lessig, *The Puzzling Persistence of Bellbottom Theory: What a Constitutional Theory Should Be*, 85 GEO. L.J. 1837, 1837 (1997) (distinguishing between “taken for granted” propositions, which can be asserted with little or nothing by way of argument, and “up for grabs” propositions, which are sufficiently contested to require a more active defense).

<sup>9</sup> Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1803 (1997); see also *id.* at 1803–04. In a useful typology that I draw on substantially in this Comment, Lessig describes social contestation as falling within a spectrum along two axes. An issue can be contested or uncontested: subject to “actual and substantial disagreement” or to little disagreement at all. *Id.* at 1802. In our culture, abortion is a contested issue; infanticide is not. Contested issues can also lie in the foreground or background of public debate. A foregrounded issue is a matter of “sustained public attention,” *id.* at 1803, while a background issue may be subject to disagreement but is “not perceived to have social salience,” *id.* at 1804. For a useful chart and discussion, see *id.* at 1803–07; and Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1393–1400 (1997). See also JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION* 179–82 (2011) (discussing how legal arguments may move from being “off-the-wall” to “on-the-wall”); William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821, 1824–25 (2001) (linking Balkin and Lessig’s concepts in a discussion of constitutional welfare rights); Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, THE ATLANTIC (June 4, 2012, 2:55 PM), <http://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/25804> [http://perma.cc/8EMV-XCVQ] (applying this idea to different current legal struggles, including the legal challenge to the Affordable Care Act’s “individual mandate,” see *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012), and to same-sex marriage litigation). Of course, specific issues and disputes involving religious freedom have always been in the foreground of public and legal debate. See generally SARAH BARRINGER GORDON, *THE SPIRIT OF THE LAW* (2010) (describing key legal contests involving religion over the past 70 years). But those controversies rarely called religious freedom itself into question.

the divide, some saw the contraception mandate as “trampling”<sup>10</sup> or “assault[ing]” religious liberty.<sup>11</sup> On the other side were those who warned that a win for Hobby Lobby threatened our local and national civil rights laws,<sup>12</sup> and perhaps the rule of law itself.<sup>13</sup> After the ruling, most of the immediate reaction to the decision was similarly divided. The polarizing nature of the issue, and of the Court’s decision, was both reflected in and encouraged by Justice Ginsburg’s stinging dissent.<sup>14</sup>

As always during times of revolutionary (or reactionary) passion, those who are more concerned with analyzing the conflict than with participating in it may find themselves squeezed from both directions. When an issue moves to the foreground of social contestation, one is expected to choose sides. Nevertheless, some writers have taken an interest in evaluating and sometimes lamenting the current struggle, not just fighting it.<sup>15</sup>

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<sup>10</sup> Edward Whelan, *The HHS Contraception Mandate vs. the Religious Freedom Restoration Act*, 87 NOTRE DAME L. REV. 2179, 2180 (2012).

<sup>11</sup> *Id.* at 2189.

<sup>12</sup> See, e.g., Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1237–40 (2014); Leslie C. Griffin, *If Conestoga Wins, Watch Out Civil Rights*, HAMILTON & GRIFFIN ON RTS. (Mar. 24, 2014) <http://hamilton-griffin.com/if-conestoga-wins-watch-out-civil-rights/> [<http://perma.cc/KA7S-WXKH>].

<sup>13</sup> See generally MARCI A. HAMILTON, *GOD VS. THE GAVEL: THE PERILS OF EXTREME RELIGIOUS LIBERTY* (2d ed. 2014).

<sup>14</sup> See *infra* notes 66–78 and accompanying text. Indeed, it is possible that Justice Ginsburg wrote as she did in part to spur a legal response from the political branches, as in her effective dissent in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), which helped encourage the passage of the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 29 and 42 U.S.C.). See Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 127 HARV. L. REV. 437, 437–42 (2013); *id.* at 439 (“Justice Ginsburg was courting the people.” (emphasis omitted)).

<sup>15</sup> See, e.g., Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY 123 (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson eds., 2008); Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839; Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781 (2007); Laura K. Klein, Note, *Rights Clash: How Conflicts Between Gay Rights and Religious Freedoms Challenge the Legal System*, 98 GEO. L.J. 505 (2010). That Professor Douglas Laycock, a forceful advocate of the importance of both religious liberty and LGBT rights, has ended up being caricatured and condemned for his position is strong evidence of the squeeze that those in the middle may experience from one or both wings of the debate. See, e.g., Dahlia Lithwick, *Chilling Effect*, SLATE (May 28, 2014, 5:54 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/05/douglas\\_laycock\\_gets\\_smeared\\_lgbtq\\_groups\\_attack\\_on\\_the\\_university\\_of\\_virginia.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/05/douglas_laycock_gets_smeared_lgbtq_groups_attack_on_the_university_of_virginia.html) [<http://perma.cc/Z6DF-VXZK>] (describing and criticizing some activists’ efforts to obtain records of communications between Laycock and various groups, in order to gain “a full, transparent accounting of the resources used by Professor Laycock which may [have been] going towards halting the progress of the LGBT community and to erode the reproductive rights of women across the country” (internal quotation marks omitted)).

This Comment falls into the analytical category. I have my own views on the merits of *Hobby Lobby*.<sup>16</sup> But it is the controversy over the contraception-mandate litigation, not the case itself, that takes center stage here.<sup>17</sup> I focus less on the doctrinal questions the Court dealt with or left unanswered, and more on the legal and social factors that turned a statutory case into the legal and political blockbuster of the Term.

More specifically, in thinking about the broader social context that made *Hobby Lobby* so prominent and the debate over it so inflamed, it is the *moment* that matters. We are in the middle of a process of social contestation on some key questions: between certain issues being taken for granted in one direction and their being equally taken for granted in the other direction. It is difficult, if not impossible, to stand outside such moments. But there is some value in focusing, at a slight remove, on the fact of the moment itself.

A great deal of recent constitutional scholarship has examined the relationship between social and legal change, and between social movements and courts.<sup>18</sup> The *Hobby Lobby* case and its ancillary issues offer an excellent opportunity to consider these relationships. More specifically, this occasion allows us to scrutinize one particular stage in the life cycle of social and legal change: the moment at which an issue is at its most contested and foregrounded. It is unsurprising

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<sup>16</sup> In short, I think the Court was right in *Hobby Lobby*. I also believe that — at least as long as the federal government is unwilling or unable to eliminate the problems that result from enlisting private employers in the provision of what ought to be a public good — the Court should adhere to the compromise it offered in the case. Whether it will adhere to that compromise, a question raised but not answered by the Court's issuance of a stay in *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014), or whether some governmental response will alter the shape of the compromise as the *Hobby Lobby* Court depicted it, is something I do not venture to predict here. Finally, I would not have been terribly distressed if the plaintiffs had lost in *Hobby Lobby*, provided that they had lost at the interest-balancing stage rather than having their claims denied on categorical grounds.

<sup>17</sup> In that sense, this Comment is thus similar to Klarman's analysis of *United States v. Windsor*, 133 S. Ct. 2675 (2013), in these pages last year, which was more concerned with describing the "dramatic changes in the social and political contexts surrounding" the decision that "rendered [*Windsor*] conceivable" than with championing or criticizing its outcome. Michael J. Klarman, *The Supreme Court, 2012 Term — Comment: Windsor and Brown: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 129 (2013).

<sup>18</sup> See, e.g., Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002); Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740 (2014); Theodore Ruger, *Social Movements Everywhere*, 155 U. PA. L. REV. PENNUMBRA 18 (2006), <http://www.pennlawreview.com/online/156-U-Pa-L-Rev-PENnumbra-262.pdf> [<http://perma.cc/QG6X-NZPM>]; Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877 (2013) (book review).

that courts will speak up at these moments, particularly if Congress has left them little leeway to avoid or postpone the question. In some ways, however, these critical moments may also be the ones in which judicial action is likely to be the least fruitful. These are surely fertile times for activists and advocates. But perhaps there is good reason at such moments to hear from ironists<sup>19</sup> and tragedians<sup>20</sup> as well.

The heated nature of our current debate over the contraception mandate and related issues may prove short-lived. It may be a mere byproduct of the energy expended in a period of dramatic social transformation. The degree of controversy occasioned by *Hobby Lobby* would have been unlikely thirty years ago, given the state of social consensus at that time. It may prove equally unthinkable thirty years from now.<sup>21</sup> In the meantime, the *Hobby Lobby* moment gives us a chance to take stock of the nature and effects of the social contestation we are experiencing, and of the rapid changes and reversals of view that have thrown one of the central aspects of the American church-state settlement into question.

Part I of this Comment summarizes the *Hobby Lobby* decision. In my view, the decision itself is not the primary source of the controversy. In any event, both the majority and dissenting opinions are thorough and lucid, although like all opinions they leave questions in their wake.<sup>22</sup> My discussion in this Part is thus quite brief.

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<sup>19</sup> See RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* 73 (1989) (defining an “ironist” as someone who “has radical and continuing doubts about the final vocabulary she currently uses,” “realizes that argument phrased in her present vocabulary can neither underwrite nor dissolve these doubts,” and “does not think that her vocabulary is closer to reality than others, that it is in touch with a power not herself”); *id.* at 75 (“The ironist spends her time worrying about the possibility that she has been initiated into the wrong tribe, taught to play the wrong language game.”). For Professor Richard Rorty, who described himself as a liberal ironist, this sense of ironism does not preclude one from taking a stand on behalf of one’s political commitments, contingent though they may be. See *id.* at 61. My interest here is not in “liberal ironism,” but in ironism itself, and the capacity it may offer both to interrogate one’s own commitments and to appreciate the commitments of one’s adversaries. I thank Professor Micah Schwartzman for pressing me to clarify this point.

<sup>20</sup> See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 59, 87 (1988) (contrasting between “comic” readings of the Constitution as a document that can provide “happy endings” to contentious issues, and “tragic” readings that emphasize the potential that the Constitution will “present[] irresolvable conflicts between the realms of law and morality”). See generally MARC O. DEGIROLAMI, *THE TRAGEDY OF RELIGIOUS FREEDOM* 6–11 (2013) (offering a tragic reading of the Religion Clauses); HORWITZ, *supra* note 6, at 303–06 (arguing that moral remainders are inevitable in attempts to reconcile religion and liberal democracy).

<sup>21</sup> Cf. MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR* 206 (2013) (noting that decisions that were highly polarizing at the time may become “iconic” as public opinion coalesces around a new consensus).

<sup>22</sup> One important question I do not discuss here is the potential limits on religious accommodation imposed by the Establishment Clause. This question became a point of scholarly contention concerning the *Hobby Lobby* case. But it does not figure in the majority opinion, and is not essential to this Comment’s analysis of the *Hobby Lobby* controversy as a moment of social contesta-

Part II discusses the legal and social sources of the controversy. Legally, it discusses a key element of the American church-state consensus as it existed until recently: the accommodation of religion.<sup>23</sup> That consensus is aptly summed up by Professor Andrew Koppelman: Religion is “a good thing,”<sup>24</sup> and “[a]ccommodation of religion as such is permissible.”<sup>25</sup> We may debate whether courts or legislatures should be responsible for it, but it is generally agreed “that *someone* should make such accommodations.”<sup>26</sup> Until recently, there was widespread approval for religious accommodation.<sup>27</sup> That consensus found strong expression in RFRA, which passed just two decades ago with the overwhelming support of Congress. There have been dissenters from this consensus.<sup>28</sup> On the whole, however, it enjoyed “taken for granted” status. In Lessig’s terms, disagreement over religious accommodations was a background issue, not a foreground issue.<sup>29</sup>

The past few years have witnessed a significant weakening of this consensus. Contestation over religious accommodations has moved rapidly from the background to the foreground. Accommodations by *anyone* — courts *or* legislatures — have been called into question, including by those who acknowledge that until recently those accommodations would have been uncontroversial. Whether religion is “a good thing” — whether it ought to enjoy any kind of unique status, and whether that status should find meaningful constitutional protection — has itself come up for grabs.

This legal contestation has been accompanied by — indeed, may be driven by<sup>30</sup> — significant social dissensus. Although *Hobby Lobby*

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tion. For a thorough development of this argument, see Frederick Mark Gedicks & Rebecca G. Van Tassel, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343 (2014). See also Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51 (2014). For responses, see, for example, Richard W. Garnett, *Accommodation, Establishment, and Freedom of Religion*, 67 VAND. L. REV. EN BANC 39 (2014); and Marc DeGirolami, *On the Claim that Exemptions from the Mandate Violate the Establishment Clause*, MIRROR OF JUST. (Dec. 5, 2013), <http://mirrorofjustice.blogs.com/mirrorofjustice/2013/12/exemptions-from-the-mandate-do-not-violate-the-establishment-clause.html> [<http://perma.cc/37B7-MSPJ>].

<sup>23</sup> In line with common usage in this area, I refer mostly to “religious accommodations” in this Comment rather than “religious exemptions.”

<sup>24</sup> KOPPELMAN, *supra* note 4, at 2.

<sup>25</sup> *Id.* at 5.

<sup>26</sup> *Id.*

<sup>27</sup> See *id.*

<sup>28</sup> See sources cited *infra* notes 105, 118.

<sup>29</sup> See *supra* note 9 and accompanying text.

<sup>30</sup> Cf. Perry Dane, *Doctrine and Deep Structure in the Contraception Mandate Debate* (July 21, 2013) (unpublished manuscript), <http://ssrn.com/sol3/abstract=2296635> [<http://perma.cc/H CZ5-KQPP>] (noting the heated nature of the battle over the contraception mandate and discussing the larger stakes both sides see in the debate).

itself involves a controversial social issue — the status of women’s reproductive rights — much of the reason for the shift in views on accommodation involves another contested field in the American culture wars: the status of gay rights and same-sex marriage. The cause of marriage equality, which seems to be a *fait accompli* awaiting final confirmation from the Court, has come increasingly into conflict with the views of religious objectors to same-sex marriage.<sup>31</sup> Same-sex marriage and its consequences have become a central, foregrounded, socially contested issue. The church-state consensus, drawn into the gravitational pull of this contest, has been put up for grabs as a result. Part III offers some thoughts about the lessons and implications of this debate, both for religious liberty and for the general culture wars that have featured so heavily in the *Hobby Lobby* controversy.

A brief caveat is in order. I offer a particular framework for thinking about the *Hobby Lobby* moment in this Comment. It focuses in particular on LGBT rights and changes in the marketplace as drivers of the controversy surrounding the Court’s ruling. I believe that those factors have been major influences on *Hobby Lobby* as a social and legal moment and have contributed significantly to changes in current views on religious accommodations. But other possible frameworks, and other factors, exist. One of those, obviously, is the status of reproductive rights and women’s access to contraceptive services. I argue in this Comment that despite the emphasis on that subject in *Hobby Lobby*, and especially in Justice Ginsburg’s dissent, other factors were at work in contributing to the degree of public attention and disagreement that accompanied this case. This focus is not intended to deny or disparage the importance of reproductive rights. It is simply intended to direct attention to other factors, less apparent on the face of the opinion, that are nonetheless essential elements of the *Hobby Lobby* moment.

### I. *HOBBY LOBBY* AS AN “EASY CASE”

*Hobby Lobby* involves a clash between two federal laws. The Patient Protection and Affordable Care Act of 2010<sup>32</sup> (ACA) requires employers with fifty or more employees to provide “minimum essential coverage” in their health insurance plans.<sup>33</sup> Penalties for failing to do so are steep: an employer that offers a health care plan but fails to

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<sup>31</sup> For prescient discussions of the issues raised, see generally SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 15.

<sup>32</sup> Pub. L. No. 111-148, 124 Stat. 119 (codified as amended in scattered sections of the U.S. Code).

<sup>33</sup> See 26 U.S.C. § 4980H(a), (c)(2) (2012).

comply with the minimum coverage requirements faces a \$100-per-day penalty for each affected individual.<sup>34</sup> The minimum coverage requirements promulgated by the Department of Health and Human Services (HHS) require coverage for “[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling.”<sup>35</sup>

The initial regulations proposed by HHS offered exemptions for a narrow set of “religious employers,” such as churches and religious orders.<sup>36</sup> They excluded a wide range of religious nonprofits, such as religious universities or hospitals, as well as for-profit businesses. The narrow reach of the exemptions occasioned pushback from individuals and groups outside<sup>37</sup> and inside<sup>38</sup> the Obama Administration.

Ultimately, the Administration expanded the set of accommodations. In addition to the exemption for “religious employers,” the regulations provided that certain religious nonprofits that certified that they qualified for the exemption and objected to some or all of the covered contraceptive services could avoid direct coverage of those services, which would be provided by the insurer.<sup>39</sup> For-profit corporations were ineligible for religious accommodations.

The second statute, RFRA, was passed in response to the Court’s controversial decision in *Employment Division v. Smith*.<sup>40</sup> The statute provides that “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability,” unless the burden is “in furtherance of a compelling governmental interest” and “is the least restrictive means of furthering

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<sup>34</sup> See 26 U.S.C. § 4980D(a)–(b) (2012); see also *Hobby Lobby*, 134 S. Ct. at 2762–64 (describing the contraception mandate).

<sup>35</sup> Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725 (Feb. 15, 2012) (codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147) (alterations in original) (quoting *Women’s Preventive Services Guidelines*, HEALTH RES. & SERVS. ADMIN., U.S. DEP’T OF HEALTH & HUM. SERVS., <http://www.hrsa.gov/womensguidelines> (last visited Sept. 28, 2014) [<http://perma.cc/SQ23-MAT7>]) (internal quotation mark omitted).

<sup>36</sup> See 45 C.F.R. § 147.131(a) (2013).

<sup>37</sup> See, e.g., U.S. Conference of Catholic Bishops, Office of the Gen. Counsel, Comment Letter Re: Interim Final Rules on Preventive Services (Aug. 31, 2011), <http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-to-hhs-on-preventive-services-2011-08.pdf> [<http://perma.cc/6GGK-B8CK>].

<sup>38</sup> See, e.g., MARK HALPERIN & JOHN HEILEMANN, DOUBLE DOWN: GAME CHANGE 2012, at 66–69 (2013); Byron Tau & Donovan Slack, *Biden: We ‘Screwed Up’ Contraception Mandate*, POLITICO (Mar. 1, 2012, 4:18 PM), <http://www.politico.com/politico44/2012/03/biden-we-screwed-up-contraception-debate-116128.html> [<http://perma.cc/8B9T-PJCJ>].

<sup>39</sup> See 45 C.F.R. § 147.131(b)–(c). Similar treatment was offered for self-insured religious organizations. See Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,893 (July 2, 2013) (codified in scattered sections of 26, 29, and 45 C.F.R.). HHS asserted that insurers would incur little or no additional cost as a result. See *id.* at 39,877, 39,883.

<sup>40</sup> 494 U.S. 872 (1990). For discussion of *Smith*, see *infra* pp. 168–70.



that compelling governmental interest.”<sup>41</sup> The statute’s purpose was described as the restoration of “the compelling interest test” set forth in two of the Court’s prior decisions.<sup>42</sup> When Congress passed the Religious Land Use and Institutionalized Persons Act<sup>43</sup> (RLUIPA), however, it deleted a reference to First Amendment law in the section of RFRA defining “exercise of religion.” RLUIPA replaced that language with a broad, freestanding definition of “religious exercise” as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”<sup>44</sup> Congress emphasized that this definition should “be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.”<sup>45</sup> The Court struck down RFRA as applied to the states in 1997.<sup>46</sup> But it has affirmed and vigorously followed RFRA as applied to federal law.<sup>47</sup>

The contraception mandate was challenged by a wide range of plaintiffs.<sup>48</sup> The plaintiffs whose cases were taken up by the Court, Hobby Lobby, Conestoga Wood Specialties, and Mardel, are all closely held corporate enterprises. Mardel operates Christian bookstores; the other businesses sell non-sectarian products but operate according to religious principles.<sup>49</sup> They and their principal owners brought suit challenging the application of the mandate as a matter of both RFRA and the Free Exercise Clause.

Writing for a five-Justice majority, Justice Alito upheld the RFRA claim without deciding any free exercise issues. If it is not heretical to say so of a judgment that has aroused such excitement, the opinion is clear and straightforward, containing fewer rhetorical flights in its forty-nine pages than Justice Kennedy managed to squeeze into a four-page concurrence.

In the wake of the Supreme Court’s decision in *Citizens United v. FEC*,<sup>50</sup> the most hotly anticipated question was whether corporations

<sup>41</sup> 42 U.S.C. § 2000bb-1(a)–(b) (2012).

<sup>42</sup> *Id.* § 2000bb(b)(1) (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972); and *Sherbert v. Verner*, 374 U.S. 398 (1963)).

<sup>43</sup> *Id.* at § 2000cc–2000cc5.

<sup>44</sup> *Id.* § 2000cc-5(7)(A), incorporated by reference in RFRA at 42 U.S.C. § 2000bb-2(4).

<sup>45</sup> *Id.* § 2000cc-3(g).

<sup>46</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).

<sup>47</sup> See *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 423–24 (2006).

<sup>48</sup> See *HHS Mandate Information Central*, BECKET FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/hhsinformationcentral> (last visited Sept. 28, 2014) [<http://perma.cc/YH3-TGYE>].

<sup>49</sup> See *Hobby Lobby*, 134 S. Ct. at 2764–66. For ease of reference, I refer generally to only Hobby Lobby in this Comment.

<sup>50</sup> 130 S. Ct. 876 (2010) (holding that corporations may raise First Amendment claims against government restriction of political expenditures).

could assert claims under the Free Exercise Clause. As it happened, the question the Court decided in *Hobby Lobby* was more prosaic: Are some corporations “persons” entitled to raise statutory claims under RFRA? The answer was yes. The Dictionary Act, which applies here, defines the word “person” to include corporations.<sup>51</sup> Corporate claims have been “entertained” under both RFRA and the Free Exercise Clause.<sup>52</sup> RFRA “was designed to provide very broad protection for religious liberty”<sup>53</sup> and should not be read constrictively. Nothing in the corporate form, which is ultimately a flexible “fiction,” demands that the statute be construed to exclude such claims; the corporations pay the penalty, but “the humans who own and control those companies” feel the sting of the religious burden.<sup>54</sup> Whatever questions might arise in future cases, this one involved “closely held corporations, each owned and controlled by members of a single family.”<sup>55</sup> They were, as Justice Sotomayor noted at oral argument, the perfect plaintiffs for purposes of this question.<sup>56</sup>

The rest of the plaintiffs’ case went smoothly. The penalties for failing to cover the objectionable contraceptive services were sufficient to constitute a substantial burden.<sup>57</sup> HHS’s most viable argument was that the claim of a substantial burden was too attenuated, given the distance between the provision of coverage and the individual choices of employees whether to use particular contraceptive methods. Following its precedent in *Thomas v. Review Board*,<sup>58</sup> however, the Court declined to second-guess the religious judgment of the plaintiffs, whose sincerity the government did not question, that the provision of coverage entailed wrongful cooperation with a grave moral evil.<sup>59</sup>

The burden under RFRA then shifted to the government. Although the Court noted that RFRA’s test for a compelling government interest requires a particularized inquiry into “the asserted harm of granting specific exemptions to [the] particular religious claimants” challenging the mandate,<sup>60</sup> and showed some solicitude for the plaintiffs’ contention that HHS’s interest could not be considered compelling given the

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<sup>51</sup> *Hobby Lobby*, 134 S. Ct. at 2768 (citing Dictionary Act, 1 U.S.C. § 1 (2012)).

<sup>52</sup> *See id.* at 2768–70.

<sup>53</sup> *Id.* at 2767; *see also id.* at 2772 (citing 42 U.S.C. § 2000cc-3(g)).

<sup>54</sup> *Id.* at 2768.

<sup>55</sup> *Id.* at 2774.

<sup>56</sup> *See* Transcript of Oral Argument at 19, *Sebelius v. Hobby Lobby Stores*, Nos. 13-354, 13-356, 2014 WL 1219115 at \*19, *decided sub nom.* *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/13-354\\_3ebh.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-354_3ebh.pdf) [<http://perma.cc/RK7G-LQC3>].

<sup>57</sup> *See Hobby Lobby*, 134 S. Ct. at 2775–76.

<sup>58</sup> 450 U.S. 707 (1981).

<sup>59</sup> *See Hobby Lobby*, 134 S. Ct. at 2778–79.

<sup>60</sup> *Id.* at 2779 (quoting *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 431 (2006)) (internal quotation marks omitted).

other exemptions to the mandate,<sup>61</sup> it proceeded on the assumption that the government had shown a compelling interest.<sup>62</sup>

The final question was whether the government had selected the “least restrictive means” of achieving this interest.<sup>63</sup> Here, the government was hoist by its own petard, having strenuously maintained, by way of justifying the exemption scheme for nonprofits, that the exemption would fully cover female employees of those entities without either the insurers or the employees incurring serious additional costs.<sup>64</sup> Under the circumstances, it was not hard for the majority to conclude that the nonprofit exemption mechanism *could* be extended to objecting closely held for-profit corporations, in a way that neither “impinge[d] on the plaintiffs’ religious belief[s]” nor failed to “serve[] HHS’s stated interests equally well.”<sup>65</sup>

Writing for a four-member minority, Justice Ginsburg dissented, blasting the majority for a “decision of startling breadth”<sup>66</sup> that was too accepting of religious exemptions from general laws and too willing to require the public to bear the costs of those exemptions.<sup>67</sup> The Court, she charged, wrongly treated RFRA “as a bold initiative departing from, rather than restoring, pre-*Smith* jurisprudence.”<sup>68</sup> Congress had “enacted RFRA to serve a far less radical purpose” than that.<sup>69</sup>

On the merits, Justice Ginsburg charged, “the Court falter[ed] at each step of its analysis.”<sup>70</sup> The existing caselaw did not support the extension of the right to engage in religious exercise, which is “characteristic of natural persons, not artificial legal entities,” to for-profit corporations.<sup>71</sup> *Some* “artificial legal entities” should be protected, because “[r]eligious organizations exist to foster the interests of persons subscribing to the same religious faith,”<sup>72</sup> but the line should be drawn

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<sup>61</sup> See *id.* at 2780. Justice Kennedy wrote separately to underscore “the importan[ce] [of] confirm[ing]” the “premise . . . that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees.” *Id.* at 2786 (Kennedy, J., concurring).

<sup>62</sup> See *id.* at 2780 (majority opinion).

<sup>63</sup> *Id.* at 2781 (quoting 42 U.S.C. § 2000bb-1(b)(2) (2012)).

<sup>64</sup> See *id.* at 2781–82; Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,882 (July 2, 2013) (codified in scattered sections of 26, 29, and 45 C.F.R.).

<sup>65</sup> *Hobby Lobby*, 134 S. Ct. at 2782; see also *id.* at 2786 (Kennedy, J., concurring) (emphasizing, with reference to the nonprofit exemption mechanism, that “the record in these cases shows that there is an existing, recognized, workable, and already-implemented framework to provide coverage” to female employees).

<sup>66</sup> *Id.* at 2787 (Ginsburg, J., dissenting).

<sup>67</sup> See *id.*

<sup>68</sup> *Id.* at 2791–92.

<sup>69</sup> *Id.* at 2787.

<sup>70</sup> *Id.* at 2793.

<sup>71</sup> *Id.* at 2794. Justices Breyer and Kagan did not join this section of the dissent.

<sup>72</sup> *Id.* at 2795.

at “for-profit corporations.”<sup>73</sup> Nor could the plaintiffs show a substantial burden, because of the attenuation between any religious claims by the corporate owners and the independent contraceptive choices of their employees.<sup>74</sup> The government’s interests in “public health and women’s well being,” she emphasized, were clearly compelling.<sup>75</sup> And what she described as the “let the government pay”<sup>76</sup> approach of the majority on the least-restrictive-means test failed to shield female employees from potential “logistical and administrative obstacles,”<sup>77</sup> and would lead to an endless stream of accommodation demands by for-profit corporations.<sup>78</sup>

In the face of an eloquent dissent, much of which commanded four votes on the Court, it is surely a purposeful exaggeration to call *Hobby Lobby* an easy case, as I have done here. Better, perhaps, to call the Court’s decision highly straightforward. Justice Kennedy is right to pay tribute to Justice Ginsburg’s “powerful dissent.”<sup>79</sup> But he is right, too, to dismiss it as overstated.<sup>80</sup> And he correctly places the credit (or blame) where it lies: not with Justice Alito’s opinion, strong as it is, but with RFRA, which supplies the propulsion in both *Hobby Lobby* and Chief Justice Roberts’s equally clear opinion in *Gonzales v. O Centro Espírita Beneficente União do Vegetal*.<sup>81</sup> Both opinions move forward not under their own steam, but under the compulsion of a powerful statute — one “designed to provide very broad protection for religious liberty.”<sup>82</sup>

It would be reasonable in these circumstances for those who dislike the outcome in *Hobby Lobby* to raise doubts about RFRA itself, although I do not share those doubts. But at least such a view would properly place the blame where it lies. It is the statute, not the decision, that provides *Hobby Lobby* with its “startling breadth.”<sup>83</sup> Given

<sup>73</sup> *Id.* at 2796.

<sup>74</sup> *See id.* at 2798–99.

<sup>75</sup> *Id.* at 2799.

<sup>76</sup> *Id.* at 2802.

<sup>77</sup> *Id.* (quoting Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,888 (July 2, 2013) (codified in scattered sections of 26, 29, and 45 C.F.R.)) (internal quotation mark omitted).

<sup>78</sup> *See id.* at 2802–03, 2805–06.

<sup>79</sup> *Id.* at 2785 (Kennedy, J., concurring).

<sup>80</sup> *Id.*

<sup>81</sup> 546 U.S. 418 (2006).

<sup>82</sup> *Hobby Lobby*, 134 S. Ct. at 2767; *see also id.* at 2785 (Kennedy, J., concurring) (“As the Court notes, under our precedents, RFRA imposes a ‘stringent test.’” (quoting *id.* at 2761 (majority opinion)); *O Centro*, 546 U.S. at 436 (“RFRA operates by mandating consideration, under the compelling interest test, of exceptions to ‘rule[s] of general applicability.’” (alteration in original) (quoting 42 U.S.C. § 2000bb-1(a))).

<sup>83</sup> *Hobby Lobby*, 134 S. Ct. at 2787 (Ginsburg, J., dissenting); *cf.* Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. REV. 221, 254 (noting that RFRA is a consequence of the Court’s earlier decision in *Smith*: “[r]eligious liberty was committed into the hands of shift-

that RFRA has been around for twenty years, and was reinforced by amendment almost fifteen years ago, it is rather late in the day to be startled. To the extent that RFRA is a “putative super-statute,”<sup>84</sup> one with “quasi-constitutional” status,<sup>85</sup> it cannot be surprising that it is powerful medicine.

## II. FOREGROUNDED CONTESTATION AROUND *HOBBY LOBBY*

*Hobby Lobby* was not, in doctrinal terms, the hardest case of the Term. Nor, given the possibility of a legislative response, was it unfixable even if it *was* wrong. Even for those who worried that a victory for the plaintiffs might disrupt the provision of women’s contraceptive care, the case was hardly a disaster.<sup>86</sup> As with the Court’s decision on the ACA’s individual mandate,<sup>87</sup> to which in many respects the contraception-mandate litigation was a sequel, the Court chastened the Administration but did not prevent it from substantially achieving its aims. Nevertheless, *Hobby Lobby* was indisputably the most prominent decision of the Term — and the most excoriated. How can we explain this apparent gap between a clearly written, politically revisable opinion in the case, and the sheer amount of controversy it engendered?

The answer lies outside the four corners of both RFRA and the ACA, and well outside the firm but relatively soft-spoken words of the opinion in *Hobby Lobby* itself. The majority — perhaps because it *was* the majority — did not depict itself as taking sides in a momentous culture war,<sup>88</sup> although it is hard to read Justice Ginsburg’s

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ing political majorities precisely to the extent that the Court withdrew judicial protection under the Constitution”).

<sup>84</sup> William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1230 (2001); see also *id.* at 1216 (defining a “super-statute” as “a law or series of laws that . . . seeks to establish a new normative or institutional framework for state policy” and that, if it “stick[s] in the public culture,” ends up having a “broad effect on the law”). Although I doubt the majority would put it in these terms, much of the heat of the public and judicial contestation over *Hobby Lobby* might be seen as a struggle over whether RFRA *is* a super-statute.

<sup>85</sup> Laycock, *supra* note 83, at 254.

<sup>86</sup> See *Hobby Lobby*, 134 S. Ct. at 2782 (concluding that the accommodation for nonprofits, if extended to for-profit corporations, would ensure that “female employees would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives”); see also, e.g., Andrew Koppelman, *The Hobby Lobby Decision Was a Victory for Women’s Rights*, THE NEW REPUBLIC (June 30, 2014), <http://www.newrepublic.com/article/118488/hobby-lobby-decision-was-victory-womens-rights> [<http://perma.cc/U72S-3K3V>].

<sup>87</sup> Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

<sup>88</sup> That Justice Alito wrote his opinion for a majority of the Court might have affected the tone of the opinion for several reasons. The opinion might have been written to avoid directly engaging culture-war issues in order to secure votes. It might have been written in this manner to deflect attention away from hotly contested issues, which a dissent might naturally want to emphasize. Or it might simply reflect the general rhetorical approach of majority opinions, which

dissent in any other way. Just the same, the case's status as both a product of and a contributor to the larger culture war is unmistakable. To understand the furor over *Hobby Lobby*, it is necessary to turn away from the opinion itself and examine the particular moment of foregrounded legal and cultural contestation it represents.

*A. Legal Contestation: Reconsidering the Accommodation of Religion*

Accommodation of religion is an aboriginal feature of American public law. From the earliest days of the Republic, exemptions from legally imposed burdens on religious belief and practice “were seen as a natural and legitimate response to the tension between law and religious convictions.”<sup>89</sup> Although the principle was not universally agreed upon — Thomas Jefferson famously insisted in his letter to the Danbury Baptist Association that “[man] has no natural right in opposition to his social duties”<sup>90</sup> — accommodations were widely granted by both Congress and the states to religious groups or individuals confronted with laws that burdened their religious obligations. Some of those accommodations, with exemptions from military service being perhaps the most prominent example, necessarily entailed the shifting of costs onto third parties.<sup>91</sup> There have been arguments over whether that history suggests that the Free Exercise Clause *requires* a judicially enforceable right to religious exemptions,<sup>92</sup> or whether it means only that accommodations *may* be granted by legislatures or state constitutions.<sup>93</sup> But neither position denies that *some* branch of government could opt to accommodate religious objectors to general laws.

For close to thirty years, the Court's view was that religious exemptions — even from neutral, generally applicable laws — were more than permissible: they were mandatory and judicially enforceable. The case that announced this rule, *Sherbert v. Verner*,<sup>94</sup> involved a non-neutral law: the unemployment compensation law in question singled out Sunday worshippers for accommodation and thus discrimi-

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tend to adopt an official rather than a personal voice and to impart an air of inevitability and obviousness, whether warranted or not, to the prevailing view.

<sup>89</sup> Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1466 (1990).

<sup>90</sup> Letter from Thomas Jefferson to a Committee of the Danbury Baptist Ass'n (Jan. 1, 1802), in 16 THE WRITINGS OF THOMAS JEFFERSON 281, 281–82 (A. Lipscomb ed., 1903).

<sup>91</sup> See McConnell, *supra* note 89, at 1468–69 (offering examples and noting that religious exemptions from military service imposed “high costs” on those who were required to serve, *id.* at 1468).

<sup>92</sup> See, e.g., *id.* at 1511–13.

<sup>93</sup> See, e.g., Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 916–17, 929–30 (1992).

<sup>94</sup> 374 U.S. 398 (1963).

nated among religious beliefs.<sup>95</sup> Later cases, however, made clear that an exemption would be required unless the countervailing government interest was “of the highest order and . . . not otherwise served,”<sup>96</sup> even where the regulation in question was indisputably neutral.<sup>97</sup> The rule may have been weakly or inconsistently applied,<sup>98</sup> but there was little doubt that it *was* the rule.<sup>99</sup>

All this changed with *Employment Division v. Smith*. There, the Court held that “an individual’s religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”<sup>100</sup> The Free Exercise Clause would no longer be read to “relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”<sup>101</sup> But *Smith* made clear that whatever the fate of judicially ordered exemptions, political actors remained free to create “nondiscriminatory religious-practice exemption[s]” from generally applicable laws.<sup>102</sup>

Given the shift in views on accommodation of religion that has accompanied the contraception-mandate controversy, it is worth recalling just how harshly *Smith* was viewed at the time, by political liberals and progressives as well as religious conservatives. Writing in these pages soon after the Court’s decision, Professor Robin West described *Smith* as “perhaps the most politically illiberal decision of the

<sup>95</sup> See *id.* at 406. Note, however, that the Court did not treat the equality argument as *necessary* to its conclusion that the plaintiff was entitled to an exemption. See *id.* (“The unconstitutionality of the disqualification of the Sabbatarian is thus *compounded* by the religious discrimination which South Carolina’s general statutory scheme necessarily effects.” (emphasis added)).

<sup>96</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

<sup>97</sup> See *id.* at 220 (requiring an exemption for children of objecting Amish parents from a mandatory school attendance law).

<sup>98</sup> See, e.g., CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 42–45 (2007); Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 300 (1992); cf. James E. Ryan, Note, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1412, 1416–17 (1992) (noting the low success rate in the lower courts, in the decade leading up to the Supreme Court’s decision in *Smith*, of religious exemption claims under the compelling interest test).

<sup>99</sup> See, e.g., Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1109–10, 1120–21 (1990).

<sup>100</sup> *Emp’t Div. v. Smith*, 494 U.S. 872 878–79. The opinion of the Court, written by Justice Antonin Scalia, distinguished or cabined the earlier cases but did not overrule them. Few people, however, including *Smith*’s defenders, credited this effort. See, e.g., Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 756 n.50 (1992) (calling the distinctions from prior cases offered in *Smith* “so sophistic as to suggest that Justice Antonin Scalia relied upon them only for the purpose of maintaining his majority”).

<sup>101</sup> *Smith*, 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)).

<sup>102</sup> *Id.* at 890.

term.”<sup>103</sup> The majority, she wrote, had “reversed long-settled liberal principles of free exercise jurisprudence that explicitly balanced the impact on the individual’s liberty against the state’s interest.”<sup>104</sup> The general view<sup>105</sup> was that *Smith* had “drastically diminished,”<sup>106</sup> even “gutted,”<sup>107</sup> “the protections of the Free Exercise Clause.”<sup>108</sup>

This consensus helped fuel the religiously and politically diverse coalition that midwived RFRA.<sup>109</sup> Both the critical academic reaction to *Smith* and the swift legislative response were emblematic of a widely held view: religious accommodations and exemptions are a good thing. *Smith* was wrong to eliminate them as a matter of judicially enforceable constitutional right. But we can, and should, at least take the opinion at its word and be “solicitous” of religious liberty through the legislature.<sup>110</sup> Koppelman has nicely summed up that consensus on religious accommodation:

There is considerable dispute about whether the decision when to accommodate ought to be one for legislatures or courts, but that debate rests on the assumption, common to both sides, that someone should make such accommodations. The sentiment in favor of accommodation is nearly unanimous in the United States.<sup>111</sup>

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<sup>103</sup> Robin West, *The Supreme Court, 1989 Term — Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 53 (1990).

<sup>104</sup> *Id.* at 54.

<sup>105</sup> This position was not unanimous. See, e.g., Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245 (1991); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991) (criticizing Justice Scalia’s opinion in *Smith* but defending the rejection of judicially enforceable religious accommodations).

<sup>106</sup> Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503, 503 (1992).

<sup>107</sup> *Id.* at 524.

<sup>108</sup> *Id.* at 503; accord Norman Dorsen, *A Tribute to Justice William Brennan, Jr.*, 104 HARV. L. REV. 15, 19 (1990) (describing *Smith* as having “weakened the free exercise clause”); Frank Michelman, *Saving Old Glory: On Constitutional Iconography*, 42 STAN. L. REV. 1337, 1355 (1990) (doubting that “most civil libertarian constitutionalists” would support the narrow reading of *Yoder* offered in *Smith*); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 216 (1992) (describing *Smith* as problematically “majoritarian[.]” and calling it as part of a “retreat on free exercise”).

<sup>109</sup> See Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 210–11 & nn.9–10 (1994).

<sup>110</sup> *Emp’t Div. v. Smith*, 494 U.S. 872, 890 (1990).

<sup>111</sup> KOPPELMAN, *supra* note 4, at 5; see also MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE 120 (2008) (“[O]ver time Congress and the Court have ironed out their differences to at least some extent, converging on a regime that protects at least some judicial accommodations and allows others to be introduced legislatively, at both the federal and the state level. This part of our tradition, at least right now, is in a reasonably healthy state.”); Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER (forthcoming 2015) (manuscript at 1), <http://ssrn.com/abstract=2466571> [<http://perma.cc/DUS4-U99Y>] (“Almost no one thinks that American law would be truly and adequately respectful of religious



Much has changed since *Smith* was decided. Indeed, much has changed even in the short time since Koppelman wrote those words. In particular, recent years have witnessed the ascendance of a strong form of legal egalitarianism.<sup>112</sup> For people holding that view, claims for judicially enforceable exemptions from general laws may be seen as little more than “a special interest demand.”<sup>113</sup>

From this egalitarian perspective, *Smith* does not go far enough. The consensus in favor of accommodation of religion that Koppelman describes seems to have weakened, if not collapsed. A substantial body of opinion on this issue has moved from the view that *Smith* erred grievously by rejecting the prior regime of free exercise exemptions from generally applicable law, to the view that legislative exemptions are permitted but subject to careful cabining,<sup>114</sup> to a broader questioning of religious accommodations altogether.

We may put the point more precisely. Arguments for religious accommodation have hardly vanished. *Hobby Lobby* itself is proof of that, and the principle still has scholarly advocates.<sup>115</sup> What has changed is that accommodation has become highly contestable — *and* the question of accommodation has moved from the background to the foreground of contestation on church-state issues. In a way that it was not until very recently, the question of religious accommodation is in play.

One example of this shift is especially relevant to the *Hobby Lobby* moment. Last spring, with *Hobby Lobby* already teed up in the Supreme Court, the Mississippi legislature considered whether to pass its own Religious Freedom Restoration Act. Given the timing and some of the bill’s content, objections to its passage were to be expected. One group of law professors, all of them prominent in church-state scholarship, wrote urging the legislature to reject the bill.<sup>116</sup> In addition to

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freedom if the law offered no avenue to accommodate deeply held, conscientious religious commitments.”)

<sup>112</sup> Professor Steven Smith calls this movement “secular egalitarianism.” Steven D. Smith, *Religious Freedom and Its Enemies, or Why the Smith Decision May Be a Greater Loss Now than It Was Then*, 32 CARDOZO L. REV. 2033, 2046 (2011). That label may be accurate if it is taken to refer specifically to the position that “legal decisions,” broadly understood, “should be based on secular grounds,” and that equality is a “virtually unquestioned” secular value. *Id.* But not all stringent egalitarians are nonreligious, and I fear that the label risks misleading casual readers.

<sup>113</sup> Laycock, *supra* note 7, at 422; *see also*, e.g., HAMILTON, *supra* note 13, at 1–3, 8–9, 349–51.

<sup>114</sup> Various versions of this position are canvassed in Douglas Laycock, *The Religious Exemption Debate*, 11 RUTGERS J.L. & RELIGION 139, 157–63 (2009).

<sup>115</sup> *See*, e.g., Mark L. Rienzi, *The Case for Religious Exemptions — Whether Religion Is Special or Not*, 127 HARV. L. REV. 1395 (2014) (book review); *see also* HORWITZ, *supra* note 6, at 191–92.

<sup>116</sup> *See* Letter from Ira C. Lupu, Professor of Law Emeritus, George Wash. Univ., et al., to Phillip Gunn, Speaker, Miss. House of Representatives, et al. (Mar. 10, 2014), [http://content.thirdway.org/publications/795/Letter\\_by\\_Religious\\_Liberty\\_Scholars\\_Opposing\\_Mississippi\\_Bill\\_2681.pdf](http://content.thirdway.org/publications/795/Letter_by_Religious_Liberty_Scholars_Opposing_Mississippi_Bill_2681.pdf) [<http://perma.cc/6MAN-KWYE>] [hereinafter Mississippi RFRA Letter].

making specific criticisms of the bill, they added this candid — and telling — peroration:

Twenty years ago, the Religious Freedom Restoration Act might have been less fraught with legal and policy peril. Now, when it will most likely be both seen and used as a shield against enforcement of civil rights laws (current and future), enacting it seems like a uniquely poor idea. Doing so will harm the state's reputation as well as its legal culture.<sup>117</sup>

It is not striking that the Mississippi bill should have drawn opposition. Beyond any doubts about the merits of the specific provisions of the bill in question, some of the letter's signers had already voiced more general reservations about legislative accommodations of religion.<sup>118</sup> What *is* striking is the particular argument employed here. RFRA's one-time legitimacy is conceded, if grudgingly. Today, however, the signatories argue that such statutes are more problematic — not because of their particulars alone, but because of how they will be “*seen*.”<sup>119</sup>

One hesitates to build an argument on a turn of phrase. In this case, however, the language is important. It captures the movement of the religious accommodations question from the background to the foreground of contestation in our legal and political culture, and gestures at some of the reasons for this change. Even at the height of support for RFRA and other legislative accommodations for religion, after all, it was hardly unforeseeable that these laws might conflict with nondiscrimination statutes.<sup>120</sup> At the time, however, those concerns had to be balanced against what was then seen as the positive value of religious accommodation itself.

The balance of concerns has now shifted significantly. As I argue below, many of the reasons for that shift are obvious. Less visible, however, is the fact that, in the process, an increasing number of people have come to see religious accommodation not just as losing in the

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<sup>117</sup> *Id.* at 6.

<sup>118</sup> See, e.g., Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 CARDOZO L. REV. 565 (1999); Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555 (1991); Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743 (1992); Schwartzman, *supra* note 7. Other signers have at least treated the constitutionality of legislative accommodations as a given in the past. See, e.g., Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263, 1292–96 (2008).

<sup>119</sup> Mississippi RFRA Letter, *supra* note 116, at 6 (emphasis added); cf. Paul Horwitz, “*A Troublesome Right*”: *The “Law” in Dworkin’s Treatment of Law and Religion*, 94 B.U. L. REV. 1225, 1238 & n.100 (2014) (suggesting that for those who believe that law should express the values of nondisparagement or equal dignity, the very existence of some religious accommodations or exemptions may increasingly be seen as harmful in and of itself).

<sup>120</sup> See, e.g., Ira C. Lupu, *Of Time and the RFRA: A Lawyer’s Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 208–10 (1995).

balance against other interests,<sup>121</sup> but as not presenting much of an interest at all. For some, religious accommodation has become virtually synonymous with, or code for, discrimination.<sup>122</sup> It is not so much losing in the balance as dropping out of the equation altogether. Although the phrase is perhaps not meant to suggest this much, the letter's authors are at least strategically smart to suggest that religious accommodation statutes are now viewed very differently by the legal and political culture. The ground has shifted from underneath these statutes.

### B. Social Contestation

Shifts in contestation on legal meanings do not occur in a vacuum. They are driven by social contestation: by what positions are treated as contestable or uncontestable, utterable or unutterable. Here, too, there have been significant changes. The contraception-mandate litigation, and the public response to the decision in *Hobby Lobby*, may shed further light on these changes.

1. *LGBT Rights.* — *Hobby Lobby* involved the use of contraceptives, whose acceptability is “as close to cultural consensus as we get.”<sup>123</sup> Much of the early critical reaction to *Hobby Lobby* understandably focused on women's access to contraceptive services, which is indeed an important public health issue.<sup>124</sup> For a variety of reasons, some sincere and some strategic, most of the public criticism and political vote-whipping in response to *Hobby Lobby* has focused on women's healthcare and equality.<sup>125</sup> But this issue was not the sole cause of the pre- and post-decision controversy surrounding *Hobby Lobby*.

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<sup>121</sup> See, e.g., Feldblum, *supra* note 15 (arguing that conflicts between religious liberty claims and nondiscrimination claims should generally be decided against the religious claimants, but insisting that the burdens on religious individuals and institutions in those cases are real and substantial).

<sup>122</sup> See, e.g., JAY MICHAELSON, POLITICAL RESEARCH ASSOCS., REDEFINING RELIGIOUS LIBERTY: THE COVERT CAMPAIGN AGAINST CIVIL RIGHTS (2013), <http://www.politicalresearch.org/resources/reports/full-reports/redefining-religious-liberty> [<http://perma.cc/CRF3-JYVT>].

<sup>123</sup> Ross Douthat, *Sex and Consequences*, N.Y. TIMES: EVALUATIONS, July 8, 2014, <http://douthat.blogs.nytimes.com/2014/07/08/sex-and-consequences/> [<http://perma.cc/7VRN-R48L>]; see also, e.g., Frank Newport, *Americans, Including Catholics, Say Birth Control Is Morally OK*, GALLUP (May 22, 2012), <http://www.gallup.com/poll/154799/americans-including-catholics-say-birth-control-morally.aspx> [<http://perma.cc/WW5F-CNF8>].

<sup>124</sup> See, e.g., Elizabeth Sepper, *Contraception and the Birth of Corporate Conscience*, 22 AM. U. J. GENDER SOC. POL'Y & L. 303, 336 (2014). Justice Kennedy wrote separately in *Hobby Lobby* to emphasize this point. See 134 S. Ct. at 2785–86 (Kennedy, J., concurring).

<sup>125</sup> See, e.g., *Hobby Lobby Decision: Republican Senate Candidates Would Go Further than SCOTUS, Support Radical Measures to Block Birth Control*, DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE (June 30, 2014), <http://www.dscc.org/pressrelease/hobby-lobby-decision-republican-senate-candidates-would-go-further-scotus-support> [<http://perma.cc/XWL2-YSE2>]. By contrast, while much of the post-decision discussion involved reproductive rights, most of the pre-decision discussion involved LGBT issues.

The Court's decision, after all, was *premised* on the assurance that women's access to reproductive services would be secure, regardless of employer.<sup>126</sup> The majority may have glossed over the practical difficulties involved in making this assurance a reality, but the fact remains that the plaintiffs won only because both the government and the majority made clear that women's access to reproductive services would be unimpaired. To be sure, the decision would still have been controversial had its only subject been women's health. But more was needed to make it explosive.

The "more," it seems clear, is LGBT rights, specifically same-sex marriage and ancillary issues. The change in views on this subject is a paradigmatic example of the way that social meanings, and ultimately legal readings, can move from uncontestability at one end of the spectrum, through a period in which their meaning is "contested" and "political,"<sup>127</sup> and ultimately to uncontestability at the other end of the spectrum. Public views on LGBT rights and same-sex marriage have made much of this journey, in a very short time.<sup>128</sup>

Those views have in turn fed changes in judicial understandings of the plausible meaning of the Constitution's broad guarantees. Fifty years ago, "homosexual practices" sat comfortably on the list of seemingly self-evident exclusions from an evolving interpretation of the Due Process Clause and its protections for conduct within "lawful marriage."<sup>129</sup> The law has changed dramatically since then.<sup>130</sup> Last Term's decision in *United States v. Windsor*<sup>131</sup> seems likely to lead soon to final confirmation in the Court that the fundamental right that

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<sup>126</sup> See *Hobby Lobby*, 134 S. Ct. at 2760 ("The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing.").

<sup>127</sup> Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 417 (1995).

<sup>128</sup> See, e.g., KLARMAN, *supra* note 21, at 130–34, 149–52, 156–57; ROBERT D. PUTNAM & DAVID E. CAMPBELL, *AMERICAN GRACE* 402–06 (2010).

<sup>129</sup> *Poe v. Ullman*, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting) ("[The] laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis."); see also Lessig, *Fidelity and Constraint*, *supra* note 9, at 1427 (noting that in roughly the same time period, the view that homosexuality was a "disease" was "common ground for liberals as well as conservatives" on the Court (citing *Boutilier v. INS*, 387 U.S. 118, 127 (1967) (Douglas, J., dissenting))).

<sup>130</sup> See generally *Developments in the Law — Sexual Orientation & Gender Identity*, 127 HARV. L. REV. 1680 (2014) (discussing legal and social changes in this area).

<sup>131</sup> 133 S. Ct. 2675 (2013).

not long ago “dare[d] not speak its name”<sup>132</sup> emphatically includes the right to form a family.<sup>133</sup>

These myriad changes have not just been a matter of background contestation, of slow and quiet change. They have occupied the foreground of public political and cultural discussion.<sup>134</sup> And given the background presence of antidiscrimination laws, which in many states now cover sexual orientation,<sup>135</sup> they raise corollary legal issues concerning the religiously motivated conscientious refusal to provide services to gays and lesbians in relation to same-sex marriages.<sup>136</sup>

Gay rights and same-sex marriage barely featured at all in the texts of the opinions in *Hobby Lobby*. They surfaced briefly in Justice Ginsburg’s dissent and its list of potential “minefield” issues raised by the majority’s “immoderate reading of RFRA.”<sup>137</sup> In noting that “Hobby Lobby and Conestoga surely do not stand alone as commercial enterprises seeking exemptions from generally applicable laws on the basis of their religious beliefs,”<sup>138</sup> Justice Ginsburg allowed a brief citation to the notorious *Elane Photography, LLC v. Willock*<sup>139</sup> case to hint at these broader questions.<sup>140</sup> The majority was even more circumspect. It dismissed the dissent’s concerns that “discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction,” with the curt assertion that “[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and

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<sup>132</sup> Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004).

<sup>133</sup> See *Marriage Litigation*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/litigation> (last visited Sept. 28, 2014) [<http://perma.cc/GKF4-XXGQ>] (maintaining an updated list of federal and state court decisions on same-sex marriage).

<sup>134</sup> See, e.g., KLARMAN, *supra* note 21, at 111–13; PUTNAM & CAMPBELL, *supra* note 128, at 396–401.

<sup>135</sup> See *Non-Discrimination Laws: State by State Information — Map*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/maps/non-discrimination-laws-state-state-information-map> (last visited Sept. 28, 2014) [<http://perma.cc/6RLT-ERNL>] (showing states that include sexual orientation among the covered classes protected by antidiscrimination laws). The number is substantial but still covers fewer than half the states.

<sup>136</sup> For an early, but prescient, overview of these issues, see SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 15.

<sup>137</sup> *Hobby Lobby*, 134 S. Ct. at 2805 (Ginsburg, J., dissenting).

<sup>138</sup> *Id.* at 2804.

<sup>139</sup> 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014) (upholding, against a challenge rooted in free speech rather than free exercise, an antidiscrimination suit against a for-profit photography business whose owners refused, on religious grounds, to photograph a lesbian commitment ceremony), *cited in Hobby Lobby*, 134 S. Ct. at 2805 (Ginsburg, J., dissenting).

<sup>140</sup> The dissent also cited *In re Minnesota ex rel. McClure*, 370 N.W.2d 844 (Minn. 1985), which upheld the application of a state employment discrimination law to a group of for-profit health clubs whose owners insisted for religious reasons that “fornicators and homosexuals,” among others, were not suitable employees. See *id.* at 847, *cited in Hobby Lobby*, 134 S. Ct. at 2804–05 (Ginsburg, J., dissenting).

prohibitions on racial discrimination are precisely tailored to achieve that critical goal.”<sup>141</sup> Other forms of discrimination, including both gender and sexual orientation discrimination, and discrimination in contexts outside employment, such as the provision of services in places of public accommodation, went unmentioned.

In this case, however, the absence of evidence is not evidence of absence. Slightly less than a year elapsed between the New Mexico Supreme Court’s decision in *Elane Photography* and the decision in *Hobby Lobby*. In that time, *Elane Photography* and its implications have figured in both the contraception-mandate debate and related controversies concerning religious accommodations.<sup>142</sup> Both *Elane Photography* and *Hobby Lobby* played a role in the acrimonious state-by-state debate over proposed religious accommodations laws in 2013 and 2014,<sup>143</sup> and in national reactions to those events, such as the furor over whether Arizona Governor Jan Brewer should veto legislation that would have allowed business owners with religious objections to assert a claim under that state’s mini-RFRA if sued by private parties invoking state or local antidiscrimination laws.<sup>144</sup> The two cases were yoked together by commentators who asked in advance of the *Hobby Lobby* oral argument whether a Supreme Court ruling in favor of the plaintiffs would allow “business owners [to] use religion as an excuse to discriminate against LGBT people”<sup>145</sup> and raised alarms about an

<sup>141</sup> *Hobby Lobby*, 134 S. Ct. at 2783.

<sup>142</sup> See, e.g., Sarah Lipton-Lubet, *Contraceptive Coverage Under the Affordable Care Act: Dueling Narratives and Their Policy Implications*, 22 AM. U. J. GENDER SOC. POL’Y & L. 343 (2014); Louise Melling, *Will We Sanction Discrimination?: Can “Heterosexuals Only” Be Among the Signs of Today?*, 60 UCLA L. REV. DISCOURSE 248 (2013); Linda Greenhouse, *Early Warning*, N.Y. TIMES, Apr. 2, 2014, <http://www.nytimes.com/2014/04/03/opinion/early-warning.html> [<http://perma.cc/JC7Z-ECF5>]; Kaimipono D. Wenger, *License to Discriminate? Religious Freedom Discrimination, Elane Photography, and S.B. 1062*, CONCURRING OPINIONS (Feb. 21, 2014) <http://www.concurringopinions.com/archives/2014/02/license-to-discriminate-religious-freedom-discrimination-elane-photography-and-s-b-1062.html> [<http://perma.cc/F6GL-SBNZ>].

<sup>143</sup> See, e.g., Paul Horwitz, *Same-Sex Marriage & Religious Freedom: A New Round in the Old Debate Between Liberty & Equality*, COMMONWEAL, Apr. 11, 2014, at 8, <https://www.commonwealmagazine.org/same-sex-marriage-religious-freedom> [<http://perma.cc/L2V7-NJU5>]; Laycock, *supra* note 15, at 871; Lupu, *supra* note 111, at 8–9.

<sup>144</sup> See S.B. 1062, 51st Leg., 2d Reg. Sess. § 2 (Ariz. 2014), <http://www.azleg.gov/legtext/51leg/2r/bills/sb1062p.pdf> [<http://perma.cc/EVM9-PXUT>]; Shadee Ashtari, *Arizona Senate Passes Bill Allowing Discrimination on Basis of Religious Freedom*, HUFFINGTON POST (Feb. 20, 2014, 1:04 PM), [http://www.huffingtonpost.com/2014/02/20/arizona-religious-freedom-discrimination\\_n\\_4823334.html](http://www.huffingtonpost.com/2014/02/20/arizona-religious-freedom-discrimination_n_4823334.html) [<http://perma.cc/6P5U-24TK>] (noting that one of the bill’s sponsors cited the ruling in *Elane Photography* in support of the law). The bill was vetoed. See Letter from Janice K. Brewer, Governor of Ariz., to Andy Biggs, President of the Ariz. Senate (Feb. 26, 2014), [http://azgovernor.gov/dms/upload/PR\\_022614\\_SB1062VetoLtr.pdf](http://azgovernor.gov/dms/upload/PR_022614_SB1062VetoLtr.pdf) [<http://perma.cc/5WVS-K77B>] (discussing the veto of this bill).

<sup>145</sup> Adam Winkler, *Will the Supreme Court License Anti-Gay Discrimination?*, HUFFINGTON POST (Mar. 24, 2014, 9:28 AM), [http://www.huffingtonpost.com/adam-winkler/will-the-supreme-court-li\\_b\\_5020848.html](http://www.huffingtonpost.com/adam-winkler/will-the-supreme-court-li_b_5020848.html) [<http://perma.cc/483M-5YPV>]; cf. Horwitz, *supra* note 143, at 8–9.

era of “Gay Jim Crow.”<sup>146</sup> Conversely, opponents of same-sex marriage painted both cases as twin fronts in a “Silent War on Religious Liberty.”<sup>147</sup> If both wings of the *Hobby Lobby* Court barely mentioned the conflict between religious liberty and equality for same-sex couples, it might have had less to do with prudence or minimalism, and more to do with the fact that all the epithets had already been used up.

The point, to be clear, is not that a case involving real or perceived access to contraceptive services is not significant in itself. It is clearly an important substantive issue; it has been a focus of legislative debate at the state level in recent years; and it was a prominent subject in national politics in the last presidential election and the recent midterm elections. But even on politically controversial healthcare issues such as abortion, *some* form of accommodation has been reached. For example, abortion continues to be (nominally) legal and available, but it is not publicly subsidized, and substantial conscience exemptions leave individual providers free to opt out of performing those procedures.<sup>148</sup> That compromise is contested.<sup>149</sup> But, at least with respect to funding and the mandatory provision of abortions, it is mostly background contestation. How to reconcile religious objections and LGBT equality, by contrast, remains very much in the foreground of current contestation. Obviously, the debate over same-sex marriage and religious liberty is responsible neither for the contraception mandate nor for the litigation it produced. But the debate has a great deal to do with just

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<sup>146</sup> See, e.g., Joshua Holland, *It's Not Just AZ — “Gay Jim Crow” Laws Are Popping up Across the US*, MOYERS & COMPANY (Feb. 26, 2014), <http://billmoyers.com/2014/02/26/its-not-just-az-gay-jim-crow-laws-are-popping-up-across-the-us/> [http://perma.cc/3EQG-AVTZ]; Kirsten Powers, *Jim Crow Laws for Gays and Lesbians?*, USA TODAY (Feb. 19, 2014, 1:17 PM), <http://www.usatoday.com/story/opinion/2014/02/18/gays-lesbians-kansas-bill-religious-freedom-christians-column/5588643> [http://perma.cc/4DFG-YCXH]; Mark Joseph Stern, *Kansas’ Anti-Gay Segregation Bill Is an Abomination*, SLATE (Feb. 13, 2014, 8:30 AM), [http://www.slate.com/blogs/outward/2014/02/13/kansas\\_anti\\_gay\\_segregation\\_bill\\_is\\_an\\_abomination.html](http://www.slate.com/blogs/outward/2014/02/13/kansas_anti_gay_segregation_bill_is_an_abomination.html) [http://perma.cc/4KAB-2DRC].

<sup>147</sup> Bobby Jindal, Governor, State of Louisiana, Prepared Remarks: The Silent War on Religious Liberty (Feb. 13, 2014), <http://officeofgovernorbobbyjindal.createsend1.com/t/ViewEmail/d/930F67F00F751D630B5AEB36B909D8502540EF23F30FEDED> [http://perma.cc/KJ7C-RP4H].

<sup>148</sup> See, e.g., Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417, 1463–65 (2012). Professor Elizabeth Sepper argues that “same-sex marriage objections lack the distinct and compelling features of conscientious objection recognized by law” in contexts such as the provision of abortion. Elizabeth Sepper, *Doctoring Discrimination in the Same-Sex Marriage Debates*, 89 IND. L.J. 703, 708 (2014). That point is important in considering whether the compromises over abortion have any purchase in cases such as *Elane Photography* or *Hobby Lobby*. But it does not contradict, and may actually support, the point made in the text above: that it has been harder to bridge the gap over religious accommodations with respect to LGBT rights than it has been to arrive at some form of compromise with respect to abortion.

<sup>149</sup> See, e.g., Robin Fretwell Wilson, *The Limits of Conscience: Moral Clashes over Deeply Divisive Healthcare Procedures*, 34 AM. J.L. & MED. 41, 42–45 (2008).

how large *Hobby Lobby* loomed in the public conversation — and still does.

2. *Changing Views of the Marketplace.* — That *Hobby Lobby* was, so to speak, in some measure a gay rights case, and that any case that intersects with the culture wars is likely to receive an added amount of attention and controversy, are both fairly well understood. Another facet of the case, however, has gone relatively unnoticed. It has to do with the very terrain on which *Hobby Lobby* was fought: the lived experience of the commercial marketplace itself.

Two related assumptions about commercial life seem to have had considerable purchase in the responses to the litigation over the contraception mandate itself, and the perplexed or outraged reactions to the *Hobby Lobby* decision. The first is the *doux commerce* assumption. That assumption, which was advanced by Enlightenment figures such as Montesquieu<sup>150</sup> and revived as a subject by Albert Hirschman,<sup>151</sup> suggests that commerce “is a sociable institution and can be expected to cultivate virtues”<sup>152</sup> conducive to life in a diverse society. Commerce “foster[s] tolerance and understanding” and “smooth[s] over social, religious, and cultural differences.”<sup>153</sup> Forced to work and trade together in the pursuit of goods and private gain, people will be more likely to set aside their “private grievances”<sup>154</sup> and observe “rules, understandings, and standards of behavior enforced by reciprocity of advantage.”<sup>155</sup> Easily romanticized,<sup>156</sup> often honored in the breach,<sup>157</sup> it nevertheless retains a hold on our conception of market relations: dealings between employer and employee, between consumers and businesses, and so on. Those interactions should be thin, broad, and placid. Private attachments and grievances have little or no place here.

The second assumption follows from the first: religion should, for the most part, be zoned out of the marketplace and market relations. With only a little hyperbole, Professor Ronald Colombo has called this

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<sup>150</sup> See MONTESQUIEU, *THE SPIRIT OF THE LAWS* 338 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748).

<sup>151</sup> See ALBERT O. HIRSCHMAN, *THE PASSIONS AND THE INTERESTS* 59–63 (1977).

<sup>152</sup> Henry E. Smith, *Rose’s Human Nature of Property*, 19 WM. & MARY BILL RTS. J. 1047, 1048 (2011).

<sup>153</sup> Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 17 (2010); see also Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 34–35 (2000); Nathan B. Oman, *Markets as a Moral Foundation for Contract Law*, 98 IOWA L. REV. 183, 202–04 (2012).

<sup>154</sup> Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 775 (1986).

<sup>155</sup> *Id.* at 776.

<sup>156</sup> See *id.* (calling the *doux commerce* concept “perhaps [an] overly roseate Enlightenment view of commerce”).

<sup>157</sup> See, e.g., GARY MINDA, *BOYCOTT IN AMERICA: HOW IMAGINATION AND IDEOLOGY SHAPE THE LEGAL MIND* (1999).



a vision of the “naked private square.”<sup>158</sup> The market and its participants are often viewed “as a thoroughly secular institution in which religion plays no role and has no place.”<sup>159</sup> It is an old, now trite observation that, for many, religion is viewed as belonging mostly to the “‘private’ spaces of home and house of worship.”<sup>160</sup> This position is captured in Chief Justice Burger’s assertion: “The Constitution decrees that religion must be a private matter for the individual, the family, and . . . institutions of private choice” such as churches.<sup>161</sup> If support for this proposition has arguably faded on the Court itself,<sup>162</sup> it is still very much the prevailing view within the liberal mainstream, including those holding mainline religious views. In this division of life into public and private spheres, the marketplace is assumed to fall more into the public than the private sphere.<sup>163</sup>

<sup>158</sup> Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1 (2013).

<sup>159</sup> *Id.* at 6; see also Lyman Johnson, *Re-Enchanting the Corporation*, 1 WM. & MARY BUS. L. REV. 83, 92 (2010) (“[D]eep-seated patterns of thought, ingrained business practices, and social norms make it difficult to link the spheres of faith and business, leading to what Alford and Naughton call ‘a divided life,’ where matters of Spirit and finance occupy wholly separate spheres.” (quoting HELEN J. ALFORD & MICHAEL J. NAUGHTON, *MANAGING AS IF FAITH MATTERED: CHRISTIAN SOCIAL PRINCIPLES IN THE MODERN ORGANIZATION* 12 (2001)), quoted in Colombo, *supra* note 158, at 6 n.21).

<sup>160</sup> Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 108 (1998). In the 1990s, this complaint became prominent with the publication of Professor Stephen Carter’s book, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993). President Clinton famously made a point of praising Carter’s book publicly. See Marci A. Hamilton, Review Essay, *What Does “Religion” Mean in the Public Square?*, 89 MINN. L. REV. 1153, 1155 (2005) (noting that Clinton is holding a copy of Carter’s book in the portrait of him that hangs at Yale Law School); Gwen Ifill, *Clinton Warns Youths of the Perils of Pregnancy*, N.Y. TIMES (Feb. 4, 1994), <http://www.nytimes.com/1994/02/04/us/clinton-warns-youths-of-the-perils-of-pregnancy.html> [<http://perma.cc/4HWJ-QQGP>]. It is no coincidence that it was this period, in which both Democrats and Republicans were seeking to capture the “values” flag and appeal to religious voters, that saw the overwhelming passage of RFRA. Anyone looking to follow the movement of mainstream American political thought over the last quarter century should simply track the changing public positions of the Clintons.

<sup>161</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971). That statement was made in the context of the Establishment Clause, not the Free Exercise Clause. There are good reasons why government might be disabled from acting in particular ways with respect to religion under the Establishment Clause, even if it is allowed or required to accommodate religion under the Free Exercise Clause, although the language of “public” and “private” may not fully capture those reasons. See HORWITZ, *supra* note 6, ch. 7. But Chief Justice Burger’s statement captures a broader sentiment about the role of religion that has been relevant to questions of free exercise and religious accommodation as well. See, e.g., CARTER, *supra* note 160, at 8, 22.

<sup>162</sup> See, e.g., *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (holding that town’s practice of opening board meetings with a prayer did not violate the Establishment Clause).

<sup>163</sup> It is no coincidence that a book on the shopping mall in American law and history links the modern-day mall to the paradigmatic public space, the agora. See PAUL WILLIAM DAVIES, *AMERICAN AGORA: PRUNYARD V. ROBINS AND THE SHOPPING MALL IN THE UNITED STATES* 49, 58–59 (2001).

These assumptions about the nature of the marketplace and the minimal role religion should play within it are woven into American law itself. With some exceptions,<sup>164</sup> the marketplace is often treated as an identity-neutral, egalitarian space.<sup>165</sup> To the extent that identity has a place there, it is thin, not thick.

These assumptions play into what was, at least until *Hobby Lobby*, the common, mostly undertheorized distinction between nonprofit and for-profit religious institutions, or between commercial and noncommercial institutions, for freedom of association<sup>166</sup> as well as religious exercise purposes.<sup>167</sup> Even those who take a robust view of free exercise or associational rights are inclined to respect this distinction, if only for pragmatic reasons.<sup>168</sup> To fail to respect it falls, for most people in polite legal circles, into the realm of “unutterability.”<sup>169</sup>

The sacred status of this demarcation was evident in Justice Ginsburg’s dissent in *Hobby Lobby*, with its concerns about the “havoc” the Court’s (or RFRA’s) erasure of the distinction might bring.<sup>170</sup> It

<sup>164</sup> See, e.g., 42 U.S.C. § 2000e-1 (2012), upheld in *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987).

<sup>165</sup> See, e.g., Tracy E. Higgins & Laura A. Rosenbury, *Agency, Equality, and Antidiscrimination Law*, 85 CORNELL L. REV. 1194, 1217 (2000) (“Translating the concept of the undifferentiated public citizen to the private workplace leads to a view of the workplace as a public, neutral sphere where differences are irrelevant or emerge only as an expression of private preference.”); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2063–64, 2072–74 (2003) (discussing the American desire to “sanitize” the workplace — to “suppress the personal elements of people’s lives that threatened the smooth functioning of the firm,” *id.* at 2073).

<sup>166</sup> See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609, 632–39 (1984) (O’Connor, J., concurring in part and concurring in the judgment). For some questions about this case, see PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* 215–18 (2013).

<sup>167</sup> For a thoughtful overview of these questions, see Robert K. Vischer, *Do For-Profit Businesses Have Free Exercise Rights?*, 21 J. CONTEMP. LEGAL ISSUES 369 (2013). See also Mark Tushnet, *Do For-Profit Corporations Have Rights of Religious Conscience?*, 99 CORNELL L. REV. ONLINE 70 (2013), <http://cornelllawreview.org/clonline/do-for-profit-corporations-have-rights-of-religious-conscience> [<http://perma.cc/WFE4-R4C6>].

<sup>168</sup> See, e.g., John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. REV. 787, 828–29 (2014).

<sup>169</sup> See generally Lawrence Lessig, *Understanding Federalism’s Text*, 66 GEO. WASH. L. REV. 1218, 1220–21 (1998) (describing the process by which ideas become socially “unutterable”). Professor Richard Epstein’s writing is an arguable exception, see, e.g., Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 STAN. L. REV. 1241, 1277–78 (2014), but, to be slightly puckish about it, some of Epstein’s interlocutors might question whether his work belongs in polite society, see, e.g., Bagenstos, *supra* note 12.

<sup>170</sup> *Hobby Lobby*, 134 S. Ct. at 2787 (Ginsburg, J., dissenting); see also *id.* at 2794–95 (“The Court’s ‘special solicitude to the rights of religious organizations,’ however, is just that. No such solicitude is traditional for commercial organizations. Indeed, until today, religious exemptions had never been extended to any entity operating in ‘the commercial, profit-making world.’” (citations omitted) (first quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012), then quoting *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 337 (1987))). Justice Ginsburg was mostly right about this, I think. But so was Justice Alito, when he observed that both Justice Ginsburg’s dissent and

featured prominently in public reactions to the litigation, which fastened fiercely on the dangers of extending free exercise claims, statutory or otherwise, to the commercial realm.<sup>171</sup> Hobby Lobby's claims, and those of the other for-profit businesses challenging the contraception mandate, were seen as an ominous development, accompanied by citations to the *Lochner* era.<sup>172</sup>

In an important sense, however, *Hobby Lobby* and the litigation surrounding the contraception mandate simply make evident something that has drawn too little scholarly notice. In many parts of the country, this picture of the marketplace as a neutral space, a realm of thin identities if not actual *doux commerce*, has been upended by actual practice.

Hobby Lobby itself, with its interweaving of religious views into business decisions about when to open or close, what to stock, and of course what benefits to support or oppose,<sup>173</sup> is now the most prominent example. But it is not alone.<sup>174</sup> Many religious traditions agree that “[d]ividing the demands of one’s faith from one’s work in business is a fundamental error.”<sup>175</sup> To a growing and increasingly visible extent, a range of faiths and sects take an “integralist” view that sees “religion not as one isolated aspect of human existence but rather as a comprehensive system more or less present in all domains of the individual’s life.”<sup>176</sup> The chains and small businesses that dot the shop-

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HHS’s argument failed to supply a clear, principled basis for a distinction in this area between nonprofit and for-profit institutions. *See id.* at 2769–71 (majority opinion).

<sup>171</sup> *See, e.g.*, Press Release, Am. Civil Liberties Union, Supreme Court Upsets Church-State Balance and Enhances Digital Privacy in Key End-of Term Decisions (July 1, 2014), <https://www.aclu.org/organization-news-and-highlights/supreme-court-upsets-church-state-balance-and-enhances-digital> [<http://perma.cc/NS7S-3HDS>]; Jeffrey Rosen, *The End of Anti-Discrimination*, NEW REPUBLIC (Mar. 25, 2014), <http://www.newrepublic.com/article/117144/hobby-lobby-ruling-could-end-anti-discrimination-laws-we-know-them> [<http://perma.cc/GAT2-22PF>].

<sup>172</sup> *See, e.g.*, Bagenstos, *supra* note 12, at 1233–34; Elizabeth Sepper, *Free Exercise Lochnerism* (forthcoming 2015), [http://papers.ssrn.com/soi3/papers.cfm?abstract\\_id=2463274](http://papers.ssrn.com/soi3/papers.cfm?abstract_id=2463274) [<http://perma.cc/7U7F-MDQ2>].

<sup>173</sup> *See Hobby Lobby*, 134 S. Ct. at 2764–66 (describing the faith-centered business practices of Hobby Lobby and the other plaintiffs).

<sup>174</sup> *See, e.g.*, Brief of the C12 Group, LLC, as Amicus Curiae Supporting the Non-Governmental Parties at 1–2, 23–30, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354), 2014 WL 343191.

<sup>175</sup> PONTIFICAL COUNCIL FOR JUSTICE & PEACE, VOCATION OF THE BUSINESS LEADER: A REFLECTION 6 (3d ed. 2012), <http://www.stthomas.edu/cathstudies/cst/VocationBusinessLead/VocationTurksonRemar/VocationBk3rdEdition.pdf> [<http://perma.cc/M7B6-4338>]; *see also* Brief of Amici Curiae the Council for Christian Colleges & Universities et al., and Petitioner Conestoga at 3–9, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354), 2014 WL 343194. For other examples, *see* Colombo, *supra* note 158, at 3–4, 18–22; Alan J. Meese & Nathan B. Oman, *Hobby Lobby, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations Are RFRRA Persons*, 127 HARV. L. REV. F. 273, 278–80 (2014); and Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Money-makers?*, 21 GEO. MASON L. REV. 59, 66–73 (2013).

<sup>176</sup> Kenneth D. Wald, *Religion and the Workplace: A Social Science Perspective*, 30 COMP. LAB. L. & POL’Y J. 471, 474 (2009), *quoted in* Colombo, *supra* note 158, at 18; *see also* Colombo,

ping areas near the cities and college towns where law schools can be found may not reflect this development as strongly, but it is happening just the same.<sup>177</sup>

Not everyone has noticed the extent to which many American companies or their owners adopt integralist views of religion and business. But many have noticed that moral considerations, and not just profit maximization, have played an increasingly visible and contested role in the marketplace. As Justice Alito observed, “modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so.”<sup>178</sup> Many for-profit businesses pursue charitable or social endeavors;<sup>179</sup> many investors and investment funds cater to morally and socially conscious aims;<sup>180</sup> and many new corporate forms or governing rules recognize the role of pursuits beyond narrow profit seeking.<sup>181</sup>

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*supra* note 158, at 16–19 (discussing and providing examples of the increase of religion and spirituality in America in the last two to three decades). *See generally* ALFORD & NAUGHTON, *supra* note 159 (providing strategies for integrating faith into business management practices); RONALD J. COLOMBO, *THE FIRST AMENDMENT AND THE BUSINESS CORPORATION* (2014) (on file with the Harvard Law School Library); LAKE LAMBERT III, *SPIRITUALITY, INC.* (2009) (tracing and analyzing the role of religion in the workplace); DAVID W. MILLER, *GOD AT WORK* (2007) (examining the intersection of faith and work and tracing developments in the field).

For a discussion of what has been called the “faith at work” movement and its relationship to the *Hobby Lobby* decision, see Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom*, *THE IMMANENT FRAME* (July 8, 2014, 12:33 PM), <http://blogs.ssrc.org/tif/2014/07/08/impossibility-of-religious-freedom> [<http://perma.cc/6V7K-LL74>]. Professor Sullivan is more critical of RFRA than I am, and argues that in understanding the case, “it is important . . . to move beyond the culture-wars framing of most commentaries and examine why it seems obvious, even natural, to the justices in the majority and to many others outside the Court that Hobby Lobby is engaged in a protected exercise of religion.” *Id.* Although I agree with her commentary in many respects, I think the “culture-war framing” is relevant here, in the sense that it is important to understand how our cultural divides on contested issues have led to a seeming impasse in this and other cases. It is not required, of course, that those of us who study this area participate in those battles or frame the issues from one side of the divide or the other.

<sup>177</sup> Cf. Michael A. Helfand & Barak D. Richman, *The Challenge of Co-Religionist Commerce*, 64 *DUKE L.J.* (forthcoming 2015) (manuscript at 1, 18–19), [http://papers.ssrn.com/soi3/papers.cfm?abstract\\_id=2403877](http://papers.ssrn.com/soi3/papers.cfm?abstract_id=2403877) [<http://perma.cc/FN82-7WTW>] (noting the substantial volume of “commerce between co-religionists who intend their transactions to adhere to religious principles or pursue religious objectives”). The figures they cite do not appear to include the many businesses run on religious principles that serve a broader set of consumers, such as Hobby Lobby or Chick-fil-A.

<sup>178</sup> *Hobby Lobby*, 134 S. Ct. at 2771.

<sup>179</sup> *Id.*

<sup>180</sup> *See, e.g.*, Colombo, *supra* note 158, at 22–23; M. Todd Henderson & Anup Malani, *Essay, Corporate Philanthropy and the Market for Altruism*, 109 *COLUM. L. REV.* 571, 613–15 (2009). *But see* James D. Nelson, *Conscience, Incorporated*, 2013 *MICH. ST. L. REV.* 1565, 1591 (“[M]ore recently, socially responsible investment has come to look a lot more like ordinary institutional investment.”).

<sup>181</sup> *Hobby Lobby*, 134 S. Ct. at 2771 (discussing the rise of “hybrid corporate forms” such as the benefit corporation); David L. Engel, *An Approach to Corporate Social Responsibility*, 32 *STAN. L. REV.* 1 (1979) (discussing the “corporate social responsibility” movement). *See generally* Brett G. Scharffs, *Our Fractured Attitude Towards Corporate Conscience* (Mar. 12, 2014) (unpublished

Most businesses still seek to please the largest number of consumers with the least amount of disturbance.<sup>182</sup> Accordingly, most corporate departures from pure profit-seeking will involve relatively uncontroversial choices. It did not escape notice in some circles that in the middle of the *Hobby Lobby* litigation, President Obama praised CVS Caremark, the pharmacy chain now known as CVS Health, for its announcement that it would soon refuse to carry tobacco products.<sup>183</sup> That decision, and the positive response it elicited, might be distinguished from the *Hobby Lobby* case in numerous ways. But the bottom line, so to speak, is that CVS's decision concerned a habit that today finds diminishing public support. It was a safe choice.

Where foregrounded issues of contestation regarding the culture wars are concerned, we can expect those decisions to be more rare but also more salient and controversial.<sup>184</sup> Disputes over LGBT rights and their relationship to the marketplace offer a timely and pertinent example. To take one prominent instance, while the decision in *Hobby Lobby* was pending and state-level struggles over religious accommodation were reaching their apex, the CEO of Mozilla, Brendan Eich, resigned under pressure because of a donation he had made in 2008 to the Proposition 8 campaign in California.<sup>185</sup> Following the *Hobby Lobby* decision itself, there were widespread calls for a boycott of any company that refused to directly support full contraceptive coverage for women.<sup>186</sup>

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manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2445680](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2445680) [<http://perma.cc/XY3B-SRXP>].

<sup>182</sup> This is not always the case, of course. See, e.g., Tushnet, *supra* note 167, at 78 (noting the possibility of niche marketing for religious or other businesses); cf., e.g., Sean P. Sullivan, *Empowering Market Regulation of Agricultural Animal Welfare Through Product Labeling*, 19 ANIMAL L. 391, 404–05 (2013) (noting a growth in niche markets for “enhanced-welfare animal products”).

<sup>183</sup> See, e.g., Scharffs, *supra* note 181, at 1–2.

<sup>184</sup> Interestingly, after *Windsor*, a number of major corporations publicly offered their support for the Court's decision. See, e.g., *Big Brands Come out in Support of Supreme Court DOMA and Prop 8 Decisions*, PINK NEWS (June 27, 2013, 12:44 AM), <http://www.pinknews.co.uk/2013/06/27/big-brands-come-out-in-support-of-supreme-court-doma-and-prop-8-decisions> [<http://perma.cc/W7P2-KZC3>]. Their willingness to do so may indicate their confidence in public support for same-sex marriage. It may also be taken, however, as further evidence of the argument in the text above that the modern marketplace is not devoted solely to profit maximization, but is also an arena of moral and social contestation.

<sup>185</sup> See Taylor Casti, *Anti-Gay Marriage Mozilla CEO Resigns After Backlash*, HUFFINGTON POST (Apr. 7, 2014, 12:59 PM), [http://www.huffingtonpost.com/2014/04/03/brendan-eich-anti-gay-moz\\_n\\_5085006.html](http://www.huffingtonpost.com/2014/04/03/brendan-eich-anti-gay-moz_n_5085006.html) [<http://perma.cc/33HN-98K3>]. The episode was discussed and critiqued in a public statement issued by a variety of supporters of same-sex marriage. See *Freedom to Marry, Freedom to Dissent: Why We Must Have Both*, REAL CLEAR POLITICS (Apr. 22, 2014), [http://www.realclearpolitics.com/articles/2014/04/22/freedom\\_to\\_marry\\_freedom\\_to\\_dissent\\_why\\_we\\_must\\_have\\_both\\_122376.html](http://www.realclearpolitics.com/articles/2014/04/22/freedom_to_marry_freedom_to_dissent_why_we_must_have_both_122376.html) [<http://perma.cc/M663-RUQS>].

<sup>186</sup> See, e.g., *Sign the Pledge: Boycott Hobby Lobby*, DAILY KOS: CAMPAIGNS, <https://www.dailykos.com/campaigns/751> (last visited Sept. 28, 2014) [<http://perma.cc/R6LP-YHLH>].

Obviously, distinctions may be drawn between some of these examples. We may readily distinguish, for instance, between the granting of government exemptions from generally applicable laws sought by companies like Hobby Lobby and the exercise of consumer preferences by supporters or opponents of Hobby Lobby or Brendan Eich. But it is important to see the bigger picture here. Everyone understands that the questions of women's reproductive health and LGBT rights that were raised by *Hobby Lobby* are socially contested. Fewer observers have noted that the marketplace itself has become a site of social contestation rather than a refuge from the culture wars.

The reactions to *Hobby Lobby* — and to the Hobby Lobby chain itself, and the existence of numerous religiously observant businesses that are willing to forego potential customers and disregard some of the rules of *doux commerce* — suggest that this change came as a shock to many. The angry responses the decision provoked — the calls for boycotts, and the desire to put market forces to work to guarantee not just progressive corporate policies, but progressive views by individual corporate executives — suggest that the marketplace has become a battleground. Given the issues involved, it is unsurprising that many stakeholders on both sides of this debate are deeply committed on these issues, unwilling to set aside their convictions for the sake of *doux commerce*, and adamant in refusing to compromise.

Liberals are right to be concerned about this.<sup>187</sup> Justice Alito's assurance that "it seems unlikely that the sort of corporate giants to which HHS refers will often assert RFRA claims,"<sup>188</sup> let alone succeed in them, seems correct to me, for doctrinal and other reasons.<sup>189</sup> But if the marketplace is indeed becoming imbricated with thick religiosity and with social and political contestation, there is no guarantee that past performance will predict future results. If the American agora

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<sup>187</sup> Cf. Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255, 2272 (1997) ("[T]he attempt to fix the boundaries between church and state and the project of liberal theory (of finding an archimedean point to the side of, above, or below sectarian interest) are one and the same. They stand or fall together, and what would threaten their fall . . . is a religion that does not respect the line between public and private, but would plant its flag everywhere. An uncompromising religion is a threat to liberalism because were it to be given full scope, there would be no designated, safe space in which toleration was the rule.")

<sup>188</sup> *Hobby Lobby*, 134 S. Ct. at 2774.

<sup>189</sup> On the doctrinal point, as Justice Alito notes, those corporations would face significant problems showing that their claim was sincere. *See id.* More broadly, as I noted above, most companies remain interested in satisfying the greatest number of potential consumers with the least amount of bad publicity. *See supra* notes 182–184 and accompanying text. Worries that a corporation, or at least one operating outside of a narrower niche, would find it attractive to assert claims for religious exemptions, *see, e.g.*, Tushnet, *supra* note 167, at 76–82, seem overstated to me, *see* HORWITZ, *supra* note 166, at 227–28 (arguing that even if businesses had wider latitude to argue for a right to discriminate on associational or other grounds, most would resist taking such a step).

calms down again, it will not be because Congress or the state legislatures are able to impose some Westphalian peace. Any new peace will require either a significant settlement of currently contested social questions or a renegotiation of the norms that govern the marketplace altogether.

### III. *Assessing the Hobby Lobby Moment*

*Hobby Lobby* answers some pressing questions, rightly or wrongly, and wisely keeps silent on others. Notably, it is not *Citizens United* redux. Despite the fears that were voiced on this issue during the litigation, the Court did not do for the Free Exercise Clause what *Citizens United* did for the Speech Clause, although nothing in the majority's opinion suggests that it would not do so in the proper case. It does not rely on any claims about the "metaphysical status"<sup>190</sup> of corporations, religious or otherwise.<sup>191</sup> But neither does it treat the corporate form as a barrier to religious claims; it simply recognizes it as a convenient "fiction" whose purpose is to serve human affairs.<sup>192</sup> It reads RFRA firmly and broadly, in keeping with the powerful nature of the statute.<sup>193</sup> But, despite the possible ramifications of the opinion, the Court does not extend its holding beyond closely held corporations, and the opinion makes clear that the compelling-interest calculus will yield other answers to other questions and other legal regimes, including our landmark antidiscrimination laws.<sup>194</sup> It uses the government's own willingness to accommodate religious nonprofits as a recipe for further accommodations in the for-profit arena.<sup>195</sup> Indeed, in the end it appears that the government itself was responsible for Justice Kennedy's crucial fifth vote in favor of the plaintiffs.<sup>196</sup> To be sure, the opinion left open some tantalizing questions about whether that compromise will suffice in all cases.<sup>197</sup> But those questions are hardly incapable of resolution.<sup>198</sup> The Court handed *Hobby Lobby* and similarly situated corporations a significant victory — *and* made clear that the government could continue to ensure that female employees had

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<sup>190</sup> Richard Schragger & Micah Schwartzman, *Some Realism About Corporate Rights 2* (Univ. of Va. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Paper No. 2013-43, 2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2360309](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2360309) [<http://perma.cc/4PQY-UDQV>].

<sup>191</sup> See *Hobby Lobby*, 134 S. Ct. at 2768.

<sup>192</sup> *Id.*

<sup>193</sup> See *id.* at 2768–75.

<sup>194</sup> See *id.* at 2783.

<sup>195</sup> See *id.* at 2769–72.

<sup>196</sup> See *id.* at 2786 (Kennedy, J., concurring).

<sup>197</sup> See *id.* at 2763 n.9, 2782 & nn.39–40 (majority opinion).

<sup>198</sup> See, e.g., *Wheaton College v. Burwell*, 134 S. Ct. 2806, 2807 (2014) (noting that the government may treat direct notification of a religious objection as triggering the insurer's obligation to provide contraceptive services to employees of the objecting entity).

full access to contraceptive services. And because the decision was statutory, not constitutional, *Hobby Lobby* leaves everything open for political negotiation and resettlement, however unlikely that looks at the moment.

Nevertheless, both the litigation over the contraception mandate and the Supreme Court's decision in *Hobby Lobby* ignited a public firestorm. A calmly worded and revisable judgment, *Hobby Lobby* sits withal in the eye of a hurricane: a perfect storm of foregrounded legal and social contestation over religious accommodation, LGBT rights, and a "re-enchanting"<sup>199</sup> and repoliticized marketplace. Its judgment may channel and constrain the nature of the response to it, but it will hardly be able to quell the broader contestation over these issues. Appeals to the "culture wars" as an explanation of our national debates are often exaggerated and sometimes challenged outright.<sup>200</sup> But they are sometimes dead right. If any controversy can be described as a part of the culture wars, the *Hobby Lobby* moment surely qualifies.

The primary goal of this Comment is to describe, not prescribe. Although I share the hope that there remains some room for mutual accommodation and compromise, I venture no predictions on that front and offer no reasons for great optimism. Rather, I want to offer three potentially disquieting assessments of the *Hobby Lobby* moment and its meaning.

First, the moment *is* a significant part of the meaning. There is a voluminous literature on the relationship between law and social change.<sup>201</sup> Understandably, that work tends to focus on the longer temporal sweep of social and legal development, to speak in terms of years and decades rather than particular moments. But the *Hobby Lobby* moment is important, and revealing, for *being* a moment. It offers a window into the difficulty of doing or settling *anything* at the precise juncture at which an issue is moving from one end of the spectrum of contestation to the other: from religious accommodation being overwhelmingly popular to its future being cast into doubt, for example, or from a constitutional right to same-sex marriage being "unutterable"<sup>202</sup> to its being so inevitable and natural that opposition to it can be said to lack even a rational basis.<sup>203</sup> At either end of the spectrum, the decisions that courts issue are inevitable. In that precise

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<sup>199</sup> Johnson, *supra* note 159, at 97–98.

<sup>200</sup> See, e.g., MORRIS P. FIORINA WITH SAMUEL J. ABRAMS & JEREMY C. POPE, CULTURE WAR?: THE MYTH OF A POLARIZED AMERICA 8–9 (3d ed. 2011); ALAN WOLFE, ONE NATION, AFTER ALL: WHAT MIDDLE-CLASS AMERICANS REALLY THINK ABOUT GOD, COUNTRY, FAMILY, RACISM, WELFARE, IMMIGRATION, HOMOSEXUALITY, WORK, THE RIGHT, THE LEFT AND EACH OTHER 88–132 (1998).

<sup>201</sup> See sources cited *supra* note 18.

<sup>202</sup> Lessig, *supra* note 169, at 1220–21.

<sup>203</sup> See, e.g., *Love v. Beshear*, 989 F. Supp. 2d 536, 549 (W.D. Ky. 2014).



moment of foregrounded contestation, by contrast, they are excruciating, and unresolvable by ordinary law. Absent the clearest possible textual support, decisions at the midway point of social change risk exposing the Court at its most political, for reasons having little or nothing to do with the Justices' own good or bad faith.<sup>204</sup>

We may draw a second observation from the *Hobby Lobby* moment. Culture wars move at different paces in different places. They involve different phenomena and institutions with different tempi, influenced by different factors with different schedules: the pace of general and elite opinion, the quick punctuation of elections and the slow and unpredictable course of judicial vacancies and appointments, the contest between different groups over who will set the agenda and which items will come first, the glacial influence of academic debates and the slow shifts in academic consensus, the tug-of-war between legislative and judicial, and state and federal, leadership on an issue, and more. We could analogize culture wars, as they play out in law and politics, to a polyrhythmic piece of music, in which various instruments play longer or shorter patterns over different measures and in different time signatures. We do not necessarily know at any given moment in the song what is happening. Nor do we know what *will* happen: whether the rhythm and the song will solidify and coalesce, or decay and fall into cacophony.

We saw much of this phenomenon in the struggle over same-sex marriage.<sup>205</sup> The chorus of post-*Windsor* judicial opinions and the movement of public opinion suggest that we may have reached a stable rhythm. We are not there yet, however, with respect to the issues that arose in *Hobby Lobby* and related developments outside the courts: the status of religious accommodation, its relationship to both same-sex marriage and sexual-orientation discrimination, the rise of thick religious commitments in the marketplace, and the fate of RFRA itself. We do not yet know how, whether, or with what timing this discordant nation will come together on these issues.

In that sense, Justice Ginsburg may have been both right and wrong when she protested that the result in *Hobby Lobby* was not what Congress had in mind when it enacted RFRA. When it passed RFRA, Congress was doing many things: responding to the recent decision in *Smith*, following the New Democratic theme of the 1992 presidential election and seeking to bring religious and values voters back within the Democratic Party fold, building capital for the 1994 mid-

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<sup>204</sup> See Richard A. Posner, *The Supreme Court, 2004 Term — Foreword: A Political Court*, 119 HARV. L. REV. 31, 40–41 (2005). Indeed, as I suggested above, the potential “super-statute” status of a law such as RFRA may make interpretive decisions about that statute at crucial moments especially hotly contested, and hence political. See *supra* note 84.

<sup>205</sup> See generally KLARMAN, *supra* note 21.

terms, and perhaps participating in the longer historical conversation about the free exercise of religion. It was acting in the moment, not looking twenty years ahead. If it had, it might well have found the current state of contestation impossible to imagine.<sup>206</sup> Indeed, it only took a few years for the coalition that built RFRA to splinter over these very issues.<sup>207</sup> But Justice Ginsburg is also wrong, because the statute, reinforced by RLUIPA, was strong enough to justify — if not require — the ruling in *Hobby Lobby*, despite her protestations. Congress was simply acting in a different moment and under a different rhythm, with a different state of social contestation in mind. Whether the courts, Congress, and the state legislatures will find some common ground now is doubtful but not impossible. If they do, however, it will depend on factors beyond the reach of any one institution, each of which can move only at its own speed.<sup>208</sup>

Both these points lead to a final observation. Precisely because these pivotal moments are moments of foregrounded contestation and uncertainty, drawing on the deep divisions that characterize the culture wars on particular issues, the real battle in these moments, within and beyond the law, is over what Lessig calls “utterability.”<sup>209</sup> Moving an issue “on the wall,”<sup>210</sup> so that it forms a legally plausible argument, is only the first part of the game. More important still, if one wants to guarantee or consolidate a victory — particularly one that involves social as well as legal contestation — is to define what can and cannot

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<sup>206</sup> See, e.g., *id.* at 136–37 (noting changes in leading politicians’ positions on domestic partnership, same-sex unions, and finally same-sex marriage). It is striking that Professor Chai Feldblum, a strong advocate of same-sex marriage, wrote in a book published only six years ago, in the context of the relationship between same-sex marriage and religious liberty: “In some number of years (I do not know how many), I believe a majority of jurisdictions in this country will have modified their laws so that LGBT people will have full equality in our society, including access to civil marriage or to civil unions that carry the same legal effect as civil marriage.” Feldblum, *supra* note 15, at 126. It is unlikely that many people sharing her views would today view civil unions alone as recognizing the “full equality” of LGBT partners.

<sup>207</sup> See, e.g., Laycock, *supra* note 114, at 149.

<sup>208</sup> Indeed, that Justice Alito wrote the opinion in *Hobby Lobby* is emblematic of the ways in which courts, in particular, move at a very different tempo in the culture wars, often creating disjunctions with the larger cultural fabric. Justice Alito built his claim to nomination largely on the strength of his involvement in the Reagan Administration, but buttressed it with the support of legal liberals who supported his strong post-*Smith* reading of the Free Exercise Clause as a Third Circuit judge in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999). It is not surprising that he would now author an equally strong opinion in *Hobby Lobby* — or that, given the changes in our culture, it should find a much less receptive audience among legal liberals.

<sup>209</sup> Lessig, *supra* note 169, at 1218–20.

<sup>210</sup> See Balkin, *supra* note 9.

“be said” over the long run,<sup>211</sup> to define a particular argument as “indecent” and thus unutterable.<sup>212</sup>

This is an old game. It is at least as old as the once-common suggestion that admission to polite legal circles requires one to avow that *Brown* was wholly correct and *Lochner* terribly wrong.<sup>213</sup> As with that conventional wisdom, it is always open to recontestation.<sup>214</sup> But the goal — especially when the issue is contested, and much more so when it is both socially and legally contested — is to end the contest, preemptively if possible, by declaring certain arguments unutterable.

So it is with the arguments in and around *Hobby Lobby*. The battle is for the definitional high ground: to define particular religious accommodations, or accommodation in general, as something that will “harm [a] state’s reputation as well as its legal culture”;<sup>215</sup> to define the contraception mandate as part of a “war on religious liberty”;<sup>216</sup> to define accommodations in the area of same-sex marriage as “Gay Jim Crow”;<sup>217</sup> or to describe the Court’s reading of RFRA in *Hobby Lobby* as utterly beyond Congress’s imagining and liable to lead to terrible consequences.<sup>218</sup> Or — as I have described it here — as an “easy” decision that is easy to fix.

These kinds of efforts are understandable, but deeply ironic. They are most true when they are least needed. No one expends that kind of rhetorical energy, or succeeds in sparking public interest to this extent, on an easy case involving an uncontested social issue. Hence the rhetorical heat of the *Hobby Lobby* moment. These arguments are inevitably pitched in terms of what the law *already* and incontestably *is* — about what RFRA, or prior cases, or the Religion Clauses themselves, “clearly” mean. It is not always evident whether those arguing in such terms believe it. Indeed, it may very well be the mark of a moment of foregrounded social contestation that the participants in the argument *do* believe that what they are saying is clearly and incontrovertibly right, even when they should know better.

In any event, the truth is otherwise. The important arguments in moments of deep social and legal contestation — including the *Hobby Lobby* moment — are not arguments about what the law is; they are

<sup>211</sup> Lessig, *supra* note 169, at 1220.

<sup>212</sup> *Id.* at 1220–21 & n.17 (citing *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring)).

<sup>213</sup> See, e.g., LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 59, 90 (1996); Scott M. Noveck, *Is Judicial Review Compatible with Democracy?*, 6 *CARDOZO PUB. L. POL’Y & ETHICS J.* 401, 427 (2008).

<sup>214</sup> See, e.g., Posner, *supra* note 204, at 53.

<sup>215</sup> Mississippi RFRA Letter, *supra* note 116, at 6.

<sup>216</sup> Jindal, *supra* note 147.

<sup>217</sup> Holland, *supra* note 146.

<sup>218</sup> See *Hobby Lobby*, 134 S. Ct. at 2787 (Ginsburg, J., dissenting).

assertions about what our values *should* be. They are a battle for the descriptive high ground: for mastery over the terms of utterability.

The heated level of rhetoric in and around *Hobby Lobby* — seemingly everywhere but in Justice Alito's aggressive but tempered opinion — stands as a recognition of the limits of legal reasoning in such transitional moments. It is an indirect acknowledgment that the answers to the questions posed by such cases — Is religion special? Should we accommodate it? Can we make room for both LGBT rights and religious liberty? How much room is there for pluralism in the marketplace? — lie outside the scope of *any* statute or judicial opinion, *Hobby Lobby* included. For better or worse, at least in particular moments of foregrounded legal contestation, everything is utterable and even what was once sacred is up for grabs.