THE BORN-AGAIN CHAMPION OF CONSCIENCE

CONSCIENCE AND ITS ENEMIES: CONFRONTING THE DOGMAS OF LIBERAL SECULARISM. By Robert P. George. Wilmington, Del.: ISI Books. 2013. Pp. 290. $29.95.

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Professor Robert George's "deliberately and provocatively entitled" book[1] — *Conscience and Its Enemies: Confronting the Dogmas of Liberal Secularism* — is tailor-made for today's political culture wars. "[S]ecular liberals" (p. xi) are portrayed as the "enemies of what James Madison called the 'sacred rights of conscience'" (p. xii); same-sex marriage is described as one of the "twin relics of barbarism . . . returned in distinctively modern garb" (p. 204); and the Obama Administration is treated as a representative of "hard-left socialism" (p. 12) bent on "trampling conscience rights" by requiring employer health plans to cover contraception (p. 155).

In speeches, interviews, and essays reinforcing the book's central themes, George routinely employs similar rhetoric. He accuses the Administration of running "roughshod over the rights of conscience that are so fundamental to our liberties as Americans."[2] He faults it for "aggressively prosecuting the agenda . . . its most ardent left-wing supporters hoped for."[3] He specifically denounces the "odious" contraception-coverage rule[4] as a "gross violation of religious liberty and the rights of conscience."[5] And he bemoans liberals' "abuse of anti-discrimination laws . . . to harass caterers, florists, and others" who refuse equal services to same-sex couples.[6] "Those who are driving the train," George warns, "have no regard for the ethical beliefs of Catho-

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[1] AFRTalk, *Robert George Discusses His Book — Conscience and Its Enemies*, YOUTUBE (July 3, 2013), http://www.youtube.com/watch?v=LQ2ruoO3AIo (00:02:03).

[2] *Id.* (00:03:04).

[3] Robert George, *"Catholics for Sebelius," Indeed*, MIRROR JUST. (Jan. 21, 2012), http://mirrorofjustice.blogs.com/mirrorofjustice/2012/01/catholics-for-sebelius-indeed.html [http://perma.cc/4JWB-WMB8].

[4] Kathryn Jean Lopez, *What 'Conscience' Really Means*, NAT'L REV. ONLINE (July 12, 2013, 12:00 AM), http://www.nationalreview.com/article/353233/what-conscience-really-means-interview [http://perma.cc/4YFP-4E8M] (interview with Robert P. George).

[5] Sherif Girgis & Robert P. George, *Morals and Mandates*, PUB. DISCOURSE (Feb. 14, 2012), http://www.thepublicdiscourse.com/2012/02/4736 [http://perma.cc/K8C3-VYXX].

[6] Lopez, *supra* note 4.

lics and others when they are in conflict with left-liberal orthodoxy . . . the conscience rights of Catholics and others be damned."[7]

In the face of this perceived onslaught by the liberal "enemies of conscience" (p. 156) — the principal effect of which would be to deny commercial businesses like Hobby Lobby Stores, Inc. the right to claim religious exemptions from the law — George declares that the "[f]riends of religious freedom must respond swiftly and strongly" because "[k]ey elements of our religious freedom hang in the balance."[8] With Madison as his lodestar, George insists that "the Constitution guarantees to each individual . . . 'those sacred rights of conscience so essential to his present happiness and so dear to his future hopes.'"[9] He invokes the "principles on which our nation was founded" to claim protection for conscientious objectors in the commercial marketplace (p. 164). And he treats exemption rights as a fundamental part of the "robust conception of religious freedom that has served our nation so well."[10]

This passionate defense of exemption rights, however, represents a striking departure from George's past scholarship on the issue — scholarship that he conspicuously fails to acknowledge in *Conscience and Its Enemies*. That earlier work rejected the Madisonian argument for requiring religious exemptions as a constitutional matter, expressed considerable doubts about granting judicially enforceable exemption rights as a prudential matter, and critiqued the underlying premise for such rights as the dangerous product of secular liberalism — the same liberalism that George now says must be checked by expanding exemption rights.[11]

George is not the only conservative who once opposed religious-exemption rights. The Reagan Administration pressed the case against constitutionally compelled exemptions in the 1980s,[12] as did Justice

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[7] George, *supra* note 3.

[8] Robert P. George, *What* Hobby Lobby *Means*, FIRST THINGS (July 1, 2014), http://www.firstthings.com/web-exclusives/2014/06/what-hobby-lobby-means [http://perma.cc/9ND2-6DMK].

[9] Lopez, *supra* note 4.

[10] Robert P. George & Hamza Yusuf, *Religious Exemptions Are Vital for Religious Liberty*, WALL ST. J., Mar. 24, 2014, http://www.wsj.com/articles/SB10001424052702304914204579397170026645290 (supporting Hobby Lobby's claim for an exemption and explaining that "exemptions protect people in situations where legislative or executive acts might otherwise unnecessarily force them to violate their consciences").

[11] *See infra* Part I.

[12] *See* Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 BYU L. REV. 299, 336 ("In the past three years the Reagan Justice Department has attempted to undo [the exemption] doctrine and relegate the free exercise clause to an essentially vestigial position in the constitutional scheme."); *see also* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL: RELIGIOUS LIBERTY UNDER THE FREE EXERCISE CLAUSE 73–74, 78–80, 108–15 (1986),

Rehnquist;[13] Justice Scalia dramatically boosted the case in 1990;[14] and several prominent conservative scholars in addition to George championed it thereafter.[15] It is these conservatives who, by George's current reckoning, would seem to be the worst enemies of conscience. For their views would not only have the effect of denying exemption rights to commercial businesses like Hobby Lobby, but also to a much broader class of individuals bringing more traditional conscience claims.

Part I of this Review details how, prior to the debates over same-sex marriage and Obamacare, Professor George rejected the type of presumptive exemption rights he now treats as essential to protecting conscience. Part II then dispels the myth, ironically perpetuated by George, that liberals have fundamentally changed their position on religious-exemption rights. The truth is, most liberals continue to support what they have supported since Justice Brennan authored *Sherbert v. Verner*[16] five decades ago: religious-exemption rights *for individuals and religious organizations*. What liberals are opposing today is the unprecedented expansion of exemption rights to *commercial businesses*, something never countenanced by the Court prior to *Burwell v. Hobby Lobby Stores, Inc*.[17]

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https://www.ncjrs.gov/pdffiles1/Digitization/115053NCJRS.pdf [https://perma.cc/G73Z-9N4E] (critiquing several of the Court's decisions granting exemptions and approving several of its decisions denying exemptions).

[13] *See* Thomas v. Review Bd., 450 U.S. 707, 723 (1981) (Rehnquist, J., dissenting) (arguing that when "a State has enacted a general statute, the purpose and effect of which is to advance the State's secular goals, the Free Exercise Clause does not in my view require the State to conform that statute to the dictates of religious conscience of any group").

[14] *See* Emp't Div. v. Smith, 494 U.S. 872 (1990) (stating that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes),'" *id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)).

[15] *See, e.g.*, Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 248 (1991) ("The conduct exemption . . . is not, strictly speaking, a doctrine of religious liberty. It is one aspect of the post–World War II takeover of our civil liberties corpus by the political morality of liberal individualism. . . . Critics of *Smith* who are serious about constitutional law, or who are not liberals, and especially critics who are both, should rethink their position."); Lino A. Graglia, Church of the Lukumi Babalu Aye*: Of Animal Sacrifice and Religious Persecution*, 85 GEO. L.J. 1, 61 (1996) (criticizing the conduct exemption as "an assault on self-government and federalism in pursuit of a promise of preferential treatment" and arguing that a "doctrine invented by Justice Brennan and enthusiastically supported by the ACLU and Americans United for Separation of Church and State [i]s not likely to be in the long-range interest of religion").

[16] 374 U.S. 398 (1963) (establishing the free-exercise exemption doctrine).

[17] 134 S. Ct. 2751 (2014). For a detailed discussion of this unprecedented expansion, see James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 HARV. C.R.-C.L. L. REV. (forthcoming 2015), http://ssrn.com/abstract=2400100.

I. NOT SO LONG AGO . . .

It is difficult to imagine a statement more at odds with Professor George's current rhetoric about the rights of conscience than the following pronouncement from the Supreme Court:

> Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.[18]

Although the Warren Court temporarily shelved this teaching in favor of the *Sherbert* exemption doctrine, Justice Scalia, hardly a secular liberal, explicitly resurrected it in his 1990 opinion for the Court in *Employment Division v. Smith*.[19] Many commentators responded to that opinion with "shock and dismay,"[20] and George recently described the post-*Smith* environment as one in which "everybody was on the same side" in declaring the decision "an outrage" because it "read religious freedom, free exercise of religion, out of the Constitution."[21]

But while today George waxes nostalgic about the widespread denunciation of *Smith*,[22] in 1998 he praised the decision as "impeccably faithful to the original meaning of the 'Free Exercise Clause.'"[23] In fact, George's only critique of *Smith* at that time was that it did not go far enough because it failed to overrule *Wisconsin v. Yoder*[24] and *Sherbert*,[25] the very cases Congress relied upon when passing the Religious Freedom Restoration Act of 1993[26] (RFRA). Unlike the many scholars who believed *Smith* to rest on a fundamentally mistaken interpretation of the First Amendment, and who urged Congress to cor-

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[18] Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594–95 (1940) (footnote omitted).

[19] 494 U.S. at 879.

[20] ROBERT T. MILLER & RONALD B. FLOWERS, TOWARD BENEVOLENT NEUTRALITY: CHURCH, STATE, AND THE SUPREME COURT 147 (4th ed. 1992). Professor Michael Stokes Paulsen has written that "[o]ne could reasonably proclaim *Smith* the worst religious freedom case of the past fifty years." Michael Stokes Paulsen, *Disaster: The Worst Religious Freedom Case in Fifty Years*, 24 REGENT U. L. REV. 283, 284 n.2 (2012) (but ultimately bestowing the honor upon *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010)).

[21] Penn Federalist, *Robert P. George on Freedom of Conscience*, YOUTUBE (May 12, 2014), http://www.youtube.com /watch?v=iXE3Ulnn1KY (00:59:55).

[22] *See id.* (00:59:07) ("It's an agreement that we had, if I recall correctly, back in 1993, 1994, when Congress passed the Religious Freedom Restoration Act. . . . [T]he *Smith* decision was considered a horrible decision . . . . It generated an amazing coalition. It was a great force of unification.").

[23] Robert P. George, *Protecting Religious Liberty in the Next Millennium: Should We Amend the Religion Clauses of the Constitution?*, 32 LOY. L.A. L. REV. 27, 32 (1998).

[24] 406 U.S. 205 (1972).

[25] George, *supra* note 23, at 33.

[26] 42 U.S.C. §§ 2000bb–2000bb-4 (2012), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997).

rect the mistake by passing RFRA, George argued in no uncertain terms that "[t]here is no free exercise 'right' to conduct exemptions."[27] Moreover, he proclaimed himself "doubtful" about the wisdom of supplementing the Free Exercise Clause with an "arrangement in which legislation that adversely affects anyone's religious belief or practice is scrutinized by the judiciary to ensure that it is, from a public policy viewpoint, absolutely necessary."[28]

As the last quote indicates, one key difference between the old George and the new George concerns the role of judges. The old George maintained that "the question of whether judges ought to be able to mandate conduct exemptions *is not one of justice*, but of prudence,"[29] and he expressed strong reservations about the wisdom of "authorizing judges to hold even neutral, general laws to the 'compelling interest' and 'least restrictive means' standards.'"[30] Of course, that is precisely what RFRA does. And while the old George identified the idea of judicially enforced exemption "rights" with the "mischievous" liberal theories of Professor Ronald Dworkin,[31] and warned against an exemption regime administered by the "princes" of "law's empire,"[32] the new George treats RFRA rights as a "[k]ey element[] of our religious freedom."[33] Indeed, he has signed several letters urging states to adopt their own RFRAs — and thus give more power to judges — in the name of "justice."[34] George's newfound enthusiasm

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[27] George, *supra* note 23, at 32*; see id.* at 33–34 (maintaining that religious adherents "have no constitutionally guaranteed — and, thus, judicially enforceable — right to such an exemption" from legal obligations).

[28] *Id.* at 35.

[29] *Id.* (emphasis added); *see id.* at 32 ("Properly interpreted, the 'Free Exercise Clause' simply does not vest broad discretion or policy-making authority in the hands of judges by authorizing them to decide whether neutral, general laws are supported by a 'compelling interest,' or advance such an interest by the 'least restrictive means.'").

[30] *Id.* at 37; *see also* Emp't Div. v. Smith, 494 U.S. 872, 889 n.5 (1990) ("[I]t is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice."); George, *supra* note 23, at 37 ("I myself have doubts about whether it is in fact prudent to vest this sort of authority in the hands of judges . . . ."); *id.* at 36 ("[M]y voice will be on the side of extreme caution in assessing proposals to expand the power of unelected and electorally unaccountable judges.").

[31] Robert P. George, *Judicial Review and the Religion Clauses: A Response to Professor Greenawalt*, 32 LOY. L.A. L. REV. 59, 60 (1998) [hereinafter George, *Judicial Review*]. *See generally* Robert P. George, *Individual Rights, Collective Interests, Public Law, and American Politics*, 8 LAW & PHIL. 245 (1989) [hereinafter George, *Individual Rights*] (offering a detailed critique of "Dworkin's liberalism," *id.* at 246, and rejecting "Dworkin's argument for an individual 'right to moral independence,'" *id.* at 247).

[32] George, *supra* note 23, at 36 (internal quotation marks omitted).

[33] George, *supra* note 8.

[34] *See, e.g.*, Letter from Professor Douglas Laycock, et al., to Jim W. Smith, Dir., N.D. Legislative Counsel (May 31, 2012) (describing RFRAs as "invaluable tools for promoting justice and freedom"), http://mirrorofjustice.blogs.com/files/north-dakota-rla-scholars-letter.pdf [http://perma

for judicially enforced exemption rights was on vivid display at an event in 2013, where he exclaimed: "If our side believes that fundamental religious freedoms are being violated, the flame-throwing that I have in mind is what we do at the Becket Fund for Religious Liberty, . . . sue 'em!"[35]

Interestingly, the new George and the old George are both on display in *Conscience and Its Enemies*, which is organized as a collection of separate essays on a variety of topics. On the one hand, the book is full of references to the "rights" of conscience (pp. xii, 106, 111, 112, 145, 155, 163), and the new George has made clear that he views these rights as having a constitutional dimension.[36] On the other hand, the book contains significant remnants of George's past skepticism of judicially enforceable rights. For example, the second chapter contains a striking passage concerning a "typical" student statement George hears when teaching classes on civil liberties (p. 15). The statement essentially paraphrases Justice Jackson's famous line in *West Virginia State Board of Education v. Barnette*[37] about how the Bill of Rights guarantees the judicial safeguarding of fundamental rights against majority whims.[38] George decries the sentiment for being "about as wrong as you can get" (p. 16), insisting: "None of the American found-

.cc/H862-UM7J]. For another example of the tension between (1) conservative rhetoric generally associating judicial enforcement of individual rights with liberals, and (2) selective conservative appeals for such judicial intervention, see Reva B. Siegel, *The Supreme Court, 2012 Term — Foreword: Equality Divided*, 127 HARV. L. REV. 1, 27–29 (2013) (discussing a Reagan Administration publication that "systematically associates the threat of 'liberal interpretation' with judges who interfere with democratic self-governance," *id.* at 27, but simultaneously "emphasize[s] the importance of appointing judges who would strike down the decisions of representative government and impose limits on affirmative action," *id.* at 29).

[35] Berkeley Ctr., *Religious Freedom: A Conversation with Rick Warren, Robert George, and John Diulio*, YOUTUBE (Mar. 1, 2013), https://www.youtube.com/watch?v=wPEW8AoPeQk (1:04:40). George serves on the board of directors and the executive committee of the Becket Fund, which represented Hobby Lobby in its RFRA case. George, *supra* note 8.

[36] *See* Lopez, *supra* note 4 (quoting James Madison for the proposition that "the Constitution guarantees to each individual . . . 'those sacred rights of conscience'"). George employs the Madison quote about conscience rights twice in *Conscience and Its Enemies* (pp. xii, 163), and he argues that "standing up for conscience means defending the principles on which our nation was founded" (p. 164). *See also* Robert P. George & Katrina Lantos Swett, *Religious Freedom Is About More than Religion*, WALL ST. J., July 25, 2013, http://www.wsj.com/articles/SB10001424127887324783204578624510558738282 ("We honor the rights of conscience . . . . Since America's founding, the country has honored this form of liberty.").

[37] 319 U.S. 624 (1943).

[38] *Compare id.* at 638 ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."), *with* p. 16 ("Well, Professor, I can tell you how the framers of the Constitution sought to protect liberty and prevent tyranny. They attached to the Constitution a Bill of Rights to protect the individual and minorities against the tyranny of the majority. And they vested the power to enforce those rights in the hands of judges who . . . are . . . able to protect people's rights without fear of political retaliation.").

ers . . . believed that judicial review was the central, *or even a significant*, constraint on the national government's power. *Nor did the Founders believe that judicial enforcement of Bill of Rights guarantees would be an important way of protecting liberty*" (p. 16).[39]

This confident assertion regarding the Founders' views about judicial review might come as some surprise to James Madison, who said the following in introducing the Bill of Rights:

> [I]ndependent tribunals of justice will consider themselves in a peculiar manner the *guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive*; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.[40]

Thomas Jefferson agreed: "In the arguments in favor of a declaration of rights, . . . one which has *great weight* with me [is] the legal check which it puts into the hands of the judiciary."[41] Madison and Jefferson, it seems, would be at risk of receiving Fs in Professor George's civil liberties class.[42]

In any event, the skepticism of judicial review on display early in *Conscience and Its Enemies* is fully consistent with the old George's rejection of religious-exemption rights. And George's discomfort with the *Barnette* principle is of a piece with Professor Gerard Bradley's argument — made in the specific context of the religious-exemption debate in the 1990s — that Justice Jackson's opinion in *Barnette* is the "prototypical" example of misguided contemporary liberalism.[43]

In sharp contrast to the views of Bradley and the old George, Justice O'Connor — the Court's chief advocate for religious-exemption rights in the 1990s — explicitly relied upon *Barnette*'s minority-rights rationale to justify free-exercise exemptions.[44] At the time, George was having none of it:

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[39] Emphasis has been added.

[40] 1 ANNALS OF CONG. 457 (1789) (Joseph Gales ed., 1834) (emphasis added).

[41] Letter from Thomas Jefferson to James Madison (Mar. 15, 1789) (emphasis added), http://press-pubs.uchicago.edu/founders/print_documents/v1ch14s49.html [http://perma.cc/6C3H-KVGA].

[42] The disconnect is particularly striking given that George serves as the director of the James Madison Program in American Ideals and Institutions at Princeton University. *Welcome*, JAMES MADISON PROGRAM AM. IDEALS & INSTS., http://web.princeton.edu/sites/jmadison/welcome.html [http://perma.cc/4TM8-62AW] (last visited Jan. 9, 2015).

[43] Bradley, *supra* note 15, at 255; *see id.* at 256 ("From the standpoint of critical reason, [the liberal construction of rights] has been subjected to cogent, even fatal, criticism by, for example, John Finnis and Robert George." (footnote omitted)). *See generally* George, *Individual Rights*, *supra* note 31, at 255 ("Over the past forty years liberals in the Western democratic nations have campaigned to obtain legal immunities for controversial activities they believe to be matters of individual right.").

[44] *See* Emp't Div. v. Smith, 494 U.S. 872, 902–03 (1990) (O'Connor, J., concurring in the judgment).

> I am, of course, familiar with the argument that says expansive judicial power is necessary to protect individuals and minorities — in this case individual members of minority faiths — from the depredations of legislative majorities. *But the more I think about this argument in the context of American history, the less I am impressed by it.* Nothing in the record, taken as a whole, ought to incline us to think that judges are more competent or trustworthy than legislators in . . . striking the proper balance between individual freedom and other values to be advanced or protected by legislation.[45]

George adheres to this view in some of the early chapters of *Conscience and Its Enemies* (chs. 2, 5), repeatedly invoking *Dred Scott v. Sandford*[46] and *Roe v. Wade*[47] to cast doubt on the advisability of judicial review (pp. 17, 44–52). This is the same tactic George employed back in 1998 when arguing against religious-exemption rights.[48] But in the chapters of his book focusing on "religious freedom and the rights of conscience" (chs. 10, 11, 15), George welcomes "the high likelihood that the Supreme Court . . . will require exemptions for religious employers and others who conscientiously object" to the contraception-coverage rule (p. 106), and he argues that "political authority must meet a heavy burden" when "requiring the believer to do something contrary to his faith or in forbidding the believer to do something his faith requires" (p. 125).

George describes RFRA as "one way of capturing" the "broad presumption in favor of religious liberty" and the "heavy burden" that political authority must overcome to rebut the presumption (p. 125). But he treats the underlying presumption and burden, not RFRA itself, as defining the "substantive matter of what religious freedom demands from those who exercise the levers of state power" (p. 125). And just like the Becket Fund did in advocating for the owners of Hobby Lobby and other businesses, George invokes the language of constitutional rights when making the case for presumptive exemptions.[49] A lot

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[45] George, *supra* note 23, at 35–36 (emphasis added). *But see* Letter from Jefferson, *supra* note 41 (endorsing judicial review to preserve rights because independent judges would merit "great confidence for their learning and integrity" and would not be swayed by the "civium ardor prava jubentium," or popular passions).

[46] 60 U.S. 393 (1857).

[47] 410 U.S. 113 (1973).

[48] George, *Judicial Review*, *supra* note 31, at 59–60.

[49] In Chapter 10, which includes the book's most extensive discussion of the rights of conscience, George writes that "freedom of religion . . . is rightly labeled in America 'the first freedom,'" in part because "it is listed first in our Bill of Rights" (p. 113). Chapter 11 is entitled "Religious Liberty: A Fundamental Human Right" (p. 115). *See also* Lopez, *supra* note 4 (quoting Madison for the proposition that the Constitution protects conscience rights); Press Release, Becket Fund for Religious Liberty, Final HHS Rule Fails to Protect Constitutional Rights of Millions of Americans (June 28, 2013), http://www.becketfund.org/becket-welcomes-opportunity-to-study-final-rule-on-hhs-mandate [http://perma.cc/QN4T-67X9] ("The easy way to resolve this

seems to have changed since 1998, when George wrote that "the restraints [the Free Exercise Clause] places upon legislatures are modest" and that when "neutral and general laws happen to have adverse incidental effects on religious faith or practice, they do not — *even presumptively* — violate the 'Free Exercise Clause.'"[50]

Of course, it is entirely possible to support laws like RFRA without believing that religious exemptions are constitutionally required. Professor Eugene Volokh, for example, defends RFRA as reasonably establishing a "common-law exemption model, in which courts can recognize exemptions but subject to trumping by legislatures"[51] so that the "elected representatives of the people can have the final word."[52] Although the old George might not have shared Volokh's enthusiasm for having courts decide exemption claims "in the first instance,"[53] he most certainly agreed that such matters should "*finally* be resolved . . . by the institutions of self-government," not the courts.[54] The new George, however, treats the very idea of Congress reversing the Supreme Court's decision in *Hobby Lobby* as a threat to "[k]ey elements of our religious freedom."[55]

Is there any way to reconcile George's past assertion that "[t]here is no free exercise 'right' to conduct exemptions"[56] with his new insistence that those opposing the extension of such rights to commercial businesses are "enemies of conscience" (p. 156)? George appears to make a partial attempt by including this caveat toward the end of his discussion of presumptive exemption rights:

> We can debate, as a matter of American constitutional law or as a matter of policy, whether it is, or should be, up to courts or legislators to decide when exemptions to general, neutral laws should be granted for the sake of religious freedom, or to determine when the presumption in favor of religious freedom has been overcome (p. 125).

George quickly adds, however, that "the substantive matter of what religious freedom demands" remains the same either way (p. 125).

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would have been to exempt sincere religious employers completely, *as the Constitution requires*." (emphasis added)).

50 George, *supra* note 23, at 32 (emphasis added); *see also* Emp't Div. v. Smith, 494 U.S. 872, 888 (1990) (concluding that a religiously diverse nation "cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order").

51 Eugene Volokh, *The Priority of Law: A Response to Michael Stokes Paulsen*, 39 PEPP. L. REV. 1223, 1228 (2013) (emphasis omitted).

52 *Id.* at 1229.

53 *Id.* at 1228. *But see* George, *supra* note 23, at 35 ("I myself am doubtful as to whether those advocating judicial decision-making are right."); *id.* at 34 (maintaining that it is up to legislatures to decide if granting exemptions in particular situations is "just and prudent public policy").

54 George, *Judicial Review*, *supra* note 31, at 62 (emphasis added).

55 George, *supra* note 8.

56 George, *supra* note 23, at 32.

And in interviews and speeches elaborating upon this point, George emphasizes that the "only question is what branch of government should make the decision as to whether the standard has been met; the standard we can agree on: compelling interest, least intrusive or least restrictive means."[57]

George provides absolutely no authority for the novel proposition that legislatures might be obligated to apply the heretofore exclusively judicial standard of "strict scrutiny" to protect conscience rights.[58] Moreover, he offers no explanation for how this requirement might be operationalized by legislatures passing thousands of laws, any number of which could conceivably impose incidental burdens on religious practices known and unknown to the legislators. Would legislatures be obligated to proactively identify potential conflicts before passing legislation? Would they be obligated to revisit legislation when conflicts are discovered after the fact? George suggests no answers. But by making this novel claim, perhaps George believes he can thread the needle of (1) treating religious exemptions as a constitutionally guaranteed right, which gives particular force to the "enemies of conscience" charge, while (2) not conceding that religious exemptions are a *judicially enforceable* constitutional right. The attempt is not convincing, particularly given that George himself treated the two concepts as indistinguishable in 1998.[59]

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[57] InstAmericanValues, *Religious Liberty and the Human Good, the Conversation*, YOUTUBE (June 1, 2012), http://www.youtube.com/watch?v=sUKNKlf88nQ (59:54); *see also* Franciscan University of Steubenville, *Dr. Robert George: The Nature and Basis of Religious Freedom*, YOUTUBE (June 16, 2014), http://www.youtube.com/watch?v=BCK2ctra05s (45:42) ("I think the test is the right test, and it's a test that I think any country should adopt some version of *as part of its fundamental law*, any country that is serious about respecting religious freedom." (emphasis added)). *But see* George, *supra* note 23, at 33 (maintaining that the *Smith* Court "was correct in refusing to follow the *Sherbert* and *Yoder* precedents by applying the 'compelling interest' and 'least restrictive means' tests to decide whether to mandate the conduct exemptions sought by members of the Native American Church").

[58] In 1998, George treated exemptions as a matter of "legislative discretion." George, *supra* note 23, at 37; *see also id.* at 31–32 (explaining that "where a legislature *wishes to grant* a conduct exemption for a religiously motivated behavior, there is not necessarily an 'Establishment Clause' impediment," *id.* at 31 (emphasis added), but that the "restraints [the Free Exercise Clause] places upon legislatures are modest," *id.* at 32). *See generally* Lisa Schultz Bressman, *Accommodation and Equal Liberty*, 42 WM. & MARY L. REV. 1007, 1007 (2001) ("Because permissive accommodation is not mandatory, it does not raise the knotty issue of determining when legislatures *must* grant exemptions requests."); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 686 (1992) (describing "legislative" accommodations as "discretionary" in nature).

[59] *See* George, *supra* note 23, at 33–34 (explaining that religious adherents "have no constitutionally guaranteed — *and, thus, judicially enforceable* — right to" exemptions (emphasis added)). Although George argued against recognizing a *constitutional right* to religious exemptions in 1998, he made clear that the *discretionary* granting of religious exemptions in particular cases could be "just and prudent public policy." *Id.* at 34.

In a different line of argument, George makes what he claims to be a critical distinction between an autonomy-based understanding of conscience rights and a duty-based understanding (pp. 106–14). The autonomy view treats conscience as the "writer of permission slips," "licensing us to do as we please" (p. 112). The duty view, by contrast, treats conscience as a "stern monitor" (p. 112), providing only a "right to do what one judges oneself under an obligation to do, whether one welcomes the obligation or must overcome a strong aversion to fulfill it" (pp. 112–13). George rejects the former as a "counterfeit" (p. 112) view of conscience representing the "liberal ideology that is dominant . . . in the contemporary secular intellectual culture" (p. 111). He embraces, however, the latter understanding that "[c]onscience identifies one's *duties* under the moral law" and that "conscience has rights *because it has duties*" (p. 112).

George's reliance on the duty-based argument for conscience rights is richly ironic. For in the 1990s, Professor Michael McConnell and Justice O'Connor made this very same argument relentlessly — with their principal authority being James Madison, no less[60] — only to have their case for presumptive exemption rights dismissed by George and Bradley. Bradley's response to the duty argument hardly could have been more forceful:

> McConnell seems to think that showing that a religious conception of duty to God propelled our tradition of liberty of conscience verifies the conduct exemption. . . . [But t]here is no straight path between the most obstreperous conscientious objection and the conduct exemption. Roger Williams is likely the great dissenter in our historical tradition; certainly no one in our history has placed religious duty closer to the center of his political thought. Yet, Williams was politically an authoritarian, and would have none of *Sherbert*, including that case's notion of solicitation of conscience.[61]

After surveying the arguments for and against constitutional exemption rights, George concluded in 1998: "In my judgment, Justice Scalia and Professor Bradley win their debate with Justice O'Connor

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[60] *See, e.g.*, Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 173 (1992) ("Madison said that the law protects religious freedom because the duties arising from spiritual authority are 'precedent both in order of time and degree of obligation, to the claims of Civil Society.' The Free Exercise Clause does not protect autonomy; it protects obligation." (footnote omitted) (quoting JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785)); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1453 (1990) (quoting same language from Madison); *see also, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 561 (1997) (O'Connor, J., dissenting) (same); Emp't Div. v. Smith, 494 U.S. 872, 901–02 (1990) (O'Connor, J., concurring in the judgment) (contending that the Free Exercise Clause protects against laws that "coerce a person to violate his *religious conscience* or intrude upon his *religious duties*," *id.* at 901 (emphasis added)).

[61] Bradley, *supra* note 15, at 265–66.

and Professor McConnell over the original meaning of the 'Free Exercise Clause.'"[62]

Just a decade later, however, George was co-authoring the *Manhattan Declaration*,[63] which included a not-so-subtle attack on Justice Scalia's interpretation in *Smith*:

> In recent decades a growing body of case law has paralleled the decline in respect for religious values in the media, the academy and political leadership, *resulting in restrictions on the free exercise of religion*. *We view this as an ominous development*, not only because of its threat to the individual liberty guaranteed to every person, regardless of his or her faith, but because the trend also threatens the common welfare and the culture of freedom on which our system of republican government is founded.[64]

George's co-author, the late Chuck Colson, made the point explicit, explaining that "[t]hanks to *Smith*, an irreligious majority has the power to impose its will on a devout minority. . . . This stands the First Amendment on its head, which is . . . why we wrote the Manhattan Declaration . . . ."[65]

Why has Professor George gone from defending *Smith* and denying the existence of presumptive exemption rights to championing those rights in the *Manhattan Declaration* and *Conscience and Its Enemies*? The answer is perhaps best illustrated by modifying, in the tradition of Justice Scalia,[66] the passionate closing lines of a speech George gave earlier this year:

> [Those] on the ~~left~~ *right* that used to ~~support~~ *question the wisdom of* RFRA no longer ~~support~~ *question* it. Now they ~~attack~~ *champion* it. . . . What happened? Why do they now ~~oppose~~ *support* so vehemently something they ~~supported so enthusiastically~~ *once so doubted*? The answer to that question is like the answer to so many other questions today: same-sex marriage.[67]

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[62] George, *supra* note 23, at 31.

[63] Robert George, Timothy George & Chuck Colson, *Manhattan Declaration: A Call of Christian Conscience*, MANHATTAN DECLARATION (Nov. 20, 2009), http://www.manhattandeclaration.org/man_dec_resources/Manhattan_Declaration_full_text.pdf [http://perma.cc/Q8NP-25X9].

[64] *Id*. at 8 (emphasis added).

[65] Chuck Colson, *I Hate Being Right Sometimes*, BREAKPOINT (June 24, 2011, 12:00 AM), http://www.breakpoint.org/bpcommentaries/entry/13/17347 [http://perma.cc/NPH5-PPQ9]; *see also* Chuck Colson, *Told You So*, BREAKPOINT (Nov. 23, 2010, 12:00 AM) ("The world created by *Smith* is why the Manhattan Declaration is so important."), http://www.breakpoint.org/bpcommentaries/entry/13/15855 [http://perma.cc/MK48-PJD2].

[66] *See* United States v. Windsor, 133 S. Ct. 2675, 2709–10 (2013) (Scalia, J., dissenting) (using strikethroughs and italics to modify passages from the Court's opinion).

[67] Franciscan University of Steubenville, *supra* note 57 (48:20). The only thing that would make this statement more accurate would be the addition of two more words at the end of the sentence: "and Obamacare."

II. THE REAL ISSUE: THE UNPRECEDENTED EXPANSION OF EXEMPTION RIGHTS INTO THE COMMERCIAL REALM

While Professor George's speech unwittingly explains his own change in position quite nicely, it mischaracterizes the position of liberals on religious exemptions. Liberals who opposed *Smith* in 1990 and supported RFRA in 1993 — including liberal organizations, professors, and politicians — largely continue to support religious exemptions for individuals, while opposing the extension of such exemptions to commercial businesses.

The ACLU, for example, advocated in 2014 on behalf of a Jewish prisoner seeking a religious exemption from a prison headgear policy[68] and a Rastafarian student seeking a religious exemption from a public school's grooming policy.[69] Americans United for Separation of Church and State recently supported a Muslim prisoner's successful religious-exemption claim in the Supreme Court.[70] The Brennan Center for Justice, while opposing the requested exemption in *Hobby Lobby*, reiterated its support for *Sherbert* and our nation's "proud heritage of constitutionally mandated religious tolerance."[71] The American Jewish Committee took a similar position in *Hobby Lobby*, emphasizing that it "views the protections afforded by RFRA as no less important today than at the time of its enactment."[72] And the Center for American Progress, arguably the most influential liberal think tank in the nation, has described the *Sherbert*/RFRA test as an "important religious liberty standard," but one that "was intended to protect . . . individuals and religious nonprofit organizations, not corporations."[73]

In the academy, one need not look far to find liberal supporters of religious exemptions. Indeed, as I have detailed elsewhere, several self-described liberals and supporters of same-sex marriage have been

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[68] Kyle Roerink, *ACLU: Wyoming Should Let Orthodox Jew Inmate Wear Skullcap*, CASPER STAR TRIBUNE (Jan. 13, 2014, 6:00 PM), http://trib.com/news/state-and-regional/govt-and-politics/aclu-wyoming-should-let-orthodox-jew-inmate-wear-skullcap/article_576c0260-ec4e-5876-867f-e165ed1cf91c.html [http://perma.cc/J8ER-Q6FW].

[69] Press Release, ACLU of Louisiana, Open Letter on Student Religious Rights (Aug. 25, 2014), http://laaclu.org/press/2014/082514.htm [http://perma.cc/CY96-ZEN6].

[70] *See* Brief of Americans United for Separation of Church and State as Amicus Curiae in Support of Petitioner, Holt v. Hobbs, No. 13-6827 (U.S. Jan. 20, 2015).

[71] Brief of the Brennan Center for Justice at N.Y.U. School of Law as Amicus Curiae in Support of the Government at 16, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (Nos. 13-354 & 13-356).

[72] Brief Amicus Curiae of American Jewish Committee and Jewish Council for Public Affairs in Support of the Government at 2, *Hobby Lobby*, 134 S. Ct. 2751 (Nos. 13-354 & 13-356).

[73] DONNA BARRY ET AL., CENTER FOR AM. PROGRESS, A BLUEPRINT FOR RECLAIMING RELIGIOUS LIBERTY POST–*HOBBY LOBBY* 10 (2014), http://cdn.americanprogress.org/wp-content/uploads/2014/07/ReligiousLibertyReport.pdf [http://perma.cc/T28K-KYR7].

at the forefront of high-profile academic lobbying efforts pressing for broad religious exemptions to antidiscrimination laws in the context of same-sex marriage.[74] And while other liberal academics are wary of recognizing exemptions in the civil rights context,[75] there is no evidence that those specific concerns are leading to a widespread abandonment of support for religious accommodations in general.

Of course, there are some legal scholars who oppose RFRA. The most prominent example is Professor Marci Hamilton, and her opposition was recently cited by a Comment in the *Harvard Law Review* to support the claim that the "consensus in favor of accommodation of religion . . . seems to have weakened, if not collapsed."[76] But Hamilton has vigorously opposed RFRA since its passage in 1993,[77] so her position lends no support to the proposition that a "substantial body of opinion on this issue has moved from the view that *Smith* erred grievously . . . to a broader questioning of religious accommodation altogether."[78]

As for politicians, in the wake of the Court's decision in *Hobby Lobby*, liberal members of Congress did *not* abandon their support for RFRA or call for its repeal; rather, they offered narrow legislation to clarify that religious-exemption rights do not extend to commercial businesses.[79] In advocating for that legislation, Senator Charles Schumer explained:

> [I]n 1993 when we first passed the RFRA and we were dealing with the protection of individual — underlining individual — liberties[,] . . . I said the RFRA would help restore the American tradition of allowing maximum religious freedom. *That is as true today as it was then. I believe as strongly in RFRA as it was written, then as I do now*, but it was misinterpreted and wrongly expanded by the Supreme Court. . . . The debate is

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[74] *See* Oleske, *supra* note 17, at 10 n.32, 19 n.79.

[75] *See, e.g.*, Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 123, 152–54 (Douglas Laycock et al. eds., 2008); Laura S. Underkuffler, *Odious Discrimination and the Religious Exemption Question*, 32 CARDOZO L. REV. 2069, 2082–88 (2011).

[76] Paul Horwitz, *The Supreme Court, 2013 Term — Comment: The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 170 (2014); *see also id.* at 170 n.113.

[77] *See* Lauren Markoe, *Should Congress Repeal the Law Behind the Hobby Lobby Case?*, RELIGION NEWS SERVICE (July 3, 2014) (noting that Hamilton "has been trying to repeal RFRA since Congress passed it nearly unanimously in 1993"), http://www.religionnews.com/2014/07/03/congress-repeal-law-behind-hobby-lobby-case [http://perma.cc/S4FS-MSAN].

[78] Horwitz, *supra* note 76, at 170. *See generally* Elizabeth Sepper, Response, *Reports of Accommodation's Death Have Been Greatly Exaggerated*, 128 HARV. L. REV. F. 24 (2014).

[79] Press Release, Slaughter, DeGette, Nadler Introduce Legislation in Response to *Hobby Lobby* Decision (July 9, 2014), http://nadler.house.gov/press-release/slaughter-degette-nadler-introduce-legislation-response-hobby-lobby-decision [http://perma.cc/8C9B-W9HS] ("Congress never intended to allow corporate employers to block employee access to critical preventive services like birth control." (internal quotation mark omitted)).

> really whether the Supreme Court appropriately interpreted the RFRA in applying it to profit-making corporations.[80]

Viewing exemption rights as limited to individuals and religious organizations, and not commercial businesses, is hardly a new position for liberals. In 1982, Justices Brennan, Marshall, and Blackmun all signed on to the Court's statement in *United States v. Lee*[81] that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."[82] That disavowal of free exercise exemptions in the commercial realm — which went unchallenged until *Hobby Lobby*[83] — came outside the gay rights context and twenty-eight years before the passage of Obamacare.[84]

In 1999, liberal members of Congress reaffirmed this understanding of the proper scope of religious exemptions when debating the Religious Liberty Protection Act (RLPA), which failed to become law precisely because of fears that its broad scope would extend exemptions to commercial businesses:

> [R]eligious liberty is an individual right expressed by individuals and through religious associations, educational institutions and houses of worship. [Our amendment] would have made clear that the right to raise a claim under RLPA would have applied to that individual right, but that non-religious corporate entities could not seek refuge in a religious claim under RLPA to attack civil rights laws.[85]

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80 160 Cong. Rec. S4531 (daily ed. July 16, 2014) (statement of Sen. Schumer).

81 455 U.S. 252 (1982).

82 *Id.* at 261 (1982).

83 The *Hobby Lobby* majority had to reach back twenty-one years before *Lee* to find the last case where the Court had entertained an exemption claim by a business owner. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2767 (2014) (citing Braunfeld v. Brown, 366 U.S. 599 (1961)). The result in *Braunfeld* was the same as in *Lee*: the exemption claim was denied. *Braunfeld*, 366 U.S. at 609.

84 *See* Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 305 (1985) (same liberal Justices, in another case unrelated to gay rights, joining an opinion distinguishing between "commercial activities undertaken with a 'business purpose'" and "evangelical activities" or "volunteer work"); Newman v. Piggie Park Enters., 390 U.S. 400, 402 n.5 (1968) (unanimous decision of the Warren Court rejecting as "patently frivolous," *id.*, a restaurant chain's argument that, because the owner religiously objected to racial integration, the 1964 Civil Rights Act "constitute[d] an interference with the free exercise of the Defendant's religion," *id.* (quoting Newman v. Piggie Park Enters., 377 F.2d 433, 438 (4th Cir. 1967) (Winter, J., concurring specially)) (internal quotation mark omitted)).

85 H.R. REP. NO. 106-209, at 41 (1999); *see* Ada-Marie Walsh, Note, *Religious Land Use and Institutionalized Persons Act of 2000: Unconstitutional and Unnecessary*, 10 WM. & MARY BILL RTS. J. 189, 192 (2001) ("[RLPA] stalled in the Senate because of concern about its broad nature and its potential undermining effect on certain civil rights laws in areas such as employment and housing.").

As Justice O'Connor famously said in the context of a free association claim for an exemption from a civil rights law, the "Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State. A shopkeeper has no constitutional right to deal only with persons of one sex."[86]

One can certainly argue that this position is mistaken, either in general or as specifically applied to religious liberty claims, but it is simply not plausible to claim that it represents a *new* position for liberals. Quite the opposite, it is the granting of exemptions to commercial businesses that represents the new development in the religious liberty field.[87]

CONCLUSION

In the 1990s, when Professor George was expressing his strong support for *Smith*, I was criticizing the decision for swinging the Court's jurisprudence from one extreme (strict scrutiny applied to laws incidentally burdening individual religious practices) to another (no scrutiny applied to such laws).[88] I continue to adhere to that basic view,[89] and I find little comfort in the fact that the Court has swung back beyond its earlier extreme by reading RFRA to go considerably further than its pre-*Smith* jurisprudence.

George, by contrast, has alternatively championed both extremes: the no-exemption-rights view and the even-more-exemption-rights-than-before-*Smith* view. There is, of course, nothing wrong with changing one's position. But in the spirit of "bluntness" that George invites in the opening pages of his book (p. x), I would suggest that someone who alters his views on conscience rights in such a fundamental way without even attempting an explanation for the switch is hardly in a position to declare who qualifies as an "enemy of conscience."

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[86] Roberts v. U.S. Jaycees, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring in the judgment).

[87] *See* Sepper, *supra* note 78, at 24.

[88] James M. Oleske, Jr., Note, *Undue Burdens and the Free Exercise of Religion: Reworking a "Jurisprudence Of Doubt,"* 85 GEO. L.J. 751, 753–54, 759 (1997).

[89] That said, I think a better middle ground than the one I proposed in 1997 can be found in Ronald J. Krotoszynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of* Smith, 102 NW. U. L. REV. 1189, 1197–99, 1262–70 (2008) (proposing "rationality with bite" review of all laws that incidentally burden religion, *id.* at 1264).