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Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions

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STEPHANIE H. BARCLAY
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CONSTITUTIONAL ANOMALIES OR AS-APPLIED CHALLENGES? A DEFENSE OF RELIGIOUS EXEMPTIONS

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MARK L. RIENZI^{**}

Abstract: In the wake of *Burwell v. Hobby Lobby* and now in anticipation of *Craig v. Masterpiece Cakeshop, Inc.*, the notion that religious exemptions are dangerously out of step with norms of Constitutional jurisprudence has taken on a renewed popularity. Critics increasingly claim that religious exemptions, such as those available prior to *Employment Division v. Smith* and now available under the federal Religious Freedom Restoration Act (RFRA), are a threat to basic fairness, equality, and the rule of law. Under this view, exemptions create an anomalous private right to ignore laws that everyone else must obey, and such a scheme will result in a tidal wave of religious claimants striking down government action. Our Article presents an observation that undermines these central criticisms. Far from being “anomalous” or “out of step” with our constitutional traditions, religious exemptions are just a form of “as-applied” challenges offered as a default remedy elsewhere in constitutional adjudication. Courts regularly provide exemptions from generally applicable laws for other First Amendment protected activity like expressive conduct that mirror the exemptions critics fear in the context of religious exercise. The Article also presents original empirical analysis, including a national survey of all federal RFRA cases since *Hobby Lobby*, indicating that concerns of critics about religious exemptions have not been borne out as an empirical matter. Our findings suggest that even after *Hobby Lobby*, cases dealing with religious exemption requests remain much less common than cases dealing with other expressive claims, and are less likely to result in invalidation of government actions. Thus, far from creating anomalous preferential treatment that threatens the rule of law, a religious exemption framework simply offers a similar level of protection courts have long provided for dissenting minority rights housed elsewhere in the First Amendment.

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INTRODUCTION

Religious exemptions create an “anomaly” within our legal system—an unfair special privilege to ignore the laws everyone else must obey.¹ Worse still, protecting the rights of diverse religious claimants in our nation will “be courting anarchy” by turning our law into “swiss cheese” and inviting a tidal wave of litigation.²

So goes one of the most common refrains raised by critics of religious exemptions. Some prominent free exercise cases have traded on these assumptions, most notably the famous and controversial case of *Employment Division v. Smith*.³ Many of the recent criticisms of religious exemptions rely on these assumptions, both in the context of exemptions offered constitutionally or statutorily through laws such as the Religious Freedom Restoration Act (“RFRA”).⁴ And these arguments are being made with increasing frequency and volume in the wake of *Burwell v. Hobby Lobby Stores, Inc.*,⁵ and now in anticipation of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.⁶ But are these arguments really accurate?

A closer look at religious exemptions cases—particularly in comparison with other types of First Amendment cases—shows that the claim of unfair favoritism is not correct. This Article presents the claim that religious exemption requests are just a version of what is generally thought of as one of the most common, modest, and preferred modes of constitutional adjudication: the as-applied challenge. This is true regardless of whether the reli-

¹ *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 886 (1990); see also Mary Anne Case, *Why “Live-and-Let-Live” Is Not a Viable Solution to the Difficult Problems of Religious Accommodation in the Age of Sexual Civil Rights*, 88 S. CAL. L. REV. 463, 469, 471 (2015) (arguing that *Employment Division v. Smith* was correctly decided, and that the Religious Freedom Restoration Act (“RFRA”) both causes problems of administrability for religious exemptions and results in problematic preferential treatment of some types of religious claims).

² *Smith*, 494 U.S. at 888; JOHN CORVINO ET AL., *DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION* 52 (2017); see also *infra* notes 71–92 (surveying arguments of critics); *infra* notes 267–303 and accompanying text (reviewing empirical analysis of religious exemption cases).

³ *Smith*, 494 U.S. at 886; see also Brian A. Freeman, *Expiating the Sins of Yoder and Smith: Toward a Unified Theory of First Amendment Exemptions from Neutral Laws of General Applicability*, 66 MO. L. REV. 9, 11 (2001) (“explor[ing] the extent to which the Constitution requires exemptions from neutral laws of general applicability in order to protect the free exercise of religion”); Kenneth Marin, *Employment Division v. Smith: The Supreme Court Alters the State of Free Exercise Doctrine*, 40 AM. U. L. REV. 1431, 1433–75 (1991) (surveying the historical development of free exercise jurisprudence). See generally *Reynolds v. United States*, 98 U.S. 145, 167 (1878) (concluding that allowing religious exemptions would result in a “[g]overnment . . . only in name”).

⁴ 42 U.S.C. § 2000bb (2012).

⁵ 134 S. Ct. 2751 (2014).

⁶ *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 280–81 (Colo. App. 2015), *cert. denied sub nom. Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm’n*, No. 2015SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), *cert. granted sub nom. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 137 S. Ct. 2290 (2017) (mem.).

gious exemptions are offered constitutionally or through statutes such as RFRA. Furthermore, under this form of as-applied adjudication, courts regularly provide identical exemptions in the context of expressive conduct that critics fear in the context of religious exercise protections.

For example, in religious exemption cases, as in other expressive conduct as-applied challenges, the decision-maker is asked to find that a constitutional right would be infringed by a particular application of an otherwise valid law not specifically aimed at protected activity. The remedy in both contexts is a court order protecting the exercise of the constitutional right, but otherwise leaving the law in place to apply to other circumstances that may arise. In fact, the aspect of religious exemptions that generates most of the criticism—the limited carve-out from a law that otherwise remains in place to apply to others—has been widely praised elsewhere as making as-applied challenges preferable to more aggressive constitutional remedies, such as facial invalidation.⁷

Furthermore, there are deep structural similarities between the as-applied challenges in the expressive realm and the religious exercise realm. Thus, far from being problematic anomalies “in tension with other constitutional principles,” the Supreme Court has *described* limited carve-outs as “the basic building blocks of constitutional adjudication.”⁸ When religious exemption requests are properly understood as as-applied challenges, they actually look quite pedestrian, particularly in comparison to how constitutional challenges work to protect other First Amendment interests.⁹

But what about the concern that providing religious exemptions will result in our society “courting anarchy?” Is there something uniquely pervasive and dangerous about *religious* exemption requests? Is it true that the diverse religious views in our country mean we will face an “endless chain of exemption demands” that are much more expansive than other types of First Amendment activity?¹⁰ And particularly in the wake of *Hobby Lobby*, will we face a tidal wave of litigation by an endless line of religious objectors who then become a law unto themselves and strike down government action at every turn?

⁷ Of course, not all religious liberty claims are exemption requests. Some religious liberty claims seek to strike down laws on their face, including under the Establishment Clause or if the law engages in facial targeting under the Free Exercise Clause. *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 526, 531–32 (1993) (holding invalid a law restricting the Santeria religious ritual of animal sacrifice); *Edwards v. Aguillard*, 482 U.S. 578, 580–81 (1987) (holding facially invalid a law requiring teaching “creation sciences” because it lacked a “clear secular purpose”).

⁸ *Gonzales v. Carhart*, 550 U.S. 124, 167–68 (2007); William P. Marshall, *Bad Statutes Make Bad Law: Burwell v. Hobby Lobby*, 2014 SUP. CT. REV. 71, 74.

⁹ See *infra* notes 267–303 and accompanying text.

¹⁰ See *infra* notes 152–178 and accompanying text.

Our original empirical analysis suggests otherwise.¹¹ The data suggests that expressive claims are much more pervasive than religious claims, both in absolute terms and as a percentage of all reported cases. We also provide a new survey of all federal RFRA decisions since *Hobby Lobby*, which analyzes how the Supreme Court's decision in *Hobby Lobby* impacted win rates of reported religious exercise cases. The data does not demonstrate a dramatic increase in the win rate of religious exercise litigants under RFRA. This may be explained, in part, because there are important legal limitations on successful religious claims, like the requirement of sincerity.

So what explains the treatment we give to religious exemptions compared to other First Amendment exemptions? One clue likely comes from the divergent 1940s cases of *Minersville School District v. Gobitis* and *West Virginia State Board of Education v. Barnette*.¹² It may be that the Supreme Court's embrace of a majoritarian approach to religious exercise in *Gobitis* (as later affirmed by *Smith*) leads critics of religious exemptions to view religious exercise rights more skeptically, even though neither the jurisprudential comparison to similar rights nor the empirical data justify such differential criticism and alarm. In fact, the Court firmly rejected the *Gobitis* approach under *Barnette*, and instead opted for a strong counter-majoritarian framework for expressive rights.¹³ Viewed in this context, a religious exemption scheme such as RFRA is simply a restoration of a pluralistic protection of dissenting rights through as-applied challenges.

Part I of this Article surveys scholarly criticisms of religious exemptions as a threat to equality and the rule of law.¹⁴ Part II sets forth an alternate view of religious exemptions as narrow, as-applied challenges that are elsewhere viewed as the preferred mode of constitutional adjudication. This Part explores how in the particularly relevant comparator context of compelled speech, courts regularly provide exemptions from generally applicable laws that mirror the exemptions critics fear in the context of religious exercise.¹⁵ Part III discusses the authors' original empirical analysis of religious versus speech claims to illustrate that, contrary to scholarly apprehension, *Hobby Lobby* has not had a dramatic effect on government win rates in religious exemption challenges, nor have religious claims undergone a dramatic expansion in volume following *Hobby Lobby*. If anything, the volume

¹¹ See *infra* notes 267–289 and accompanying text.

¹² *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640–42 (1943) (holding that compelling students to salute the flag and say the pledge of allegiance, despite their religious objections, violated their First Amendment rights); *Minersville Sch. Dist. Bd. of Educ. v. Gobitis*, 310 U.S. 586, 598–600 (1940) (holding constitutional a compulsory flag salute in school), *overruled by Barnette*, 319 U.S. 624.

¹³ *Barnette*, 319 U.S. at 641.

¹⁴ See *infra* notes 17–67 and accompanying text.

¹⁵ See *infra* notes 68–232 and accompanying text.

of these cases appears to be slightly decreasing as a percentage of all reported cases.¹⁶

I. THE CRITICISM OF RELIGIOUS EXEMPTIONS AS ANOMALOUS AND DANGEROUS

A. *Smith and Initial Backlash*

Critics of religious exemptions frequently rely on Justice Antonin Scalia's majority opinion in *Smith*.¹⁷ There, the Supreme Court rejected the notion that the Free Exercise Clause requires religious exemptions from generally applicable and neutral laws.¹⁸ To overrule prior precedent that favored such exemptions, Justice Scalia relied on two justifications that remain influential among modern critics of religious exemptions: (1) religious exemptions allow objectors to unfairly avoid compliance with an otherwise valid law, and (2) allowing exemptions in our radically diverse society would court anarchy.¹⁹

First, Justice Scalia argued that religious exemptions were tantamount to "a private right to ignore generally applicable laws," which would result in "a constitutional anomaly."²⁰ A person's religious views, Justice Scalia explained, do not "excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."²¹ Viewing exemptions through this lens, Justice Scalia framed the issue in the case as "decid[ing] 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"²² This issue arose in the context of a state's decision to deny unemployment benefits to a Native American person fired for violating a state prohibition on the use of peyote, even though the use of the drug was part of a religious ritual. Justice Scalia argued that the "government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'"²³

¹⁶ See *infra* notes 233–341 and accompanying text.

¹⁷ *Smith*, 494 U.S. at 874, 878–89.

¹⁸ *Id.* at 882. The Supreme Court has since whittled away at this principle from *Smith*. See, e.g., *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188–90 (2012) (recognizing an exemption from the generally applicable Americans with Disabilities Act).

¹⁹ *Smith*, 494 U.S. at 879, 888.

²⁰ *Id.* at 886.

²¹ *Id.* at 878–79.

²² *Id.* at 874.

²³ *Id.* at 885 (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988)).

Justice Scalia even went so far as to argue that valid, generally applicable laws that did not target religion could not really burden religious exercise. He noted that the Free Exercise Clause would certainly prohibit a law that specifically targeted a religious group or practice, by doing things like banning statues used for worship purposes.²⁴ But it would be quite another thing, he argued, for the Free Exercise Clause to create an exemption from a law that was not “specifically directed at their religious practice” and when the law is otherwise constitutional when applied to others who engage in the practice for non-religious reasons.²⁵ A generally applicable and neutral law, according to Justice Scalia, could no more burden religious exercise than it could “abridg[e] the freedom . . . of the press” if the law does not target such constitutional activity; instead, the burden on them is an “incidental effect of a generally applicable and otherwise valid provision.”²⁶ Justice Scalia thus explained that heightened scrutiny was “inapplicable” to a challenge to “an across-the-board . . . prohibition on a particular form of conduct.”²⁷

In a portion of the opinion addressing the tension this approach created with existing law, Justice Scalia acknowledged several court decisions in other constitutional contexts. This included speech, press, and association cases where the “First Amendment bars application of a neutral, generally applicable law to religiously motivated action,” or else “compelled expression” that implicates religious freedom.²⁸ In an attempt to distinguish these cases, Justice Scalia developed his hybrid rights theory and observed that these cases involved free exercise claims alongside other constitutional rights, or else were based solely upon freedom of speech.²⁹ Justice Scalia also argued that employing heightened scrutiny “before the government may regulate the content of speech . . . is not remotely comparable to using it for” religious exemptions.³⁰ He argued that heightened scrutiny in the speech context, which allows the “unrestricted flow of contending speech,” is merely a constitutional norm, whereas a religious exemption would result in a constitutionally anomalous “private right to ignore generally applicable laws. . . .”³¹

Second, Justice Scalia argued that religious exemptions are particularly problematic in “a cosmopolitan nation made up of people of almost every

²⁴ *Id.* at 877–78.

²⁵ *Id.* at 878.

²⁶ *Id.*

²⁷ *Id.* at 884–85.

²⁸ *Id.* at 881–82.

²⁹ *Id.*

³⁰ *Id.* at 886.

³¹ *Id.*

conceivable religious preference,” and this “danger increases in direct proportion to the society’s diversity of religious beliefs.”³² “[W]e cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order,” he explained.³³ Applying heightened scrutiny for such “religious divergence” would “open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind.”³⁴ Some of the contexts Justice Scalia used as examples where problematic exemptions could be requested included drug laws, traffic laws, or animal cruelty laws.³⁵ Thus, in the view of Justice Scalia, “adopting such a system would be courting anarchy.”³⁶

Justice Scalia acknowledged that other First Amendment rights, like free speech and press, sometimes bar “application of a neutral, generally applicable law to religiously motivated action.”³⁷ But although he explained descriptively this difference between religious and other First Amendment rights under his regime, he never justified normatively why this distinction between religious exercise and other First Amendment rights should exist.

When the Supreme Court’s decision in *Smith* was handed down, it received widespread criticism. One scholar noted that in academia generally, “criticism of *Smith* . . . has become commonplace.”³⁸ The criticism was not

³² *Id.* at 888 (internal citation and quotation marks omitted).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 889.

³⁶ *Id.* at 888.

³⁷ *Id.* at 881.

³⁸ See Ira C. Lupu, *Employment Division v. Smith and the Decline of Supreme Court-Centrism*, 1993 BYU L. REV. 259, 260 n.9 (collecting sources that discuss potential implications of *Smith*); see also *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 559 (1993) (Souter, J., concurring in part, concurring in the judgment) (noting that there are doubts as to whether “the *Smith* rule merits adherence”); 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, 851–56 (2001) (arguing that despite the conclusion and subsequent criticism of *Smith* free exercise is still “alive and well”); James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CALIF. L. REV. 91, 114 (1991) (“What is there to admire [about *Smith*]? The Court wanted to reach its result in the worst way, and it succeeded.”); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 2–3 (arguing that *Smith* was incorrectly decided based on precedent and original intent); Marin, *supra* note 3, at 1475–76 (1991) (arguing that “the *Smith* Court has rendered the free exercise clause impotent”); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990) (“There are many ways in which to criticize the *Smith* decision. . . . *Smith* is contrary to the deep logic of the First Amendment.”); Harry F. Tepker, Jr., *Hallucinations of Neutrality in the Oregon Peyote Case*, 16 AM. INDIAN L. REV. 1, 11–26 (1991) (critiquing Justice Antonin Scalia’s use of history and precedent in the *Smith* decision); Carol M. Kaplan, Note, *The Devil Is in the Details: Neutral, Generally Applicable Laws and Exceptions from Smith*, 75 N.Y.U. L. REV. 1045, 1046 (2000) (arguing that “[*Smith*] was not well crafted and was based on a mischaracterization of precedent”); Mark J. Rosen, Comment, *Native Americans May Be Denied State Unemployment Benefits for Ceremonial*

limited to academia—religious, political, and civil rights leaders also joined in from across the political spectrum, with Ted Kennedy, Bill Clinton, and the ACLU joining forces with Orrin Hatch and the United States Conference of Catholic Bishops in efforts to repair what they saw as damage done by *Smith*.³⁹

This backlash resulted in the nearly unanimous passage of RFRA to reinstate a religious exemption framework.⁴⁰ When RFRA was passed in 1993, the bill was supported by one of the broadest bipartisan coalitions in recent political history, with sixty-six religious and civil liberties groups, including Muslims, Sikhs, Humanists, and secular civil liberties organizations such as the ACLU and Americans United for Separation of Church and State.⁴¹

B. Smith's Academic Resurgence

In light of recent hot-button religious exemption cases like *Hobby Lobby*,⁴² and now *Masterpiece Cakeshop*,⁴³ legal academic support for

Ingestion of Peyote Without Violating First Amendment's Free Exercise Clause, 23 RUTGERS L.J. 209, 230 (1991) (arguing that “[t]he Court’s cursory disregard for precedent in arriving at its holding suggests the Court’s willingness to forego long-standing doctrinal jurisprudence, and substitute its new, stultified vision of the Free Exercise liberties ‘protected’ by the Constitution”); Whitney Travis, Note, *The Religious Freedom Restoration Act and Smith: Dueling Levels of Constitutional Scrutiny*, 64 WASH. & LEE L. REV. 1701, 1707 (2007) (noting that “*Smith* was met with enormous criticism”). To be sure, *Smith* did have some contemporaneous academic defenders. See, e.g., Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 916 (1992) (questioning the originalist historical evidence in favor of religious exemptions); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 309 (1991) (defending “*Smith*’s rejection of constitutionally compelled free exercise exemptions without defending *Smith* itself”).

³⁹ See Brett H. McDonnell, *The Liberal Case for Hobby Lobby*, 57 ARIZ. L. REV. 777, 784 (2015) (“Given the politics currently surrounding RFRA, it should come as little surprise that many religious organizations objected to the decision in *Smith*. It is more surprising that many liberal civil rights organizations objected as well—the ACLU, Americans United for the Separation of Church and State, People for the American Way, and Americans for Democratic Action came together in a powerful coalition that proposed a statutory overturning of *Smith*. . . . Thus, at the Court, in Congress, and in the White House, a large number of liberals supported the principle of religious liberty embodied in RFRA.”).

⁴⁰ 42 U.S.C. § 2000bb (2012); Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 210, 243–44 (1994); Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 588 (1998) (noting that “RFRA is federal law, supported by a near unanimous House and Senate and an enthusiastic President”); Travis, *supra* note 38, at 1707 (noting that “[i]n direct response to *Smith*, Congress passed the RFRA in 1993 with nearly unanimous support in both the House and the Senate”).

⁴¹ Laycock & Thomas, *supra* note 40, at 210 n.9; Travis Gasper, Comment, *A Religious Right to Discriminate: Hobby Lobby and “Religious Freedom” as a Threat to the LGBT Community*, 3 TEX. A&M L. REV. 395, 416 (2015) (noting that “the groups most active in pushing for passage of the 1993 RFRA were ideologically left of center”).

⁴² 134 S. Ct. 2751 (2014).

⁴³ *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 280–81 (Colo. App. 2015), *cert. denied sub nom. Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm’n*, No. 2015SC738, 2016 WL

RFRA has declined, while the once-maligned reasoning of *Smith* has recently resurfaced. As many commentators have observed, “the space for accommodating religious objections to general legal obligations is increasingly contested in contemporary American legal, political, and ethical discourse.”⁴⁴ In particular, the question of whether “demands for exemptions from generally applicable laws” are justified is “an issue that has recently assumed increased significance”⁴⁵

For example, in the wake of recent RFRA cases, one scholar recently advanced “the normative view that *Smith* was correctly decided and that . . . [RFRA] was a mistake.”⁴⁶ Another argued that “*Smith* was decided the way it was for a reason.”⁴⁷ Another defended the principal holding of *Smith* that when you have “a neutral state law that applies to everyone,” this law should apply to all without religious exceptions.⁴⁸ And still another argued that Justice Scalia correctly decided *Smith* in holding that “[r]eligion is not a get-out-of-the-law-free-card.”⁴⁹ Notably, most of these critics do not object in principle to protecting religious liberty; rather, the objections of critics generally boil down to the same two primary arguments Justice Scalia relied on in *Smith*.

First, critics argue that religious exemptions from otherwise valid laws provide an anomalous remedy—essentially an excuse to avoid obeying the

1645027 (Colo. Apr. 25, 2016), cert. granted sub nom. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n, 137 S. Ct. 2290 (2017) (mem.).

⁴⁴ Hillel Y. Levin et al., *To Accommodate or Not to Accommodate: (When) Should the State Regulate Religion to Protect the Rights of Children and Third Parties?*, 73 WASH. & LEE L. REV. 915, 918 (2016); see also Frederick Mark Gedicks, *One Cheer for Hobby Lobby: Improbable Alternatives, Truly Strict Scrutiny, and Third-Party Employee Burdens*, 38 HARV. J.L. & GENDER 153, 176 (2015) (expressing concern about *Burwell v. Hobby Lobby*’s “unprecedented expansion of permissive accommodation” as an “‘opt-out’ from generally applicable legislation”); Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 170 (2014) (arguing that “[a] substantial body of opinion on this issue has moved from the view that *Smith* erred grievously by rejecting the prior regime of free exercise exemptions from generally applicable law, . . . to a broader questioning of religious accommodations altogether”); Maimon Schwarzschild, *Do Religious Exemptions Save?*, 53 SAN DIEGO L. REV. 185, 187 (2016) (“[S]upport for religious exemptions may now be breaking down along ideological-political lines. . . . [O]utright opposition to the idea of religious exemption was uncommonly met with until very recently, either in politics or in the legal literature.”); Elizabeth Sepper, *Reports of Accommodation’s Death Have Been Greatly Exaggerated*, 128 HARV. L. REV. F. 24, 24 (2014), http://harvardlawreview.org/wp-content/uploads/2014/11/vol_128_Sepper.pdf [<https://perma.cc/4W9U-DKWT>] (claiming a growing consensus “against granting religious exemptions from generally applicable laws”).

⁴⁵ Laura M. Weinrib, *Freedom of Conscience in War Time: World War I and the Limits of Civil Liberties*, 65 EMORY L.J. 1051, 1054 (2016).

⁴⁶ Case, *supra* note 1, at 469.

⁴⁷ Marshall, *supra* note 8, at 74.

⁴⁸ Haley Gray, *What You Need to Know About the Masterpiece Cakeshop Case*, 5280: DENVER MAG. (June 28, 2017), <http://www.5280.com/2017/06/what-you-need-to-know-about-masterpiece-cakeshop-v-colorado-civil-rights-commission/> [<https://perma.cc/FYJ6-T94Z>].

⁴⁹ CORVINO ET AL., *supra* note 2, at 31.

laws that apply to everyone else. They have been described as “a troubling form of relief—special exemptions from neutral laws for a limited class of beneficiaries—that is in tension with other constitutional principles,” or as not “in the tradition of American liberty.”⁵⁰ Under this view, exemptions are problematic because they allow religious objectors to avoid “play[ing] by the same rules as everyone else.”⁵¹ Thus, if a given law is justified at all, then the law ought to be applied consistently.⁵² Offering exemptions, one scholar argues, would “result in a kind of ‘Swiss cheese’ law.”⁵³ Professor Frederick Gedicks asserts that RFRA defies common sense and the constitution by giving religious believers “a free pass to ignore laws that bind everyone else.”⁵⁴ Professors Ira Lupu and Robert Tuttle similarly argue that extending “strict, rights-protective review to laws that imposed an incidental burden on religious experience thus elevated religious freedom to a preferred position among First Amendment rights, rather than assimilating the Free Exercise Clause with its counterpart rights of speech and press.”⁵⁵

The view that religious exemptions are anomalous quickly leads to the conclusion that recipients of such exemptions are getting preferential treatment under the law, or as one scholar asserted, “disconcerting favoritism” for religious objectors.⁵⁶ Some raise concerns that religious accommodations would result in particularly problematic special treatment in the context of anti-discrimination laws, including the public accommodation laws at issue in *Masterpiece Cakeshop*.⁵⁷ Other scholars echo these allegations of special privilege for religion under a religious accommodation scheme.⁵⁸

⁵⁰ Case, *supra* note 1, at 469–70 (noting that “the sorts of religious exemptions from generally applicable laws typically proposed by proponents of a live-and-let-live solution to the sexual culture wars are neither workable nor in the tradition of American liberty” (internal quotation marks omitted)); Marshall, *supra* note 8, at 74; see also Dan T. Coenen, *Free Speech and Generally Applicable Laws: A New Doctrinal Synthesis*, 103 IOWA L. REV. 435, 466 (2018) (“[S]ingling out religious practitioners for special treatment in applying generally applicable laws creates a tension with the constitutional norm, rooted largely in the Establishment Clause, of ensuring the state’s complete neutrality toward religion. Stated another way, exempting members of particular religious traditions from laws that apply to everyone else smacks of advantaging both religion in general and some religions over others.” (internal quotation marks omitted)).

⁵¹ CORVINO ET AL., *supra* note 2, at 22.

⁵² *Id.* at 22, 31.

⁵³ *Id.* at 52.

⁵⁴ Frederick Mark Gedicks, *Is Religion an Excuse for Breaking the Law?*, NEWSWEEK (Mar. 12, 2016, 10:51 AM), <http://www.newsweek.com/are-religious-beliefs-excuse-breaking-law-435664> [<https://perma.cc/R54Y-XEM4>].

⁵⁵ IRA C. LUPU & ROBERT W. TUTTLE, *SECULAR GOVERNMENT: RELIGIOUS PEOPLE* 11–12 (2014).

⁵⁶ Marshall, *supra* note 8, at 74; see also Case, *supra* note 1, at 486–87 (raising concerns about the risk of “unconstitutional favoritism implicit in proposals for special religious accommodations”).

⁵⁷ See generally MARCI A. HAMILTON, *GOD VS. THE GAVEL: THE PERILS OF EXTREME RELIGIOUS LIBERTY* (2d rev. ed. 2014) (discussing the problems inherent to “extreme” legal protec-

Second, critics argue that religious accommodations are uniquely pervasive, such that they deteriorate the rule of law and risk anarchy, particularly post *Hobby Lobby*. In this vein, Professor Case argues that *Hobby Lobby* has “open[ed] up the floodgates to a host of new potential claims for religious exemption by a host of different kinds of service providers.”⁵⁹ Professor Leslie Griffin argues that because of *Hobby Lobby*, the “broad reading of RFRA . . . will encourage many future lawsuits and undermine more civil liberties.”⁶⁰ She also asserted that “[a]lmost anything can be turned into a claim of ‘cooperation with evil’” and “all federal laws are now subject to challenge, with the possibility of every citizen becoming ‘a law unto himself’ until the rule of law is undermined.”⁶¹ Professor Elizabeth Sepper

tions for religious freedom, starting with RFRA and its offshoots); Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1238–40 (2014); Case, *supra* note 1, at 485 (noting that “[a]dvocates of exemptions from public accommodation laws for service providers who refuse to provide flowers or cake for same-sex wedding celebrations have yet to explain whether and why the claims of these Christian bakers and florists are more worthy of accommodation” than other groups); Lucien J. Dhooge, *Public Accommodation Statutes, Sexual Orientation and Religious Liberty: Free Access or Free Exercise?*, 27 U. FLA. J.L. & PUB. POL’Y 1, 58 (2016) (arguing that “any conflicts between religious liberty asserted by secular businesses and access to goods and services must be resolved in favor of the government’s compelling interest in guaranteeing full and non-discriminatory access for all persons,” and that this “result does not denigrate religion”) (internal footnote omitted); Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, 125 YALE L.J. F. 416, 419 (2016), https://www.yalelawjournal.org/pdf/Lederman_PDF_pt9q3ynr.pdf [<https://perma.cc/R72J-26CV>] (arguing that “there is widespread fear in some quarters—and presumably hope in others—that such claims might become a template for similar claims, pursuant to federal or state RFRA or analogous state constitutional provisions, for religious exemptions from laws that prohibit discrimination in employment, or in the provision of public accommodations, on the basis of sexual orientation”); Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2561–64 (2015) (noting concern that religious exemptions could be granted from public accommodations laws through “complicity-based conscience claims”); Leslie C. Griffin, *If Conestoga Wins, Watch Out Civil Rights*, HAMILTON & GRIFFIN ON RIGHTS (Mar. 24, 2014), <http://hamilton-griffin.com/if-conestoga-wins-watch-out-civil-rights/> [<https://perma.cc/JBR8-GFVA>]. *But see* Sepper, *supra* note 44, at 26 (noting that “[p]ublic accommodations laws generally apply with full force to all businesses serving the public, religiously affiliated or not”).

⁵⁸ See Michele Goodwin & Allison M. Whelan, *Constitutional Exceptionalism*, 2016 U. ILL. L. REV. 1287, 1329 (arguing that religious accommodations result in a religious “exceptionalism” where “‘religiously based rights’ trump all other constitutionally derived interests” and result in “problematic norms”); Schwarzschild, *supra* note 44, at 199 (noting that “exemptions and accommodations puts religious people in the invidious position of demanding special privileges” that is particularly troubling “in an egalitarian society, where a core idea is rejection of special privilege”).

⁵⁹ Case, *supra* note 1, at 469, 487.

⁶⁰ Leslie C. Griffin, *Hobby Lobby: The Crafty Case That Threatens Women’s Rights and Religious Freedom*, 42 HASTINGS CONST. L.Q. 641, 673 (2015).

⁶¹ *Id.* at 687–88; *see also* Erwin Chemerinsky & Michele Goodwin, *Religion Is Not a Basis for Harming Others: Review Essay of Paul A. Offit’s Bad Faith: When Religious Belief Undermines Modern Medicine*, 104 GEO. L.J. 1111, 1133–34 (2016) (“This decision will lead to much broader challenges. Christian Scientists, for example, will claim that they do not have to provide

argues that “[t]he *Hobby Lobby* decision throws open the courtroom door to corporations and hands them the now-powerful weapon of corporate conscience to fight off regulation that protects the full and equal citizenship of the people.”⁶² Professor Corvino raises concerns that the religious activities that receive protection for “exemption and accommodation purposes are expansive and expanding” as a result of *Hobby Lobby*.⁶³ Corvino explains that the “pervasiveness” and “endless variety of religious scruples,” provide a strong motive not to have an extensive “exemption regime.”⁶⁴ Thus, Corvino concludes that it is “precisely for that reason that Justice Scalia opined [in *Smith*] that, in a religiously diverse nation, any system requiring strict scrutiny for laws burdening religious beliefs is ‘courting anarchy.’”⁶⁵ Professor Lupu has argued that “a general regime of judicial exemptions is a lawless, sometimes unconstitutional, and pervasively unprincipled charade.”⁶⁶ Numerous others have expressed similar administration concerns.⁶⁷

any health insurance to their employees.”); Alan E. Garfield, *And the Wall Comes Tumbling Down: How the Supreme Court Is Striking the Wrong Balance Between Majority and Minority Rights in Church-and-State Cases*, 68 ARK. L. REV. 789, 825 (2015) (arguing that “[b]y tipping the scales so drastically in favor of religious objectors, Justice Alito put out a welcome mat for religious objections by corporations”); Christopher T. Robertson, *Vaccines and Airline Travel: A Federal Role to Protect the Public Health*, 42 AM. J.L. & MED. 543, 569 (2016) (arguing that “the ruling casts a shadow over all public health regulation, given that virtually any objector can cloak their objection in religious garb”); Sarah M. Stephens, *An Employer’s Conscience After Hobby Lobby and the Continuing Conflict Between Women’s Rights and Religious Freedom*, 24 BUFF. J. GENDER, L. & SOC. POL’Y 1, 4 (2016) (“The Court’s significant expansion of religious liberty doctrine in *Hobby Lobby* invites businesses to seek exemptions from nondiscrimination laws such as Title VII, the Pregnancy Discrimination Act, and the Americans with Disabilities Act, as well as other laws, which provide workplace protections to women, such as the Family and Medical Leave Act[. . . .]”).

⁶² Elizabeth Sepper, *Gendering Corporate Conscience*, 38 HARV. J.L. & GENDER 193, 233 (2015).

⁶³ CORVINO ET AL., *supra* note 2, at 38.

⁶⁴ *Id.* at 46, 47–50 (quoting BRIAN LEITER, WHY TOLERATE RELIGION? 34 (2013)).

⁶⁵ *Id.* at 37, 50; *see also id.* at 36–38; LEITER, *supra* note 64, at 34.

⁶⁶ Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35, 101 (2015).

⁶⁷ Case, *supra* note 1, at 468, 469 (positing that *Smith* is sound jurisprudence “even if for no other reason, then because of the descriptive impracticability of an approach to religious exemptions from generally applicable law”); Dhooge, *supra* note 57, at 54 (asserting that RFRA “opens the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind,” and “[t]he impact of such an approach . . . contradicts constitutional tradition and common sense” (internal quotation marks and footnotes omitted)); Marshall, *supra* note 8, at 130 (suggesting that providing religious accommodations under RFRA “will exacerbate the concerns inherent in a jurisprudence that the Court soundly rejected in *Smith* as both unworkable and normatively unsound”).

II. RELIGIOUS EXEMPTIONS UNDERSTOOD AS AS-APPLIED CHALLENGES

The question of whether to provide as-applied exemptions from generally applicable laws can be seen as a broader political question about how our pluralistic society should treat dissenting views or practices. Should society generally demand conformity to general policies preferred by the majority, or should it take a “live and let live” approach by allowing minority and nonconformist groups and individuals to live their lives and order their communities as they see fit where possible?⁶⁸ That longstanding debate continues to rage in academia, and will for decades to come.⁶⁹ But this Part illustrates that under *Employment Division v. Smith*’s framework, courts are likely to answer the question in favor of accommodating divergent minority positions when it comes to speech-based rights, but not religion.⁷⁰

⁶⁸ Levin et al., *supra* note 44, at 925.

⁶⁹ Some scholars note, “for those Progressives who had confronted the costs of countermajoritarian constitutionalism head on, there was ample reason to interrogate an extension of individual rights.” Weinrib, *supra* note 45, at 1136; *see also* Charles M. Freeland, *The Political Process as Final Solution*, 68 IND. L.J. 525, 526 n.11 (1993) (collecting sources and describing the school of thought viewing reliance on political process instead of robust bill of rights protections as the long awaited solution to the “countermajoritarian problem” that has plagued the “democracy as material equality”). Still other scholars recognize that robust individual freedoms are critical, even for a healthy democracy, and cannot merely be what is “left over” after the political process is complete. KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 196–201 (1989) (arguing that denying constitutional rights excludes certain groups from fully belonging to the American people); Charles A. Reich, *The Individual Sector*, 100 YALE L.J. 1409, 1412 (1991); *see also* Owen Fiss, *A Life Lived Twice*, 100 YALE L.J. 1117, 1118 (1991) (praising judicial protection of individual liberty against majoritarian will); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 19 (1996) (pointing out that many scholars think *Brown* proves that courts are “countermajoritarian heroics” who protect minority rights); David Luban, *The Warren Court and the Concept of a Right*, 34 HARV. C.R.-C.L. L. REV. 7, 8 (1999) (same); Michael J. Perry, *Protecting Human Rights in a Democracy: What Role for the Courts?*, 38 WAKE FOREST L. REV. 635, 637 (2003) (questioning whether the role of the judiciary in protecting entrenched human rights is appropriate); Jeremy Waldron, *A Rights-Based Critique of Constitutional Rights*, 13 OXFORD J. LEGAL STUD. 18, 19–20 (1993) (questioning our deference to some rights in comparison to others); Rebecca E. Zietlow, *The Judicial Restraint of the Warren Court (and Why It Matters)*, 69 OHIO ST. L.J. 255, 259 n.13 (2008) (observing over 500 law review articles “written in the past twenty years advocating the proposition that courts should protect minorities against the will of the majority”).

⁷⁰ *See also* Corinna Barrett Lain, *Three Supreme Court “Failures” and a Story of Supreme Court Success*, 69 VAND. L. REV. 1019, 1072 (2016) (“The Court’s self-conception of its role as a countermajoritarian protector has helped it stretch to its countermajoritarian limits, at least in certain contexts. Here, several of the Supreme Court’s First Amendment cases come to mind; its protection of flag burning, cross burning, and Ku Klux Klan rallies as freedom of expression are prime examples. . . . [M]uch work still needs to be done on why the Justices embrace their countermajoritarian role in some contexts and not others.”).

A. As-Applied Challenges Such as Religious Exemptions Are the Preferred Mode of Constitutional Adjudication

Relying on *Smith*, Professor Corvino argues that if a given law is justified at all, then the law ought to be applied “consistently.”⁷¹ Offering exemptions, he argues, “result[s] in a kind of ‘Swiss cheese’ law.”⁷² Thus, if a law is facially valid, it ought to apply universally. As a result, Professor Corvino and others argue that a judgment that invalidates a law only in one circumstance, but leaves the law otherwise intact, creates an anomaly resulting in “special rights” for objectors “in tension with other constitutional principles.”⁷³

But such a judgment can be described in much more positive terms—as a “modest,”⁷⁴ “normal,”⁷⁵ “surgical,”⁷⁶ “narrow,”⁷⁷ and “logically primary”⁷⁸ method that comprise “the basic building blocks of constitutional adjudication.”⁷⁹ These latter terms are precisely how both the Supreme Court and leading commentators describe as-applied adjudication.

The Supreme Court has explained that “the *normal rule* is that partial, rather than facial, invalidation is the required course, such that a statute may be declared invalid to the extent that it reaches too far, but otherwise left

⁷¹ CORVINO ET AL., *supra* note 2, at 31.

⁷² *Id.* at 52.

⁷³ *Id.*; Marshall, *supra* note 8, at 74; Schwarzschild, *supra* note 44, at 199; *see also infra* notes 152–178 and accompany text.

⁷⁴ *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 331 (2006).

⁷⁵ *Id.* at 329 (holding that “the ‘normal rule’ is that ‘partial, rather than facial, invalidation is the required course,’ such that a ‘statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact’”) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985)) (emendations in original).

⁷⁶ *See* Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 956 (2011) (observing that as-applied challenges involve surgical severing); *see also* *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008) (asserting that “facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution,” and that “a ruling of unconstitutionality frustrates the intent of the elected representatives of the people” (alterations and quotation marks omitted)).

⁷⁷ *Snyder v. Phelps*, 562 U.S. 443, 460 (2011).

⁷⁸ Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1329, 1368 (2000) (citing *United States v. Raines*, 362 U.S. 17, 5) (1960)); *see also* *Yazoo & Miss. Valley R.R. v. Jackson Vinegar Co.*, 226 U.S. 217, 219–20 (1912) (holding that a statute that settles claims for “lost or damaged freight” was valid “as applied” to the facts before the court); Fallon, *supra*, at 1368 (“[A]s-applied challenges reflect entrenched though often unarticulated presuppositions that the full meaning of a statute frequently is not obvious on the occasion of its first application, but can be left to emerge through case-by-case specification; that familiar processes of interpretation characteristically treat statutes as comprising multiple subrules; and that any constitutionally invalid subrules through which a statute might be specified can ordinarily be *separated* from valid subrules.” (emphasis omitted)).

⁷⁹ *Gonzales v. Carhart*, 550 U.S. 124, 167–68 (2007) (quotation marks omitted).

intact.”⁸⁰ Thus, when examining a statute’s constitutionality the Court attempts to narrow its holding to address the specific problem, or “to sever its problematic portions while leaving the remainder intact.”⁸¹ Such a principle flows from the “axiom[] that a ‘statute may be invalid as applied to one state of facts and yet valid as applied to another.’”⁸² This approach also allows the Court to address more concrete facts and to do the least damage to the rule of law as envisioned by the original drafters.⁸³ As Justice Stevens put it, when the Court strikes down statutes facially, rather than as-applied, “[t]he Court operates with a sledge hammer rather than a scalpel.”⁸⁴

Many scholars also note the Roberts Court’s preference for as-applied challenges instead of facial ones.⁸⁵ This preference has manifested itself in many different legal contexts, including “abortion rights, Congress’s enforcement power under Section 5 of the Fourteenth Amendment, and campaign finance.”⁸⁶ Professor Richard Fallon has explained that this jurisprudential preference for limited invalidations that leave a statute otherwise intact generally relies on a three-part rationale: (1) the constitutional principle of “avoiding unnecessary or premature decisions of constitutional issues” where possible; (2) the fact that meanings of statutes are often best specified “through a series of fact-specific, case-by-case decisions”; and (3) the reality that constitutionally invalid applications of statutes often “could be severed or separated from valid ones.”⁸⁷ Scholars disagree about the frequency with which the Supreme Court actually employs as-applied versus facial analysis to strike down statutes, but there is little debate that as-

⁸⁰ *Ayotte*, 546 U.S. at 329 (internal quotation marks omitted) (emphasis added).

⁸¹ *Id.* at 328–29 (citations and internal quotation marks omitted).

⁸² *Id.* at 329.

⁸³ *Sabri v. United States*, 541 U.S. 600, 608–09 (2004) (holding that “facial challenges are best when infrequent” because “[f]acial adjudication carries too much promise of ‘premature interpretation of statutes’ on the basis of factually barebones records”) (quoting *Raines*, 362 U.S. at 22) (emendations omitted); see also *Wash. State Grange*, 552 U.S. at 450–51 (holding that “facial challenges threaten to short circuit the democratic process”).

⁸⁴ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 399 (2010) (Stevens, J., concurring in part and dissenting in part).

⁸⁵ Luke Meier, *Facial Challenges and Separation of Powers*, 85 IND. L.J. 1557, 1557 n.3 (2010) (citing David L. Franklin, *Looking Through Both Ends of the Telescope: Facial Challenges and the Roberts Court*, 36 HASTINGS CONST. L.Q. 689, 697 (2009) (arguing that the Supreme Court’s “as-applied” preference confirms its “fidelity to the traditional model”); Gillian E. Metzger, *Facial and As-Applied Challenges Under the Roberts Court*, 36 FORDHAM URB. L.J. 773, 773 (2009) (arguing that “[o]ne recurring theme of the Roberts Court’s jurisprudence to date is its resistance to facial constitutional challenges and preference for as-applied litigation”); Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1233, 1239 (2010) (noting that “the Court insists that ‘as-applied’ challenges are the most common and preferred form of constitutional challenge”).

⁸⁶ Metzger, *supra* note 85, at 776.

⁸⁷ Fallon, *supra* note 78, at 1330–31.

applied invalidation of laws generally involves a “surgical severing” of constitutionally infirm aspects of the rule.⁸⁸

What has generally gone unnoticed is that judicially-created religious exemptions are functionally a species of as-applied adjudication. This is true regardless of whether the exemption results from litigation brought under constitutional free exercise grounds or statutory grounds (such as RFRA). In both instances, the decision-maker must determine whether a constitutional right would be infringed by a particular application of an otherwise valid law. And in both instances, the court will order a remedy that protects the exercise of the constitutional right, but otherwise leaves the law in place to apply to other circumstances that may arise. After *Smith*, it is much more difficult to obtain successful religious exemptions as a constitutional matter in many contexts. Viewed in this light, RFRA is essentially restoring a standard that again allows for as-applied challenges to otherwise valid laws.

For example, the Supreme Court’s decision in *Hobby Lobby* held that the Department of Health and Human Services (“HHS”) contraception mandate unjustifiably burdened a family-held business’s religious exercise because the government had many other alternatives to accomplish its interest of making contraception more accessible to women.⁸⁹ The Court therefore held that RFRA required “an exemption from the rule.”⁹⁰ But the Court did not strike down the HHS mandate wholesale. Thus, this law continues to apply to all other covered employers, but with surgical exemptions for a limited group of religious objectors.

Courts have engaged in this same type of adjudication in other successful challenges under RFRA and the Religious Land Use and Institutionalized Persons Act (“RLUIPA”). For example, in 2006, in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, the Court held that the Controlled Substances Act, although generally constitutional, could not be applied to prohibit the sacramental use of hoasca tea for a religious group.⁹¹ And in 2015, in *Holt v. Hobbs*, the Court concluded that the prison’s ban on beards, although generally valid, could not be applied to prohibit certain religiously-motivated beards.⁹² In each case, the Court required an exception to an otherwise valid law to protect a religious exercise right.

⁸⁸ See, e.g., Fallon, *supra* note 76, at 956 (explaining that as-applied challenges involve the surgical severing of problematic aspects of a statute from acceptable applications).

⁸⁹ 134 S. Ct. 2751, 2760, 2780–82 (2014).

⁹⁰ *Id.* at 2761.

⁹¹ 546 U.S. 418, 438–39 (2006).

⁹² 135 S. Ct. 853, 859 (2015).

B. Survey of First Amendment As-Applied Challenges

Of course, the fact that religious exemptions are functionally as-applied challenges does not answer whether those sorts of as-applied challenges still result in unfair preferential treatment for religious liberty claims if they are offered to facially valid and generally applicable laws. As-applied challenges in other First Amendment contexts provide a particularly relevant comparator to assess that question.

The Supreme Court has recognized that “[t]he Free Exercise Clause embraces a freedom of conscience and worship that has *close parallels* in the speech provisions of the First Amendment”⁹³ Free exercise protections and free speech protections theoretically serve many similar roles in our constitutional democracy: they both operate as important safeguards against government overreach, implicate matters of personal choice and identity, allow for robust pluralism in our diverse society, help curb dissension and social conflict, and protect minority rights that will not necessarily be addressed through the political process.⁹⁴ As one notable academic has observed regarding free exercise compared to other constitutional rights, “it seems intuitively correct that similar rights should be enforced to a similar extent with similar doctrine.”⁹⁵

Prior to *Smith*, in a number of constitutional cases the Supreme Court did enforce the First Amendment rights of speech and religious exercise quite similarly. In *Murdock v. Pennsylvania*, for example, a city had a generally applicable ordinance that required “all persons canvassing for or soliciting . . . goods, paintings, pictures, wares, or merchandise of any kind” to pay a fee to the city to obtain a license to solicit.⁹⁶ Plaintiffs who had been arrested under this ordinance were Jehovah’s Witnesses going door to door distributing religious literature and soliciting donations without ever obtaining such a license.⁹⁷ The Plaintiffs argued this government action “deprived them of the freedom of speech, press, and religion guaranteed by the First Amendment.”⁹⁸

⁹³ *Lee v. Weisman*, 505 U.S. 577, 591 (1992) (emphasis added).

⁹⁴ See, e.g., RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION* 167–68 (2016) (arguing that enumerated rights like freedom of speech and religious exercise are like “lifeboats” on a sinking ship; the last defense for retained individual rights when structural protections fail); Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 196–98 (1991) (discussing historic rationales for religious freedom).

⁹⁵ Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 IND. L.J. 77, 120–22 (2000). *But see* Coenen, *supra* note 50, at 467 (arguing that different treatment of speech and religious exercise exemptions is warranted because speech and religious exercise rights “serve different purposes within our constitutional system”).

⁹⁶ 319 U.S. 105, 106 (1943).

⁹⁷ *Id.* at 106–07.

⁹⁸ *Id.* at 107.

In addressing these claims, the Supreme Court first made clear that the ordinance at issue in this case was facially valid.⁹⁹ Further, the Court observed that the regulation did not discriminate.¹⁰⁰ Thus, the limited question before the Court was simply whether the ordinance “as construed and applied require[d] religious colporteurs to pay a license tax as a condition to the pursuit of their activities.”¹⁰¹

The Court rejected the government’s argument that providing an exemption would put Jehovah’s Witnesses “above the law.”¹⁰² Instead, it explained, “[a] license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance.”¹⁰³ Just because a law is facially valid does not mean it can be validly enforced when it butts up against fundamental constitutional rights. At that point, an ordinance “is not directed to the problems with which the police power of the state is free to deal.”¹⁰⁴ This is because, as the Court noted, “[f]reedom of press, freedom of speech, [and] freedom of religion are in a preferred position.”¹⁰⁵ The *Murdock* Court thus held that the ordinance’s application here both curtailed the free press and impinged freedom of religion, and that these rights “*stand or fall together*.”¹⁰⁶

As-applied challenges brought under other speech-based claims still receive fairly similar treatment to that provided under *Murdock*.¹⁰⁷ But after *Smith*, and under the scheme advocated by critics of religious exemptions, there are at least two contexts where as-applied speech challenges receive significantly different treatment than similar religious challenges: compelled action and discretionary enforcement or application of a law.

⁹⁹ *Id.* at 110 (holding that there was no “question as to the validity of a registration system for colporteurs and other solicitors”).

¹⁰⁰ *Id.* at 115.

¹⁰¹ *Id.* at 110.

¹⁰² *Id.* at 116 (internal quotation marks omitted).

¹⁰³ *Id.* at 115.

¹⁰⁴ *Id.* at 116.

¹⁰⁵ *Id.* at 115.

¹⁰⁶ *Id.* at 117 (emphasis added). The Court arrived at a similar conclusion in several other cases dealing with religious solicitation. *See, e.g.*, *Follett v. McCormick*, 321 U.S. 573, 577 (1944) (holding that the application of a flat license tax was a violation of the free exercise clause); *Jamison v. Texas*, 318 U.S. 413, 414, 417 (1943) (holding that the law could not prohibit dissemination of religious handbills in the street); *Cantwell v. Connecticut*, 310 U.S. 296, 304–07 (1940) (concluding that the application of a regulation that required a certificate in order to solicit support for a religion was a violation of the Constitution).

¹⁰⁷ *Murdock v. Pennsylvania*, 319 U.S. 105, 117 (1943).

In these contexts, RFRA can be viewed as an attempt to functionally restore the as-applied standard that existed prior to *Smith* and that resembles First Amendment speech protections.

1. Compelled Action

In *Wisconsin v. Yoder*, the state had a neutral and generally applicable law that made school compulsory for students until the age of sixteen.¹⁰⁸ Based on their religious beliefs, Amish families refused to send their children to public school after they completed eighth grade. The government refused to provide an exemption for these families, and it fined the families for failing to send their children to school.¹⁰⁹ Plaintiffs offered evidence that the government's refusal to provide an exemption would result in "destruction of the Old Order Amish church community as it exists in the United States today."¹¹⁰ The Court noted that:

to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability.¹¹¹

The Court also reasoned that a facially neutral regulation could still violate the requirement that the Government remain neutral if it applies in a way that "unduly burdens the free exercise of religion."¹¹² In this case, the Court held that the government failed to meet its burden under strict scrutiny and justify this religious burden. Thus, the Court provided an exemption.¹¹³

Yoder was one of the cases *Smith* attempted to banish to the hybrid-rights category.¹¹⁴ Professor Gedicks has argued that *Smith* replaced *Yoder* with a standard that "specifies that incidental burdens imposed by a law on religious practices are subject to rational basis scrutiny so long as the law is 'generally applicable.'"¹¹⁵

¹⁰⁸ 406 U.S. 205, 207 (1972).

¹⁰⁹ *Id.* at 208.

¹¹⁰ *Id.* at 212.

¹¹¹ *Id.* at 220.

¹¹² *Id.*

¹¹³ *Id.* at 234–35.

¹¹⁴ See Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 882 (1990) (holding that "[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections such as freedom of speech and of the press").

¹¹⁵ Gedicks, *supra* note 95, at 91–94, 113 (quoting *Smith*, 494 U.S. at 885–86).

The facts of *Yoder*, however, are remarkably similar to other free speech cases dealing with compelled expression that remain good law in the expressive constitutional realm. For example, the canonical compelled speech case of *Wooley v. Maynard* presents a good example of different treatment of free exercise versus speech rights when it comes to exemptions.¹¹⁶ There, the plaintiff was a Jehovah's Witness who challenged the application of New Hampshire's law requiring the state motto of "Live Free or Die" on all state license plates.¹¹⁷ Consequences for violating this law included fines and even jail time.¹¹⁸

The Court did not question the state's ability to generally require drivers to display the state motto.¹¹⁹ Rather, the Court analyzed whether the facially valid law could be applied to the parties in this case, or whether they were entitled to an exemption based on their disagreement with the message on the license plate.¹²⁰

Notably, the appellee's disagreement with the state's license plate message was based on their sincere "religious objections to the motto."¹²¹ As Jehovah's Witnesses, they believed that they could not advertise the motto on their vehicles.¹²² Thus, their speech objection was coextensive with their religious objection. Had the claim been analyzed solely under the rational basis framework some modern scholars advocate as appropriate for religious exemptions, though, the holding of this case likely would have been that a person's religion does not "excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."¹²³

The religious beliefs here also implicated compelled speech, however, and the Court thus explained that the First Amendment protects the "right to speak freely and the right to refrain from speaking at all."¹²⁴ The Court applied heightened scrutiny to determine that the State did not have an adequately compelling interest to justify the requirement it had other, narrower means to accomplish the objective.¹²⁵ As a result, the Court held that "the

¹¹⁶ 430 U.S. 705, 715–16 (1977).

¹¹⁷ *Id.* at 707.

¹¹⁸ *Id.* at 708–09.

¹¹⁹ *Id.* at 717.

¹²⁰ *Id.* at 713, 717.

¹²¹ *Id.* at 708.

¹²² *Id.* at 707.

¹²³ *Smith*, 494 U.S. at 878–79; see *Wooley v. Maynard*, 430 U.S. 705, 717 (1972). Of course, there is a possibility that a court would find the law in *Wooley v. Maynard* not to be generally applicable because of the exception for government vehicles. *Id.* at 707 n.1. But along those same lines, it could be argued that the law in *Employment Division v. Smith* likewise was not truly generally applicable, because it included an exception for the use of peyote that was "prescribed by a medical practitioner." *Smith*, 494 U.S. at 874 (internal quotation marks omitted).

¹²⁴ *Wooley*, 430 U.S. at 714–15.

¹²⁵ *Id.* at 716.

State of New Hampshire may not require appellees to display the state motto” and upheld the district court’s injunction protecting them from prosecution.¹²⁶ The Court thus upheld an exemption from an otherwise facially valid law.¹²⁷

Wooley and *Yoder* are interesting comparators because both involve a government action that was not designed to target First Amendment activity, but both nonetheless compelled activity with serious expressive or religious implications. *Wooley* and its progeny also illustrate that in some instances a law is more likely to be deemed content based (or inappropriately targeted at protected conduct) and thus deserving of exacting scrutiny in the speech realm compared to the parallel finding of targeting in the religious realm.¹²⁸ No *Smith* defender would seriously argue that the license plate law in *Wooley* targeted Jehovah’s Witnesses either facially or intentionally.¹²⁹ Nevertheless, the law *did* target a certain type of action that the plaintiffs found objectionable for religious reasons.¹³⁰ Under the *Smith* regime, the government almost certainly would have received a free pass for this law’s “incidental” burden on religious exercise.¹³¹ That is so even though the law would have also been compelling a type of action that had religious significance to the plaintiffs. Under speech jurisprudence, the Court subjected the law to the most heightened form of constitutional scrutiny.¹³² Indeed, in the

¹²⁶ *Id.* at 717. The district court had entered an order enjoining the state “from arresting and prosecuting (the Maynards) at any time in the future for covering over that portion of their license plates that contains the motto ‘Live Free or Die.’” *Id.* at 709 (internal quotation marks omitted).

¹²⁷ *See id.* at 717.

¹²⁸ To be sure, even the Court’s more generous approach to finding non-neutrality in the speech realm has been plagued with inconsistencies and faced heavy criticism. *See, e.g.*, Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court’s Application*, 74 S. CAL. L. REV. 49, 50 (2000) (arguing that “the Court has erred in developing the principle of content neutrality,” and its “applications are inconsistent with the very reasons that this principle is at the core of First Amendment analysis”); R. George Wright, *Content-Neutral and Content-Based Regulations of Speech: A Distinction That Is No Longer Worth the Fuss*, 67 FLA. L. REV. 2081, 2083 (2015) (noting that “[s]cholars have recognized a range of important problems associated with the jurisprudence of supposedly content-neutral and content-based regulations of speech for some time”). Thus, a more systematic review of courts’ approach in intermediate scrutiny cases, as well as cases labeling a law as “content based” would be necessary to draw more concrete conclusions.

¹²⁹ *Smith*, 494 U.S. at 878.

¹³⁰ *Wooley v. Maynard*, 430 U.S. 705, 707 (1972).

¹³¹ *Smith*, 494 U.S. at 878.

¹³² *See* Israel Klein, *FDA Puffery: Smoking Out the Constitutionality of Graphic Cigarette Warning Labels*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 201, 220 (2013) (detailing the various standards used by the courts in analyzing speech infringement claims); *see also* Caroline Mala Corbin, *Speech or Conduct? The Free Speech Claims of Wedding Vendors*, 65 EMORY L.J. 241, 281 (2015) (stating that *Wooley* involved strict scrutiny rather than intermediate scrutiny used for merely expressive conduct); Brian Galle, *Free Exercise Rights of Capital Jurors*, 101 COLUM. L. REV. 569, 581 n.57 (2001) (noting the application of “strict scrutiny review” in major free speech cases); B. Ashby Hardesty, Jr., *Joe Camel Versus Uncle Sam: The Constitutionality of*

speech realm, laws have been deemed content-based, and thus deserving of “exacting scrutiny,” simply because they required a speaker to provide the “content” of the speaker’s identity.¹³³

Some scholars have tried to justify less searching scrutiny for religious claims by drawing a distinction between the government having less interest in prohibiting what people *say* (which implicates speech) than what they *do* (which implicates religious exercise). One such scholar, for example, argues for a “weaker test applicable to religious exemption claims” because “[w]hen people are asking for freedom not just to speak, or to be treated equally without regard to race, but to act, the law must often intrude on that freedom.”¹³⁴ Yet many First Amendment cases demonstrate that such a distinction is often illusory. Consider the law in *Wooley*, which the Court described as compelling a certain message (a motto on a license plate), and thus warranting heightened scrutiny. But again, the plaintiffs’ objection to compelled speech at issue in *Wooley* was coextensive with the plaintiffs’ religious exercise—the sincere religious objection to displaying the state motto on a license plate.¹³⁵

Similarly, in other speech cases like the *Barnette* decision, the plaintiffs’ objection to compelled speech was also coextensive with the plaintiffs’ religious exercise—a sincere objection to saluting the flag for religious reasons.¹³⁶ Even in the contraception mandate cases—which are held up by some critics as the textbook example of religious action gone too far—some plaintiffs raised similar objections to the contraception mandate based on

Graphic Cigarette Warning Labels, 81 *FORDHAM L. REV.* 2811, 2828 (2013) (noting laws that “compel” or “restrict” speech are subject to strict scrutiny); Bryan M. Haynes et al., *Compelled Commercial Speech: The Food and Drug Administration’s Effort to Smoke Out the Tobacco Industry Through Graphic Warning Labels*, 68 *FOOD & DRUG L.J.* 329, 341 (2013) (same); Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 *CALIF. L. REV.* 47, 93–94 & n.235 (2011) (positing that the strict scrutiny standard applied to compelled speech should be applied to sentencing decisions); Ashley Peterson, Comment, *Lighting a Fire Under Free Speech: The FDA’s Graphic Attempts to Reduce Smoking Rates*, 48 *U. RICH. L. REV.* 799, 818 n.151, 826–27 (2014) (noting that the regulation of tobacco companies’ speech is still limited under a First Amendment analysis despite the health risks of tobacco use); Nadia N. Sawicki, *Compelling Images: The Constitutionality of Emotionally Persuasive Health Campaigns*, 73 *MD. L. REV.* 458, 492 (2014) (analyzing the issue of “professionals’ First Amendment rights” under the strict scrutiny standard). *But see* Leslie Gielow Jacobs, *Pledges, Parades, and Mandatory Payments*, 52 *RUTGERS L. REV.* 123, 183–84 (1999) (noting that the Court seemed to apply elements of both strict scrutiny and mid-level balancing review).

¹³³ See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 345, 347 (1995) (concluding that restrictions on handing out leaflets expressing a controversial political view was deserving of the greatest constitutional protection).

¹³⁴ Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 *UCLA L. REV.* 1465, 1500 (1999).

¹³⁵ *Wooley*, 430 U.S. at 708.

¹³⁶ 319 U.S. 624, 629 (1943).

speech and association concerns.¹³⁷ Attempting to categorize “speech” as entirely distinct from religious “action” often amounts to little more than a confusing fiction. As Justice Neil Gorsuch noted in a somewhat similar context:

[t]he distinction blurs in much the same way the line between acts and omissions can blur when stared at too long, leaving us to ask (for example) whether the man who drowns by awaiting the incoming tide does so by act (coming upon the sea) or omission (allowing the sea to come upon him). Often enough the same facts can be described both ways.¹³⁸

2. Discretionary Enforcement or Application of a Law

The Supreme Court has provided as-applied exemptions from facially valid laws regulating—or prohibiting—speech in problematic ways. But these types of discretionary or open-ended laws often leave religious exercise rights vulnerable as well, particularly for religious minorities.

For example, in the speech context, in *Cohen v. California*, the Supreme Court upheld a challenge to a law imposing criminal liability for a breach of the peace.¹³⁹ This law had been applied to punish Cohen for wearing a jacket with an offensive message inside the corridor of a courthouse.¹⁴⁰ Cohen was arrested and convicted for “maliciously and willfully disturbing the peace or quiet of any neighborhood or person by offensive conduct,” and the California Court of Appeals affirmed, finding that he had engaged in “offensive conduct.”¹⁴¹

The Court rejected a facial challenge to the law, observing that the “statute [was] applicable throughout the entire State”¹⁴² and was not facially “overbroad or vague.”¹⁴³ But the issue remained whether the state had power to apply such a law to prohibit protected speech.¹⁴⁴ The Court determined that, as applied to the facts, the law violated Cohen’s freedom of expression

¹³⁷ See, e.g., Complaint at 39, *Eternal Word Television Network, Inc. v. Sebelius*, No. 13-cv-521 (S.D. Ala. Oct. 28, 2013) (arguing that “[d]efendants’ actions thus violate [Eternal Word Television Network’s] right to be free from compelled speech as secured to it by the First Amendment of the United States Constitution”); Complaint at 54, *Little Sisters of the Poor Home for the Aged v. Sebelius*, No. 13-CV-02611 (D. Colo. Sept. 24, 2013) (arguing that “Defendants’ actions thus violate the Plaintiffs’ right to speak, and the Plaintiffs’ right to be free from compelled speech, as secured to them by the First Amendment of the United States Constitution”).

¹³⁸ *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025–26 (2017) (Gorsuch, J., concurring in part) (citations omitted).

¹³⁹ 403 U.S. 15, 16–17 (1971).

¹⁴⁰ *Id.* at 16.

¹⁴¹ *Id.* at 16–17.

¹⁴² *Id.* at 19.

¹⁴³ *Id.* at 24 n.5.

¹⁴⁴ *Id.* at 19.

rights.¹⁴⁵ The Court explained that the state’s “undifferentiated fear or apprehension of disturbance . . . is not enough to overcome the right to freedom of expression.”¹⁴⁶ The Court thus reversed Cohen’s conviction, holding that “the state may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense.”¹⁴⁷ Cohen was thus entitled to an exemption from the otherwise lawful application of the state’s breach of the peace statute.

Because constitutional religious exemptions are much more limited post-*Smith*, religious exemptions under RFRA ensure that problematic applications of neutral laws, like that in *Cohen*, do not simply go unnoticed for vulnerable religious minorities. For example, in 2014, *McAllen Grace Brethren Church v. Salazar* involved the discretionary application of the Bald and Golden Eagle Protection Act.¹⁴⁸ Under this law, an undercover federal agent infiltrated a sacred Native American powwow and cut the celebration short when he noticed that tribal members possessed eagle feathers.¹⁴⁹ The agent interrogated the powwow participants, confiscated their feathers, and threatened them with criminal prosecution unless they signed papers abandoning their feathers.¹⁵⁰ Without the ability to seek a religious exemption under RFRA, the Native Americans in this case would have been left with much less effective alternatives for recourse from the government’s application of this facially valid statute.¹⁵¹

3. What About Intermediate Scrutiny?

Since the 1960s, the Court has frequently applied intermediate scrutiny when assessing as-applied challenges to neutral and generally applicable laws.¹⁵² One prominent example comes from *United States v. O’Brien*, in

¹⁴⁵ *Id.* at 18.

¹⁴⁶ *Id.* at 23 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969)).

¹⁴⁷ *Id.* at 26.

¹⁴⁸ 764 F.3d 465, 468 (5th Cir. 2014).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 468–69; see *Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act: Hearing Before the Subcommittee on the Constitution and Civil Justice of the Committee on the Judiciary House of Representatives*, 114 Cong. 8–9 (2015) (statement of Lori Windham, Senior Counsel, Becket Fund for Religious Liberty) (describing the federal agent’s actions—including refusing to leave a Native American ceremony—as part of “Operation Pow-Wow”).

¹⁵¹ *McAllen Grace*, 764 F.3d at 471–80 (holding that under an RFRA analysis the government is held to a strict scrutiny standard to justify applying the statutory burden to someone “whose sincere exercise of religion is being seriously impaired”).

¹⁵² *Hill v. Colorado*, 530 U.S. 703, 719–20, 726 (2000); *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 798–99 (1989); *United States v. Grace*, 461 U.S. 171, 176–78 (1983); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563–64 (1980); Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783–84, 786–87 (citing *United States v. O’Brien*, 391 U.S. 367, 376–77 (1968)); see also Susan Dente Ross, *Reconstructing First Amendment Doctrine: The 1990s*

which the Supreme Court held that “incidental restrictions” on speech rights that resulted from neutral laws were subjected to intermediate scrutiny.¹⁵³ *O’Brien* dealt with an across the board ban on draft-card destruction, which was used to prosecute a war protestor who burned his draft card as a form of symbolic dissent.¹⁵⁴

Because of the similar factual context of incidental burdens on speech versus exemption claims from generally applicable laws, some scholars have questioned whether intermediate scrutiny would be a more appropriate standard of review for religious exemptions from generally applicable laws.¹⁵⁵ A thorough analysis of the virtues and consistency of this intermediate scrutiny approach in the speech realm is beyond the scope of this article,¹⁵⁶ but two observations here are worth making.

First, many scholars correctly observe that the regime under *Smith* looks nothing like intermediate scrutiny.¹⁵⁷ Intermediate scrutiny generally requires courts to engage in a searching inquiry of whether the government action impinging on speech rights is justified. Professor Gedicks has noted that “it is not unusual for the Court to invalidate laws under [intermediate scrutiny].”¹⁵⁸ For example, in *McCullen v. Coakley*, anti-abortion protesters challenged a Massachusetts restriction limiting speech on public land near abortion clinics.¹⁵⁹ Even though the Supreme Court engaged in intermediate scrutiny analysis, it unanimously ruled against the government and in favor

[R]Evolution of the Central Hudson and *O’Brien* Tests, 23 HASTINGS COMM. & ENT. L.J. 723, 727 (2001).

¹⁵³ 391 U.S. 367, 377.

¹⁵⁴ *Id.* at 369.

¹⁵⁵ Professor Corvino has asserted that “RFRA ought to be modified to require an ‘intermediate scrutiny standard’ for incidental burdens,” which would “bring it in line with how we treat other fundamental freedoms.” CORVINO ET AL., *supra* note 2, at 51; *see also id.* at 32 (arguing that “incidental burdens on religion” should “trigger intermediate scrutiny”). Notably, such a legal standard would look much different than the standard Corvino defends earlier in the same book, where he asserts that *Smith* was correctly decided. *Id.* at 31; *see also* James M. Oleske, Jr., *A Regrettable Invitation to “Constitutional Resistance,” Renewed Confusion over Religious Exemptions, and the Future of Free Exercise*, 20 LEWIS & CLARK L. REV. 1317, 1326, 1355 n.202 (2017) (arguing that *Smith* ought to be modified to allow intermediate scrutiny for religious exemption requests).

¹⁵⁶ For a treatment of this subject, see Coenen, *supra* note 50, at 443–52.

¹⁵⁷ *See* Gordon, *supra* note 38, at 107, 109 n.149 (noting that “*Smith* held that the free exercise clause requires no balancing of interests at all . . . [T]he Court refused to consider any intermediate levels of constitutional scrutiny. It concluded that [because] compelling interest scrutiny is too strict, no scrutiny at all should apply . . . [Because] the prescription on its eyeglasses was too strong, the Court preferred to be sightless. . . .”); McConnell, *supra* note 38, at 1128 (“[J]ust because the [pre-*Smith* free exercise] test was not so strong as ‘compelling’ does not mean that the Court failed to apply heightened scrutiny in its previous decisions. There is no support in the precedents for the Court to replace the prior test with nothing more than the toothless rationality review that is applicable to all legislation.”).

¹⁵⁸ Gedicks, *supra* note 95, at 90.

¹⁵⁹ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2525 (2014).

of speech rights.¹⁶⁰ Similarly, commercial speech challenges have frequently resulted in at least intermediate scrutiny and as-applied invalidation of government action, even when the law was not struck down facially. Since the 1990s, the Court has aggressively protected commercial speech and has struck down regulations on the advertising of compound drugs, state restrictions on tobacco advertising, and a ban on labels stating the alcoholic content of beer.¹⁶¹

This searching review thus looks nothing like the mere “rational basis review” many describe *Smith* as providing.¹⁶² As Professor Oleske explains, *Smith* was problematic because it shifted Supreme Court jurisprudence to the extreme of “applying no scrutiny” to “laws incidentally burdening individual religious practices”¹⁶³ Thus, the *Smith* framework is anomalous in that it fails to *at least* provide intermediate scrutiny for religious exercise.

Second, even when dealing with laws that the Court describes as completely neutral and generally applicable, sometimes the Supreme Court employs exacting scrutiny for speech rights. For example, in *United States v. Grace*, the Court analyzed a law that included a broad prohibition on expressive activity on the Supreme Court grounds.¹⁶⁴ Some protesters wanted to carry signs, banners, or devices on the public sidewalks surrounding the Supreme Court, and they challenged the law.¹⁶⁵ Although the Court acknowledged that this law was “facially content-neutral,” it determined that it was still unconstitutional “as-applied” to conduct in which plaintiffs in the case wished to engage.¹⁶⁶ The Court explained, “[w]e hold that under the First Amendment the section is unconstitutional as applied to those sidewalks.”¹⁶⁷ Thus, the plaintiffs were given an exemption from this content-neutral law based on what looked like quite exacting scrutiny in the free speech context.

The Court followed a similar approach in the context of the federal wiretap act in the 2001 case of *Bartnicki v. Vopper*.¹⁶⁸ There, the Court dealt with the question of whether the federal wiretap act could be used to punish

¹⁶⁰ *Id.* at 2530, 2541.

¹⁶¹ See Bhagwat, *supra* note 152, at 795 nn.80–82 (2007) (citing *Thompson v. W. Med. Ctr.*, 535 U.S. 357, 360 (2002); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995)); see also *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 8 (1986) (collecting cases where corporate speech protections have resulted in the invalidation of government action).

¹⁶² See, e.g., *State v. Arlene’s Flowers, Inc.*, 389 P.3d 543, 560 (Wash. 2017) (citing *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 872 (1990)).

¹⁶³ Oleske, *supra* note 155, at 1355.

¹⁶⁴ 461 U.S. at 181.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 181 n.10, 183.

¹⁶⁷ *Id.* at 183.

¹⁶⁸ 532 U.S. 514, 535 (2001).

the publication of an illegally intercepted cellular telephone call.¹⁶⁹ The Court began by observing that the federal prohibition on intercepting telephone calls was hardly new; rather “federal law has prohibited such disclosures since 1934.”¹⁷⁰ The Court found that the act was a facially constitutional and “content-neutral law of general applicability.”¹⁷¹ And the Court found that both the federal wiretap act and its Pennsylvania analogue were violated by the interception and publication at issue in *Bartnicki*.¹⁷² That meant that—at least in the ordinary course—petitioners would be “entitled to recover damages from each of the respondents” for the violations.¹⁷³ Thus, the Court determined whether it would provide an exception to the normal application of the wiretap law for the particular circumstances at issue.¹⁷⁴

To analyze this question, it is notable that the Court did not apply the *O’Brien* intermediate scrutiny standard. In fact, three dissenting justices argued that the Court should have simply applied *O’Brien* and upheld the application of the law.¹⁷⁵ Instead, the Court expressed concern that “enforcement of th[e] provision in these cases . . . implicates the core purposes of the First Amendment because it imposes sanctions on the publication of truthful information of public concern.”¹⁷⁶ As a result, the Court indicated that the government justification must be of “the highest order,” and no such justification existed for this application of the law.¹⁷⁷ The Court in *Bartnicki* thus created an exemption to protect constitutional interests from an otherwise valid and generally applicable law, and it did so with a searching scrutiny based on the unique First Amendment burdens caused by the law’s application.¹⁷⁸

Thus, even when dealing with laws described as neutral and generally applicable, in the speech context courts sometimes engage in a searching review beyond what is arguably required under *O’Brien* because of the

¹⁶⁹ *Id.* at 517.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 526.

¹⁷² *Id.* at 525.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 544–45 (Rehnquist, C.J., dissenting).

¹⁷⁶ *Id.* at 533–34 (majority opinion).

¹⁷⁷ *See id.* at 528 (quoting *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979)).

¹⁷⁸ *See also id.* at 535 (Breyer, J., concurring) (joining opinion because “I agree with its narrow holding limited to the special circumstances present here”) (joined by O’Connor, J.). Not surprisingly, other courts have therefore continued to apply § 2511(1)(c) to other circumstances. *See, e.g., Doe v. Smith*, 429 F.3d 706, 708 (7th Cir. 2005) (holding that plaintiff properly stated claim for violation of the Wiretap Act based on intentional disclosure of personal video); *Lewton v. Divingnzzo*, 772 F. Supp. 2d 1046, 1048 (D. Neb. 2011) (attorney in custody case violated Wiretap Act by disclosing secret recordings captured by device hidden in child’s toy).

unique burdens on speech. Arguably, this is quite similar to how a religious exemption framework operates when the application of a generally applicable law results in unique burdens on religious exercise.

4. What About Antidiscrimination Laws and Dignitary Harms?

The prospect of exemptions to anti-discrimination laws has prompted some of the most virulent backlash against religious exemptions to generally applicable laws.¹⁷⁹ One of the frequent objections raised is that such exemptions are particularly concerning because of the dignitary harm they would inflict on third parties.¹⁸⁰ No doubt the prospect of refusal of service in any context has the potential to be deeply offensive and hurtful, particularly when it involves goods or services related to one's identity and significant personal life events.¹⁸¹ And the government's interest in prohibiting

¹⁷⁹ See generally HAMILTON, *supra* note 57 (describing religious exemptions as perilous and threatening the rule of law); Bagenstos, *supra* note 57, at 137–40; Terri R. Day & Danielle Weatherby, *LGBT Rights and the Mini RFRA: A Return to Separate but Equal*, 65 DEPAUL L. REV. 907, 911–12 (2016) (discussing “the tension and interplay between those advocating for LGBT-inclusive laws and those seeking protection under state, mini RFRA from what they characterize as religious discrimination to resist the trend toward LGBT equal rights”); Dhooge, *supra* note 57, at 58–59 (“[A]ny conflicts between religious liberty asserted by secular businesses and access to goods and services must be resolved in favor of the government’s compelling interest in guaranteeing full and non-discriminatory access for all persons. Such a result does not denigrate religion.”); Lederman, *supra* note 57, at 419 (arguing that “there is widespread fear in some quarters—and presumably hope in others—that such claims might become a template for similar claims, pursuant to federal or state RFRA or analogous state constitutional provisions, for religious exemptions from laws that prohibit discrimination in employment, or in the provision of public accommodations, on the basis of sexual orientation”); Lupu, *supra* note 66, at 98 (asking if RFRA could “now be construed to protect religiously motivated employment discrimination based on sexual orientation, or discrimination by wedding vendors, merchants in other contexts, or government officials against same-sex couples”); NeJaime & Siegel, *supra* note 57, at 2561–63 (noting concern that religious exemptions could be granted from public accommodations laws); Sepper, *supra* note 44, at 26 (noting that “[p]ublic accommodations laws generally apply with full force to all businesses serving the public, religiously affiliated or not”); Gasper, *supra* note 41, at 414–16; Griffin, *supra* note 57.

¹⁸⁰ See, e.g., Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 189–90 (2011) (describing five different types of dignitary harm). Litigants in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* also argued that to frame the denial of service as being about the ability to “obtain goods or services . . . both misunderstands the nature of the government interest at stake and trivializes the profound dignitary harm that people experience when they are turned away from a business because of who they are.” Brief in Opposition at 24, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, No. 16-111 (Nov. 28, 2016). For a response to many of these arguments, see generally Carl H. Esbeck, *Do Discretionary Religious Exemptions Violate the Establishment Clause?*, 106 KENTUCKY L.J. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2952370 [<https://perma.cc/RQK4-36J9>].

¹⁸¹ Some scholars have also argued that religious exemption claims based on complicity are particularly hurtful for third parties, because such claims involve a moral judgment or indication that this third party's behavior is sinful. See, e.g., NeJaime & Siegel, *supra* note 57, at 2561–63.

dignitary harms is valid when that interest does not come into conflict with other constitutional rights.

However, in the free speech context, the Supreme Court has consistently held that a government's desire to protect people from emotional harm—even far more acute emotional harm than is present in many of the wedding vendor cases—does not constitute a compelling government interest.¹⁸² For example, it is difficult to imagine more excruciating humiliation, degradation, or emotional harm than that endured by the father who saw Westboro Baptist Church picketers with signs stating “God Hates Fags,” “You’re Going to Hell,” and “God Hates You” at the funeral of his son, a Marine killed in Iraq in the line of duty.¹⁸³ Notably, the plaintiffs’ behavior in *Snyder v. Phelps* constituted action that was simultaneously religious and expressive.

At trial, a Maryland jury found that the Church’s protest met the applicable standards for the tort of intentional infliction of emotional distress (“IIED”), and it returned a verdict of over \$10 million for the marine’s family.¹⁸⁴ Despite this significant emotional distress, the Supreme Court upheld an as-applied challenge to the state tort law in an 8-1 decision.¹⁸⁵

The Court explained that although Westboro had “inflict[ed] great pain,” freedom of speech protections were a defense against state tort claims and prohibited the Court (or the jury) from “react[ing] to that pain by punishing the speaker.”¹⁸⁶ Because the speech at issue was “entitled to ‘special protection’ under the First Amendment,”¹⁸⁷ the Court set aside the jury verdict and held that the First Amendment precluded recovery for IIED.¹⁸⁸ The Court made clear, though, that it was providing a modest and “narrow” ruling that swept “no more broadly” than the specific facts of the as-applied challenge before it.¹⁸⁹ Thus, not only did the Court provide a limited exemption to a neutral and generally applicable tort law based on speech protections, it emphasized that this is the preferred mode of modest adjudication.¹⁹⁰

The Court in *Snyder* also emphasized the “bedrock principle underlying the First Amendment” that “the government may not prohibit the ex-

¹⁸² See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 (1983) (noting that the Supreme Court has “stated that offensiveness was classically not a justification validating the suppression of expression protected by the First Amendment” (internal quotation marks and alterations omitted)).

¹⁸³ *Snyder*, 562 U.S. at 448.

¹⁸⁴ *Id.* at 450.

¹⁸⁵ *Id.* at 460–61.

¹⁸⁶ *Id.* at 451, 461.

¹⁸⁷ *Id.* at 458.

¹⁸⁸ *Id.* at 460.

¹⁸⁹ *Id.* (citation omitted).

¹⁹⁰ See *id.*; see also *Cantwell*, 310 U.S. at 303, 311 (reversing the conviction of a religious solicitor based on an as-applied challenge to a breach of the peace statute).

pression of an idea simply because society finds the idea itself offensive or disagreeable.”¹⁹¹ Any other result would “effectively empower a majority to silence dissidents simply as a matter of personal predilections.”¹⁹²

Nor is the government entitled to a unique trump card to avoid emotional harm in the context of anti-discrimination laws. In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, the Court addressed whether state law prohibiting discrimination in public accommodations could require a private parade to admit a parade group that wished to advocate an LGBT message with which the parade disagreed.¹⁹³ The Court began its analysis by addressing the facial validity of the public accommodation law.¹⁹⁴ Specifically, the parade organizers argued that the public accommodation law was “overbroad” and “unconstitutionally vague.”¹⁹⁵ The Supreme Court rejected this argument, noting that “[p]rovisions like these are well within the State’s usual power to enact,” and “they do not, as a general matter, violate the First or Fourteenth Amendments.”¹⁹⁶ Indeed, the Court praised such laws as having a “venerable history,”¹⁹⁷ and noted that the state law prohibition targeted “the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds.”¹⁹⁸ Nor was this statute facially “unusual in any obvious way, since it [did] not, on its face, target speech or discriminate on the basis of its content.”¹⁹⁹ The Supreme Court thus made crystal clear that it was dealing with a facially valid law in *Hurley*.

The question, then, was whether the parade organizers were entitled to an exemption from the application of the otherwise valid anti-discrimination law in this case.²⁰⁰ The lower court held that any impact on the parade group’s expressive rights was merely “incidental” and “no greater than necessary to accomplish the statute’s legitimate purpose of eradicating discrimination.”²⁰¹ On this latter point, the Supreme Court reversed, holding that the generally applicable state law had been applied in such a way as to infringe on “the

¹⁹¹ *Snyder*, 562 U.S. at 458 (citing *Texas v. Johnson*, 491 U.S. 397, 414 (1989)); see also *Bolger*, 463 U.S. at 71 (holding that “we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression”); *Nat’l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43, 43–44 (1977) (per curiam) (holding unconstitutional the Illinois Supreme Court’s refusal to stay a prohibition on the right to express anti-semitic messages).

¹⁹² *Cohen*, 403 U.S. at 21.

¹⁹³ 515 U.S. 557, 561, 566 (1995).

¹⁹⁴ *Id.* at 571–72.

¹⁹⁵ *Id.* at 564–65.

¹⁹⁶ *Id.* at 572.

¹⁹⁷ *Id.* at 571.

¹⁹⁸ *Id.* at 572.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 566.

²⁰¹ *Id.* at 563 (citation and internal quotation marks omitted).

choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control."²⁰² Thus, the application of the public accommodation law here infringed upon First Amendment protections, and the parade organizers were entitled to an exemption.²⁰³

The Supreme Court engaged in nearly identical analysis in *Boy Scouts of America v. Dale*.²⁰⁴ There, the New Jersey state court held that the Boy Scouts organization was subject to the state public accommodation law, it was not exempt under any express exemptions, and it had violated the law by revoking the membership of a scout leader because he was a self-professed gay man.²⁰⁵ In reviewing this holding, the Supreme Court observed that the New Jersey statute defined "place of public accommodation" very broadly.²⁰⁶ This breadth did not invalidate the statute on a facial basis, but it did mean that "potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased."²⁰⁷ Thus, the Court analyzed "whether the application of New Jersey's public accommodations law to require that the Boy Scouts accept Dale as an assistant scoutmaster runs afoul of the Scouts' freedom of expressive association."²⁰⁸ The Court concluded that it did, reversed the New Jersey state court, and provided an exemption from New Jersey's anti-discrimination law based on this as-applied challenge.²⁰⁹

Both *Hurley* and *Dale* are fascinating because they result in precisely the types of exemptions to anti-discrimination laws in the speech context that many scholars find unthinkable in the religious context. In *Dale*, it was surely emotionally distressing for a gay scout leader to be expelled from the Boy Scouts; indeed, unlike *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, which involved a one-time and brief interaction, Dale was expelled from a program that had been a major part of his life for nearly as long as he could remember.²¹⁰ Yet the Court determined that here the government's interest was insufficient to trump the Boy Scouts association rights.²¹¹

²⁰² *Id.* at 575, 577–81; *see also* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000) (holding that the government did not have a compelling government interest in applying public accommodation law to force the Boy Scouts to admit a gay scout leader).

²⁰³ *Hurley*, 515 U.S. at 573.

²⁰⁴ 530 U.S. at 646.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 656–57.

²⁰⁷ *Id.* at 657.

²⁰⁸ *Id.* at 656.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 644–45.

²¹¹ *Id.* at 661; *see also* *Hurley*, 515 U.S. at 574 (holding that the exclusion of the LGBT group was "hurtful," but still protected).

In the anti-discrimination conflicts currently percolating, including in *Masterpiece Cakeshop*, religious objectors have generally raised both free speech and religious exercise claims in which they object to providing artistic services that contradict their beliefs about sexuality.²¹² But none of these business owners have engaged in targeted expression that comes close to the intentionally hurtful speech at issue in *Snyder*, nor the total exclusion of an individual from all aspects of an organization as in *Dale*. Rather, in *Masterpiece Cakeshop* for example, the baker was willing to sell a wide range of baked goods to LGBT individuals; his objection was limited to creating a custom-designed wedding cake for a same-sex wedding.²¹³ This is true of the run of the wedding vendor cases.²¹⁴ In fact, in most of these cases the would-be-customer must take the additional step of deducing implied disapproval from the denial of a particular artistic service.²¹⁵ It is inherently contradictory to suggest that implicit disapproval is somehow more likely to inflict dignitary harm than a direct and purposefully hateful expression of disapproval allowed in the speech context.

One might argue that *Hurley* and *Dale* are not analogous, because *Masterpiece Cakeshop* involves a denial of a commercial service offered to

²¹² See, e.g., Memorandum Opinion and Order on Cross, *Elane Photography, LLC v. Willock*, No. CV-2008-06632 (N.M. Dist. Ct. Dec. 11, 2009), 2009 WL 8747805 (raising free speech and religious claims); Complaint at 1–2, *Amy Lynn Photography Studio, LLC v. City of Madison*, No. 2017-cv-000555 (Wis. Cir. Ct. Mar. 7, 2017); *In re Melissa Elaine Klein*, 2015 WL 4868796, at *32–34 (Or. Bureau of Labor & Indus. July 2, 2015) (Nos. 44-14, 44-15) (same).

²¹³ *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 276–77, 280–81 (Colo. App. 2015), cert. denied sub nom. *Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm’n*, No. 2015SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), cert. granted sub nom. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 137 S. Ct. 2290 (2017) (mem.).

²¹⁴ See *Gifford v. McCarthy*, 23 N.Y.S.3d 422, 429 (App. Div. 2016) (noting that objectors “would happily host wedding receptions, parties, or other events for couples in same-sex relationships,” just not weddings) (internal quotation marks omitted); *State v. Arlene’s Flowers, Inc.*, 389 P.3d 543, 550 (Wash. 2017) (holding that a florist had always served “gay and lesbian customers in the past for other, non-wedding-related flower orders”); *Klein*, 2015 WL 4868796, at *35, *51 (finding that objector claimed refusal of service “was not on account of . . . sexual orientation, but on . . . objection to participation in the event for which the cake would be prepared”); Complaint ¶¶ 22, 76–79, *Country Mill Farms, LLC v. City of East Lansing*, No. 1:17-cv-00487, 2017 WL 2387921 (W.D. Mich. May 31, 2017) (arguing that the operator of a farm “gladly s[old] produce to all comers at the Market” and had “employed people from a wide variety of racial, cultural, and religious backgrounds, including members of the LGBT community”); Brief in Chief of Appellant, *Elane Photography, LLC v. Willock*, 2010 N.M. App. Ct. Briefs LEXIS *1, at *6–7 (N.M. Ct. App. June 3, 2010) (arguing that “[w]hat is crucial for Elane Photography is the message conveyed by its photos, not the sexual orientation of the people in its photos.” (internal record citations omitted)); Complaint ¶ 7, *Amy Lynn Photography*, No. 2017-cv-000555 (arguing that photographer “serves individuals of every sexual orientation and every political belief”).

²¹⁵ For example, in *Arlene’s Flowers*, Baronelle Stutzman took the would-be customer by the hand and, after expressing her regard for him, told him she could not arrange flowers for his wedding because of her religious beliefs. But she did not express any disapproval of her customer or his relationship. See Brief of Appellants at 13, *Arlene’s Flowers*, 389 P.3d 543 (Wash. Oct. 16, 2015) (No. 91615-2), 2015 WL 12632392.

the public. Such an argument must be broken down to its parts. First, as to payment received, the Supreme Court has long held in the speech context: “It is well settled that a speaker’s rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak.”²¹⁶ And in *Hobby Lobby*, seven of the nine Supreme Court justices have at least implicitly recognized that the same principle is true for religious exercise.²¹⁷

Is there, then, something uniquely unassailable about the government’s interest when a service is being offered to the *public*? Or, as some scholars argue, must “any conflicts” asserted by public accommodations “be resolved in favor of the government’s compelling interest in guaranteeing full and non-discriminatory access for all persons?”²¹⁸ To answer those questions, one must also answer the following: Could the government require a baker who supports Black Lives Matter to bake a Confederate flag-themed cake for a rally being held by the Aryan Nations church? Or could the government force LGBT business owners to bake a cake for a Westboro Baptist Church protest? Does the fact that these bakers offer similar cakes to the public really change the analysis?

It turns out these are not simply hypothetical thought experiments. After the recent neo-Nazi demonstrations in Charlottesville, a swarm of businesses reacted by refusing to continue providing services to white supremacist organizations.²¹⁹ A salon refused to continue styling the hair of a politician who

²¹⁶ *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988).

²¹⁷ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2787 (2014) (Ginsburg, J., dissenting) (only Justice Sotomayor joined the portion of Justice Ginsburg’s dissent that argued that corporations cannot exercise religion).

²¹⁸ Dhooge, *supra* note 57, at 58–59; see also Joseph William Singer, *We Don’t Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 B.U. L. REV. 929, 930–33 (2015) (analyzing the connection between private property rights and anti-discrimination laws).

²¹⁹ See, e.g., Bill Chappell, *Neo-Nazi Site Daily Stormer Is Banned by Google After Attempted Move from GoDaddy*, NPR: THE TWO-WAY (Aug. 14, 2017, 8:30 AM), <http://www.npr.org/sections/twotwo-way/2017/08/14/543360434/white-supremacist-site-is-banned-by-go-daddy-after-virginia-rally> [<https://perma.cc/9TDM-YM7F>] (noting that a white supremacist site was banned by GoDaddy after Virginia rally); Tracy Jan & Elizabeth Dwoskin, *Silicon Valley Escalates Its War on White Supremacy Despite Free Speech Concerns*, WASH. POST (Aug. 16, 2017), https://www.washingtonpost.com/business/economy/silicon-valley-escalates-its-war-on-white-supremacy-despite-free-speech-concerns/2017/08/16/842771b8-829b-11e7-902a-2a9f2d808496_story.html?utm_term=.3ee823f7eb96 [<https://perma.cc/C5WC-88YC>]; Blake Montgomery, *PayPal, GoFundMe, and Patreon Banned a Bunch of People Associated with the Alt-Right. Here’s Why*, BUZZFEED NEWS (Aug. 2, 2017, 9:01 AM), https://www.buzzfeed.com/blakemontgomery/the-alt-right-has-a-payment-processor-problem?utm_term=.sjNDdwQ8Y#.alq53Qga4 [<https://perma.cc/DS5U-6JCJ>]; Caroline O’Donovan, *Uber Bans Racists Too*, BUZZFEED NEWS (Aug. 21, 2017, 12:10 PM), https://www.buzzfeed.com/carolineodonovan/uber-is-also-willing-to-ban-white-supremacists?utm_term=.jlMoBP3qM#.ryKQ AoZPg [<https://perma.cc/C3E8-94ZF>]; Erik Ortiz et al., *Ahead of Far Right Wing Rally in Virginia, Airbnb Cancels Accounts*, NBC NEWS (Aug. 8, 2017, 5:38 PM), <https://www.nbcnews.com/news/us-news/ahead-far-right-wing-rally-virginia-airbnb-cancels-accounts-n790716> [<https://perma.cc/9TDM-YM7F>].

would not take a position supportive of LGBT rights.²²⁰ A gay coffee shop owner recently refused to serve a group of pro-life activists, ejecting them from his store.²²¹ And in the relevant factual context for *Masterpiece Cakeshop*, the Colorado Commission allowed three bakers (including LGBT business owners) to refuse a religious customer's request to create custom cakes with religious messages criticizing same-sex marriage.²²² The Commission also admitted that a baker could decline to create a cake with a design or symbol that was "offensive," including "a white-supremacist message for the Aryan Nation," or "a cake denigrating the Koran"²²³ If one thinks that *any* of these businesses are justified in denying their services to individuals, groups, or events to which they object, then one must acknowledge that the government does not have an unassailable interest in coercing the provision of any product or service that is already offered to the public.

To be sure, there are some cases dealing with services or products offered in the public sphere where the government would prevail over First Amendment objections. But in the public accommodation context, the foundational government interest capable of trumping First Amendment objections is not avoiding dignitary harms or conscripting public vendors into government service. It is the government's interest in "removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups."²²⁴ And the unanimous Supreme Court in *Hurley* has already pointed to factors that should be assessed when the Court must balance First Amendment rights with state

cc/L2JP-VX58]; Matthew Rozsa, *After Charlottesville, Spotify Is Pulling White Supremacist Music from Its Platform*, SALON (Aug. 17, 2017, 10:59 AM), <http://www.salon.com/2017/08/17/hate-groups-spotify-is-pulling-white-supremacist-music/> [https://perma.cc/8LKW-KLKT]; Nick Statt, *Apple Pay Is Dropping Support for Websites That Sell White Supremacist Merchandise*, THE VERGE (Aug. 16, 2017, 6:51 PM), <https://www.theverge.com/platform/amp/2017/8/16/16159310/apple-pay-drops-support-white-supremacist-neo-nazi-merchandise> [https://perma.cc/EM7J-QAMR].

²²⁰ Erik Hayden, *Stylist Refuses to Cut New Mexico Governor's Hair Over Gay-Marriage Stance*, TIME (Feb. 23, 2012), <http://newsfeed.time.com/2012/02/23/stylist-refuses-to-cut-new-mexico-governors-hair-over-gay-marriage-stance/> [https://perma.cc/29TV-7VNV].

²²¹ Douglas Ernst, *Christian Activists Booted from Seattle Coffee Shop: 'I'm Gay. You Have to Leave'*, WASH. TIMES (Oct. 6, 2017), <https://www.washingtontimes.com/news/2017/oct/6/christian-activists-booted-from-seattle-coffee-sho/>; see also Stephanie Barclay, *Religious Baker Who Refused to Make a Wedding Cake for Gay Couple Deserves Protection Whether You Agree with Him or Not*, PHILA. INQUIRER (Jan. 19, 2018, 10:49 AM), <http://www.philly.com/philly/opinion/commentary/masterpiece-cakeshop-supreme-court-scotus-gay-wedding-cake-20180119.html> [https://perma.cc/7K88-RCUT].

²²² Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 282 n.8 (Colo. App. 2015), *cert. denied sub nom.* Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm'n, No. 2015SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), *cert. granted sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290 (2017) (mem.).

²²³ Petition for Writ of Certiorari, app. at 56a–58a, 78a, *Masterpiece Cakeshop*, No. 16-111.

²²⁴ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984).

interests.²²⁵ Specifically, (1) does the public accommodation “disclaim any intent to exclude [a class of individuals] *as such*” (which would create a more significant barrier to economic or political advancement), or does the public accommodation have a more discreet objection to something like a particular “message” or event;²²⁶ and (2) is the public accommodation “an abiding monopoly of access,” or does the would-be customer have a “fair shot” at obtaining the service elsewhere?²²⁷

The answers to these questions will vary depending on the evidence the government has marshaled regarding a market failure it needs to address, the economic reality in which the conflict arises, and the breadth of the First Amendment objection at issue. When courts balance these important interests, the religious objector will not always win.²²⁸ But the important point is that in these balancing scenarios, the religious objector’s rights should be given *some* weight. The theory advanced by critics under their view of *Smith* would give religious objections virtually no weight at

²²⁵ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000).

²²⁶ *Hurley*, 515 U.S. at 572. The government will have a stronger interest in combatting the type of class-based market failures approximating the Jim Crow South discrimination, which originally motivated widespread public accommodation laws. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252–53 (1964) (recounting obstacles to service for African Americans prior to the Civil Rights Act of 1964); John D. Inazu, *A Confident Pluralism*, 88 S. CAL. L. REV. 587, 603 (2015) (“There remains . . . a crucial difference between the race-based discrimination against African Americans in the Jim Crow South and *any* other form of discrimination or exclusion in our country. The pervasive impediments to equal citizenship for African Americans have not been matched by any other recent episode in American history. Our country has harmed many people But the systemic and structural injustices perpetrated against African Americans—and the extraordinary remedies those injustices warranted—remain in a class of their own.”).

²²⁷ *Hurley*, 515 U.S. at 572–78. Other state supreme courts have similarly explained that a government can demonstrate a compelling government interest where some market failure is preventing a class of individuals from obtaining a good or service. For example, in a conflict between public accommodation laws and free exercise rights in Massachusetts, the Supreme Judicial Court explained that the government must prove that accommodating the religious objectors would “significantly imped[e] the availability” of the requested service because a “large percentage of units” were unavailable to the would-be customers. *Attorney Gen. v. Desilets*, 636 N.E.2d 233, 240 (Mass. 1994). The court rejected a general interest in “eliminating discrimination” and noted that “the analysis must be more focused.” *Id.* at 238. Illinois and Michigan have adopted the same approach as Massachusetts. See *Jasniowski v. Rushing*, 685 N.E.2d 622, 622 (Ill. 1997) (reversing a ruling requiring a religious landlord to lease to a cohabiting couple); *McCready v. Hoffius*, 593 N.W.2d 545, 545 (Mich. 1999) (same). For an economic analysis about why a focus on market access is important in this fraught anti-discrimination debate, see generally Nathan B. Oman, *Doux Commerce, Religion, and the Limits of Antidiscrimination Law*, 92 IND. L.J. 693 (2017).

²²⁸ Easier cases would be where the government has demonstrated a monopoly or a market failure regarding an important service. For example, if a religious couple owned a hotel in a remote location and they were unwilling to house LGBT individuals, the government would have a stronger case for trumping any First Amendment rights. Similarly, the *Desilets* court indicated that the government could have prevailed if it had presented evidence showing a “significant housing problem” where “a large percentage of units are unavailable to cohabitants.” 636 N.E.2d at 240.

all—resulting instead in an automatic victory for the government anywhere it can point to an abstract interest in prohibiting discrimination.²²⁹ Notably, this crabbed reading of the Free Exercise Clause as necessarily giving way to any anti-discrimination interest has already been unanimously rejected by the Supreme Court in the context of federal and state employment anti-discrimination laws.²³⁰ Thus, the principled alternative is that the government should carry the burden of demonstrating a need to remove barriers to economic and political advancement under strict scrutiny in this context, and that scrutiny should be just as strict regardless of whether the objection that triggers this analysis is based on speech or religious grounds.²³¹

Finally, Professor Case argues that “[a]dvocates of exemptions from public accommodation laws for service providers who refuse to provide flowers or cake for same-sex wedding celebrations have yet to explain whether and why the claims of these Christian bakers and florists are more worthy of accommodation” than other groups.²³² But perhaps the more relevant question for Professor Case and other objecting scholars is this: why are Christian bakers and florists less worthy of accommodation than groups who would engage in nearly identical behavior for equally expressive, but not necessarily religious, purposes? And more broadly, why should religious as-applied challenges be treated less favorably than other First Amendment as-applied challenges?

III. EMPIRICAL ANALYSIS OF RELIGIOUS VERSUS SPEECH CLAIMS

The cases surveyed above demonstrate that courts already provide exemptions in other First Amendment contexts, even in the context of generally applicable laws.²³³ Thus, providing religious exemptions does not “elevate[] religious freedom to a preferred position among First Amendment rights.”²³⁴

But what of Justice Scalia’s concern that religious exemptions pose a special threat of a society “courting anarchy?” Is less protective treatment

²²⁹ See, e.g., *State v. Arlene’s Flowers, Inc.*, 389 P.3d 543, 562 (Wash. 2017) (citing *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 872 (1990)) (citing *Smith* as providing mere rational basis review for religious exercise, and deferring without question to the government’s abstract interest in combatting discrimination).

²³⁰ See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188–89 (2012) (holding that that constitutional right under the religion clauses trumped the application of the Americans with Disabilities Act).

²³¹ The Supreme Court has made clear that a government interest that is found lacking in one context does not transform into a compelling interest when it arises in the religious context. See *Gonzales*, 546 U.S. at 429–30 (holding that whether strict scrutiny is triggered by the Free Speech Clause or RFRA, “the consequences are the same”).

²³² Case, *supra* note 1, at 485.

²³³ See *supra* notes 93–232 and accompanying text.

²³⁴ LUPU & TUTTLE, *supra* note 55, at 11.

of religious objections warranted based on something else problematic about religious objections compared to other First Amendment claims? Is there something about the infinite variety of practices of faiths that distinguishes religion as giving rise to more voluminous risks than those posed by speech or association, particularly post *Hobby Lobby*'s heightened protection for such rights? For example, as discussed above, critics such as Professor Case argue that *Hobby Lobby* creates a "risk of havoc" without any "stopping point . . ."²³⁵ Further, Case suggests that *Hobby Lobby* has "open[ed] up the floodgates to a host of new potential claims for religious exemption by a host of different kinds of service providers."²³⁶ Similarly, Professor Corvino suggests that "many find *Hobby Lobby* worrisome" because religious conduct that receives protection for "exemption and accommodation purposes" is "expansive and expanding," and has a unique "pervasiveness" with an "endless variety of religious scruples."²³⁷ Professor Leslie Griffin argues that because of "*Hobby Lobby*," the "broad reading of RFRA . . . will encourage many future lawsuits and undermine more civil liberties."²³⁸ She also asserted that "[a]lmost anything can be turned into a claim of 'cooperation with evil'" and "all federal laws are now subject to challenge, with the possibility of every citizen becoming 'a law unto himself' until the rule of law is undermined."²³⁹ Professor Elizabeth Sepper argues that "[t]he *Hobby Lobby* decision throws open the courtroom door to corporations and hands them the now-powerful weapon of corporate conscience to fight off regulation that protects the full and equal citizenship of the people."²⁴⁰ And Professor Marshall asserts that "[t]he risk that Hobby Lobby invites flimsy but readily sustainable RFRA claims by entities engaged in commercial activity then should be apparent. A financial incentive combined with a high likelihood of success is a dangerous mix."²⁴¹ This line of thinking, if true, counsels that a religious exemption regime, with "an

²³⁵ Case, *supra* note 1, at 486 (internal quotation marks omitted).

²³⁶ *Id.* at 487.

²³⁷ CORVINO ET AL., *supra* note 2, at 38, 46, 47–50.

²³⁸ Griffin, *supra* note 60, at 673.

²³⁹ *Id.* at 687–88; *see also* Chemerinsky & Goodwin, *supra* note 61, at 1133–34 ("This decision will lead to much broader challenges. Christian Scientists, for example, will claim that they do not have to provide any health insurance to their employees."); Garfield, *supra* note 61, at 825 (arguing that "[b]y tipping the scales so drastically in favor of religious objectors, Alito put out a welcome mat for religious objections by corporations"); Robertson, *supra* note 61, at 569 (arguing that "the ruling casts a shadow over all public health regulation, given that virtually any objector can cloak their objection in religious garb"); Stephens, *supra* note 61, at 4 (arguing that "[t]he Court's significant expansion of religious liberty doctrine in [*Burwell v. Hobby Lobby*] invites businesses to seek exemptions from nondiscrimination laws such as Title VII, the Pregnancy Discrimination Act, and the Americans with Disabilities Act, as well as other laws, which provide workplace protections to women, such as the Family and Medical Leave Act").

²⁴⁰ Sepper, *supra* note 62, at 233.

²⁴¹ Marshall, *supra* note 8, at 120.

endless chain of exemption demands,” is a distinct threat to the rule of law because it will result in a tidal wave of religious claimants striking down government action at every turn.²⁴²

To examine this claim, we conducted a modest empirical analysis to assess (1) the likelihood that religious exemptions result in government action being struck down under RFRA, and how that rate has changed since *Hobby Lobby*; and (2) the volume of religious objection cases being brought compared to speech-based cases, and whether the volume of religious claims seem to have increased dramatically post *Hobby Lobby*. Notably, we provide the first nation-wide RFRA survey of its kind since *Hobby Lobby*.

Our findings contradict the notion that religious objections are much more likely to prompt a court to strike down government action under RFRA after *Hobby Lobby*.²⁴³ Compared to previous scholarship assessing government win rates in this area, *Hobby Lobby* does not appear to have significantly changed the government’s win rate in the last three years. Our findings also indicate that cases dealing with religious objections to laws are less pervasive than cases dealing with other expressive First Amendment claims.²⁴⁴ These findings apply to all federal cases, as well as the cases specifically at the Supreme Court level. The data also does not indicate a trend of dramatic growth in the volume of religious cases post *Hobby Lobby*. More time and data will be necessary to confirm these results. Additionally, no statistical regression analysis has been performed to isolate the effect of variables, and the findings in this Article are thus at best suggestive.

A. Methodology

We utilized three different methods to analyze religious objection claims compared to other speech and association claims, both in terms of volume and likelihood of striking down government action. Each of these methods is discussed in turn below.

We also compared our findings to the helpful empirical research of Professor Adam Winkler, who reviewed all federal cases from 1990 to 2003 dealing with strict scrutiny, including cases dealing with suspect classifications, speech, religious liberty, fundamental rights, and freedom of association.²⁴⁵ Though somewhat dated (and inapplicable to questions about how

²⁴² Ira C. Lupu, *Where Rights Begin: The Problems of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 947 (1989); see also *supra* notes 152–178 and accompanying text.

²⁴³ See *infra* notes 267–292 and accompanying text.

²⁴⁴ See *infra* notes 267–292 and accompanying text.

²⁴⁵ See generally Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006). Other authors have also surveyed RFRA cases in the Tenth Circuit recently. See generally Luke W. Goodrich & Rachel N. Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cas-*

Hobby Lobby changed the pervasiveness of religious objections), Professor Winkler's research serves as a useful benchmark.

1. New RFRA Survey Methodology

To assess how *Hobby Lobby* has impacted the government's win rate in RFRA cases, we surveyed all federal RFRA court cases available in Westlaw that have been brought in the three-year period since *Hobby Lobby*.²⁴⁶ We analyzed the court rulings to determine how frequently the court ruled for the plaintiff on a RFRA claim versus how frequently the court ruled for the government. The universe of RFRA cases was created using two types of searches. The first was a general Westlaw search for RFRA terms in the federal cases database:

- Search: advanced: ("religious freedom restoration act" RFRA "42 U.S.C. s 2000bb") & DA(aft 06-30-2014 & bef 07-01-2017).
 - Results: 478 cases.

For our second method, we used the Westlaw citing references feature to identify any cases citing to the five statutory sections of RFRA for the same three-year time period. We then cross-referenced both search results, removing any duplicate decisions. Only two new cases resulted from this second citing reference search method, bringing the total universe of cases to 480 cases.²⁴⁷

es, 48 SETON HALL L. REV. 353 (2018) (surveying Tenth Circuit religious liberty cases from 2012–2017).

²⁴⁶ The relevant time period was June 30, 2014–July 17, 2017. Some applications of RFRA necessarily evaded the data set if they unreported cases, or not part of Westlaw's database. We assume that such cases are more likely to be government wins, and that a court decision overturning government action would result in a reported case. This may mean that the government win rate is in actuality even higher. We excluded the Religious Land Use and Institutionalized Persons Act ("RLUIPA") cases from the dataset because the standard for RLUIPA was not clearly established as being as protective as RFRA until the Supreme Court's decision a year after *Hobby Lobby* in *Holt v. Hobbs*. To avoid potential data skewing that would result partially through the three-year period based on that evolving standard, and where the purpose of this analysis is to assess the impact of *Hobby Lobby*, those RLUIPA cases were excluded.

²⁴⁷ The search terms and results for this method included the following:

- Search: Federal cases under citing references for 42 U.S.C. § 2000bb from July 1, 2014 – June 30, 2017.
 - Results: 190 cases, but only 1 additional new case.
- Search: Federal cases under citing references for 42 U.S.C. § 2000bb-1 from July 1, 2014 – June 30, 2017.
 - Results: 180 cases, but only 1 additional new case.
- Search: Federal cases under citing references for 42 U.S.C. § 2000bb-2 from July 1, 2014 – June 30, 2017.

We analyzed a judicial decision as a single application of RFRA, regardless of the number of judges on the panel. Preliminary rulings and decisions that were subsequently reversed or affirmed on appeal were collected but, unless otherwise specified, were excluded from the reported results to avoid double counting.²⁴⁸ Additionally, only decisions in the relevant three-year period were counted, and it is possible that some of these decisions could be subsequently reversed. With the help of excellent research assistance, we manually reviewed all 480 cases to ensure that any decisions not addressing RFRA on the merits were also excluded.²⁴⁹ This brought the universe of unique cases addressing RFRA on the merits to a total of 101 cases. Many of the other cases were disposed of on procedural grounds or other legal claims.

Unsurprisingly, there were a number of cases (thirty-one to be precise) dealing with essentially the same challenge to the “contraception mandate” of the Affordable Care Act. These cases arose in different jurisdictions but addressed the same issue that was ultimately addressed by the Supreme Court either in *Hobby Lobby* (for the for-profit organizations) or in the consolidated appeal in *Zubik v. Burwell* (for the nonprofit organizations).²⁵⁰ In light of the government’s announcement to resolve these cases through regulatory action after the Supreme Court’s decision in *Zubik*, we decided that the most conservative course was to treat these cases as separate government losses.²⁵¹ We made this decision given that many religious exemption

○ Results: 30 cases, but 0 additional new cases.

- Search: Federal cases under citing references for 42 U.S.C. § 2000bb-3 from July 1, 2014 – June 30, 2017.

○ Results: 16 cases, but 0 additional new cases.

- Search: Federal cases under citing references for 42 U.S.C. § 2000bb-4 from July 1, 2014 – June 30, 2017.

○ Results: 30 cases, but 0 additional new cases.

²⁴⁸ The empirical analysis by Adam Winkler on strict scrutiny applications similarly analyzed court rulings, but excluded cases that were preliminary or that were addressed by another court on appeal. Winkler, *supra* note 245, at 844–45.

²⁴⁹ A decision was considered “on the merits” if the court made a determination regarding whether there was a sincere religious belief, a substantial burden on religious exercise, the government had a compelling interest, or the regulation was the least restrictive means. This included when the court discussed whether plaintiff alleged enough facts to support his RFRA claim (i.e. at the motion to dismiss stage). Not considered “on the merits” included cases where the RFRA claim was dismissed because the defendant was a state or private actor, or the plaintiff did not exhaust administrative remedies.

²⁵⁰ See *HHS Mandate Information Central*, BECKET, <http://www.becketlaw.org/research-central/hhs-info-central/> [<https://perma.cc/D3A9-HZJ5>] (compiling a database of cases challenging the HHS mandate); see, e.g., *Zubik v. Burwell*, 136 S. Ct. 1557, 1560–61 (2016) (vacating Third, Fifth, Tenth, and D.C. Circuit Courts decisions that held HHS constitutional, and remanding to address the issue of employers providing notice of their religious objections).

²⁵¹ In May 2016, the Supreme Court unanimously overturned lower court rulings against religious objectors, ordered the government not to fine the objectors, and said the lower courts

objectors are likely particularly concerned about these cases. Arguably, these cases could be treated as one case, or excluded altogether. Thus, we presented alternative findings treating these cases as two government losses (one loss for the government against for-profit challenges in *Hobby Lobby*, and one loss for the government against nonprofits in *Zubik*), or excluding these cases completely.

A final point of clarification is in order. The purpose of this methodology is to examine how courts have applied strict scrutiny under RFRA since *Hobby Lobby*; it is not to determine how strict scrutiny might affect litigants, legislators, government officials, or others. Our goal was not to determine how strict scrutiny impacts the decision of lawmakers to adopt laws, government officials to enforce laws, or litigants to bring, settle, or appeal lawsuits. That is not something that could be measured by this data.²⁵² Thus, this case survey does not capture other possible significant impacts *Hobby Lobby* may have had on the willingness of government officials to enforce certain laws or the willingness of litigants to bring lawsuits.

2. Targeted Comparative Searches Methodology

For our second method, we wanted to find a way to compare the volume of speech cases to religious exercise cases. Religious exercise cases include constitutional cases and thus present a broader universe of claims than just RFRA cases. That is why an additional search method was required to assess case volume beyond our new RFRA survey.²⁵³ Initially, we assessed a snapshot of all cases that have been brought since the *Hobby Lobby* decision in June 2014. To do this we ran three targeted searches in Westlaw to identify the approximate number of religious cases compared to other expressive First Amendment cases. We first ran searches using Westlaw's key number system to assess how many cases were assigned Westlaw's "speech and expression" key number versus its "religious exer-

should provide the government with an opportunity "to arrive at an approach going forward that accommodates the petitioners' religious beliefs." *Zubik*, 136 S. Ct. at 1560. In May 2017, the President issued an executive order directing the Department of Health and Human Services ("HHS") and other agencies to protect religious ministries from the HHS mandate. Exec. Order No. 13,798, 82 Fed. Reg. 21,675 (May 4, 2017). Further government action to finalize policy changes to the contraception mandate is anticipated.

²⁵² The data's failure to account for primary behavior is an admitted weakness, but the nature of the relevant question makes it almost impossible to collect the type of data that would be necessary to analyze the effects of *Hobby Lobby* on primary behavior.

²⁵³ If we had limited our dataset to just RFRA cases, this would have skewed the religious claims and indicated they were even smaller compared to other First Amendment expressive cases than they already are.

cise” key number.²⁵⁴ Second, we ran searches with relevant speech or religious-exercise search terms appearing at least four times in the body of a case.²⁵⁵ Third, we ran searches with the same speech or religious-exercise search terms appearing in the Westlaw summary of the case.²⁵⁶ Each search was limited to the time period of June 30, 2014, to June 30, 2017.²⁵⁷ Each of these searches has its own shortcomings in perfectly capturing the universe of speech or free exercise cases in the last three years, but together these searches triangulate to provide a likely relevant data point for the comparative volume of cases brought over the last three years.²⁵⁸

It is possible that this data, as a snapshot in time, would not reveal a sharp upward trend in the growth of religious cases. Thus, to analyze trends over time in volume, we used the targeted search language for the Westlaw key number system and ran that search limited by year for each year dating back to 1946.²⁵⁹ We chose this year because (as discussed below) the modern Spaeth Database begins in 1946 as well.²⁶⁰ We compared speech to religious cases over time in absolute terms, and also as a percentage of all reported cases by year. We used the number of all reported cases by year that was provided in the Lexis database. Westlaw does not report more than ten-thousand cases in any search category, but Lexis does not cap the number of cases pro-

²⁵⁴ For speech cases, the following search was used in all state and federal cases: “adv: TO(92xviii) & DA(aft 06-30-2014 & bef 07-01-2017).” This search references the Westlaw key number 92, Section XVIII—Freedom of Speech, Expression, and Press, k1490-k2309. For religious exercise cases, the following search was used in all state and federal cases: “adv: TO(92xiii) & DA(aft 06-30-2014 & bef 07-01-2017).” This search references the Westlaw key number 92, Section XIII—Freedom of Religion and Conscience, k1290-k1429.

²⁵⁵ For speech cases, the following search was used in all state or federal cases: “adv: ATLEAST4(“freedom #of speech”) ATLEAST4(“freedom #of press”) ATLEAST4(“freedom #of association”) ATLEAST4(“freedom #to associate”) & DA(aft 06-30-2014 & bef 07-01-2017).” For religious exercise cases, the following search was used in all state or federal cases: “adv: ATLEAST4(“freedom #of relig!”) ATLEAST4(rfra) & DA(aft 06-30-2014 & bef 07-01-2017).”

²⁵⁶ For speech cases, the following search was used in all state or federal cases: “adv: SY((free! /5 speech! press associat!)) & DA(aft 06-30-2014 & bef 07-01-2017).” For religious exercise cases, the following search was in all state or federal cases: “adv: SY((relig! /5 exerc!) rfra (free! /5 relig!)) & DA(aft 06-30-2014 & bef 07-01-2017).”

²⁵⁷ All relevant searches were run between October 19, 2017, and October 24, 2017. We understand that the numbers that come back in Westlaw searches may be subject to minor change, given that Westlaw is continually adding new cases to its library.

²⁵⁸ As a starting matter, Westlaw does not claim to include all unpublished cases in its searchable databases.

²⁵⁹ For counting purposes, our year began on July 1, the day after *Hobby Lobby* was decided, and it ended on June 30. So, a search for one year of Westlaw key number cases would look like this: “adv: (TO(92xviii)) & DA(aft 06-30-1945 & bef 07-01-1946).”

²⁶⁰ We used the Westlaw key number for our search over time because this category was created by a third party, and thus less susceptible to a critique that we relied on biased search terms.

vided in search results.²⁶¹ Thus, for the numerator we used the number of religious or speech Westlaw key cases in a given year, and for the denominator we used the number of all reported cases in that same year. We then displayed the findings from this methodology in two different graphs.

3. Spaeth Database Methodology

Finally, although the findings of the first two methods provide information about volume and win rates for *all* federal cases, some may wonder whether a comparatively larger proportion of religious cases percolate through the court system to the Supreme Court, and what type of win rates those religious cases enjoy. We thus compared religious exercise versus other expressive Supreme Court cases using Harold J. Spaeth's U.S. Supreme Court Database.²⁶² This database codes all Supreme Court decisions from 1946 to 2016 based on numerous factors, including the particular legal issue, as well as the party that was successful. This coding "makes amassing data on the Court's First Amendment decisions a relatively straightforward task."²⁶³ We first looked at all of the speech and association Supreme Court cases in which the government was clearly successful, either as the petitioner or the respondent.²⁶⁴ We then did the same thing for cases coded as religious exercise cases.²⁶⁵ Notably, this Spaeth coding of a winning party does not ensure that a religious or speech claim, respectively, is the winning issue on the merits. Thus, the value of these win rates is limited.

In terms of providing a fully representative dataset, there are some obvious limitations with the Spaeth database. Most notably, the database is limited to Supreme Court decisions, which are not representative of other

²⁶¹ To obtain the number of all reported cases from Lexis, we used the term "cite(lexis)" across all Federal and State cases. All cases in the Lexis database are given Lexis citations, so this brought back a total amount of the number of reported cases in the Lexis database. We ran this "cite(lexis)" search year by year, and used this number for the denominator.

²⁶² *Modern Database: 2017 Release 01*, WASH. UNIV. LAW: THE SUPREME COURT DATABASE (Aug. 14, 2017), <http://supremecourtdatabase.org/data.php> [<https://perma.cc/XVZ9-QW6Q>].

²⁶³ *Id.*; see, e.g., Lee Epstein & Jeffrey A. Segal, *Trumping the First Amendment?*, 21 WASH. U. J.L. & POL'Y 81, 92 (2006) (discussing the use of the database to analyze other aspects of First Amendment cases).

²⁶⁴ For this coding under the "Legal Provisions" section of the database, we selected the "Constitutional Amendment" section and then the "First Amendment" subsection. We then selected both the "association" category and the "speech, press, or assembly" category. We then ran searches under this category where the government was coded as a party, and assessed win-rates based on when the government was the winning party.

²⁶⁵ For this coding under the "Legal Provisions" section of the database, we selected the "Constitutional Amendment" section and then the "First Amendment" subsection. We then selected the "free exercise of religion" category. We similarly ran searches under this category where the government was coded as a party, and assessed win-rates based on when the government was the winning party. We also added the three RFRA cases to this category.

federal cases.²⁶⁶ Still, this database does provide a useful data point for the volume of meritorious cases that the Supreme Court is interested in addressing for speech compared to religious exercise issues. The modern database time-period ends in 2017 (the 2016 term).

B. Findings

Our findings do not indicate that government win rates have undergone a dramatic change since *Hobby Lobby*. Though the data does not assess the impact of *Hobby Lobby* on primary behavior, it does contradict the fear of some critics that *Hobby Lobby* will “encourage many future lawsuits,”²⁶⁷ “throw[] open the courtroom door to corporations,”²⁶⁸ and “invite[] flimsy but readily sustainable RFRA claims . . . with a high likelihood of success.”²⁶⁹

Additionally, our findings indicate that reported cases dealing with speech claims are much more voluminous than reported cases dealing with religious claims, both in absolute terms and as a percentage of all reported cases. The trend over time indicates that religious claims are decreasing as a percentage of all reported cases, not increasing as some critics fear.

1. New RFRA Survey Findings

In our new survey of all federal cases involving a RFRA claim in the three years since *Hobby Lobby*, the government won in fifty out of 101 cas-

²⁶⁶ According to the Supreme Court’s own website, its current caseload is over 10,000 cases, but plenary review is only granted “in about 100 cases per Term,” so less than 1% of all appeals. *The Justices’ Caseload*, SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/about/justicecaseload.pdf> [<https://perma.cc/DSD3-CQJE>]; see also David R. Stras, *The Supreme Court’s Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 967, 987 (2007) (book review) (reporting the decrease in cases that the Supreme Court decides on the merits, and noting that the Court granted review over 3% of the time in the early 1980s but has done so less than 1% of the time since the October 1999 Term, although the number of certiorari petitions has steadily increased); *The Supreme Court, 2009 Term—The Statistics*, 124 HARV. L. REV. 411, 418 tbl.II(B) (2010) (observing that the Court granted only 0.9% of 8,131 petitions for review in its 2009 Term).

²⁶⁷ Griffin, *supra* note 60, at 673.

²⁶⁸ Sepper, *supra* note 62, at 233.

²⁶⁹ Marshall, *supra* note 8, at 120. Our findings are consistent with analysis by journalists and HHS that there have been very few corporations that have taken advantage of a contraception mandate exemption. See, e.g., Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838–857 (interim final rules with request for comment Oct. 13, 2017) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147); Jennifer Haberkorn, *Two Years Later, Few Hobby Lobby Copycats Emerge*, POLITICO (Oct. 11, 2016, 5:19 PM), <http://www.politico.com/story/2016/10/obamacare-birth-control-mandate-employers-229627> [<https://perma.cc/DT69-6SCH>] (“Politico obtained the accommodation notices filed by employers between [January and March] 2014 Thirty of the entities are nonprofits and 22 are for-profits.”).

es, which is a government win rate of fifty percent.²⁷⁰ If contraception mandate cases are treated as just two consolidated government losses addressed by the Supreme court in *Hobby Lobby* and *Zubik* (one for the for-profit cases, and one for the nonprofit cases), then the government enjoys a higher win rate of sixty-nine percent. If the thirty-one contraception mandate cases are excluded altogether, the government's win rate is seventy-one percent.²⁷¹

Our findings on win rates are similar to those from the Winkler survey.²⁷² Specifically, of all of the rights Professor Winkler surveyed, government action was most likely to succeed in the context of strict scrutiny applied to religious claims, with a fifty-nine percent success rate—"more than double the mean of the other doctrinal categories."²⁷³ This number increased even further to a seventy-four percent government win rate for religious claims challenging a generally applicable law.²⁷⁴ In Professor Winkler's findings, speech claims were the most likely to result in striking government action, with the government action at issue surviving a speech challenge only twenty-two percent of the time.²⁷⁵ Notably, the government action was even less likely to survive a speech challenge than an equal protection challenge.²⁷⁶

Table 1²⁷⁷

	Government Win Rate
New RFRA survey findings (counting all contraception mandate cases as separate government losses)	50%
New RFRA survey findings (counting all contraception mandate cases as two consolidated losses)	69%
New RFRA survey findings (excluding all contraception mandate cases)	71%

²⁷⁰ The underlying data set for this Table is available at https://docs.google.com/spreadsheets/d/1wPhJNDX00p5PImroZ7rIUxx_NGxdj2ojTk8AVxIfDUw/edit#gid=1535894163 (request permission to view from author).

²⁷¹ See *infra* note 277 and accompanying text (Table 1).

²⁷² Winkler, *supra* note 245, at 844–45.

²⁷³ *Id.* at 857–58.

²⁷⁴ *Id.* at 861. This finding by Winkler is not a perfect comparison, as it was not limited to RFRA. *Id.* at 857–58. Additionally, “generally applicable law” is an undefined legal term subject to debate, and thus difficult to classify. See Gedicks, *supra* note 95, at 113 (noting that *Employment Division v. Smith* did not define “general applicability”).

²⁷⁵ Winkler, *supra* note 245, at 844.

²⁷⁶ *Id.*

²⁷⁷ This Table is permanently available at <http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-5/barclay-rienzi-graphics.pdf> [<https://perma.cc/YD43-EGQR>].

Winkler win rate for all religious claims	59%
Winkler win rate for religious challenges to generally applicable laws (not targeting religion)	74%
Winkler win rate for speech claims	22%

Our findings do not demonstrate a dramatic drop in government win rates post *Hobby Lobby*. The data does not address relevant primary behaviors, such as the choice of government officials not to adopt or enforce certain laws.²⁷⁸ But our findings do shed light on how judges continue to enforce strict scrutiny under RFRA post *Hobby Lobby*. More time and data are necessary to draw more concrete conclusions.

2. Targeted Comparative Searches Findings

In our targeted searches to assess volume of religious versus speech cases, we began by looking at volume in the three years since *Hobby Lobby*.²⁷⁹ In our findings, the number of speech and expressive cases that the searches returned generally dwarfed the number of free exercise cases in similar search results. Under each search result, speech cases outnumbered religious claims at a ratio of anywhere from 3:1 to 6:1.

These findings are consistent with Professor Winkler's findings, where the volume of speech-based claims was notably greater than the volume of religious claims. Specifically, Winkler found that speech claims constituted by far the largest category of strict scrutiny cases—222 of 459.²⁸⁰ There were thirty-three additional association cases, totaling 255 expressive cases.²⁸¹ In contrast, religious claims in Professor Winkler's database accounted for merely seventy-three of the 459 claims.²⁸²

Table 2²⁸³

	Speech and Expressive Cases	Religious Exercise Cases	Ratio
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²⁷⁸ Notably, under the new Trump administration, the Attorney General recently issued guidance that is much more protective of religious exercise under RFRA, and will likely result in much less agency action that is hostile towards religious exercise under this administration. *See generally* Memorandum from Jeffrey Sessions, Attorney Gen., U.S. Dep't of Justice, for All Executive Departments and Agencies (Oct. 6, 2017). That sort of primary behavior is not measured by our RFRA case survey.

²⁷⁹ The date range filter used for all of these searches was July 1, 2014 to June 30, 2017.

²⁸⁰ Winkler, *supra* note 245, at 844–45.

²⁸¹ *Id.* at 815.

²⁸² *Id.*

²⁸³ This Table is permanently available at <http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-5/barclay-rienzi-graphics.pdf> [<https://perma.cc/YD43-EGQR>].

Search of relevant Westlaw key number	1,796	305	6:1
Search of relevant term at least four times	1,274	333	4:1
Search in Westlaw summary of case	639	188	3:1
Winkler results	222	73	3:1

When analyzing the trends of the Westlaw key number cases over time, our findings are not consistent with the allegation that religious claims are undergoing a dramatic expansion, particularly as compared to speech cases. Table 3 illustrates both types of Westlaw key number cases tracked in absolute terms over time.²⁸⁴

Table 3²⁸⁵

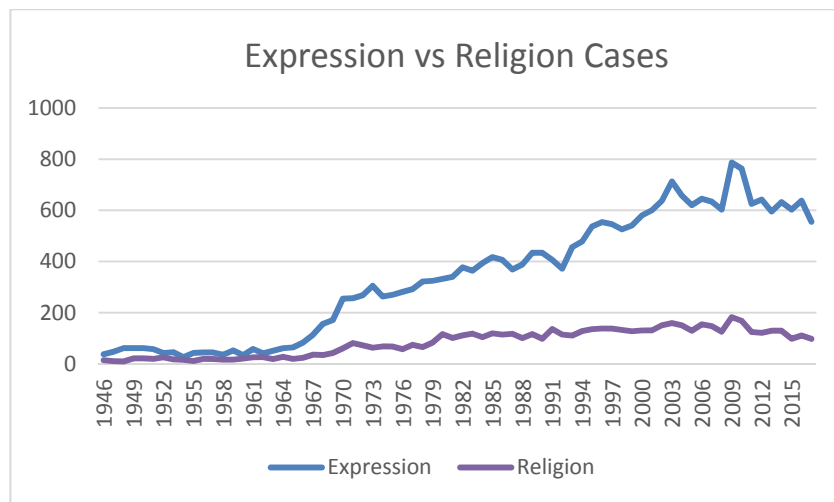
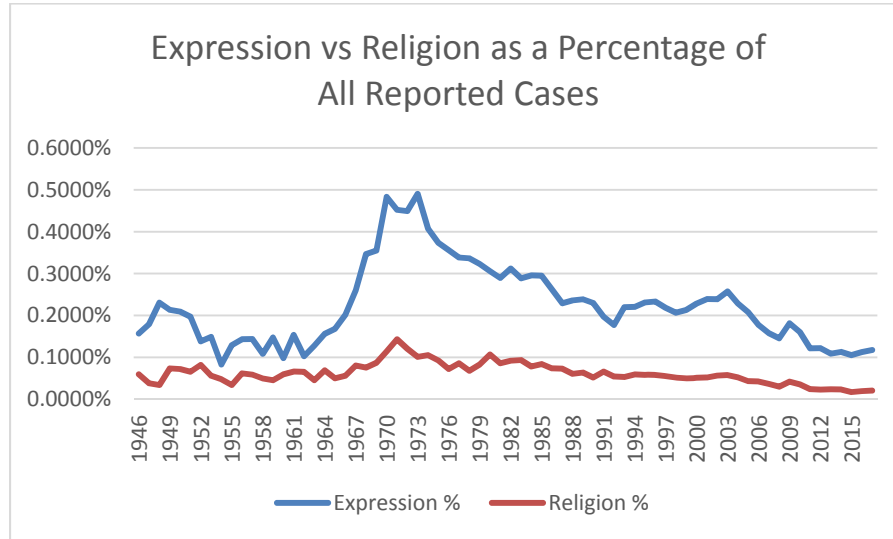


Table 4 illustrates both types of Westlaw key number cases tracked as a percentage of all reported cases over time. The percentage of religious cases appears to have stayed fairly constant over the years.

²⁸⁴ See *infra* note 285 and accompanying graphic.

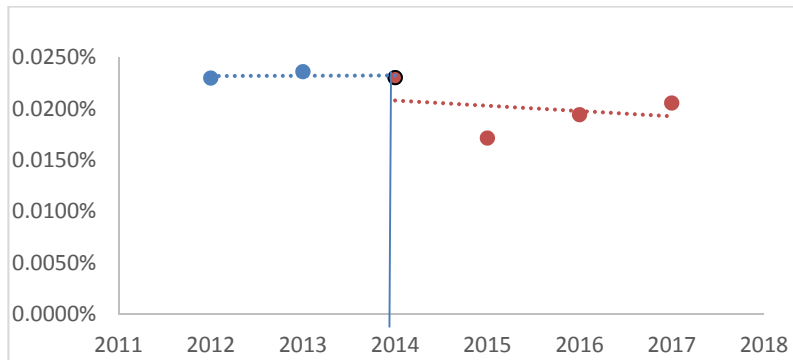
²⁸⁵ This Table is permanently available at <http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-5/barclay-rienzi-graphics.pdf> [<https://perma.cc/YD43-EGQR>]. The underlying data set is available at https://docs.google.com/spreadsheets/d/1vbW_8E7orAkidtxcNAtQHy3s60k8TVxLLOkiKGgpe_8/edit#gid=878012463 (request permission to view from author).

Table 4 ²⁸⁶



Perhaps most interesting is that if we hone in on the years immediately preceding *Hobby Lobby* and then immediately following that court decision, a fitted line graph in Table 5 illustrates that the slope of religion cases as a percentage of the reported caseload appears to be slightly decreasing.

Table 5 ²⁸⁷



3. Spaeth Database Findings

According to the Spaeth database from 1946 to 2016, there were a total of 461 First Amendment cases, and of these 378 dealt with speech or asso-

²⁸⁶ This Table is permanently available at <http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-5/barclay-rienzi-graphics.pdf> [https://perma.cc/YD43-EGQR].

²⁸⁷ This Table is permanently available at <http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-5/barclay-rienzi-graphics.pdf> [https://perma.cc/YD43-EGQR].

ciation issues. The government was coded as a party in 344 of these cases. In contrast, during the same period of time there were only thirty-two free exercise cases (thirty-five with three RFRA cases included).²⁸⁸ The government was coded as a party in twenty-nine of these cases.²⁸⁹ Thus, the speech-based claims outnumbered religious claims by a ratio of more than 10:1. Overall, across the last seven decades, the court ruled in favor of the government in forty-one percent of the free speech and association cases in which it was a party. In contrast, the court ruled in favor of the government at the higher rate of forty-five percent of the twenty-nine free exercise cases in which the government was a party. In other words, the government is less likely to win in the context of speech and association cases than in religious exercise cases. But this difference is not substantial, and likely not statistically significant at the Supreme Court level. These findings are interesting in that they indicate that a far greater number of speech-based cases than religious cases are meritorious enough to percolate to the Supreme Court.

Table 6²⁹⁰

Supreme Court Cases	Speech and Association Cases	Religious Exercise Cases
Number brought between 1946 and 2016	344	29
Government win rate	41%	45%

In sum, our findings are consistent with the conclusion that speech cases are much more pervasive than religious cases. Additionally, our findings are not consistent with the notion that religious objections are dramatically increasing in volume, or are much more likely to prompt a court to strike down government action under RFRA after *Hobby Lobby*. Compared to the work by Professor Winkler, *Hobby Lobby* does not appear to have significantly changed the government's win rate.

C. Jurisprudential Explanation for Empirical Findings

The legal constraints on religious exercise claims may help explain why religious exemption requests are not as voluminous or as successful as critics fear. Although some scholars critique religious claims because truth

²⁸⁸ *Modern Database: 2017 Release 01*, *supra* note 262.

²⁸⁹ Of these cases, twenty-six were constitutional free exercise cases and three were RFRA cases.

²⁹⁰ This Table is permanently available at <http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-5/barclay-rienzi-graphics.pdf> [<https://perma.cc/YD43-EGQR>].

claims about such beliefs are “insulated from ordinary standards of evidence,”²⁹¹ the same could be said of truth claims implicated by other First Amendment rights. What standard of evidence could be said to apply, for instance, to the truth claims of pornography, nearly nude dancing, videos of animals being crushed, flag burning, or swastikas? Yet all of those are examples of speech objections that require the most heightened scrutiny our constitutional law offers.²⁹² We often protect speech based on a speaker’s subjective belief that a law impacts their expression, even though most others may not view the law as touching on expression at all.²⁹³ For example, most drivers who had to attach a license plate with a state motto likely did not feel like they were being compelled to “say” anything, but the appellees in *Wooley v. Maynard* subjectively felt otherwise, which was why they could raise a successful as-applied challenge.²⁹⁴ As the Supreme Court has noted elsewhere, “[a] person gets from a symbol the meaning he puts into it, and what is one man’s comfort and inspiration is another’s jest and scorn.”²⁹⁵

We don’t even require speech to be sincere. We would give heightened protection to speech even if the speaker didn’t believe what he or she was saying, but still wanted to say it. Indeed, in *New York Times v. Sullivan* the Court protected speech that was not true.²⁹⁶ In contrast, a religious objector must prove her beliefs are sincere to receive protection. And sincerity acts as a significant gatekeeper to religious objectors receiving protection.

For example, in a criminal drug trafficking case, an Arizona couple attempted to raise drug money through its operation called the “Church of Cognizance,” founded on the teaching that marijuana is both a deity and sacrament.²⁹⁷ After the Border Patrol busted their “backpack runners” from Mexico, the couple argued that their drug-running was part of their church’s religious activities and thus legally protected by RFRA. In an opinion written by then-Judge Gorsuch, the Tenth Circuit held that the couple’s religious beliefs were not sincere—a threshold determination in every religious liberty case—and that the “church” was a mere front for a drug operation. The court explained that religious liberty laws do not “offer refuge to canny op-

²⁹¹ LEITER, *supra* note 64, at 34; *see also* LUPU & TUTTLE, *supra* note 55, at 27 (arguing that “[i]f the government cannot evaluate the significance of a particular religious practice within a believer’s faith, it will effectively lack the ability to identify—in a principled way—meritorious claims for accommodation”).

²⁹² *See, e.g., Nat’l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43, 43–44 (1977) (holding that because there were First Amendment implications, they must “provide strict procedural safeguards”).

²⁹³ *See, e.g., Jacobs, supra* note 132, at 160 (critiquing the way speech doctrine depends on the “subjective intensity of the speaker’s reaction” to the law’s requirement).

²⁹⁴ 430 U.S. 705, 707–08, 717 (1972).

²⁹⁵ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632–33 (1943).

²⁹⁶ 376 U.S. 254, 257–59, 264 (1964).

²⁹⁷ *United States v. Quaintance*, 608 F.3d 717, 718 (10th Cir. 2010).

erators who seek through subterfuge to avoid laws they'd prefer to ignore," such as "those who set up 'churches' as cover for illegal drug distribution operations."²⁹⁸

Further, the belief at issue must be "genuinely 'religious'" to receive protection.²⁹⁹ "[P]hilosophical and personal rather than religious" beliefs are not enough.³⁰⁰ In *Cavanaugh v. Bartelt*, for example, a district court determined that the satirical adherence to the "doctrine of the Flying Spaghetti Monster" did not constitute a religious belief qualifying for First Amendment or RLUIPA protection.³⁰¹ Instead, the court explained that this creed was "a parody, intended to advance an argument about science, the evolution of life, and the place of religion in public education."³⁰² Thus, the plaintiff was unable to prove that his religious exercise was burdened.³⁰³

The very existence of these threshold requirements in the religious exercise realm also surely shapes the type of cases that litigants are willing to bring, as they assess whether their practice is really religious and based on a belief that they can prove is both sincerely held and actually burdened by the government action. In this manner, religious exercise claims are constrained by doctrine in ways that other constitutional claims are not. These constraints provide at least one explanation for why the volume of religious exercise cases is so much lower than speech and association cases.

IV. THE ANOMALOUS MAJORITARIAN JURISPRUDENCE OF *SMITH*

The case studies and empirical analysis above indicate that as-applied challenges are praised elsewhere in constitutional jurisprudence (particularly the speech context), but uniquely maligned in the free exercise context without justification. What, then, accounts for this disparate treatment of two very similar³⁰⁴ types of constitutional challenges? One clue may come from analyzing the majoritarian jurisprudential foundation on which *Employment Division v. Smith* relies, and that has been soundly rejected in the speech context.

²⁹⁸ *Yellowbear v. Lampert*, 741 F.3d 48, 54 (10th Cir. 2014) (citing *Quaintance*, 608 F.3d at 720–23).

²⁹⁹ *Cavanaugh v. Bartelt*, 178 F. Supp. 3d 819, 829 (D. Neb. 2016), *aff'd*, No. 16-2105 (8th Cir. Sept. 7, 2016).

³⁰⁰ *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972).

³⁰¹ 178 F. Supp. 3d at 825, 828–29.

³⁰² *Id.* at 824.

³⁰³ *Id.* at 834.

³⁰⁴ The Supreme Court has observed that "[t]he Free Exercise Clause embraces a freedom of conscience and worship that has *close parallels* in the speech provisions of the First Amendment" *Lee v. Weisman*, 505 U.S. 577, 591 (1992) (emphasis added).

*A. Majoritarian Reasoning of Gobitis Overruled by
Barnette in the Speech Context*

In 1935, during an elementary school's daily pledge of allegiance ceremony, a ten-year-old fifth grader named William Gobitis refused to salute the flag. This daily patriotic ritual at the time involved a "stiff-arm" salute that some complained looked very similar to the one Hitler required in Nazi Germany.³⁰⁵ Some religious leaders had even given speeches denouncing participation in the "Heil Hitler" salute.³⁰⁶ When William declined to participate, his teacher tried to force his arm up, but William held it in his pocket and successfully resisted. The next day, William's eleven-year-old sister, Lillian, did the same thing. She told her teacher, "I can't salute the flag anymore. The Bible says at Exodus chapter 20 that we can't have any other gods before Jehovah God." The teacher hugged Lillian and called her a "dear girl."³⁰⁷

The classmates of William and Lillian Gobitis were first astonished and then disgusted with what they viewed as an unforgivable lack of patriotism. They would chant "[h]ere comes Jehovah" at the children and shower them with pebbles on their way to school every day. The Gobitis parents supported the consciences of their children, and in fact this Jehovah's Witness family was part of a national religious movement objecting to the flag salute. But they too were shunned by their community: their family-owned grocery store was threatened with a mob attack and they were subjected to a boycott. After the children were expelled from school, the family turned to the courts.³⁰⁸

This legal dispute led to *Minersville School District v. Gobitis*, one of the primary cases on which the *Smith* decision relied.³⁰⁹ In this case, the Gobitis family challenged the generally applicable public-school requirement that students either perform a salute to the national flag as part of a daily ceremony or face expulsion.³¹⁰ In this case, no one disputed the sin-

³⁰⁵ *Barnette*, 319 U.S. at 627.

³⁰⁶ NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 179 (2010).

³⁰⁷ *Id.* at 179–80; see also SHAWN FRANCIS PETERS, JUDGING JEHOVAH'S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION 33–40, 53–54 (2000) (explaining the tenacity of the Jehovah Witnesses' faith that led to *Minersville School District v. Gobitis*); Richard Danzig, *Justice Frankfurter's Opinions in the Flag Salute Cases: Blending Logic and Psychology in Constitutional Decisionmaking*, 36 STAN. L. REV. 675, 677–78 (1984) (analyzing Justice Frankfurter's opinion on the flag saluting cases based on a legal and psychological understanding); Lillian Gobitis, *The Courage to Put God First*, AWAKE!, July 22, 1993, at 12–15 (recalling what led up to her Supreme Court case).

³⁰⁸ FELDMAN, *supra* note 306, at 179–80.

³⁰⁹ *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 594–95 (1940), *overruled by Barnette*, 319 U.S. at 624).

³¹⁰ *Gobitis*, 310 U.S. at 591.

cere religious objections the Gobitis children had to participating in this ceremony.³¹¹

There was no question in the *Gobitis* Court's eyes that the generally applicable flag salute requirement was constitutional. The Court stated: "[t]hat the flag-salute is an allowable portion of a school program for those who do not invoke conscientious scruples is surely not debatable."³¹² Rather, the issue was "[w]hen does the constitutional guarantee [of religious liberty] compel exemption from doing what society thinks necessary for the promotion of some great common end, or from a penalty for conduct which appears dangerous to the general good?"³¹³ Another way to ask the same question is whether an as-applied challenge to the generally applicable flag salute requirement should be upheld for the Jehovah's Witness children, providing a "religious exemption from a law that bound everybody."³¹⁴

The Court rejected this as-applied challenge, arguing that "[t]he religious liberty that the Constitution protects has never excluded legislation of general scope not directed against doctrinal loyalties of particular sects."³¹⁵ The Court also cited to *Reynolds v. United States*, observing that "[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."³¹⁶ Thus, the Court refused to provide what it characterized as "exceptional immunity . . . to dissidents," and the Jehovah's Witness children were forced to either salute the flag or be expelled from school.³¹⁷ The Court in *Gobitis* also made clear that its reasoning was not limited to free exercise, but extended to a constitutional challenge based on speech rights as well.³¹⁸

The Court primarily relied on the theory of judicial restraint developed by Justice Felix Frankfurter, arguing that courts must defer to the will of the majority, and that it would be an "arbitrary" exercise of power undermining the strength of the government to set such legislative determinations aside.³¹⁹ In the theory set forth by Frankfurter, "the judiciary was supposed to defer to reasonable judgments made by legislators, not overturn them because it disagreed with their substance."³²⁰

³¹¹ *Id.* at 592–93.

³¹² *Id.* at 599.

³¹³ *Id.* at 593.

³¹⁴ FELDMAN, *supra* note 306, at 182.

³¹⁵ *Gobitis*, 310 U.S. at 594.

³¹⁶ *Id.* at 594–95.

³¹⁷ *Id.* at 591, 599–600.

³¹⁸ *Id.* at 595 (holding that "[n]or does the freedom of speech assured by Due Process move in a more absolute circle of immunity than that enjoyed by religious freedom").

³¹⁹ *Id.* at 596; FELDMAN, *supra* note 306, at 181–82.

³²⁰ FELDMAN, *supra* note 306, at 182.

Justice Harlan Stone authored a vigorous dissent, arguing that simply deferring to the general rules passed by a legislature amounted to “no less than the surrender of the constitutional protection of the liberty of small minorities to the popular will.”³²¹ Stone relied on his famous footnote four analysis in the previous case of *United States v. Carolene Products Co.*, and “pointed to the importance of a searching judicial inquiry into the legislative judgment in situations where prejudice against discrete and insular minorities may tend to curtail the operation of those political processes ordinarily to be relied on to protect minorities.”³²² Legislation that operated “to repress the religious freedom of small minorities, . . . must at least be subject to the same judicial scrutiny as legislation which we have recently held to infringe the constitutional liberty of . . . racial minorities,” Stone argued.³²³ This was because, in his view, the “Constitution expresses more than the conviction of the people that democratic processes must be preserved at all costs.”³²⁴

Just three years later, in the *Barnette* decision (announced on Flag Day), Justice Stone’s reasoning won the day and the Court overruled *Gobitis*—though only speaking clearly in terms of First Amendment expressive rights.³²⁵ Specifically, the Court upheld an injunction “restrain[ing] enforcement as to the plaintiffs and those of that class” based on the “limiting principles of the First Amendment.”³²⁶ In some of the most famous lines from First Amendment jurisprudence, the Supreme Court waxed eloquent about the grave risk of “coerc[ing] uniformity” in support of majoritarian sentiment.³²⁷ “Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.”³²⁸ The Court thus concluded that “[i]f 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.”³²⁹

³²¹ *Gobitis*, 310 U.S. at 606 (Stone, J., dissenting).

³²² *Id.* (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938)).

³²³ *Id.* at 607.

³²⁴ *Id.* at 606.

³²⁵ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

³²⁶ *Id.* at 630, 639.

³²⁷ *Id.* at 640.

³²⁸ *Id.* at 641.

³²⁹ *Id.* at 642 (emphasis added). The foundational principle has spawned much of our free speech jurisprudence. See *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 826 (2000) (holding that “[t]he history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly”); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (holding that “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the

Some scholars have argued that *Barnette* was not a “religious exemption case,” and was instead a case about “bar[ring] enforcement of the mandatory salute statute”³³⁰ To be sure, the Court in *Barnette* avoided the use of typical religious exemption language. But this was not a case about whether the pledge of allegiance was being stricken (or even partially stricken) for facial invalidity, or whether schools were prohibited from holding flag salute ceremonies (or aspects of the ceremonies) as a general matter. In fact, those sorts of lawsuits would come, but much later.³³¹ *Barnette* was a case in which the Court “restrained enforcement” of an otherwise valid policy “as to the plaintiffs and those of that class.”³³² To qualify for this exemption, Plaintiffs (and others in the future who were similarly situated), were being protected based on their First Amendment objection to an otherwise valid exercise of government authority. That targeted invalidation of government action is similar to what we think of as an as-applied challenge in other contexts.

Regardless of the nuances of the type of remedy offered in this case, what is clear is that *Barnette* instituted a rule of law that was distinctly protective of minority rights against majoritarian rules, and which remains foundational law in speech jurisprudence.³³³

B. *Gobitis* Resurrected by *Smith* in the Free Exercise Context

Though *Gobitis* remains bad law in the realm of free speech law, it was resurrected as one of the primary jurisprudential pillars of reasoning in *Smith*. The *Smith* Court quoted the following passage from *Gobitis*:

[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which

idea itself offensive or disagreeable”); see also Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 774 (2008) (noting that “[r]epudiation of governmentally-mandated orthodoxy and tolerance for unpopular speech are two sides of the guiding principle in modern free speech law”).

³³⁰ LUPU & TUTTLE, *supra* note 55, at 187.

³³¹ See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 8, 10 (2004).

³³² 319 U.S. at 630.

³³³ See, e.g., *Heffernan v. Paterson*, N.J., 136 S. Ct. 1412, 1417 (2016) (citing *Barnette* as setting forth the First Amendment’s “basic constitutional requirement”); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605–06 (2015) (quoting *Barnette* for the principle that the purpose of the constitution “was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts”) (internal quotation marks omitted).

contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.³³⁴

The Court relied on this reasoning to conclude that “an individual’s religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”³³⁵ The precedential value of *Smith*’s reliance on *Gobitis* is dubious. As Professor Michael McConnell put it, “[r]elying on *Gobitis* without mentioning *Barnette* is like relying on *Plessy v. Ferguson* without mentioning *Brown v. Board of Education*.”³³⁶

Four justices recognized the problem with relying on *Gobitis*. Justice Sandra Day O’Connor, for example, relied in her concurrence instead on the reasoning of *Barnette*, quoting the following passage:

[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.³³⁷

³³⁴ *Smith*, 494 U.S. at 879 (quoting *Gobitis*, 310 U.S. at 594–95) (internal quotation marks omitted).

³³⁵ *Id.* at 878–79.

³³⁶ McConnell, *supra* note 38, at 1124. *Employment Division v. Smith* also relied on “a Mormon polygamy case from 1879, [which] was decided on the theory that the Free Exercise Clause protects only beliefs and not conduct—a premise that the Court repudiated in 1940.” *Id.* (footnote omitted) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940)); see also Bruce Ackerman, *Levels of Generality in Constitutional Interpretation: Liberating Abstraction*, 59 U. CHI. L. REV. 317, 326 (1992) (arguing that “*Gobitis* should be read as an especially pure example of the New Deal approach to the Bill of Rights”).

³³⁷ *Smith*, 494 U.S. at 902–03 (O’Connor, J., concurring) (quoting *Barnette*, 319 U.S. at 638) (internal quotation marks omitted); see also GORDON S. WOOD, *CREATION OF THE AMERICAN REPUBLIC: 1776–1787*, at 593–96 (1998) (noting that our Constitution did not create pure democracy; it created many checks and balances on the excesses of majoritarian power); Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PENN ST. L. REV. 837, 849 (2011) (“The Bill of Rights itself is essentially a series of limitations on the exercise of majoritarian authority. What the framers of the federal [C]onstitution created was not a popular democracy, but a republic of fairly elaborate checks and balances.”). See generally WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 110–14 (Rita Kimber & Robert Kimber trans., 1980) (detailing the evolution of how the words “democracy” and “republic” were used); ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–23 (1986) (discussing the “counter-majoritarian difficulty” of meaningful judicial review in a democracy). See generally ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* (2001) (arguing that the Constitution ultimately upholds antidemocratic ideals); SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG*

In a nutshell, one of the principles upon which *Smith* relies is that “the true course of judicial duty” is to “keep[] their hands off” the majoritarian decisions of “legislative power,” as an exercise of judicial self-restraint.³³⁸ In contrast, the jurisprudence *Smith* overruled stands for the proposition that religious exemptions “protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility” because “[t]he history of . . . free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups.”³³⁹

As the Supreme Court previously noted, the diversity of religious beliefs in our nation should weigh in favor of us providing more protection—not less.

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor . . . [I]n spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. *Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds.*³⁴⁰

As-applied challenges to generally applicable laws allow a society as diverse as ours to accommodate the “sharp differences [that] arise” in beliefs or preferences while still allowing the democratically-enacted rules of law to continue to operate for the public good. The other alternative is to disregard the minority views that are not protected by our political process.

Regardless of one’s ultimate views on the merits of a countermajoritarian approach, the divergent precedents of *Gobitis* and *Barnette* provide one

(AND HOW WE THE PEOPLE CAN CORRECT IT) (2006) (same); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155–62 (2002) (analyzing the history of judicial review to move beyond the countermajoritarian difficulty as a constitutional theory).

³³⁸ *Barnette*, 319 U.S. at 648, 670 (Frankfurter, J., dissenting).

³³⁹ *Smith*, 494 U.S. at 902 (O’Connor, J., concurring). James Madison also famously wrote to Thomas Jefferson that that Bill of Rights was but “parchment barriers,” and that the “invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.” JAMES MADISON, *Letter from James Madison to Thomas Jefferson (Oct. 17, 1788)*, in 11 THE PAPERS OF JAMES MADISON, 7 MARCH 1788–1 MARCH 1789, at 295–300 (Robert A. Rutland et al. eds., 1977).

³⁴⁰ *Cantwell*, 310 U.S. at 310 (emphasis added).

explanation for the disfavored treatment of religious exemptions. In *Gobitis*, the Court determined that judicial restraint required it to simply defer to the will of the majority, which required school children to perform a stiff-arm flag salute against their conscience because the majority thought they should. Just three years later, in the *Barnette* decision, the Court overruled its *Gobitis* holding in the context of expressive rights, explaining that the “very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities.”³⁴¹ *Barnette* thus instituted a rule of law that was distinctly protective of minority rights, and that remains foundational jurisprudence in the context of speech rights. In contrast, this Article demonstrates how modern religious exercise law has (mistakenly) resurrected the deferential and majoritarian reasoning of *Gobitis*, while asserting that requests to treat religious exercise like other First Amendment rights are somehow out-of-step with our constitutional traditions.

For critics trying to evaluate which approach is better, the following question is instructive: Do we want to live in a society where the government can force school children to salute flags, simply because the majority likes that idea at the time? If the answer is no, that worldview hearkens to the counter-majoritarian reasoning of *Barnette*. That same principle also underlies statutes like RFRA. To support instead a double standard that treats religious exercise as less deserving than any other First Amendment right, then, would be the true anomaly.

CONCLUSION

Viewing religious exemptions through the lens of as-applied challenges makes clear that such exemptions are not anomalous at all. When requests for individual religious exemptions are compared to as-applied challenges in other constitutional contexts, it turns out that providing religious exemptions from otherwise valid laws is both the most modest and the preferred method of adjudicating conflicts between individual rights and laws passed for the public good.

The First Amendment cases surveyed in this Article indicate that religious as-applied challenges do not result in preferential treatment for religious objectors as a constitutional matter. Our new RFRA survey contradicts the notion that religious objections are much more likely to prompt a court to strike down government action under RFRA post-*Hobby Lobby*. Our findings also indicate that cases dealing with religious objections to laws are less voluminous than other cases dealing with other expressive First Amendment

³⁴¹ *Barnette*, 319 U.S. at 638.

claims, and the religious cases do not appear to be undergoing a trend of dramatic growth. In fact, the trend appears to be a slight decrease in volume.

Thus, through allowing as-applied challenges, religious exemption schemes like RFRA simply restore religious exercise rights to a similar level of protection already offered to other rights housed in the First Amendment and necessary for the protection of minority views in our pluralistic society.