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I. INTRODUCTION

Several businesses have recently challenged the constitutionality of the Affordable Care Act ("ACA")[1] on free exercise grounds, arguing that they are being forced to violate their sincerely held religious convictions when required to provide insurance coverage for contraception. The federal courts issuing opinions in these cases have varied widely, both in result and in their analyses of the relevant constitutional and statutory issues.

Some courts suggest that for-profit corporations are protected by free exercise guarantees as embodied in the Religious Freedom Restoration Act ("RFRA")[2] as long as these corporations are rightly analogized to individuals. While these courts are correct to examine the soundness of that analogy, they should not assume that free exercise guarantees are particularly robust for individuals. On the contrary, those guarantees have traditionally been relatively weak for those who *act* contrary to law for religious reasons.

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1. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified in numerous sections of 42 U.S.C.).

2. Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb-2000bb-4).

Part II of this article discusses the degree to which free exercise guarantees have protected individuals or businesses. Part III discusses RFRA and differing circuit analyses with respect to whether RFRA requires that for-profit corporations with religious objections to fulfilling certain ACA requirements be afforded an exemption with respect to those obligations. The article concludes that because free exercise guarantees as traditionally understood do not afford protection to these corporations and because RFRA is not plausibly interpreted to do so either, the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Incorporated*[3] is likely to result in a flood of litigation to determine the new parameters of RFRA.

II. FREE EXERCISE PROTECTIONS

The strength of free exercise protections depends in part upon the type of activity for which an individual is seeking immunity and in part upon whether the state is imposing a direct burden on religious practice. Speech and worship are afforded greater constitutional protection than other kinds of activities, and states are afforded more deference when indirectly burdening religious practices. Historically, free exercise guarantees have afforded relatively weak protection against indirect state burdens that are not impacting speech or worship.

A. Speech/Worship and the Criminal Law

The Supreme Court has long recognized that the Constitution affords some protection to conscience, although those protections have not been spelled out clearly. Often, the Court's description of the protections afforded by the Free Exercise Clause has focused on the prevention of intervention with modes of worship. In *Davis v. Beason*,[4] the Court described the Religion Clauses as "intended to allow every one under the jurisdiction of the United States to . . . exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others."[5] But this does not mean that all forms of worship are protected, regardless of whether others might (even willingly) be harmed in the religious exercise. In *Reynolds v. United States*,[6] the Court asked rhetorically: "[I]f a wife religiously believed it was her duty to burn herself upon the funeral

3. 134 S. Ct. 2751 (2014).
4. 133 U.S. 333 (1890).
5. *Id.* at 342.
6. 98 U.S. 145 (1878).

pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?"[7]

The *Reynolds* Court distinguished between beliefs and practices, noting that while laws "cannot interfere with mere religious belief and opinions, they may with practices."[8] Practices are not afforded immunity merely because they are in accord with religious convictions. Affording immunity on such a basis "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[9] The protections afforded by the Constitution include "the rights to one's own religious opinions and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience."[10]

Free exercise protections may trump the criminal law in the subset of cases involving religious expression. Consider *Cantwell v. Connecticut*,[11] in which the Court found that the Free Exercise Clause was incorporated through the Fourteenth Amendment to apply to the states.[12] The *Cantwell* Court explained that while the Constitution "safeguards the free exercise of the chosen form of religion,"[13] the same immunity cannot be afforded to actions. The "two concepts—freedom to believe and freedom to act"[14]—must be distinguished, because the "first is absolute,"[15] whereas "the second cannot be."[16]

Newton Cantwell and his two sons, Jesse and Russell, were Jehovah's Witnesses convicted[17] of violating a local statute

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7. *Id.* at 166.

8. *Id.*

9. *Id.* at 167.

10. Downes v. Bidwell, 182 U.S. 244, 282 (1901); *see also* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (suggesting that among the liberties protected by the Fourteenth Amendment was the liberty "to worship God according to the dictates of his own conscience").

11. 310 U.S. 296 (1940).

12. *Id.* at 303 ("The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.").

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 303–04; *see also* Kammi L. Rencher, Note, *Food Choice and Fundamental Rights: A Piece of Cake or Pie in the Sky?*, 12 NEV. L.J. 418, 433 (2012) ("[W]hile the Constitution protects the freedom to believe, it does not necessarily protect the freedom to act in accordance with those beliefs.").

17. *Cantwell*, 310 U.S. at 300 ("After trial in the Court of Common Pleas of New

precluding their soliciting funds for a religious cause without receiving prior approval.[18] Jesse Cantwell was also convicted of "inciting a breach of the peace"[19] because he had played a phonograph record that was highly critical of the Catholic Church.[20] Those listening to the record "were incensed by the contents of the record and were tempted to strike Cantwell unless he went away."[21] Cantwell then "left their presence."[22]

The *Cantwell* Court voided all of the convictions.[23] The convictions for soliciting without approval could not be sustained.

> [T]o condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.[24]

Haven County each of them was convicted on the third count, which charged a violation of § 6294 of the General Statutes of Connecticut . . . .").

18. *See id.* at 301–02:

> No person shall solicit money, services, subscriptions or any valuable thing for any alleged religious, charitable or philanthropic cause, from other than a member of the organization for whose benefit such person is soliciting or within the county in which such person or organization is located unless such cause shall have been approved by the secretary of the public welfare council. Upon application of any person in behalf of such cause, the secretary shall determine whether such cause is a religious one or is a bona fide object of charity or philanthropy and conforms to reasonable standards of efficiency and integrity, and, if he shall so find, shall approve the same and issue to the authority in charge a certificate to that effect. Such certificate may be revoked at any time. Any person violating any provision of this section shall be fined not more than one hundred dollars or imprisoned not more than thirty days or both.

19. *Id.* at 300.

20. *Id.* at 302–03 (explaining that Jesse Cantwell had "played the record 'Enemies,' which attacked the religion and church of the two men, who were Catholics.").

21. *Id.* at 303.

22. *Id.*

23. *Id.* at 311.

24. *Id.* at 307; *cf.* Martin v. City of Struthers, 319 U.S. 141 (1943) (striking down ordinance precluding house-to-house distribution of literature or solicitation); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (striking down license fee requirement as applied to those distributing religious literature and seeking contributions).

With respect to the incitement conviction, the Court noted that, as a general matter, "the provocative language . . . held [in the past] to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer."[25] Because Cantwell's speech involved "no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, [and] no personal abuse,"[26] it did not constitute the kind of speech that would qualify as inciting a breach of the peace.[27]

The Constitution also precludes the state from forcing individuals to affirm principles that contradict their religious beliefs. In *West Virginia State Board of Education v. Barnette*,[28] the Court examined a state law requiring students to salute the flag and say the following: "I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all."[29] The Court explained: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[30] Because the appellee Jehovah's Witnesses believed that saluting the flag contravened their religious beliefs,[31] the Court affirmed the lower court's judgment enjoining enforcement of the regulation at issue.[32]

Free exercise guarantees protect individual speech and worship, and the state cannot force individuals to affirm principles contrary to faith.[33] A different issue is raised, however, when the state

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25. *Cantwell*, 310 U.S. at 309–10.

26. *Id.* at 310.

27. *See id.* at 311 ("[T]he petitioner's communication, considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question."); *see also* Ioanna Tourkochoriti, *The Burka Ban: Divergent Approaches to Freedom of Religion in France and in the U.S.A*, 20 WM. & MARY BILL RTS. J. 791, 814 (2012) ("Cantwell had not made an assault or threat of bodily harm, but had only aroused animosity with his unpopular religious views.").

28. 319 U.S. 624 (1943).

29. *Id.* at 628–29.

30. *Id.* at 642.

31. *See id.* at 629 ("Their religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: 'Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them.' They consider that the flag is an 'image' within this command. For this reason they refuse to salute it.").

32. *Id.* at 642.

33. *See* Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of

requires individuals to *act* in ways not in accord with their religious beliefs.[34]

B. Constitutional Protection of Pacifist Views

In a number of cases, the Court has examined the degree to which the state must accommodate pacifist views. The issue arose in two different contexts: (1) when individuals seeking to become citizens were asked to affirm that they would defend the country if called upon to do so, and (2) when individuals seeking to avoid active military duty challenged the denial of their conscientious objector status. The Court's understanding of the constitutional guarantees has remained relatively consistent over time in these kinds of cases, although the Court's understanding of the relevant statutes has evolved.

Several cases involved individuals seeking United States citizenship who were asked whether they would take up arms to defend the United States if asked to do so. After explaining that they could not do so because of their religious convictions, the Court upheld the denial of their citizenship applications. Eventually, an applicant's refusal to bear arms to defend the country was not viewed as a sufficient condition for barring that person from becoming a citizen, although that development was due to a change in the understanding of the relevant statute rather than an expansion of free exercise guarantees.[35]

United States v. Schwimmer[36] involved a denial of an application for citizenship by Rosika Schwimmer, a Hungarian national.[37] She

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thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.") (citing *Barnette*, 319 U.S. at 633–34); *see also* James R. Dalton, Comment, *There Is Nothing Light About Feathers: Finding Form in the Jurisprudence of Native American Religious Exemptions*, 2005 BYU L. REV. 1575, 1582 (2005) ("The Free Exercise Clause of the First Amendment has been interpreted to mean that the government cannot interfere with or attempt to regulate a person's religious beliefs, penalize a person for his or her religious beliefs, or coerce a person to affirm any religious beliefs contrary to his or her conscience.").

34. W. Amy Fry, Comment, *Polygamy in America: How the Varying Legal Standards Fail to Protect Mothers and Children from its Abuses*, 54 ST. LOUIS U. L.J. 967, 969 (2010) ("While the government may not interfere with mere religious belief or opinion, it may interfere with practices.") (citing State v. Fischer, 199 P.3d 663, 667 (Ariz. Ct. App. 2008)).

35. *See infra* notes 58–61 (discussing *Girouard*).

36. 279 U.S. 644 (1929).

37. *Id.* at 646 ("Respondent was born in Hungary in 1877 and is a citizen of the country.").

testified that "she could whole-heartedly take the oath of allegiance,"[38] but that she was unwilling to affirm that she would take up arms in defense of the country, if necessary.[39] She understood that, as a practical matter, she would never be called to active duty anyway both because of her age[40] and because she was a woman.[41]

The Court upheld the denial of her application for citizenship, apparently fearing that she might dissuade others from defending the country.[42] "The influence of conscientious objectors against the use of military force in defense of the principles of our Government is apt to be more detrimental than their mere refusal to bear arms."[43] Further, that influence might be exerted even by someone who was not in fact called to serve. "The fact that, by reason of sex, age or other cause, they may be unfit to serve does not lessen their purpose or power to influence others."[44] Notwithstanding that she was "a woman of superior character and intelligence"[45] who apparently "believe[d] more than some of us do in the teachings of the Sermon on the Mount," she was told that she could not become a United States citizen.[46]

United States v. Macintosh[47] also involved a challenge to the denial of an application for citizenship. Douglas Macintosh, a Canadian citizen, was an ordained Baptist minister who was also a member of the faculty at the Yale Divinity School.[48] Macintosh explained that "[h]e was ready to give to the United States all the allegiance he ever had given or ever could give to any country, but he

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38. *Id.* at 647.

39. *Id.*

40. *Id.* at 648 ("Highly as I prize the privilege of American citizenship I could not compromise my way into it by giving an untrue answer to question 22 [that asked me to take up arms in defense of the country], though for all practical purposes I might have done so, as even men of my age—I was 49 years old last September—are not called to take up arms . . . .").

41. *Id.* at 647 (noting that no civilized country at that time had attempted to compel its female citizens to take up arms in defense of the country).

42. *Id.* at 644.

43. *Id.* at 651.

44. *Id.*

45. *Id.* at 653 (Holmes, J., dissenting).

46. *Id.* at 655 (Holmes, J., dissenting); *see also* Barry Cushman, Essay, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559, 582 (1997) (discussing "the preposterous denial of citizenship to forty-nine year old pacifist Rosika Schwimmer on the ground that she would not swear to take up arms in defense of the United States.").

47. 283 U.S. 605 (1931).

48. *Id.* at 629 (Hughes, C. J., dissenting).

could not put allegiance to the government of any country before allegiance to the will of God."[49] His naturalization application was denied because he "would not promise in advance to bear arms in defense of the United States unless he believed the war to be morally justified."[50] Those reservations were construed by the district court as indicating that "he was not attached to the principles of the Constitution."[51]

As Chief Justice Hughes explained in his dissent, the issue before the *Macintosh* Court was a narrow one, namely, whether Congress intended to preclude someone like Macintosh from becoming a United States citizen.[52] This was a matter of statutory construction rather than constitutional interpretation. As the *Macintosh* Court explained:

> The privilege of the native-born conscientious objector to avoid bearing arms comes not from the Constitution, but from the acts of Congress. That body may grant or withhold the exemption as in its wisdom it sees fit; and if it be withheld, the native-born conscientious objector cannot successfully assert the privilege.[53]

A case like *Macintosh* was distinguishable from a case like *Schwimmer*[54] in the following way: While the Court feared that individuals like Schwimmer might impede the war effort by dissuading others from participating,[55] the Court did not share those same reservations about Macintosh. As Chief Justice Hughes noted in dissent, "After the outbreak of the Great War [World War I], he [Macintosh] voluntarily sought appointment as a chaplain with the Canadian Army and as such saw service at the front. Returning to

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49. *Id.* at 618; *cf.* United States v. Bland, 283 U.S. 636 (1931). At issue in *Bland* was a denial of a citizenship application by Marie Bland, who had "refused to take the oath of allegiance prescribed by the statute to defend the Constitution and laws of the United States against all enemies, etc., except with the written interpolation of the words, 'as far as my conscience as a Christian will allow.'" *Bland*, 283 U.S. at 636.

50. *Macintosh*, 283 U.S. at 627.

51. *Id.*

52. *See id.* at 627 (Hughes, C.J., dissenting).

53. *Id.* at 624.

54. *See id.* at 635 (Hughes, C.J., dissenting) ("The judgment in United States v. Schwimmer, 279 U.S. 644 [(1929)], stands upon the special facts of that case, but I do not regard it as requiring a reversal of the judgment here. I think that the judgment below should be affirmed.").

55. United States v. Schwimmer, 279 U.S. 644, 651 (1929).

this country, he made public addresses in 1917 in support of the Allies."[56]

Chief Justice Hughes's point that individuals should not be refused citizenship because of their conscientious objections to killing[57] was vindicated in *Girouard v. United States*.[58] James Girouard "testified that he was a member of the Seventh Day Adventist denomination, of whom approximately 10,000 were then serving in the armed forces of the United States as non-combatants, especially in the medical corps; and that he was willing to serve in the army but would not bear arms."[59] The Court noted, "Refusal to bear arms is not necessarily a sign of disloyalty or a lack of attachment to our institutions."[60] Yet, the *Girouard* Court made clear that it was engaging in statutory construction rather than a constitutional analysis.[61]

One of the early conscientious objection cases involved a requirement that the University of California imposed upon its students. *Hamilton v. Regents of the University of California*[62] involved the constitutionality of "the regents' order, requiring able-bodied male students under the age of twenty-four as a condition of their enrollment to take the prescribed instruction in military

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56. *Macintosh*, 283 U.S. at 629 (Hughes, C.J., dissenting); *see also* United States v. Bland, 283 U.S. 636, 637 (1931) (Hughes, C.J., dissenting) ("The petitioner is a nurse who spent nine months in the service of our Government in France, nursing United States soldiers and aiding in psychiatric work. She has religious scruples against bearing arms. I think that it sufficiently appears that her unwillingness to take the oath was merely because of the interpretation that had been placed upon it as amounting to a promise that she would bear arms despite her religious convictions.").

57. *See Macintosh*, 283 U.S. at 632 (Hughes, C.J., dissenting) ("But the long-established practice of excusing from military service those whose religious convictions oppose it confirms the view that the Congress in the terms of the oath did not intend to require a promise to give such service.").

58. 328 U.S. 61 (1946).

59. *Id.* at 62.

60. *Id.* at 64.

61. *See id.* at 70 ("Congress specifically granted naturalization privileges to non-combatants who like petitioner were prevented from bearing arms by their religious scruples. That was affirmative recognition that one could be attached to the principles of our government and could support and defend it even though his religious convictions prevented him from bearing arms. And, as we have said, we cannot believe that the oath was designed to exact something more from one person than from another.").

62. 293 U.S. 245 (1934).

science and tactics."[63] Several students challenged the requirement because it conflicted with their sincerely held religious beliefs.[64]

The California Regents were required by federal law to make military training available[65] but were not required to make it compulsory.[66] The question before the Court was whether California's decision to make military training compulsory deprived the students of the liberty protected by the Fourteenth Amendment.[67] "[A]ppellants' contentions amount to no more than an assertion that the due process clause of the Fourteenth Amendment as a safeguard of 'liberty' confers the right to be students in the state university free from obligation to take military training as one of the conditions of attendance."[68] The Court rejected that the Fourteenth Amendment precludes the state from imposing such a requirement,[69] citing *Schwimmer* and *Macintosh* in support.[70]

In his concurring opinion, Justice Cardozo explained that the question of whether to make military training compulsory was a matter of legislative discretion. Students who "elect to resort to an institution for higher education maintained with the state's moneys, then and only then they are commanded to follow courses of instruction believed by the state to be vital to its welfare."[71] While the state's policy "may be condemned by some as unwise or illiberal or unfair when there is violence to conscientious scruples, either religious or merely ethical,"[72] that alone would not suffice to

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63. *Id.* at 265.

64. *See id.* at 253 ("[E]ach is a follower of the teachings of Jesus Christ; each accepts as a guide His teachings and those of the Bible and holds as a part of his religious and conscientious belief that war, training for war, and military training are immoral, wrong and contrary to the letter and spirit of His teaching and the precepts of the Christian religion.").

65. *Id.* at 258–59 ("[B]y acceptance of the benefits of the Morrill Act of 1862 and the creation of the university in order appropriately to comply with the terms of the grant, the State became bound to offer students in that university instruction in military tactics . . . .").

66. *Id.* at 259 ("Recently Wisconsin and Minnesota have made it [military instruction] elective.").

67. *Id.* at 262 ("[W]e need only decide whether by state action the 'liberty' of these students has been infringed.").

68. *Id.*

69. *Id.* at 265 ("Plainly there is no ground for the contention that the regents' order, requiring able-bodied male students under the age of twenty-four as a condition of their enrollment to take the prescribed instruction in military science and tactics, transgresses any constitutional right asserted by these appellants.").

70. *See id.* at 263–64.

71. *Id.* at 266 (Cardozo, J., concurring).

72. *Id.* (Cardozo, J., concurring).

establish that the policy was unconstitutional.[73] Rather, at issue in this case were "matters of legislative policy, unrelated to privileges or liberties secured by the organic law."[74] Justice Cardozo noted that "[i]nstruction in military science, unaccompanied here by any pledge of military service, is not an interference by the state with the free exercise of religion."[75] He further explained,

> From the beginnings of our history Quakers and other conscientious objectors have been exempted as an act of grace from military service, but the exemption, when granted, has been coupled with a condition, at least in many instances, that they supply the army with a substitute or with the money necessary to hire one.[76]

This more direct assistance in lieu of service would seem to be a greater affront to conscience than would the receipt of military instruction,[77] and yet this greater affront had never been thought a violation of constitutional guarantees.[78] Indeed, acceptance of the claim that such indirect action would be precluded as a violation of conscience would have important implications because individuals might then have to be exempted from paying taxes to support actions to which they had objections. "The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral."[79] The fear that robust protection of

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73. *Id.* (Cardozo, J., concurring) ("More must be shown to set the ordinance at naught.").

74. *Id.* (Cardozo, J., concurring).

75. *Id.* (Cardozo, J., concurring).

76. *Id.* at 266–67 (Cardozo, J., concurring).

77. *See id.* at 267 (Cardozo, J., concurring) ("For one opposed to force, the affront to conscience must be greater in furnishing men and money wherewith to wage a pending contest than in studying military science without the duty or the pledge of service.").

78. *Id.* at 267–68 (Cardozo, J., concurring) ("Never in our history has the notion been accepted, or even, it is believed, advanced, that acts thus indirectly related to service in the camp or field are so tied to the practice of religion as to be exempt, in law or in morals, from regulation by the state.").

79. *Id.* at 268 (Cardozo, J., concurring); *see also* Michael J. White, *The First Amendment's Religion Clauses: "Freedom of Conscience" Versus Institutional Accommodation*, 47 SAN DIEGO L. REV. 1075, 1092 (2010) ("If the phrase 'conscientious objection' can be properly applied to any individual demurral from government policy that is sufficiently 'serious' and if that demurral has a recognizably moral basis—or, alternatively, a basis in strong and sincere convictions

conscience would severely undermine federal programs has been a recurrent theme in the case law.[80]

The Court offered further clarification of the conscientious objector jurisprudence in *Sicurella v. United States*.[81] Anthony Sicurella was a Jehovah's Witness who challenged the denial of his conscientious objector status, notwithstanding his "willingness to use . . . force in defense of Kingdom interests and brethren."[82] Sicurella had made clear that "the weapons of his warfare were spiritual, not carnal,"[83] and the Court explained that his "defense of 'Kingdom Interests' has neither the bark nor the bite of war as we unfortunately know it today."[84]

The question for the Court was whether Congress intended to preclude individuals like Sicurella from being accorded conscientious objector status. Because "Congress had in mind real shooting wars when it referred to participation in war in any form—actual military conflicts between nations of the earth in our time—wars with bombs and bullets, tanks, planes and rockets,"[85] and because Sicurella was not admitting his willingness to participate in that kind of war, the Court held that "the reasoning of the Government in denying petitioner's claim is so far removed from any possible congressional intent that it is erroneous as a matter of law."[86]

Subsequent decisions about conscientious objector status also involved interpretations of congressional intent. In *United States v. Seeger*,[87] the Court offered an authoritative construction of a federal statute that "exempts from combatant training and service in the

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concerning the 'meaning of life'—an interpretation of free exercise could be developed that would be broad enough to excuse the individual person from compliance with the results of even the most 'democratic decisionmaking.' The result would be that the First Amendment's Free Exercise Clause would become, in effect, a constitutional guarantee of a subjective right to civil disobedience.").

80. *See infra* notes 147–49, 248–49, 291–96 and accompanying text (discussing the difficulties that would be posed for government programs if the Constitution required that exemptions be granted to anyone with religious objections to participation).

81. 348 U.S. 385 (1955).

82. *Id.* at 389.

83. *Id.*

84. *Id.* at 389–90.

85. *Id.* at 391.

86. *Id.*; *see also* Donald L. Doernberg, *Pass in Review: Due Process and Judicial Scrutiny of Classification Decisions of the Selective Service System*, 33 HASTINGS L.J. 871, 889 (1982) ("The Supreme Court overturned the conviction, holding that the Department of Justice erred when it stated that Sicurella's willingness to participate in a theocratic war disqualified him under the statute.").

87. 380 U.S. 163 (1965).

armed forces of the United States those persons who by reason of their religious training and belief are conscientiously opposed to participation in war in any form."[88] At issue was what Congress intended when it used "the expression 'Supreme Being' rather than the designation 'God.'"[89] The Court explained that Congress "was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views,"[90] which meant that "the test of belief 'in a relation to a Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."[91]

Seeger had "declared that he was conscientiously opposed to participation in war in any form by reason of his 'religious' belief,"[92] although "he preferred to leave the question as to his belief in a Supreme Being open."[93] Seeger's sincerity was not at issue.[94] Because "the beliefs which prompted his objection occupy the same place in his life as the belief in a traditional deity holds in the lives of his friends, the Quakers,"[95] the Court held that he was entitled to conscientious objector status.[96]

In *Welsh v. United States*,[97] the Court addressed whether an individual could be classified as a conscientious objector when his objection to all wars was expressly not religious,[98] although Welsh had clarified that "his beliefs were 'certainly religious in the ethical sense of the word.'"[99] Here, too, sincerity was not at issue.[100] The *Welsh* Court addressed whether Congress intended to afford conscientious objector status to an individual who "deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience

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88. *Id.* at 164–65 (interpreting § 6(j) of the Universal Military Training and Service Act, 50 U.S.C. app. § 456(j) (1958)).

89. *Id.* at 165.

90. *Id.*

91. *Id.* at 165–66.

92. *Id.* at 166.

93. *Id.*

94. *Id.* at 166–67 ("His belief was found to be sincere, honest, and made in good faith . . . .").

95. *Id.* at 187.

96. *See id.*

97. 398 U.S. 333 (1970).

98. *Id.* at 341 ("Welsh struck the word 'religious' entirely . . . .").

99. *Id.*

100. *Id.* at 337 ("There was never any question about the sincerity and depth of Seeger's convictions as a conscientious objector, and the same is true of Welsh.").

to refrain from participating in any war at any time."[101] The relevant issue was whether the asserted beliefs ethical in source "occupy in the life of that individual 'a place parallel to that filled by . . . God' in traditionally religious persons."[102] Because the relevant section of the federal statute "exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war,"[103] the Court held that Welsh was wrongly denied conscientious objector status.[104]

In his concurrence in the result, Justice Harlan explained that the judgment below had to be reversed, "not as a matter of statutory construction, but as the touchstone for salvaging a congressional policy of long standing that would otherwise have to be nullified."[105] He thus implied that conscientious objector status had to be afforded as a constitutional matter.

One way to test whether conscientious objector status must be accorded as a constitutional rather than as a statutory matter is to consider whether someone with a sincere religious objection to a *particular* war must be afforded an exemption, even though Congress required the objection to be to all wars rather than to one war in particular.[106] In *Sisson v. United States*,[107] the Court considered a case involving an individual who had sincere objections to the Vietnam War in particular rather than to war in general.[108] The jury, who had been instructed that "the crux of the case was whether Sisson's refusal to submit to induction was 'unlawfully, knowingly and wilfully' done,"[109] found the defendant guilty.[110] The district court granted "what it termed a motion in arrest of

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101. *Id.* at 340.

102. *Id.*

103. *Id.* at 344.

104. *See id.*

105. *Id.* at 345 (Harlan, J., concurring).

106. *See* Donald L. Beschle, *Does a Broad Free Exercise Right Require a Narrow Definition of "Religion"?*, 39 HASTINGS CONST. L.Q. 357, 370 n.104 (2012) ("Under the statute, objection to only 'unjust war' does not qualify for conscientious objector status.").

107. 399 U.S. 267 (1970).

108. *See id.* at 274 ("When asked why he had refused induction, Sisson emphasized that he thought the war illegal. He also said that he felt the Vietnam war was 'immoral,' 'illegal,' and 'unjust,' and went against 'my principles and my best sense of what was right.'").

109. *Id.* at 276.

110. *Id.* ("The jury, after deliberating about 20 minutes, brought in a verdict of guilty.").

judgment"[111] and held "that the indictment did not charge an offense based on defendant's 'never-abandoned' Establishment, Free Exercise, and Due Process Clause arguments relating to conscientious objections to the Vietnam war."[112] The district court also ruled that the Selective Service provision at issue "offends the Establishment Clause because it 'unconstitutionally discriminated against atheists, agnostics, and men, like Sisson, who, whether they be religious or not, are motivated in their objection to the draft by profound moral beliefs which constitute the central convictions of their beings.'"[113] The United States government appealed directly to the United States Supreme Court based "on the 'arresting judgment' provision of the Criminal Appeals Act."[114] The Court rejected that it had jurisdiction based on the "arresting judgment" provision, however, because "the critical requirement is that a judgment can be arrested only on the basis of error appearing on the 'face of the record,' and not on the basis of proof offered at trial."[115]

The Court decided that "the decision was in fact an acquittal rendered by the trial court after the jury's verdict of guilty."[116] To explain why that was a more accurate characterization of what had happened, the Court first hypothesized a different case in which the jury had been offered the following instruction:

> If you find defendant Sisson to be sincere, and if you find that he was as genuinely and profoundly governed by conscience as a martyr obedient to an orthodox religion, you must acquit him because the government's interest in having him serve in Vietnam is outweighed by his interest in obeying the dictates of his conscience. On the other hand, if you do not so find, you must convict if you find that petitioner did wilfully refuse induction.[117]

If that had been the instruction, the Court explained that "there [could] be no doubt that its verdict of acquittal could not be appealed

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111. *Id.* at 277.

112. *Id.*

113. *Id.* at 278 (quoting United States v. Sisson, 297 F. Supp. 902, 911 (Mass. App. Dec. 1969)).

114. *Id.* at 278–79 (citing 18 U.S.C. § 3731 (1964)).

115. *Id.* at 281. The Court noted that there was another reason that it did not have jurisdiction to hear the government's appeal, namely that "[t]he second statutory requirement, that the decision arresting judgment be 'for insufficiency of the indictment,' is also not met in this case." *See id.* at 287.

116. *Id.* at 288.

117. *Id.* at 289.

under § 3731 *no matter how erroneous the constitutional theory underlying the instructions.*"[118]

The *Sisson* Court understood that there were differences between the hypothesized case and the one before the Court.[119] In the instant case, the judge rather than the jury found for the defendant,[120] although "judges, like juries, can acquit defendants."[121] Further, the judge in this case found for the defendant after the jury issued a guilty verdict, although the Federal Rules of Criminal Procedure "expressly allow[ed] a federal judge to acquit a criminal defendant after the jury 'returns a verdict of guilty.'"[122] Finally, the judge "labeled his post-verdict opinion an arrest of judgment,"[123] although that label was inaccurate.[124]

The Court viewed the trial court decision as "a post-verdict directed acquittal,"[125] which meant that the Court did not have jurisdiction to address the merits.[126] The district court's suggestion that the First and Fourteenth Amendments protected an individual's sincere refusal to participate in a particular war[127] would not be addressed on the merits[128] until *Gillette v. United States*.[129]

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118. *Id.*; *see also* 18 U.S.C. § 3731:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, or any part thereof, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

119. *Sisson*, 399 U.S. at 290 ("There are three differences between the hypothetical case just suggested and the case at hand.").

120. *Id.* ("[I]n this case it was the judge—not the jury—who made the factual determinations.").

121. *Id.*

122. *Id.* (citing FED. R. CRIM. P. 29(b)–(c)).

123. *Id.*

124. *See id.* at 279–88.

125. *Id.* at 290.

126. *Id.* at 308 ("[T]he appeal in this case must be dismissed for lack of jurisdiction.").

127. *See id.* at 277 (suggesting that "the indictment did not charge an offense based on defendant's 'never-abandoned' Establishment, Free Exercise, and Due Process Clause arguments relating to conscientious objections to the Vietnam war").

128. Charles J. Reid, Jr., *John T. Noonan, Jr., on the Catholic Conscience and War:* Negre v. Larsen, 76 NOTRE DAME L. REV. 881, 903 (2001) (noting that even after *Sisson*, the "question whether Congress might compel one who had conscientious scruples to kill or to subject him to the alternative of summary punishment remained open").

At issue in *Gillette* was "whether conscientious objection to a particular war, rather than objection to war as such, relieves the objector from responsibilities of military training and service."[130] The Court combined two cases, each involving an individual with sincere objections to participating in the Vietnam War in particular.[131] Guy Gillette "was convicted of wilful failure to report for induction into the armed forces."[132] He claimed that he was a conscientious objector with respect to the Vietnam conflict, although he did not object to war as a general matter.[133] Louis Negre sought a discharge as a conscientious objector after having completed his basic training. Negre, a devout Catholic, believed that he had a duty "to discriminate between 'just' and 'unjust' wars and to forswear participation in the latter."[134] He concluded that the Vietnam conflict was an unjust war and that participation in that war would be a violation of conscience.[135]

The sincerity of Gillette's and Negre's convictions was not in doubt.[136] Rather, the issues before the Court included both the proper interpretation of the conscientious objector section and whether that section so construed would pass constitutional muster.[137] The *Gillette* Court explained: "For purposes of determining the statutory status of conscientious objection to a particular war, the focal language of § 6(j) is the phrase, 'conscientiously opposed to participation in war in any form.'"[138] The Court believed the proper interpretation of this section beyond dispute. "This language, on a straightforward reading, can bear but one meaning; that conscientious scruples relating to war and military service must amount to conscientious opposition to participating personally in any war and all war."[139]

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129. 401 U.S. 437 (1971).

130. *Id.* at 439.

131. *Id.* at 440.

132. *Id.* at 439.

133. *Id.* ("[T]his petitioner had stated his willingness to participate in a war of national defense or a war sponsored by the United Nations as a peace-keeping measure, but declared his opposition to American military operations in Vietnam, which he characterized as 'unjust.'").

134. *Id.* at 441.

135. *Id.*

136. *See id.* at 440.

137. *See id.* at 446.

138. *Id.* at 443.

139. *Id.* (citing Welsh v. United States, 398 U.S. 333, at 340, 342 (1970)). *But cf.* United States v. Macintosh, 283 U.S. 605, 635 (1930) (Hughes, C.J., dissenting) ("Nor is there ground, in my opinion, for the exclusion of Professor Macintosh because his conscientious scruples have particular reference to wars believed to be unjust.").

In discussing the difference between objecting to a particular war and objecting to war as a general matter, the *Gillette* Court cited *Sicurella*,[140] explaining that it was permissible for purposes of qualifying for the exemption for an individual to differentiate between a "theocratic war"[141] and "real shooting wars,"[142] and say that he would only be willing to fight in the former. That distinction was not at issue in *Gillette*, however, because in the latter case the plaintiffs "for a variety of reasons consider[ed] one particular 'real shooting war' to be unjust, and therefore oppose[d] participation in that war."[143]

The *Gillette* Court then addressed whether affording an exemption to those who objected to war as a general matter but not to those who objected to a particular unjust war "works a de facto discrimination among religions."[144] After all, some religious traditions oppose war of any sort, while other traditions

> themselves distinguish between personal participation in "just" and in "unjust" wars, commending the former and forbidding the latter, and therefore adherents of some religious faiths—and individuals whose personal beliefs of a religious nature include the distinction—cannot object to all wars consistently with what is regarded as the true imperative of conscience.[145]

The Court rejected the contention that the Government was favoring certain religious traditions over others, instead noting that the chosen method of differentiation was supported by "a number of valid purposes having nothing to do with a design to foster or favor any sect, religion, or cluster of religions."[146] Those purposes included "the Government's need for manpower"[147] and "the interest in maintaining a fair system for determining 'who serves when not all serve.'"[148] There would likely be even greater difficulty in determining who was entitled to a conscientious exemption because "[a]ll the factors that might go into nonconscientious dissent from

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140. *See supra* notes 81–86 and accompanying text (discussing *Sicurella*).

141. *Gillette*, 401 U.S. at 446.

142. *Id.* at 446–47.

143. *Id.* at 447.

144. *Id.* at 451–52.

145. *Id.* at 452.

146. *Id.* at 452–53.

147. *Id.* at 455.

148. *Id.* The Court noted, "The Report of the National Advisory Commission on Selective Service (1967) is aptly entitled In Pursuit of Equity: Who Serves When Not All Serve?" *See id.* at n.20.

policy, also might appear as the concrete basis of an objection that has roots as well in conscience and religion."[149]

With respect to the Free Exercise challenge in particular, the Court explained that the draft laws were "not designed to interfere with any religious ritual or practice, and d[id] not work a penalty against any theological position."[150] Because "[t]he incidental burdens felt by persons in petitioners' position are strictly justified by substantial governmental interests that relate directly to the very impacts questioned,"[151] the Court held that affording conscientious objector status only to those objecting to all wars did not violate constitutional guarantees.[152]

C. Unemployment Compensation Cases

While Free Exercise guarantees did not immunize conscientious objectors from punishment for their refusals to participate in a particular war when doing otherwise would have violated their sincere religious convictions, those guarantees have sometimes extended protection to religiously motivated behavior. Yet, these guarantees have only been effective in a limited context, and the Court has refused to extend these protections to other areas, opportunities to do so notwithstanding.

Consider *Sherbert v. Verner*,[153] which involved Adell Sherbert's challenge to South Carolina's refusal to afford her unemployment compensation benefits. Sherbert lost her job because she would not work on Saturday, her Sabbath,[154] and she was unable to accept other employment for the same reason.[155] South Carolina refused to afford unemployment compensation to those who failed to accept suitable employment without good cause.[156] The *Sherbert* Court

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149. *Id.* at 455.

150. *Id.* at 462.

151. *Id.*

152. *Cf.* White, *supra* note 79, at 1090–92 ("[I]t is far from obvious that there should be any *general* constitutional right of the 'free exercise' of a conscience, [whenever conscience] . . . happens to find itself in serious opposition to any positive law or governmental policy.").

153. 374 U.S. 398 (1963).

154. *Id.* at 399 ("Appellant, a member of the Seventh-day Adventist Church was discharged by her South Carolina employer because she would not work on Saturday, the Sabbath Day of her faith.").

155. *Id.* at 399–400 ("[S]he was unable to obtain other employment because from conscientious scruples she would not take Saturday work . . . .").

156. *Id.* at 401 ("The appellee Employment Security Commission, in administrative proceedings under the statute, found that appellant's restriction upon her availability for Saturday work brought her within the provision disqualifying for

explained that it "has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for 'even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions.'"[157] Such challenges could not win the day because "[t]he conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order."[158]

The Court began its analysis by noting that "appellant's conscientious objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation."[159] The Court then reasoned that if the denial of unemployment benefits "is to withstand appellant's constitutional challenge,"[160] it must be for one of two reasons: (1) "her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise,"[161] or (2) "because any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.'"[162]

The Court noted that while "it is true that no criminal sanctions directly compel appellant to work a six-day week,"[163] it is also true that "appellant's declared ineligibility for benefits derives solely from the practice of her religion, [and] the pressure upon her to forego that practice is unmistakable."[164] Basically, Sherbert was being forced "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[165]

The Court then examined "whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right."[166] The state merely offered the "possibility that the filing of fraudulent claims by unscrupulous claimants feigning

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benefits insured workers who fail, without good cause, to accept 'suitable work when offered . . . by the employment office or the employer. . . .'").

157. *Id.* at 403 (quoting Braunfeld v. Brown, 366 U.S. 599, 603 (1961)).

158. *Id.* (citing Reynolds v. United States, 98 U.S. 145 (1878)).

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

163. *Id.*

164. *Id.* at 404.

165. *Id.*

166. *Id.* at 406.

religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work."[167] After noting that "there is no proof whatever to warrant such fears of malingering or deceit as those which the respondents now advance,"[168] the Court suggested that "even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."[169]

What would count as a sufficiently important state interest to justify the infringement of religious liberties? The Court offered an example, noting that a business could be forced to close on Sunday (even if the owners observed a different Sabbath day) because of the "strong state interest in providing one uniform day of rest for all workers."[170] However, several members of the Court suggested that there was some tension between upholding a law requiring a business to close on a day that was not the owner's Sabbath on pain of a criminal penalty while precluding a state from denying a worker unemployment compensation because she refused to work on her Sabbath.[171]

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167. *Id.* at 407.

168. *Id.*

169. *Id.* at 407–08.

170. *Id.* at 408. There is some question whether this really was a very important interest of the state. *See* Nicholas Nugent, Note, *Toward a RFRA That Works*, 61 VAND. L. REV. 1027, 1039 (2008) ("[I]t would be absurd to classify *Braunfeld*'s interest in a uniform day of rest as 'compelling' under classic strict scrutiny.").

171. *See Sherbert*, 374 U.S. at 417 (Stewart, J., concurring in the result) ("The *Braunfeld* case involved a state *criminal* statute. The undisputed effect of that statute, as pointed out by Mr. Justice Brennan in his dissenting opinion in that case, was that 'Plaintiff, Abraham Braunfeld, will be unable to continue in his business if he may not stay open on Sunday and he will thereby lose his capital investment.' In other words, the issue in this case—and we do not understand either appellees or the Court to contend otherwise—is whether a State may put an individual to a choice between his business and his religion.") (internal quotation marks omitted); *id.* at 421 (Harlan, J., dissenting) ("[D]espite the Court's protestations to the contrary, the decision necessarily overrules *Braunfeld v. Brown*, 366 U.S. 599 [(1961)], which held that it did not offend the 'Free Exercise' Clause of the Constitution for a State to forbid a Sabbatarian to do business on Sunday."). Justice White joined Justice Harlan's dissent. *See id.* at 418. Justice Douglas noted:

> Some have thought that a majority of a community can, through state action, compel a minority to observe their particular religious scruples so long as the majority's rule can be said to perform some valid secular

At least one difficulty in interpreting the Free Exercise jurisprudence is that the Court has protected people like Adell Sherbert[172] but has also upheld state regulations adversely affecting businesses even when the requirements undermined religious convictions.[173] Furthermore, both before and after *Sherbert*, the Court has upheld a variety of state regulations that adversely affect religious practices.[174] It simply is not clear how these cases can be reconciled.[175]

The Court employed the *Sherbert* reasoning to reach a similar result in another employment benefits case. *Thomas v. Review Board*[176] involved an individual, Eddie Thomas, who quit his job "when he was transferred from the roll foundry to a department that produced turrets for military tanks."[177] Thomas believed that his helping to produce weapons was against his religion,[178] although a

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function. That was the essence of the Court's decision in the Sunday Blue Law Cases.

Id. at 411–12 (Douglas, J., concurring) (citations omitted). However, he did not believe *Sherbert* and *Braunfeld* were incompatible. *Id.* at 412 (Douglas, J., concurring) ("That ruling of the Court [on the Sunday Blue Law Cases] travels part of the distance that South Carolina asks us to go now. She asks us to hold that when it comes to a day of rest a Sabbatarian must conform with the scruples of the majority in order to obtain unemployment benefits."); *see also* Robert M. Bernstein, *Abandoning the Use of Abstract Formulations in Interpreting RLUIPA's Substantial Burden Provision in Religious Land Use Cases*, 36 COLUM. J.L. & ARTS 283, 292 (2013) ("The Court's jurisprudence in this area is not entirely coherent. In *Braunfeld v. Brown*, which preceded *Sherbert*, the Court suggested that a general law advancing secular goals will not impose a substantial burden on religion, even if it indirectly affects religious observance.").

172. *See infra* notes 176–97 and accompanying text (discussing *Thomas* and *Hobbie*).

173. *See infra* notes 253–310 and accompanying text (discussing *Braunfeld*, *Gallagher*, and *Lee*).

174. *See supra* notes 37–153 and accompanying text (discussing immigration and conscientious objection cases); *infra* notes 215–51 and accompanying text (discussing *Bowen* and *Lyng*).

175. *See* Bernstein, *supra* note 171, at 292 ("[F]or every case in which the Court found a substantial burden on religion, there is another in which the Court declined to find such a burden."); *cf.* Bertrand Fry, Note, *Breeding Constitutional Doctrine: The Provenance and Progeny of the "Hybrid Situation" in Current Free Exercise Jurisprudence*, 71 TEX. L. REV. 833, 833 (1993) ("[T]he breadth of the protection the Free Exercise Clause offers has seldom received coherent analysis in the Supreme Court.").

176. 450 U.S. 707 (1981).

177. *Id.* at 709.

178. *Id.* at 711 ("[H]e testified that he believed that contributing to the

friend working at the same plant who was also a Jehovah's Witness told him that "working on weapons parts at Blaw-Knox was not 'unscriptural.'"[179] Thomas rejected his friend's interpretation of religious duty, concluding that "his friend's view was based upon a less strict reading of Witnesses' principles than his own."[180] The Court made clear that merely because members of the same faith did not see eye to eye about everything did not somehow invalidate either of those member's views.[181]

Thomas had "testified that he could, in good conscience, engage indirectly in the production of materials that might be used ultimately to fabricate arms—for example, as an employee of a raw material supplier or of a roll foundry."[182] It was not for a court to decide who had the correct interpretation of religious doctrine[183] or whether the articulated religious views were sufficiently consistent or sophisticated.[184] In any event, "under Indiana law, a termination motivated by religion is not for 'good cause' objectively related to the work."[185]

The *Thomas* Court explained that "[t]he mere fact that the petitioner's religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted."[186] Even religious practices can be burdened when the state can show "that it is the least restrictive means of achieving some compelling state interest."[187] The Court

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production of arms violated his religion.").

179. *Id.*

180. *Id.*

181. *Id.* at 715 ("The Indiana court also appears to have given significant weight to the fact that another Jehovah's Witness had no scruples about working on tank turrets; for that other Witness, at least, such work was 'scripturally' acceptable. Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses.").

182. *Id.* at 711.

183. *See id.* at 714 ("The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task . . . However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.").

184. *Id.* at 715 ("Courts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.").

185. *Id.* at 713.

186. *Id.* at 718.

187. *Id.*

concluded, however, that "the interests advanced by the State [did] not justify the burden placed on free exercise of religion."[188]

In *Hobbie v. Unemployment Appeals Commission*,[189] the Court again addressed the kinds of issues raised in *Sherbert* and *Thomas*. While employed at Lawton and Company, Paula Hobbie converted to the Seventh Day Adventist faith, which meant that she could no longer work on Friday evenings or Saturdays.[190] At first the company was able to accommodate her religious requirements,[191] although Hobbie was later informed that she would either have to work during her scheduled shifts or resign from the company.[192] Hobbie refused to resign and was fired.[193] Florida law permitted individuals to receive unemployment compensation if they were not at fault for the loss of their jobs.[194] In effect, the issue before the Court was whether the refusal to work at certain times for religious reasons constituted "misconduct"[195] that would justify the denial of unemployment benefits. The Court held that "the Appeals Commission's disqualification of appellant from receipt of benefits violates the Free Exercise Clause of the First Amendment, applicable to the States through the Fourteenth Amendment,"[196] citing to *Sherbert* and *Thomas*.[197]

The *Sherbert-Hobbie* line of cases suggests robust protection of individual conscience.[198] Yet, the Court itself has suggested that the

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188. *Id.* at 719; *see also* John Infranca, *Institutional Free Exercise and Religious Land Use*, 34 CARDOZO L. REV. 1693, 1709 (2013) (explaining that Thomas "had experienced coercion in that the threat of being denied unemployment benefits placed unmistakable pressure upon him to violate his religious beliefs and continue working").

189. 480 U.S. 136 (1987).

190. *Id.* at 138 ("In April 1984, Hobbie informed her immediate supervisor that she was to be baptized into the Seventh-day Adventist Church and that, for religious reasons, she would no longer be able to work on her Sabbath, from sundown on Friday to sundown on Saturday.").

191. *Id.* ("The supervisor devised an arrangement with Hobbie: she agreed to work evenings and Sundays, and he agreed to substitute for her whenever she was scheduled to work on a Friday evening or a Saturday.").

192. *Id.* ("[T]he general manager informed appellant that she could either work her scheduled shifts or submit her resignation to the company.").

193. *Id.*

194. *Id.* ("Under Florida law, unemployment compensation benefits are available to persons who become 'unemployed through no fault of their own.'") (citing FLA. STAT. § 443.021 (1985)).

195. *See id.* at 139.

196. *Id.* at 139–40.

197. *Id.* at 140.

198. Richard Schragger & Micah Schwartzman, *Against Religious*

protections afforded to conscience by the Free Exercise Clause are much less robust than might be inferred by the *Sherbert-Hobbie* line. In *Employment Division v. Smith*,[199] the Court noted 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)'"[200] unless some kind of hybrid right is involved.[201]

The case involved Alfred Smith and Galen Black, who were fired from their jobs at a private drug rehabilitation program[202] because they had used peyote for sacramental purpose.[203] They were then denied unemployment compensation because their firing was determined to be "work-related 'misconduct.'"[204] The Court upheld Oregon's denial of unemployment compensation.[205]

Smith undermined the contention that the Constitution affords robust free exercise protection in two different respects. First, the *Smith* Court noted that it had "never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation."[206] Thus, the Court questioned the *breadth* of the protection afforded by the *Sherbert-Hobbie* line of cases. Second, the very issue before the *Smith* Court undermines the

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Institutionalism, 99 VA. L. REV. 917, 981 (2013) (describing "the regime under *Sherbert v. Verner*, which requires courts to determine whether the state has compelling interests sufficient to overcome claims of conscience").

199. 494 U.S. 872 (1990).

200. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring in judgment)). An example of a hybrid right was provided in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), where the Court held that "the First and Fourteenth Amendments prevent the State from compelling respondents to cause their children to attend formal high school to age 16." *See id.* at 234–35. The Amish believed that sending their children to school past the 8th grade would result in their children having beliefs inculcated in them which were contrary to the Amish way of life. *See id.* at 209.

201. *See Smith*, 494 U.S. at 881.

202. *Id.* at 814; Robert N. Clinton, *Peyote and Judicial Political Activism: Neo-Colonialism and the Supreme Court's new Indian Law Agenda*, 38 FED. B. NEWS & J. 92, 95 (1991) ("Alfred Smith and Galen Black were drug and alcohol treatment counselors at ADAPT, a private, nonprofit substance abuse rehabilitation program.").

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

204. *Id.*

205. *Id.* at 890 ("Because respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug.").

206. *Id.* at 883.

depth of the protection afforded by that line of cases, because at issue in *Smith* was whether individuals could be denied unemployment compensation when they had been fired because they had used peyote as part of a religious ritual.[207] According to the Court, the appellants claim was "that their religious motivation for using peyote place[d] them beyond the reach of a criminal law that [was] not specifically directed at their religious practice, and that [was] concededly constitutional as applied to those who use[d] the drug for other reasons."[208] The Court rejected that contention.[209] But consider what had been at issue in *Sherbert*, *Thomas*, and *Hobbie*.[210] Those cases involved whether refusal to work at a job or at certain times for religious motivations should be exempted from a state policy that was concededly constitutional as applied to those so refusing for other reasons. So it was not as if the respondents were making a claim with no basis in the prior case law.

As the *Smith* Court pointed out, a salient difference between *Smith* and those other cases was that *Smith* involved a criminal statute whereas the other cases did not.[211] Yet, the Court did not make clear why this difference was dispositive.[212] At issue in *Smith* was the denial of unemployment benefits rather than the possible criminal prosecutions of Smith and Black.[213] In any event, the *Sherbert-Hobbie* line of cases does not provide robust protection when read in light of *Smith*,[214] especially because the conduct at

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207. *Id.* at 874 ("This case requires us to decide whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.").

208. *Id.* at 878.

209. *Id.* ("Our decisions reveal that . . . [a different] reading is the correct one.").

210. *See supra* notes 153–97 and accompanying text (discussing those cases).

211. *See Smith*, 494 U.S. at 876 ("[T]he conduct at issue in those cases was not prohibited by law.").

212. *Cf.* Smith v. Emp't Div., 763 P.2d 146, 147 (Or. 1988), *rev'd*, 494 U.S. 872 (1990) (noting that "it was immaterial to Oregon's unemployment compensation law whether the use of peyote violated some other law").

213. Arnold H. Loewy, *Rethinking Free Exercise of Religion after* Smith *and* Boerne: *Charting a Middle Course*, 68 MISS. L.J. 105, 114 (1998) ("[W]hen the only issue before the Court was the denial of unemployment compensation, it was totally inappropriate for the Court to decide that a nonexistent, theoretical, potential criminal prosecution of Alfred Smith and Galen Black would have faced no First Amendment impediment.").

214. *Cf.* Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise*: Smith, Lukumi *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 860 n.81 (2001) ("*Smith* has created 'a free-exercise jurisprudence in tension with

issue in *Smith* involved a mode of worship rather than an activity less directly related to religious practice.

Several other pre-*Smith* cases also undercut the force of free exercise protections. At issue in *Bowen v. Roy*[215] was

> whether the Free Exercise Clause of the First Amendment compels the Government to accommodate a religiously based objection to the statutory requirements that a Social Security number be provided by an applicant seeking to receive certain welfare benefits and that the States use these numbers in administering the benefit programs.[216]

Stephen Roy and Karen Miller had applied for and received benefits under the Aid to Families with Dependent Children and Food Stamp programs.[217] However, they refused to comply with a condition of the programs, namely, that they provide the social security number of any dependents living in their household.[218] The refusal was based on Roy's sincere religious belief

> that he must keep her person and spirit unique and that the uniqueness of the Social Security number as an identifier, coupled with the other uses of the number over which she has no control, will serve to "rob the spirit" of his daughter and prevent her from attaining greater spiritual power.[219]

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itself' because it rejected the doctrine of earlier free exercise cases, such as *Yoder* and *Sherbert*, but simultaneously 'left those prior cases standing.'") (citing Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 564 (1993) (Souter, J., concurring)); Craig W. Mandell, *Tough Pill to Swallow: Whether Catholic Institutions Are Obligated under Title VII to Cover Their Employees' Prescription Contraceptives*, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 199, 214 (2008) ("[T]he *Smith* rule is a departure from the principles set forth in *Sherbert*, which subjected all laws that burdened religious exercise, directly or indirectly, to a strict scrutiny analysis."); Karl Schock, Comment, *Permissive Discrimination and the Decline of Religion Clause Jurisprudence: The Wearing Out of the Joints*, 77 U. COLO. L. REV. 229, 234 (2006) ("*Sherbert* was seriously limited by *Employment Division v. Smith* . . . .").

215. 476 U.S. 693 (1986).

216. *Id.* at 695.

217. *Id.* ("Appellees Stephen J. Roy and Karen Miller applied for and received benefits under the Aid to Families with Dependent Children program and the Food Stamp program.").

218. *Id.* ("They refused to comply, however, with the requirement, contained in 42 U.S.C. § 602(a)(25) and 7 U.S.C. § 2025(e), that participants in these programs furnish their state welfare agencies with the Social Security numbers of the members of their household as a condition of receiving benefits.").

219. *Id.* at 696.

The district court concluded that "the public interest in maintaining an efficient and fraud resistant system can be met without requiring use of a social security number for Little Bird of the Snow."[220] This was so, at least in part, because so few people have religious objections to the use of that number that the amount of fraud that might occur as a result of ruling in Roy's favor would be minimal.[221]

The Supreme Court reasoned that "Roy objects to the statutory requirement that state agencies 'shall utilize' Social Security numbers not because it places any restriction on what he may believe or what he may do, but because he believes the use of the number may harm his daughter's spirit."[222] But the First Amendment does not "require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family."[223] After all, the Court reasoned, Government does not dictate Roy's religious practices. "Just as the Government may not insist that appellees engage in any set form of religious observance, so appellees may not demand that the Government join in their chosen religious practices by refraining from using a number to identify their daughter."[224]

The *Bowen* Court reasoned that "[t]he statutory requirement that applicants provide a Social Security number is wholly neutral in religious terms and uniformly applicable."[225] Although such a requirement "may indeed confront some applicants for benefits with choices, but in no sense does it affirmatively compel appellees, by threat of sanctions, to refrain from religiously motivated conduct or to engage in conduct that they find objectionable for religious reasons."[226] The Court understood the coercive nature of the choice that Roy was being asked to make:

> [W]hile we do not believe that no government compulsion is involved, we cannot ignore the reality that denial of such benefits by a uniformly applicable statute neutral on its face is of a wholly different, less intrusive nature than affirmative

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220. *Id.* at 698 (quoting Roy v. Cohen, 590 F. Supp. 600, 607 (M.D. Pa. 1984)).
221. *See Roy*, 590 F. Supp. at 612–13.
222. *Bowen*, 476 U.S. at 699.
223. *Id.*
224. *Id.* at 699–700.
225. *Id.* at 703.
226. *Id.*

> compulsion or prohibition, *by threat of penal sanctions*, for conduct that has religious implications.[227]

The Court's statement that the pressure at issue in *Bowen* was different and less significant than other kinds of possible pressure was accurate, as long as one emphasizes that the pressure applied was not *penal* in nature. Roy was facing affirmative compulsion to do something with religious implications. Provision of the social security number would facilitate the robbing of his daughter's spirit, and not providing the number would result in a diminution in the benefits received.

The *Bowen* Court followed past practice by distinguishing between a direct and indirect burden on religious liberty. "A governmental burden on religious liberty is not insulated from review simply because it is indirect, but the nature of the burden is relevant to the standard the government must meet to justify the burden."[228] In addition, the state is entitled to some deference with respect to whether it will include a mechanism for making case-by-case decisions and, if so, which kinds of cases will be given that individualized attention.

> Although in some situations a mechanism for individual consideration will be created, a policy decision by a government that it wishes to treat all applicants alike and that it does not wish to become involved in case-by-case inquiries into the genuineness of each religious objection to such condition or restrictions is entitled to substantial deference.[229]

The substantial deference granted to the State meant that the burden placed on the State was rather weak. "Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest."[230] The very

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227. *Id.* at 704 (emphasis added).

228. *Id.* at 706–07 (citing Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 717–18 (1981)) (internal citations omitted).

229. *Id.* at 707.

230. *Id.* at 707–08; *see also* Robert N. Anderson, Comment, *Just Say No to Judicial Review: The Impact of* Oregon v. Smith *on the Free Exercise Clause*, 76 IOWA L. REV. 805, 814 (1991) (discussing the deferential standard of review . . . [that] extended to cases in which internal government procedure affected a litigant's free exercise rights").

diversity of religious belief in this country makes it very likely that almost any government regulation or program will impose a burden on someone. "[G]iven the diversity of beliefs in our pluralistic society and the necessity of providing governments with sufficient operating latitude, some incidental neutral restraints on the free exercise of religion are inescapable."[231]

The Court adopted a similar approach in *Lyng v. Northwest Indian Cemetery Protective Association*,[232] which involved the issue of "whether the First Amendment's Free Exercise Clause prohibits the Government from permitting timber harvesting in, or constructing a road through, a portion of a National Forest that has traditionally been used for religious purposes by members of three American Indian tribes in northwestern California."[233] The Forest Service was trying to connect two towns by creating a 75-mile paved road.[234] In order to complete the project, it was necessary to "build a 6-mile paved segment through the Chimney Rock section of the Six Rivers National Forest."[235]

The Forest Service had commissioned a study of "American Indian cultural and religious sites in the area."[236] That study concluded that "constructing a road along any of the available routes 'would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples.'"[237] Because the road would be so destructive, the report recommended that the road not be built.[238] The Forest Service disagreed with that conclusion, however,[239] instead choosing to build the road in a way that would minimize the cultural harm thereby caused.[240]

The *Lyng* Court suggested that the "building of a road . . . cannot meaningfully be distinguished from the use of a Social Security

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231. *Bowen*, 476 U.S. at 712.

232. 485 U.S. 439 (1988).

233. *Id.* at 441–42.

234. *Id.* at 442 ("As part of a project to create a paved 75-mile road linking two California towns, Gasquet and Orleans, the United States Forest Service has upgraded 49 miles of previously unpaved roads on federal land.").

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* ("Accordingly, the report recommended that the G-O road not be completed.").

239. *Id.* at 443 ("[T]he Forest Service decided not to adopt this recommendation . . . .").

240. *Id.* ("The Regional Forester selected a route that avoided archeological sites and was removed as far as possible from the sites used by contemporary Indians for specific spiritual activities.").

number, in *Roy*."[241] The Court reasoned that in each case "the challenged Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs."[242] However, it was also true that in each case the individuals would not have been "coerced by the Government's action into violating their religious beliefs; nor would either governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens."[243]

While not providing a clear line to determine which burdens the government could impose without offending free exercise guarantees, the *Lyng* Court did offer the following: "Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development."[244] In this case, there was "no reason to doubt"[245] that "[i]ndividual practitioners use this area for personal spiritual development; some of their activities are believed to be critically important in advancing the welfare of the Tribe, and indeed, of mankind itself."[246] Thus, the Court accepted that building the road would substantially burden particular religious practices.[247]

Importance of that spiritual development notwithstanding, "government simply could not operate if it were required to satisfy every citizen's religious needs and desires."[248] The Court understood that some individuals will find "[a] broad range of government activities—from social welfare programs to foreign aid to conservation projects— . . . deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion."[249] While that is regrettable, the "First

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241. *Id.* at 449; *see also* R. Randall Kelso, *Justice Kennedy's Jurisprudence on the First Amendment Religion Clauses*, 44 MCGEORGE L. REV. 103, 158 (2013) (noting that "[i]n *Lyng v. Northwest Indian Cemetery Protective Ass'n*, the Court applied the doctrine of *Bowen v. Roy* to conclude, under a rational basis approach, that the government could permit the harvesting of timber and construction of a road on federal government land").

242. *Lyng*, 485 U.S. at 449.

243. *Id.*

244. *Id.* at 451.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 452.

249. *Id.*

Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion."[250]

While the program at issue did not prohibit the free exercise of religion, it would certainly make that exercise very difficult if not impossible.[251] Nonetheless, the *Lyng* Court permitted the road to be built.[252]

D. Constitutional Protection of Businesses' Assertions of Conscience

In a series of cases involving businesses, the Court has been unwilling to find that the Free Exercise Clause affords protection. Consider *Braunfeld v. Brown*,[253] which involved the constitutionality of Sunday closing laws as applied to businesses that closed on a different Sabbath day pursuant to sincere religious belief. The appellant merchants were Orthodox Jews who, for religious reasons, closed "their places of business and . . . total[ly] abst[ained] from all manner of work from nightfall each Friday until nightfall each Saturday."[254] Because they had been open on Sunday, they could recoup some of the losses occasioned by being closed on Saturday.[255] Indeed, there was testimony that "Sunday closing will . . . render appellant Braunfeld unable to continue in his business, thereby losing his capital investment."[256]

Certainly, everyone who might wish to be open for business on Sunday would be affected by the law.[257] However, a special burden was imposed on those who, for religious reasons, had to be closed on a different day as well.[258] The *Braunfeld* Court noted that "the

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250. *Id.*

251. *Cf.* James R Beattie, Jr., *Beyond Separation and Neutrality: "Non 'Market Participant'" As the Central Metaphor of Religion Clause Jurisprudence*, 2 WASH. U. JURISPRUDENCE REV. 164, 187 (2010) ("What if the regulation does not criminalize religious exercise or tend to coerce contrary actions, but indirectly, or incidentally, renders religious practice impossible?").

252. *See Lyng*, 485 U.S. at 458 ("The decision of the court below, according to which the First Amendment precludes the Government from completing the G-O road or from permitting timber harvesting in the Chimney Rock area, is reversed.").

253. 366 U.S. 599 (1961).

254. *Id.* at 601.

255. *See id.* ("[E]ach of appellants had done a substantial amount of business on Sunday, compensating somewhat for their closing on Saturday . . . .").

256. *Id.*

257. *Id.* at 603 ("[A]ppellants and all other persons who wish to work on Sunday will be burdened economically by the State's day of rest mandate . . . .").

258. *Id.* ("[A]ppellants point out that their religion requires them to refrain from work on Saturday as well.").

freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions."[259] In explaining why the Free Exercise Clause did not require an exemption, the Court noted that "the statute at bar does not make unlawful any religious practices of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive."[260] The case at bar was "wholly different than when the legislation attempts to make a religious practice itself unlawful."[261] The Court cautioned that "[t]o strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, *i.e.*, legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature."[262] The free exercise guarantees do not go so far. The Court suggested that states have a fair amount of latitude when only indirectly burdening religious observance.

> But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.[263]

Yet, one of the questions at hand was whether the state could have achieved its goals without imposing the burden of Sunday closing on those who closed on other days of the week.[264] Indeed, the Court noted that other states did provide an exemption under those circumstances, and that "this may well be the wiser solution to the problem."[265] However, the Court's focus was not on "the wisdom of legislation but . . . its constitutional limitation,"[266] noting that permitting an "exemption might well undermine the State's goal of providing a day that, as best possible, eliminates the atmosphere of commercial noise and activity."[267] Further, were such an exemption

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259. *Id.* (citing Cantwell v. Connecticut, 310 U.S. 296, at 303–04, 306 (1940)).

260. *Id.* at 605.

261. *Id.* at 606.

262. *Id.*

263. *Id.* at 607 (citing *Cantwell*, 310 U.S. at 304–05).

264. *Id.* at 608 ("[A]ppellants . . . contend that the State should cut an exception from the Sunday labor proscription for those people who, because of religious conviction, observe a day of rest other than Sunday.").

265. *Id.*

266. *Id.*

267. *Id.*

allowed, "exempted employers would probably have to hire employees who themselves qualified for the exemption because of their own religious beliefs, a practice which a State might feel to be opposed to its general policy prohibiting religious discrimination in hiring."[268] The Court therefore refused to hold that "the Pennsylvania statute . . . is invalid, either on its face or as applied."[269]

Consider also *Gallagher v. Crown Kosher Super Market, Inc.*,[270] which involved whether a kosher butcher shop could remain open on Sunday notwithstanding the Sunday closing law. The Court explained that "Crown Kosher Super Market, [was] a corporation whose four stockholders, officers and directors are members of the Orthodox Jewish faith, which operates in Springfield, Massachusetts, and sells kosher meat and other food products that are almost exclusively kosher."[271] The supermarket had conducted almost a third of its business on Sunday.[272]

Massachusetts had permitted those closed on a different day to be open until 10:00 a.m. on Sunday, although the supermarket had found that this was not an economically viable alternative.[273] The supermarket argued that "if it is required by law to abstain from business on Sunday, then, because its owners' religion demands closing from sundown Friday to sundown Saturday, Crown will be open only four and one-half days a week, thereby suffering extreme economic disadvantage."[274] However, because the disadvantage suffered by Crown would not be as great as that suffered by Braunfeld, and the Sunday closing laws had been upheld in the latter case, the Court was unpersuaded that Crown had to be afforded an exemption.[275]

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268. *Id.* at 609.

269. *Id.*

270. 366 U.S. 617 (1961).

271. *Id.* at 618.

272. *Id.* at 619 ("Crown had previously been open for business on Sunday, on which day it had conducted about one-third of its weekly business.").

273. *Id.* ("Although there is a statutory provision which permits Sabbatarians to keep their shops open until 10 a.m. on Sunday for the sale of kosher meat, Crown did not do so because it was economically impractical; for the same reason, Crown did not open after sundown on Saturday.").

274. *Id.* at 630.

275. *See id.* at 631 ("These allegations are similar, although not as grave, as those made by appellants in Braunfeld v. Brown, [366 U.S. 599 (1961)] []. Since the decision in that case rejects the contentions presented by these appellees on the merits, we need not decide whether appellees have standing to raise these questions.").

It might be thought that the Sunday closing laws did not themselves mandate doing something contrary to religious belief. The store could close on Friday night and Saturday (in accordance with religious law) and close on Sunday in accordance with civil law.[276] Yet, an analogous point might have been made with respect to Adell Sherbert—she was not being required to work on Saturday; rather, she was merely being denied employment benefits for her refusal to work then.[277] The burdens imposed in the two cases seem analogous.[278]

In any event, the explanation that the Court only permits indirect burdens on religion is negated by *United States v. Lee*,[279] which involved Edwin Lee, "a member of the Old Order Amish, [who was] a farmer and carpenter."[280] Lee "employed several other Amish to work on his farm and in his carpentry shop."[281] Because of his religious beliefs, "[h]e failed to file the quarterly social security tax returns required of employers, withhold social security tax from his employees, or pay the employer's share of social security taxes."[282]

The Amish believed that they had a religious duty to take care of those in need[283] and thus objected both to the receipt of such benefits and to paying into a system providing such benefits.[284] The Court

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276. *See* Michael V. Hernandez, *The Right of Religious Landlords to Exclude Unmarried Cohabitants: Debunking the Myth of the Tenant's "New Clothes,"* 77 NEB. L. REV. 494, 551 (1998) ("In *Braunfeld*, the Sunday closing law did not conflict with the Jewish shopkeepers' religious beliefs. The shopkeepers could continue to observe the Sabbath on Saturday without violating the law or abandoning their businesses."); Lloyd Hitoshi Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 B.U. L. REV. 1137, 1165–66 (2009) ("[I]n *Braunfeld*, the state did not penalize Orthodox Jewish business owners specifically for closing their businesses on Saturday. Those owners lost the income they would have earned from being open on Sunday, but being open on Sunday was not religiously compelled (although as a practical matter, income from Sunday would offset income lost from being closed on Saturday).").

277. *See* Douglas W. Kmiec, *The Original Understanding of the Free Exercise Clause and Religious Diversity*, 59 UMKC L. REV. 591, 607 (1991) ("[N]either *Sherbert* nor *Braunfeld* merit exemption because the government actions in their cases were simply not prohibitory.") (italics not in original).

278. *See* Nugent, *supra* note 170, at 1034 ("[T]he burden on free exercise in *Sherbert* seemed similar to that in *Braunfeld* . . . .").

279. 455 U.S. 252 (1982).

280. *Id.* at 254.

281. *Id.*

282. *Id.*

283. *Id.* at 255 ("[T]he Amish believe it sinful not to provide for their own elderly and needy . . . .").

284. *Id.* ("[T]he Amish religion not only prohibits the acceptance of social

understood the significance of those beliefs: "Because the payment of the taxes or receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights."[285] The fact that there was "a conflict between the Amish faith and the obligations imposed by the social security system is only the beginning, however, and not the end of the inquiry."[286]

The *Lee* Court explained that the governmental interest in the nationwide social security system was "apparent."[287] That system "provid[es] a comprehensive insurance system with a variety of benefits available to all participants."[288] The "design of the system requires support by mandatory contributions from covered employers and employees,"[289] and that "mandatory participation [was] indispensable to the [program's] fiscal vitality."[290]

The Court then examined "whether accommodating the Amish belief will unduly interfere with fulfillment of the governmental interest,"[291] worrying that "it would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs."[292] Further, an additional consideration is that the "obligation to pay the social security tax initially is not fundamentally different from the obligation to pay income taxes."[293] Indeed, there was "no principled way . . . to distinguish between general taxes and those imposed under the Social Security Act."[294] The Court then noted that were it to find that an exemption had to be afforded, then if "a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, [then] such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax."[295] The Court concluded that "[b]ecause the broad public interest in maintaining a

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security benefits, but also bars all contributions by Amish to the social security system.").

285. *Id.* at 257.
286. *Id.*
287. *Id.* at 258.
288. *Id.*
289. *Id.*
290. *Id.*
291. *Id.* at 259.
292. *Id.* at 259–60.
293. *Id.* at 260.
294. *Id.*
295. *Id.*

sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax."[296]

The *Lee* Court's analysis seems especially relevant to how the ACA challenge at issue here should be resolved, since ACA also involves an insurance system[297] and the for-profit corporations challenging it are engaging in commercial activity. As the *Lee* Court explained, "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."[298]

The *Lee* Court reasoned that "[g]ranting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees."[299] In the case at bar, the employees were also Amish,[300] and nothing in the opinion suggests that those employees had a different view than their employer. The Court nonetheless held that the tax had to be paid,[301] notwithstanding that the employees also likely had objections to the receipt of such benefits.[302] Justice Stevens in his concurrence suggested that "a standard that places an almost insurmountable burden on any individual who objects to a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes) . . . explains most of this Court's holdings."[303]

Lee and *Braunfeld* are different in an important respect. While Braunfeld could have closed his business on Sunday without violating his religious duty,[304] Lee could not have participated in the

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296. *Id.*

297. *See infra* note 414 and accompanying text (discussing the ACA insurance plan, including its requirement that contraception be covered).

298. *Lee*, 455 U.S. at 261.

299. *Id.*

300. *See id.* at 254 ("[A]ppellee employed several other Amish to work on his farm and in his carpentry shop.").

301. *Id.* at 261 ("The tax imposed on employers to support the social security system must be uniformly applicable to all, except as Congress provides explicitly otherwise.").

302. *Id.* at 261 n.12 ("We note that here the statute compels contributions to the system by way of taxes; it does not compel anyone to accept benefits. Indeed, it would be possible for an Amish member, upon qualifying for social security benefits, to receive and pass them along to an Amish fund having parallel objectives. It is not for us to speculate whether this would ease or mitigate the perceived sin of participation.").

303. *Id.* at 263 n.3 (Stevens J., concurring in the judgment).

304. *See supra* note 276 and accompanying text.

Social Security system in any way without compromising his religious beliefs.[305] The Court held that no exemption was required under the Free Exercise Clause,[306] even though Lee had religious objections to participating in the program.

The *Lee* Court noted that "Congress granted an exemption, on religious grounds, to self-employed Amish and others,"[307] reasoning that Congress's willingness to exempt some from the program showed that Congress had "been sensitive to the needs flowing from the Free Exercise Clause."[308] The fact that Congress had exempted some did not mean that others with religious objections also had to be exempted. On the contrary, Congress' having exempted some but not others suggested that Congress had engaged in the necessary balancing of religious interests with national needs.[309] "Congress has accommodated, to the extent compatible with a comprehensive national program, the practices of those who believe it a violation of their faith to participate in the social security system."[310]

The Free Exercise Clause did not immunize the for-profit corporations discussed above from neutral, generally applicable laws.[311] It should not be thought, however, that the Free Exercise Clause immunizes all religious non-profit corporations from legal obligations that are contrary to religious belief.

Bob Jones University v. United States[312] involved whether "nonprofit private schools that prescribe and enforce racially discriminatory admissions standards on the basis of religious doctrine, qualify as tax-exempt organizations under § 501(c)(3) of the Internal Revenue Code of 1954."[313] Bob Jones University is a nonprofit corporation[314] that is "dedicated to the teaching and propagation of its fundamentalist Christian religious beliefs."[315] Among those beliefs was the sincere conviction that "the Bible forbids interracial dating and marriage."[316] At first, the school's

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305. *Lee*, 455 U.S. at 255.

306. *Id.* at 260 ("Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax.").

307. *Id.*

308. *Id.* at 261.

309. *Id.* at 260–61.

310. *Id.* at 260.

311. *See supra* notes 253–310 and accompanying text.

312. 461 U.S. 574 (1983).

313. *Id.* at 577.

314. *Id.* at 579.

315. *Id.* at 580.

316. *Id.*

chosen method of assuring that its beliefs would be honored was simply to exclude Black students completely.[317] Then, the university relaxed its policy.[318] "From 1971 to May 1975, the University accepted no applications from unmarried Negroes, but did accept applications from Negroes married within their race."[319]

The University employed other mechanisms to assure that its beliefs were respected. For example, any student who dated[320] or was married to[321] someone of another race was expelled. Indeed, anyone who advocated interracial dating[322] or belonged to an organization advocating interracial marriage[323] was expelled. The IRS revoked the school's tax-exempt status because of its interracial dating and marriage policies.[324] The University successfully challenged its loss of tax-exempt status on the district court level,[325] although that decision was reversed by the Fourth Circuit on appeal.[326] The Fourth Circuit reasoned, "To be eligible for an exemption under that section, an institution must be 'charitable' in the common law sense, and therefore must not be contrary to public policy."[327] The University appealed and the United States Supreme

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317. *Id.* ("To effectuate these views, Negroes were completely excluded until 1971.").

318. *Id.*

319. *Id.* The university had a different policy for its employees. *See id.* at n.5 ("Beginning in 1973, Bob Jones University instituted an exception to this rule, allowing applications from unmarried Negroes who had been members of the University staff for four years or more.").

320. *Id.* at 581 ("Students who date outside their own race will be expelled.").

321. *Id.* at 580 ("Students who are partners in an interracial marriage will be expelled.").

322. *Id.* at 581 ("Students who espouse, promote, or encourage others to violate the University's dating rules and regulations will be expelled.").

323. *Id.* ("Students who are members of or affiliated with any group or organization which holds as one of its goals or advocates interracial marriage will be expelled.").

324. *Id.* ("On January 19, 1976, the IRS officially revoked the University's tax-exempt status, effective as of December 1, 1970, the day after the University was formally notified of the change in IRS policy.").

325. *Id.* at 582 ("The United States District Court for the District of South Carolina held that revocation of the University's tax-exempt status exceeded the delegated powers of the IRS, was improper under the IRS rulings and procedures, and violated the University's rights under the Religion Clauses of the First Amendment.") (citing Bob Jones Univ. v. United States, 468 F. Supp. 890, 907 (D.S.C. 1978)).

326. *Id.* ("The Court of Appeals for the Fourth Circuit, in a divided opinion, reversed.") (citing Bob Jones Univ. v. United States, 639 F.2d 147 (4th Cir. 1980)).

327. *Id.*; *see also Bob Jones Univ.*, 639 F.2d at 151.

Court "granted certiorari to decide whether petitioners, nonprofit private schools that prescribe and enforce racially discriminatory admissions standards on the basis of religious doctrine, qualify as tax-exempt organizations under § 501(c)(3) of the Internal Revenue Code of 1954."[328]

Tax exemptions are afforded only when a public benefit would thereby be accrued.[329] Because "racial discrimination in education violates deeply and widely accepted views of elementary justice,"[330] the Court noted that "[i]t would be wholly incompatible with the concepts underlying tax exemption to grant the benefit of tax-exempt status to racially discriminatory educational entities."[331]

The University argued that "even if the Commissioner's policy is valid as to nonreligious private schools, that policy cannot constitutionally be applied to schools that engage in racial discrimination on the basis of sincerely held religious beliefs."[332] Denial of a tax exemption to those schools "violates their free exercise rights under the Religion Clauses of the First Amendment."[333] The Court admitted that "[d]enial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets."[334] Such a denial was nonetheless constitutionally permissible because of the government's compelling interest in eradicating racial discrimination in education and because "no 'less restrictive means' are available to achieve the governmental interest."[335]

Nor is Bob Jones University the only nonprofit organization whose religiously motivated practices had to be changed in light of civil law. *Tony & Susan Alamo Foundation v. Secretary of Labor*[336] involved the employment practices[337] of the "Tony and Susan Alamo

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328. *Bob Jones Univ.*, 461 U.S. at 577.

329. *Id.* at 591 ("Charitable exemptions are justified on the basis that the exempt entity confers a public benefit . . . .").

330. *Id.* at 592.

331. *Id.* at 595.

332. *Id.* at 602–03.

333. *Id.* at 603.

334. *Id.* at 603–04.

335. *Id.* at 604 (quoting Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 718 (1981)).

336. 471 U.S. 290 (1985).

337. *See id.* at 293 ("[T]he Secretary of Labor filed an action against the Foundation, the Alamos, and Larry La Roche, who was then the Foundation's vice president, alleging violations of the minimum wage, overtime, and recordkeeping provisions of the Fair Labor Standards Act . . . .").

Foundation, . . . a nonprofit religious organization."[338] The Court explained that the Foundation's "businesses [were] staffed largely by the Foundation's 'associates,' . . . [who] 'receive[d] no cash salaries, [although] the Foundation provide[d] them with food, clothing, shelter, and other benefits.'"[339] Lest it be thought that the Foundation was simply exploiting its staff, the Court noted that most of the associates "were drug addicts, derelicts, or criminals before their conversion and rehabilitation by the Foundation."[340] Further, the "associates who had testified at trial had vigorously protested the payment of wages, asserting that they considered themselves volunteers who were working only for religious and evangelical reasons."[341] As had been true in *Lee*,[342] the fact that both management and the employees supported management's failure to abide by the law did not somehow immunize that law-breaking.[343]

The district court had noted that "despite the Foundation's incorporation as a nonprofit religious organization, its businesses were 'engaged in ordinary commercial activities in competition with other commercial businesses.'"[344] This was important because such a finding was necessary for the Fair Standards Labor Act to be applicable.[345]

The Foundation argued that its businesses "differ from 'ordinary' commercial businesses because they are infused with a religious purpose."[346] But the Court explained that "the Foundation's businesses serve the general public in competition with ordinary commercial enterprises,"[347] and that "the payment of substandard wages would undoubtedly give petitioners and similar organizations an advantage over their competitors."[348] Thus, "the admixture of

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338. *Id.* at 292.

339. *Id.*

340. *Id.*

341. *Id.* at 293.

342. *See supra* note 302 and accompanying text.

343. *Tony & Susan Alamo Found.*, 471 U.S. at 299–303.

344. *Id.* (quoting Donovan v. Tony & Susan Alamo Found., 567 F. Supp. 556, 573 (W.D. Ark. 1982)).

345. *See id.* at 295 ("In order for the Foundation's commercial activities to be subject to the Fair Labor Standards Act, two conditions must be satisfied. First, the Foundation's businesses must constitute an '[e]nterprise engaged in commerce or in the production of goods for commerce.' 29 U.S.C. § 203(s). Second, the associates must be 'employees' within the meaning of the Act.").

346. *Id.* at 298.

347. *Id.* at 299.

348. *Id.*

religious motivations does not alter a business' effect on commerce."[349]

Both for-profit and nonprofit religious organizations may be required to follow generally applicable laws. Yet, that does not mean that the Free Exercise Clause does no work at all, because it prohibits the State from targeting on the basis of religion.[350]

In *Church of the Lukumi Babalu Aye v. City of Hialeah*,[351] the Court explained: "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."[352] At issue before the *Hialeah* Court were three ordinances adopted by the Hialeah City Council regulating "religious animal sacrifice."[353] The Court noted that the ordinances seemed to target the killing of animals for religious purposes,[354] and included an exemption for "kosher slaughter."[355] Because "few if any killings of animals are prohibited other than Santeria sacrifice,"[356] and there was evidence that members of the city council viewed the Santeria religion with great distaste,[357] the Court found the ordinances at issue in violation of free exercise guarantees.[358]

The *Hialeah* Court affirmed "the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[359] That said, "the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."[360] If there are religious exemptions for some but not for others, the law will be struck down if that exemption is understood to be favoring

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349. *Id.*

350. *See infra* notes 351–69 and accompanying text.

351. 508 U.S. 520 (1993).

352. *Id.* at 532.

353. *Id.* at 527 (noting that the council had "adopted three substantive ordinances addressing the issue of religious animal sacrifice").

354. *Id.* at 536 ("The definition excludes almost all killings of animals except for religious sacrifice, and the primary purpose requirement narrows the proscribed category even further, in particular by exempting kosher slaughter.") (citations omitted).

355. *Id.*

356. *Id.*

357. *See id.* at 541.

358. *See id.* at 547.

359. *Id.* at 531 (citing Emp't Div. v. Smith, 494 U.S. 872 (1990)).

360. *Id.* at 532 (citing Braunfeld v. Brown, 366 U.S. 599, 607 (1961)).

one religion over another. For example, "a municipal ordinance was applied in an unconstitutional manner when interpreted to prohibit preaching in a public park by a Jehovah's Witness but to permit preaching during the course of a Catholic mass or Protestant church service."[361] Of course, there are "many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct,"[362] and "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality."[363] One indicator of invidious motivation is that "a law which visits 'gratuitous restrictions' on religious conduct, seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation."[364]

The *Hialeah* Court cautioned that "laws burdening religious practice must be of general applicability."[365] Yet, the Court was not thereby suggesting that no differentiation is permissible—"[a]ll laws are selective to some extent."[366] Rather, the Court's point was that the "categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice."[367] Free exercise guarantees are violated "when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation."[368] Targeting religious conduct because of its religious nature is exactly what the Free Exercise Clause precludes. "The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause."[369]

Free Exercise jurisprudence suggests that the State has a great deal of discretion with respect to the indirect burdens that it may impose on religion, as long as the State is not targeting religion. However, the Religious Freedom Restoration Act might be thought to significantly change the burden imposed on the federal government when it passes legislation adversely affecting religion,

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361. *Id.* at 533 (citing Fowler v. Rhode Island, 345 U.S. 67 (1953)).

362. *Id.*

363. *Id.* at 534.

364. *Id.* at 538 (quoting McGowan v. Maryland, 366 U.S. 420, 520 (1961) (Frankfurter, J., concurring in the result)) (citations omitted).

365. *Id.* at 542 (citing Emp't Div. v. Smith, 494 U.S. 872, 879–81 (1990)).

366. *Id.*

367. *Id.*

368. *Id.* at 542–43.

369. *Id.* at 543.

so it must be examined before ACA's constitutionality can be discussed.

III. RFRA AND ACA

Several circuits have addressed whether Free Exercise guarantees require that ACA include an exception for those for-profit businesses with sincere religious objections to providing contraception coverage. The courts have not only reached differing conclusions but have used remarkably different reasoning, even while basing their decisions on the same cases and statute. These differences may be attributed in part to differing interpretations of the Religious Freedom Restoration Act and in part to differing interpretations of Free Exercise jurisprudence more generally.

A. Religious Freedom Restoration Act

Congress passed the Religious Freedom Restoration Act (RFRA)[370] in response to the Court's *Smith* decision.[371] RFRA was designed to reinstate the *Sherbert v. Verner* test,[372] which is triggered when the government imposes a substantial burden on religion.[373] The Court explained in *City of Boerne v. Flores*[374] that "RFRA prohibits '[g]overnment' from 'substantially burden[ing]' a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that [compelling governmental] interest.'"[375]

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370. Religious Freedom Restoration Act of 1993 ("RFRA"), Pub. L. 103-141, 107 Stat. 1488 (1993).

371. Steven G. Calabresi, *The Right to Buy Health Insurance Across State Lines: Crony Capitalism and the Supreme Court*, 81 U. CIN. L. REV. 1447, 1479–80 (2013) (discussing "the Religious Freedom Restoration Act (RFRA)—a statute that was plainly designed on its face to overrule *Employment Division v. Smith*").

372. 374 U.S. 348 (1963).

373. Sossamon v. Texas, 131 S. Ct. 1651, 1656 (2011) ("Congress first enacted the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.*, with which it intended to 'restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) . . . in all cases where free exercise of religion is substantially burdened.' § 2000bb(b)(1).").

374. 521 U.S. 507 (1997).

375. *Id.* at 515–16 (quoting 42 U.S.C. § 2000bb–1).

A central issue in ACA challenges is whether forcing a corporation to provide insurance coverage for a religiously objectionable procedure constitutes a substantial burden on religious practice.[376] Some believe that such a requirement is obviously very burdensome.[377] But the Court has offered so many mixed signals about what qualifies as a substantial burden for free exercise purposes that it is an open question as to how this issue will be resolved.

Sometimes, the Court implies that many governmental programs impose a substantial burden on religion. For example, the *Boerne* Court noted, "Claims that a law substantially burdens someone's exercise of religion will often be difficult to contest."[378] But if these claims are difficult to contest, then state laws likely impose substantial religious burdens on a variety of groups, "given the diversity of beliefs in our pluralistic society."[379] Indeed, RFRA's potential breadth[380] was one of the reasons that the Court struck the Act as applied to the states.[381] Thus, in one part of the opinion, the *Boerne* Court implies that many state requirements will impose substantial burdens on some religious groups. Yet, in another part of the opinion, the *Boerne* Court writes:

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376. Marci A. Hamilton, *RLUIPA Is a Bridge Too Far: Inconvenience Is Not Discrimination*, 39 FORDHAM URB. L.J. 959, 965–66 (2012) ("The threshold question in every free exercise case, whether statutory or constitutional, is whether the law imposes a 'substantial burden' on religious exercise.").

377. Gregory Caridi, Note, *The PPACA Contraception Mandate and the Free Exercise of Religion: Toward a More Nuanced Standard of Review*, 53 S. TEX. L. REV. 809, 823 (2012) ("There is little doubt that an employer who refused to provide contraception coverage for religious reasons could claim a substantial burden."); Jonathan T. Tan, Comment, *Nonprofit Organizations, For-Profit Corporations, and the HHS Mandate: Why the Mandate Does Not Satisfy RFRA's Requirements*, 47 U. RICH. L. REV. 1301, 1344 (2013) ("The current version of the mandate places a substantial burden on nonprofit organizations' exercise of religion by forcing them to either act contrary to their sincerely held religious beliefs or incur substantial fines.").

378. *Boerne*, 521 U.S. at 534 (citing Emp't Div. v. Smith, 494 U.S. 872, at 887, 907 (1990)).

379. Bowen v. Roy, 476 U.S. 693, 712 (1986).

380. *Boerne*, 521 U.S. at 532 ("Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter.").

381. *See id.* at 536 (stating that "the provisions of the federal statute here invoked [RFRA] are beyond congressional authority, it is this Court's precedent, not RFRA, which must control").

> It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs.[382]

Here, the Court suggests that something perceived by an adherent to be a substantial burden might nonetheless not qualify as a substantial burden on religion for two distinct reasons. First, something that imposes "a substantial burden on a large class of individuals"[383] might not thereby be classified as a substantial burden on religion in particular but might instead be viewed as an incidental burden on religion[384] if the religious individual would not be "burdened any more than other citizens,"[385] e.g., if the zoning limitations would be felt equally burdensome by the religious and non-religious alike.[386] But if that is true, then the Court must be rejecting that an individual can claim that she is bearing a substantial burden simply by virtue of the fact that the challenged regulation is significantly impacting her religious practices. If the Court were not rejecting the significant-and-thus-substantial-burden-on religion claim, then it would never be true that the religious and the non-religious could be burdened equally—the religious could always claim that their burden was one that the non-religious would of course not have to bear. Thus, the difference between incidental and substantial burdens for free exercise purposes cannot simply be in terms of whether the burden is significant, because the Court implies that even a significant burden would not qualify as substantial if shared equally by the religious and the non-religious alike.[387]

Second, the Court might not find that something was a substantial burden on religion if there was no evidence that the burden had been placed on individuals "because of their religious

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382. *Id.* at 535.

383. *Id.*

384. *See id.*

385. *Id.*

386. *Id.*

387. Regrettably, in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014), the Court ignored this jurisprudence and simply announced that it had "little trouble," *see id.* at 2775, in concluding that the corporations' free exercise rights were substantially burdened, because the provision of the contested insurance "may result in the destruction of an embryo." *See id.* at 2778.

beliefs."[388] Thus, in the very same opinion, the *Boerne* Court implies that an adherent's sincere assertion that a law substantially burdens her religious practice will be difficult to refute and also suggests that something sincerely perceived by an adherent as burdensome might nonetheless not qualify as a substantial burden on religion for RFRA purposes if the burden is borne by the religious and the non-religious alike.

Even before *Smith*, the Free Exercise jurisprudence was not uniform with respect to what qualified as a substantial burden. For example, the *Thomas* Court explained,

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless *substantial*.[389]

Here, the Court implies that even indirect compulsion can impose a substantial burden on religion.

Yet, the *Braunfeld*[390] Court downplayed the burden imposed by the State, even though the regulation at issue might have forced Braunfeld to close his business. "[T]he statute at bar does not make unlawful any religious practices of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive."[391]

The pre-*Smith* jurisprudence is also inconsistent with respect to what will be required of the state to justify its imposing a substantial burden on religious practice. The *Sherbert* Court discussed the need for "some compelling state interest . . . [to] justif[y] the substantial infringement of appellant's First Amendment right."[392] But the *Bowen* Court suggested that even substantial burdens, if indirect, would be subjected to a lesser standard of review. "A governmental burden on religious liberty is not insulated from review simply because it is indirect, but the

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388. *Boerne*, 521 U.S. at 535.

389. Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 717–18 (1981) (emphasis added).

390. Braunfeld v. Brown, 366 U.S. 599 (1961).

391. *Id.* at 605.

392. Sherbert v. Verner, 374 U.S. 398, 406 (1963).

nature of the burden is relevant to the standard the government must meet to justify the burden."[393] Here, the *Bowen* Court suggests that whether the burden is direct or indirect (rather than whether the burden is substantial) determines the standard that the government must meet to justify its regulation.[394]

The Court's most extensive discussion of RFRA's application against the Federal Government was contained in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*.[395] At issue were the religious practices of O Centro Espírita Beneficente Uniã do Vegetal (UDV). Central to the sect's faith was the receipt of communion though the use of a hallucinogenic tea.[396]

The Controlled Substances Act[397] "regulates the importation, manufacture, distribution, and use of psychotropic substances."[398] One of the plants used to make the tea was a controlled substance under the Controlled Substances Act.[399] The Government *admitted* that "applying the Controlled Substances Act to the UDV's sacramental use of *hoasca* . . . would substantially burden a sincere exercise of religion by the UDV"[400] but argued that "applying the Controlled Substances Act in this case was the least restrictive means of advancing three compelling governmental interests."[401]

The *Gonzales* Court explained that "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened."[402] It was not clear that Congress had been envisioning this use in particular when deciding which substances were prohibited,[403] and Congress had been open in the past to

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393. Bowen v. Roy, 476 U.S. 693, 706–07 (1986) (citing *Thomas*, 450 U.S. at 717–18).

394. *See supra* notes 215–31 and accompanying text (discussing *Bowen*).

395. 546 U.S. 418 (2006).

396. *Id.* at 425.

397. 21 U.S.C. § 801 *et seq.* (2000).

398. *Gonzales*, 546 U.S. at 425.

399. *See id.* ("One of the plants, *psychotria viridis*, contains dimethyltryptamine (DMT), a hallucinogen whose effects are enhanced by alkaloids from the other plant, *banisteriopsis caapi*. DMT, as well as 'any material, compound, mixture, or preparation, which contains any quantity of [DMT],' is listed in Schedule I of the Controlled Substances Act. § 812(c), Schedule I(c).").

400. *Id.* at 425–26.

401. *Id.* at 426.

402. *Id.* at 430–31 (quoting 42 U.S.C. § 2000bb-1(b)).

403. *Id.* at 432 ("[T]here is no indication that Congress, in classifying DMT, considered the harms posed by the particular use at issue here—the circumscribed, sacramental use of *hoasca* by the UDV.").

creating exemptions to controlled substance laws so that certain drugs could be used sacramentally.[404]

One question involves the kind of particularized showing that is necessary for the Government to justify its denial. The Court did not say that the refusal to afford an exemption in the particular instance would have to undermine the interests at issue—"the Government can demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program."[405] Indeed, the Court did not "doubt that there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA;"[406] it simply did not believe that the case at hand was an example.

The *Gonzales* Court was confident that the compelling interest test would "'be applied in an appropriately balanced way' to specific claims for exemptions as they arose."[407] Part of that balancing requires courts to "take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries."[408] For example, if employees have a great need for insurance coverage for their reproductive health decisions, then that will have to be weighed in the balance when considering whether an exemption should be afforded to religious employers.[409]

RFRA was intended to reinstate the free exercise test developed in the pre-*Smith* case law.[410] But that includes not only *Sherbert* and

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404. *See id.* at 433 ("[B]oth the Executive and Congress itself have decreed an exception from the Controlled Substances Act for Native American religious use of peyote.").

405. *Id.* at 435.

406. *Id.* at 436.

407. *Id.* (quoting Cutter v. Wilkinson, 544 U.S. 709, 722 (2005)).

408. Cutter v. Wilkinson, 544 U.S. 709, 720 (2005) (citing Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985)). The standard used in *Cutter* for the Religious Land Use and Institutionalized Persons Act is the same standard used in RFRA. *See Gonzales*, 546 U.S. at 436.

409. *Cf.* Caroline Mala Corbin, Colloquy, *The Contraception Mandate*, 107 NW. U. L. REV. 1469, 1479–80 (2012) (arguing that ACA survives strict scrutiny); Rebecca Hall, Comment, *The Women's Health Amendment and Religious Freedom: Finding a Sufficient Compromise*, 15 J. HEALTH CARE L. & POL'Y 401, 417 (2012) ("[A] court will likely find that the mandate is narrowly tailored to meet the government's compelling interests.").

410. Mayer, *supra* note 276, at 1164–65 ("Congress intended that RFRA's substantial burden requirement be the same as the requirement that existed in the pre-*Smith* case law."); Kevin L. Brady, Comment, *Religious Sincerity and Imperfection: Can Lapsing Prisoners Recover under RFRA and RLUIPA?*, 78 U. CHI.

Thomas, but *Braunfeld*, *Gallagher*, and *Lee*. This makes it quite unclear what constitutes a substantial burden,[411] and also what will be necessary to justify a state regulation imposing such a burden. The Court explained in *Hernandez v. C.I.R.* that "*Lee* establishes that even a substantial burden would be justified by the 'broad public interest in maintaining a sound tax system,' free of 'myriad exceptions flowing from a wide variety of religious beliefs.'"[412]

B. Challenges to ACA under RFRA

Three different circuit courts have addressed whether the ACA violates free exercise guarantees. Their analyses and results differ markedly, which may be an indication *inter alia* of how confused and confusing the underlying jurisprudence is.

The Seventh Circuit addressed ACA's constitutionality in light of free exercise guarantees in *Korte v. Sebelius*.[413] The *Korte* court explained that "the Patient Protection and Affordable Care Act ("ACA") and related regulations requiring that K & L Contractors purchase an employee health-insurance plan that includes no-cost-sharing coverage for contraception and sterilization procedures."[414]

Cyril and Jane Korte owned K & L Contractors, a construction firm.[415] The Kortes are Roman Catholics who agree with the Church's teachings regarding abortion, contraception and sterilization.[416] After discovering that their current policy provided

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L. REV. 1431, 1437 (2011) ("Neither Act defines 'substantial burden.' The Supreme Court has not interpreted the phrase in the context of RFRA or RLUIPA, but its definition is generally constant across circuits. Lower courts have concluded that substantial burden has the same meaning under both Acts and that both Acts adopt the Supreme Court's definition of substantial burden from pre-*Smith* free exercise cases.").

411. Mayer, *supra* note 276, at 1165 ("[T]he Supreme Court and various federal appellate courts have concluded that other [non-*Sherbert*] types of financial burdens imposed by law upon the free exercise of religious beliefs do not reach the level of a substantial burden."). Some commentators do not seem to appreciate that the pre-*Smith* case law does not always incorporate the same test for substantial burden. *See* Edward Whelan, *The HHS Contraception Mandate vs. the Religious Freedom Restoration Act*, 87 NOTRE DAME L. REV. 2179, 2184 (2012) ("It is likewise clear that 'substantial' is a very low threshold.").

412. 490 U.S. 680, 699–700 (1989) (quoting United States v. Lee, 455 U.S. 252, 260 (1982)).

413. 528 F. App'x 583 (7th Cir. 2012).

414. *Id.* at 584 (citing 42 U.S.C. § 300gg-13(a)(4)).

415. *Id.* ("Cyril and Jane Korte own K & L Contractors, a construction firm . . . .").

416. *Id.* at 585 ("The Kortes are Roman Catholic, and they seek to manage their

contraception coverage,[417] they wanted to shift to a different insurance plan that was in accord with their religious principles.[418] However, an ACA provision prevented their doing so.[419]

The Seventh Circuit noted that there were substantial penalties for noncompliance,[420] which might be "ruinous" for the company and for the Kortes.[421] The *Korte* court reasoned,

> RFRA prohibits the federal government from imposing a "substantial[ ] burden [on] a person's exercise of religion even if the burden results from a rule of general applicability" *unless* the government demonstrates that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[422]

The question then became *who* was burdened by the requirement.

The government argued that because K & L was a secular for-profit company, no RFRA rights were implicated at all.[423] However, that argument was rejected because the Kortes, themselves, were challenging the provision,[424] and they would have to violate their

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company in a manner consistent with their Catholic faith, including its teachings regarding the sanctity of human life, abortion, contraception, and sterilization.").

417. *Id.* ("In August 2012 they discovered that the company's current health-insurance plan includes coverage for contraception.").

418. *Id.* ("The Kortes want to terminate this coverage and substitute a health plan (or a plan of self-insurance) that conforms to the requirements of their faith.").

419. *Id.* ("The ACA's preventive-care provision and implementing regulations prohibit them from doing so [switching insurance plans].").

420. *Id.* ("The Kortes estimate that for K & L Contractors, the penalties could be as much as $730,000 per year . . . .").

421. *Id.*

422. *Id.* at 586 (quoting 42 U.S.C. § 2000bb-1(a), (b)).

423. *Id.* ("[T]he government's primary argument is that because K & L Contractors is a secular, for-profit enterprise, no rights under RFRA are implicated at all."); *see also* Autocam Corp. v. Sebelius, 730 F.3d 618, 626 (6th Cir. 2013), *vacated*, ___ U.S. ___, 134 S. Ct. 2901 (2014) ("[W]e find strong indications that Congress did not intend to include corporations primarily organized for secular, profit-seeking purposes as 'persons' under RFRA."); Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1215 (D.C. Cir. 2013), *vacated*, 134 S. Ct. 2902 (2014) ("[W]e have no basis for concluding a secular organization can exercise religion").

424. *Korte*, 528 F. App'x at 586–87 ("This ignores that Cyril and Jane Korte are also plaintiffs. Together they own nearly 88% of K & L Contractors. It is a family-run business, and they manage the company in accordance with their religious beliefs."); *see also* Beckwith Elec. Co. v. Sebelius, 960 F. Supp. 2d 1328 (M.D. Fla. 2013) ("Pragmatically, as the owner and operator of the company who is charged with

own religious beliefs were they to provide the required coverage.[425] The court granted an injunction temporarily enjoining ACA's application to the Kortes and K & L.[426]

In dissent, Judge Rovner noted both that "it is the corporation rather than the Kortes individually which will pay for the insurance coverage,"[427] and that "the firm itself will not be paying directly for contraceptive services[; rather, the] . . . company will be required to purchase insurance which covers a wide range of health care services."[428] It will be up to the employee as to whether to make use of contraceptive services.[429]

Judge Rovner demonstrated that the provision of insurance for employees is at most an indirect burden on the Korte's religious exercise—the corporation is indirectly burdened because it merely pays for insurance rather than pays for contraception directly. Moreover, the Kortes were at most indirectly involved in the corporation's spending, which would seem to make the Kortes at least doubly removed.

The Seventh Circuit again addressed the issues raised by ACA in another decision involving the Kortes in *Korte v. Sebelius* (*Korte II*).[430] The court described why it believed that ACA might burden the religious beliefs of executives in for-profit companies that were operating in accord with particular religious beliefs.

> As owners, officers, and directors of their closely held corporations, the Kortes and Grotes set all company policy and manage the day-to-day operations of their businesses. Complying with the mandate requires them to purchase the required contraception coverage (or self-insure for these services), albeit as agents of their companies and using

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setting policy, the beliefs of Beckwith are, in essence, the beliefs of Beckwith Electric.").

425. *Korte*, 528 F. App'x at 587 ("[T]he Kortes would have to violate their religious beliefs to operate their company in compliance with it.").

426. *Id.* at 588 ("The defendants are enjoined pending resolution of this appeal from enforcing the contraception mandate against the Kortes and K & L Contractors."). The Seventh Circuit reached a similar result using similar reasoning in *Grote v. Sebelius*, 708 F.3d 850, 855 (7th Cir. 2013) ("The defendants are enjoined pending resolution of this appeal from enforcing the contraception mandate against the Grote Family and Grote Industries.").

427. *Korte*, 528 F. App'x at 589 (Rovner, J., dissenting).

428. *Id.* (Rovner, J., dissenting).

429. *Id.* (Rovner, J., dissenting) ("It will be up to an employee and her physician whether she will avail herself of contraception, and if she does, it will be the insurer, rather than the Kortes, which will be funding those services.").

430. 735 F.3d 654 (7th Cir. 2013).

> corporate funds. But this conflicts with their religious commitments; as they understand the requirements of their faith, they must refrain from putting this coverage in place because doing so would make them complicit in the morally wrongful act of another.[431]

The *Korte II* court explained that "[c]ompelling a person to do an act his religion forbids, or punishing him for an act his religion requires, are paradigmatic religious-liberty injuries sufficient to invoke the jurisdiction of the federal courts."[432] Yet, the court seemed to not appreciate how robust a principle it was adopting, given the diversity of religious beliefs that corporate officers might hold. Indeed, it is not clear that the court's ruling would only apply to someone who was a corporate officer of a closely held corporation. Unless modified, the Seventh Circuit's position would seem to afford the same protections to an officer of a publicly traded corporation.[433]

Suppose that a religious employer knew that an employee was going to use part of her paycheck in a way that was contrary to the employer's religious beliefs. The Free Exercise Clause would not immunize the employer's attempt to withhold some of the employee's paycheck because of disagreement with how that money would be spent. The spending would be attributed to the employee and not the employer.[434] So, too, the decision to use contraception is attributable to the employee and not the employer. Further, the requirement that contraceptive services be included within the insurance coverage is attributable to the government rather than the employer. If an employer is permitted to not support the provision of contraception even indirectly, then it would seem that employers should be able to withhold taxes that support religiously objectionable practices, assuming that the amounts could be quantified.[435]

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431. *Id.* at 668.

432. *Id.*

433. Regrettably, the *Burwell* Court also seemed to open the door to claims by publicly traded corporations. *Cf.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2774 (2014) ("[I]t seems unlikely that the sort of corporate giants to which HHS refers will *often* assert RFRA claims") (emphasis added).

434. *Cf.* Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 486–87 (1986) ("It is well settled that the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution. For example, a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary.").

435. *Cf.* Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 268 (1934) (Cardozo, J., concurring) ("The conscientious objector, if his liberties were to be thus

If RFRA is merely reinstituting the pre-*Smith* jurisprudence, then *Braunfeld*, *Gallagher*, and *Lee* all suggest that the Seventh Circuit erred. Even if it were true that the potential burdens on the Kortes and K & L might have been "ruinous,"[436] that was also true in *Braunfeld*. Even if the Kortes claimed that they were barred by their religion from paying into a system that supported contraception thereby making the burden on religious exercise direct rather than indirect, that argument did not win the day in *Lee*.[437]

The Third Circuit took a much different approach in *Conestoga Wood Specialties Corp. v. Secretary of U.S. Dep't of Health and Human Services*.[438] Conestoga is a for-profit corporation manufacturing wood cabinets.[439] The voting shares were owned entirely by the Hahn family.[440] The Hahns are Mennonites who believe that destruction of a fertilized embryo is intrinsically evil.[441] They objected to providing health coverage to their employees that included emergency contraception that might lead to the destruction of an already conceived human embryo.[442] The Third Circuit concluded that for-profit corporations do not and cannot have or exercise free exercise rights.[443] The court rejected that "just because

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extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral.").

436. *Korte*, 735 F.3d at 585.

437. *See supra* notes 279–310 and accompanying text (discussing *Lee*). The D.C. Circuit suggested that individuals forced to provide insurance coverage for contraception would thereby be forced to "approve and endorse" something "over whatever [religious] objections they may have." *See* Gilardi v. U.S. Dep't of Health and Human Servs., 733 F.3d 1208, 1217–18 (D.C. Cir. 2013). But Lee objected to paying into Social Security, and his desire not to approve or endorse that system did not entitle him to refrain from paying into that system.

438. 724 F.3d 377 (3d Cir. 2013), *rev'd and remanded by* Burwell v. Hobby Lobby Stores, Inc., ___ U.S. ___, 134 S. Ct. 2751 (2014).

439. *Id.* at 381 ("Conestoga is a Pennsylvania for-profit corporation that manufactures wood cabinets and has 950 employees.").

440. *Id.* ("The Hahns own 100 percent of the voting shares of Conestoga.").

441. *Id.* at 381–82 ("The Hahns practice the Mennonite religion. According to their Amended Complaint, the Mennonite Church 'teaches that taking of life which includes anything that terminates a fertilized embryo is intrinsic evil and a sin against God to which they are held accountable.'").

442. *Id.* ("Specifically, the Hahns object to two drugs that must be provided by group health plans under the Mandate that 'may cause the demise of an already conceived but not yet attached human embryo.' These are 'emergency contraception' drugs such as Plan B (the 'morning after pill') and *ella* (the 'week after pill').") (internal citations omitted).

443. *Id.* at 385 ("[W]e simply cannot understand how a for-profit, secular

courts have recognized the free exercise rights of churches and other religious entities, it necessarily follows that for-profit, secular corporations can exercise religion."[444]

While the court recognized the Hahns' religious objections to providing emergency contraception coverage, the court noted that because "Conestoga is distinct from the Hahns, the Mandate does not actually require *the Hahns* to do anything."[445] As for Conestoga, that "a for-profit, secular corporation cannot assert a claim under the Free Exercise Clause necessitates the conclusion that a for-profit, secular corporation cannot engage in the exercise of religion."[446] But an entity that cannot exercise religion will not be able to bring a RFRA claim.[447]

The court understood that if Conestoga decided not to comply with the Act's mandates, the government would impose fines. However, the court reasoned that Conestoga, rather than the Hahns, would be subject to the fines.[448] Basically, the court reasoned that the Hahns could not pick and choose among the benefits and detriments resulting from their decision to incorporate.[449]

Is RFRA intended to cover secular, for profit corporations? This is a matter of statutory construction for the Court.[450] But the pre-

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corporation—apart from its owners—can exercise religion."); *cf.* Schragger & Schwartzman, *supra* note 198, at 984 ("Unless churches have their own consciences (and we have already argued that they do not) . . . .").

444. *Conestoga Wood*, 724 F.3d at 385.

445. *Id.* at 388.

446. *Id.*

447. *Id.* ("Since Conestoga cannot exercise religion, it cannot assert a RFRA claim.").

448. *Id.* at 389 ("The Mandate does not impose any requirements on the Hahns. Rather, compliance is placed squarely on Conestoga. If Conestoga fails to comply with the Mandate, the penalties—including fines, *see* 26 U.S.C. § 4980D, and civil enforcement, *see* 29 U.S.C. § 1132—would be brought against Conestoga, not the Hahns.").

449. *See id.* ("As the Hahns have decided to utilize the corporate form, they cannot 'move freely between corporate and individual status to gain the advantages and avoid the disadvantages of the respective forms.'") (quoting Potthoff v. Morin, 245 F.3d 710, 717 (8th Cir. 2001)); *see also* Mersino Mgmt. Co. v. Sebelius, No. 13-CV-11296, 2013 WL 3546702, *12 (E.D. Mich. 2013) ("Having assumed the corporate form, and all of the benefits and protections that corporate status assures, the Mersinos cannot simply ignore that form when it suits their needs. '[T]here is a distinction [between a corporation and its owners], and it matters in important respects.'") (quoting Grote v. Sebelius, 708 F.3d 850, 857 (Rovner, J. dissenting)).

450. The Court might say, for example, that RFRA applies to religious nonprofit corporations but not to religious for-profit corporations. *Cf.* Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 340–46 (1987)

Smith jurisprudence represented by *Braunfeld*, *Gallagher*, and *Lee* suggest that the Hahns and Conestoga Wood are not protected by free exercise guarantees even if RFRA includes secular, for-profit corporations within its ambit.

The Tenth Circuit addressed some of the implicated issues in *Hobby Lobby Stores, Inc. v. Sebelius*.[451] The Green family operated two businesses, Hobby Lobby Stores, Inc. and Mardel, Inc.[452] Hobby Lobby is "an arts and crafts chain with over 500 stores."[453] Mardel is a "chain of thirty-five Christian bookstores."[454] Both companies are for-profit.[455] Both companies "have organized their businesses with express religious principles in mind."[456] For example, Hobby Lobby's statement of purpose included a promise to operate "the company in a manner consistent with Biblical principles."[457] Mardel, which only sold Christian books and materials,[458] is self-described as "a faith-based company dedicated to renewing minds and transforming lives through the products we sell and the ministries we support."[459]

The Greens have a sincere religious belief that "human life begins when sperm fertilizes an egg . . . [and that] it is immoral for them to facilitate any act that causes the death of a human embryo."[460] They argued that "they would be facilitating harms against human beings if the Hobby Lobby health plan provided coverage for the four FDA-approved contraceptive methods that prevent uterine implantation."[461] The sincerity of their beliefs was not at issue,[462] and their refusal to provide the coverage at issue would result in heavy fines—"$1.3 million per day, or almost $475 million per year."[463] If the corporations were to drop health

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(Brennan, J., concurring in the judgment) (discussing why non-profit and for-profit religious corporations might be treated differently).

451. 723 F.3d 1114 (10th Cir. 2013), *aff'd by* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

452. *Id.* at 1122 ("The plaintiffs in this case are David and Barbara Green, their three children (Steve Green, Mart Green, and Darsee Lett), and the businesses they collectively own and operate: Hobby Lobby Stores, Inc. and Mardel, Inc.").

453. *Id.*

454. *Id.*

455. *See id.* (noting that Mardel is "also run on a for-profit basis").

456. *Id.*

457. *Id.*

458. *Id.*

459. *Id.*

460. *Id.*

461. *Id.* at 1125.

462. *Id.* ("The government does not dispute the sincerity of this belief.").

463. *Id.*

insurance as a general matter, they would be subject to even greater penalties.[464]

The Tenth Circuit noted that some entities had been exempted from the mandate,[465] but that Hobby Lobby and Mardel had not been included in those afforded an exemption.[466] The court then began its analysis, interpreting RFRA to be Congress' attempt to impose the free exercise constraints on the federal government[467] that had existed prior to *Smith*.[468] The court then examined the cases prior to *Smith*, concluding that "the Supreme Court has settled that *individuals* have Free Exercise rights with respect to their *for-profit businesses*."[469] As support for that proposition, the court cited to *Lee* and *Braunfeld*.[470] Yet, as the court itself recognized, the Supreme Court in those cases only *considered* whether free exercise rights had been violated by the respective state and federal law,[471] deciding in both cases that there was *no* violation.[472] Nonetheless, the Tenth Circuit apparently believed that these cases supported the proposition that "individuals may incorporate for religious purposes and keep their Free Exercise rights, and unincorporated individuals may pursue profit while keeping their Free Exercise rights."[473] The court asked rhetorically: "Would an incorporated kosher butcher really have no claim to challenge a regulation mandating non-kosher butchering practices?"[474]

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464. *See id.* ("If the corporations instead drop employee health insurance altogether, they will face penalties of $26 million per year.").

465. *See id.* at 1123 ("A number of entities are partially or fully exempted from the contraceptive-coverage requirement.").

466. *See id.* at 1124 ("No exemption, proposed or otherwise, would extend to for-profit organizations like Hobby Lobby or Mardel.").

467. The court noted that RFRA did not apply to the states, *see id.* at 1133 (citing City of Boerne v. Flores, 521 U.S. 507, 532 (1997)), but still applies to the federal government. *See id.* (citing Kikumura v. Hurley, 242 F.3d 950, 959 (10th Cir. 2001)).

468. *Id.* ("Congress, through RFRA, intended to bring Free Exercise jurisprudence back to the test established before *Smith*.").

469. *Id.* at 1134.

470. *See id.*

471. *See id.* (citing in the following way: "*See, e.g.*, United States v. Lee, 455 U.S. 252 (1982) (*considering* a Free Exercise claim of an Amish employer); Braunfeld v. Brown, 366 U.S. 599 (1961) (plurality opinion) (*considering* a Free Exercise claim by Jewish merchants operating for-profit) (some internal citations omitted) (emphasis added).

472. It was only in another part of the opinion that the court admitted that the *Lee* Court had found no free exercise violation. *See id.* at 1139.

473. *Id.* at 1134.

474. *Id.* at 1135.

While *Gallagher* suggests that the Tenth Circuit's hypothetical butcher would have standing to challenge, the case also suggests that the butcher would lose on the merits. Presumably, if there were a law mandating non-kosher practices that was clearly an attempt to target religious practices, the Court would strike down the law following *Hialeah*. However, if this were a neutral law, e.g., because for some reason there was evidence that kosher butchering practices endangered public health, then such an ordinance would likely be upheld. The *Gallagher* Court upheld a Sunday-closing law that had a significant effect on Crown Kosher Super Market's bottom line, and protecting the public health would presumably be at least as important as enforcing a uniform day of rest.

C. *The* Burwell *Decision*

In *Burwell v. Hobby Lobby Stores, Inc.*,[475] the Court held that RFRA requires that ACA exempt closely held, for-profit corporations from providing insurance for contraception in violation of their consciences.[476] The Court refused to limit its holding to closely held corporations, instead suggesting that although publicly traded corporations would also be protected under RFRA, it was unlikely that there would be many such claims.[477]

The *Burwell* Court did not offer a detailed discussion of what constitutes a substantial burden on free exercise rights.[478] Instead, the fact that provision of the insurance *might* result in the death of embryos was enough to meet the relevant standard.[479] But this means either that there will be great deal of litigation spelling out what constitutes a substantial burden or that a whole host of federal laws will need to have exemptions for a variety of religious beliefs

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475. 134 S. Ct. 2751 (2014).

476. *Id.* at 2759–60.

477. *See id.* at 2774 ("[I]t seems unlikely that the sort of corporate giants to which HHS refers will often assert RFRA claims.").

478. *Id.* at 2798 (Ginsburg, J., dissenting) ("The Court barely pauses to inquire whether any burden imposed by the contraceptive coverage requirement is substantial.").

479. *See id.* at 2775 ("[T]he Hahns and Greens have a sincere religious belief that life begins at conception. They therefore object on religious grounds to providing health insurance that covers methods of birth control that . . . may result in the destruction of an embryo. By requiring the Hahns and Greens and their companies to arrange for such coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs.").

unless the government can establish that the failure to accord such exemptions is justified under strict scrutiny.[480]

IV. CONCLUSION

Recently, several for-profit corporations have challenged ACA under RFRA. RFRA has been interpreted to incorporate the pre-*Smith* free exercise jurisprudence. Yet the pre-*Smith* free exercise guarantees were not very robust, especially for businesses challenging broad federal programs. Even decidedly religious corporations would seem unlikely to be successful under that jurisprudence, given the Court's unwillingness to find for Crown Kosher Market in *Gallagher*.

With respect to RFRA in particular, the *O Centro* Court suggested that broad federal programs might well not require additional exemptions because of religious objections when Congress had made a conscious decision about who should be granted a religious exemption and who should not. Is RFRA intended to cover for-profit businesses? That is unclear. What seems clear, however, is that the pre-*Smith* jurisprudence that includes *Braunfeld*, *Gallagher*, and *Lee* would not have required an exemption for someone participating in an insurance or tax program merely because they had religious objections to some of the uses to which their contributions would be put.[481]

The Court has made clear that RFRA must take into account those who would be burdened by granting an exemption, e.g., employees who need insurance coverage for various reproductive choices. Yet, even when there were no competing interests to be weighed in the balance, the pre-*Smith* Free Exercise jurisprudence was not protective of religious corporations engaging in commerce.

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480. *See id.* at 2780 ("We will assume that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA, and we will proceed to consider the final prong of the RFRA test, *i.e.*, whether HHS has shown that the contraceptive mandate is 'the least restrictive means of furthering that compelling governmental interest.'") (quoting42 U.S.C. § 2000bb–1(b)(2)).

481. *See* Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 392 (1990) ("The Free Exercise Clause accordingly does not *require* the State to grant appellant an exemption from its generally applicable sales and use tax."); Ethridge B. Ricks, Note, *The Gospel According to the Warden: RLUIPA, the First Amendment, and Prisoners' Religious Liberty Requests*, 11 FIRST AMEND. L. REV. 542, 550 (2013) ("If someone adheres to a religion that prohibits paying taxes to an organized government, the Free Exercise Clause does not provide an exemption for that person to avoid paying the tax [sic] general tax.").

The *Lee* and *Tony and Susan Alamo Foundation* cases illustrate that.

Refusing to accept guidance from the past jurisprudence, the Court in *Burwell v. Hobby Lobby Stores, Inc.* found that RFRA required an exemption for the closely held corporations challenging the ACA provision.[482] The Court thereby invites reexamination of a whole host of cases. What had been settled under *Braunfeld*, *Gallagher*, *Lee*, *Tony and Susan Alamo Foundation*, *Bowen*, *Lyng*, and the conscientious objector cases is now open for reconsideration insofar as federal law is implicated. In short, by finding that corporations must be afforded an exemption to ACA under RFRA, the Court has opened the floodgates and there will likely be a whole host of suits under RFRA against the federal government.

On the one hand, *Burwell* may increase pressure to overrule *Smith* and reinstitute the allegedly very protective Free Exercise jurisprudence that had existed prior to *Smith*, although in reality that jurisprudence had been anything but consistent. On the other hand, *Burwell* may prompt the Congress to repeal or substantially modify RFRA, which might then result in even less protection of free exercise. What is certain is that by adopting an un-cabined approach, the *Burwell* Court has guaranteed even more confusion in the lower courts with respect to *which* religious practices will be respected.

482. *Burwell*, 134 S. Ct. at 2759–60 ("[U]nder RFRA, that conclusion means that enforcement of the HHS contraceptive mandate against the objecting parties in these cases is unlawful.").