1-1-2016

DIY Solutions to the Hobby Lobby Problem

Kristin Haule

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I. INTRODUCTION

Burwell v. Hobby Lobby Stores, Inc.[1] is one of the most controversial Supreme Court decisions in recent times, yet the practical problems it creates are also some of the easiest to fix. The decision has been criticized for bolstering the rights of corporations at the expense of actual people—notably women. But there are many public misconceptions about the actual implications of this case. Fortunately, the perceived injustices are actually much smaller and more easily fixable than is generally understood.

In Section II, this Note discusses the historical backdrop leading up to the *Hobby Lobby* decision. It explains how the law evolved to raise the issue presented in *Hobby Lobby*. It also illustrates where the *Hobby Lobby* decision fits within the back-and-forth dialogue between the Supreme Court and Congress regarding free exercise rights.

Section III of this Note focuses on the current law, explaining the HHS contraceptive mandate portion of the Patient Protection and Affordable Care Act (ACA) and the *Hobby Lobby* decision's impact on that mandate.

In Section IV, this Note critiques the existing law, pointing out popular criticisms and potential ramifications of the *Hobby Lobby* decision.

Section V outlines three potential solutions to the problems created by the *Hobby Lobby* decision, and Section VI elaborates upon which of these three solutions is the best.

∗ J.D., Loyola Law School, Los Angeles, May 2016. Tremendous thanks to Professor Justin Levitt for his expert guidance and valuable feedback in writing this Note. Many thanks also to the members of the *Loyola of Los Angeles Law Review* for their careful and diligent efforts in bringing this Note through the publication process.

1. 134 S. Ct. 2751 (2014).

II. HISTORICAL BACKGROUND

Understanding the evolution of free exercise rights in the United States is critical to fully understanding the *Hobby Lobby* decision, its context, and its implications. Free exercise rights have not been static throughout history. Rather, the current state of the law is the result of a back-and-forth dialogue between the Supreme Court, limiting the scope of free exercise rights, and Congress, expanding it. In many ways, the *Hobby Lobby* decision is the next statement within that back-and-forth dialogue.

A. Employment Division, Department of Human Resources of Oregon v. Smith

In 1987, the Oregon legislature passed a law prohibiting the possession of controlled substances not prescribed by a medical practitioner.[2] It included the hallucinogenic drug peyote within the definition of "controlled substance."[3] While several other states exempted sacramental peyote use from their respective drug laws,[4] Oregon did not.[5]

Following this law's passage, a private drug rehabilitation organization in Oregon fired two of its employees, Alfred Smith and Galen Black, for ingesting peyote at a Native American Church ceremony.[6] Both employees were members of the Native American Church, a widespread religion among Native Americans.[7] The State of Oregon subsequently denied the employees' unemployment compensation applications because they had been discharged for "work-related misconduct."[8] The employees brought suit, challenging the constitutionality of the Oregon statute under the Free Exercise Clause of the First Amendment.[9]

Existing case law at the time seemed to support Smith and Black.[10] Both legal scholars and the general public assumed that the

2. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 874 (1990).
3. *Id.*
4. *Id.* at 890.
5. *Id.* at 876.
6. *Id.* at 874.
7. *Id.*
8. *Id.* at 872.
9. *Id.* at 872–74.
10. Janet V. Rugg & Andria A. Simone, *The Free Exercise Clause:* Employment Division v. Smith*'s Inexplicable Departure from the Strict Scrutiny Standard*, 6 ST. JOHN'S J. LEGAL

government must justify burdening this kind of religious practice by demonstrating a compelling governmental interest, especially in employment benefit cases such as this.[11] Plus, popular opinion supported Smith and Black.[12]

Nonetheless, in April of 1990, the Supreme Court departed from this precedent[13] and held that the Free Exercise Clause of the First Amendment does not prevent a state from creating a drug law that prohibits even sacramental peyote use.[14] The Court reasoned that to rule otherwise would essentially eviscerate our legal system.[15] It declined to apply strict scrutiny to such generally applicable laws which inadvertently burden religious practice, explaining that to do so would "creat[e] a private right to ignore generally applicable laws."[16] It further explained that the political process could adequately protect these religious rights if that is what society wants.[17] A rehearing was denied on June 4, 1990.[18]

B. RFRA & AIRFA Amendments 1994

The *Smith* decision was wildly unpopular, among both regular citizens and legislatures.[19] Congress reacted quickly to the *Smith* decision, taking particular note that "the free exercise of religion may be protected through the political process."[20] The very next month, on July 26, 1990, lawmakers introduced the Religious Freedom Restoration Act (RFRA) into the House.[21] RFRA states that the government may not substantially burden a person's exercise of religion, even if the burden results from a rule of general

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COMMENT. 117, 126 n.40 (1990) (describing the two-part strict scrutiny test adopted in Sherbert v. Verner, 374 U.S. 398 (1963), and followed by several cases thereafter).

11. *Id.* at 126–28.

12. *Id.* at 119.

13. *Id.* at 127.

14. *Smith*, 494 U.S. at 872.

15. *Id.* at 885 (explaining that "[t]o make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling,' permit[s] him, 'to become a law unto himself'").

16. *Id.* at 886.

17. *Id.* at 890 ("Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process.").

18. *Id.* at 872.

19. BRUCE LEDEWITZ, AMERICAN RELIGIOUS DEMOCRACY: COMING TO TERMS WITH THE END OF SECULAR POLITICS 37 (2007).

20. H.R. REP. NO. 103-88, at 4 (1993).

21. H.R. 5377, 101st Cong. (1990).

applicability, unless the law passes strict scrutiny.[22] This originally applied to both federal and state laws.[23] Congress cited the enforcement power of the Fourteenth Amendment as its constitutional authority for passing RFRA.[24] In 1993, RFRA became law.[25]

The following year, Congress relied on its power to regulate commerce with Indian tribes to pass the American Indian Religious Freedom Act Amendments of 1994.[26] Included among the amendments was a law protecting traditional Indian religious use of peyote.[27] The law itself included a statement that lawmakers passed these amendments in response to the Supreme Court's decision in *Smith*.[28]

C. City of Boerne v. Flores

City of Boerne v. Flores[29] then challenged RFRA's constitutionality. The City of Boerne, Texas, enacted Ordinance 91-05 to protect historic landmarks.[30] The Saint Peter Catholic Church in Boerne sought a building permit to enlarge the church building to accommodate its growing parish, but the permit was denied under the Ordinance.[31] The Archbishop of the church, P.F. Flores, brought suit, challenging the ordinance as invalid under RFRA.[32] The Supreme Court ultimately sided with the city and invalidated RFRA as applicable to the States.[33] It explained, "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior" under the Fourteenth Amendment.[34]

The *Flores* Court echoed and elaborated upon many of the concerns brought up in *Smith*. It explained that RFRA substantially

22. *Id.*
23. H.R. 1308, 103d Cong. § 5 (1993).
24. S. REP. NO. 103-111, at 13–14 (1993).
25. 42 U.S.C. § 2000b-1 (1994).
26. American Indian Religious Freedom Act Amendments of 1994, Pub. L. No. 103-344, 1325 (1994).
27. 42 U.S.C. § 1996a (1994).
28. § 1996a(a)(4)–(5).
29. 521 U.S. 507 (1997).
30. Flores v. City of Boerne, 73 F.3d 1352, 1354 (1996).
31. *Flores*, 521 U.S. at 512.
32. *Id.*
33. *Id.* at 532.
34. *Id.*

curtails the States' traditional general regulatory power.[35] RFRA's scope far exceeds the purported goal of preventing and remedying constitutional violations for two reasons.[36] First, RFRA was not limited to laws that have been motivated by religious bigotry.[37] Second, numerous state laws substantially burden individuals.[38] Furthermore, RFRA's stated goal was to essentially overrule the *Smith* decision by adopting the strict scrutiny standard for laws of general applicability that incidentally burden religious practice.[39] Therefore, RFRA, as applied to the States, ventures impermissibly into the judicial branch of government.[40]

But Congress does not need to rely on the Fourteenth Amendment in order to carve out a religious practices exemption for federal laws.[41] This is presumably proper under the Necessary and Proper Clause, as necessary and proper to carrying out the implementation of each of the existing laws to which Congress wishes to carve out an exception.[42] Furthermore, the *Flores* concerns about violating the separation of powers arose in the context of Congress's Fourteenth Amendment enforcement clause powers.[43] Therefore, the separation of powers concerns do not apply to Congress's power to apply RFRA to the federal government.[44] Consequently, while *Flores* invalidated RFRA as applied to state laws, RFRA remains in effect as applied to federal laws, at least to

35. *Id.* at 534.

36. *Id.* at 535.

37. *Id.*

38. *Id.*

39. *Id.* at 536 ("RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.").

40. *Id.*

41. Kikumura v. Hurley, 242 F.3d 950, 958 (10th Cir. 2001) ("[B]ecause Congress' ability to make laws applicable to the federal government in no way depends on its enforcement power under Section 5 of the Fourteenth Amendment, the *Flores* decision does not determine the constitutionality of RFRA as applied to the federal government.").

42. *Id.* at 959 ("[F]inally, the Committee believes that Congress has the constitutional authority to enact [RFRA]. Pursuant to Section 5 of the Fourteenth Amendment and the Necessary and Proper Clause embodied in Article I, Section 8 of the Constitution, the legislative branch has been given the authority to provide statutory protection for a constitutional value . . . .") (quoting H.R. REP. NO. 103-88, at 17 (1993)).

43. *Id.*

44. *Id.*

the extent that Congress does not create future laws which modify or repeal it.[45]

D. RLUIPA

In 2000, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA), which amended RFRA by expanding the term "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[46] RLUIPA clarified the intended sweeping breadth of RFRA: "the exercise of religion 'shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.'"[47]

In 2006, the Supreme Court affirmed the Tenth Circuit's interpretation that RFRA is still valid law as applied to the federal government in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*.[48] In that case, a religious group brought suit, challenging the federal Controlled Substances Act's proscription of the group's use of hoasca—a Schedule I hallucinogenic tea used as part of the group's religious services.[49] The Court determined that under RFRA, the federal government must still justify enforcement of its laws that burden religious institutions by demonstrating a compelling interest.[50]

In support of its decision requiring strict scrutiny, the Court first pointed out that the president and Congress have already exempted Native American religious use of peyote, another Schedule I substance, from the Controlled Substances Act.[51] It rejected the government's argument that, notwithstanding RFRA's longstanding protection of sacramental peyote use, the Court should nonetheless

45. *Id.*

46. Enacted as 42 U.S.C. § 2000cc-5 (2000), incorporated to apply to all of RFRA under 42 U.S.C. § 2000bb-2.

47. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2772 (2014) (quoting 42 U.S.C. § 2000cc-3(g)).

48. 546 U.S. 418 (2006).

49. *Id.* at 423–24.

50. *Id.* at 430–31 ("RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened.").

51. *Id.* at 421.

carve out an exception to RFRA to ban even religious use of hoasca.[52] The Court explained:

> While there may be instances where a need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA, it would be surprising to find that this was such a case, given the longstanding peyote exemption and the fact that the very reason Congress enacted RFRA was to respond to a decision denying a claimed right to sacramental use of a controlled substance.[53]

The Court also pointed out that RFRA itself already "plainly contemplates" a mechanism for determining exceptions to RFRA.[54] In response to the government's slippery-slope concerns, the Court explained, "RFRA operates by mandating consideration, under the compelling interest test, of exceptions to 'rule[s] of general applicability.'"[55]

Finally, the Court countered the government's concerns about eviscerating Congress's purposes for passing the Controlled Substances Act by outlining Congress's reasons for enacting RFRA.[56] It elaborated, "Congress recognized that 'laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise,' and legislated 'the compelling interest test' as the means for the courts to 'strik[e] sensible balances between religious liberty and competing prior governmental interests.'"[57]

III. STATEMENT OF EXISTING LAW

The historical context of free exercise rights is only part of the story. It is also important to see where *Hobby Lobby* fits within the context of recent healthcare law changes.

52. *Id.*
53. *Id.*
54. *Id.* at 434.
55. *Id.* at 436.
56. *Id.* at 439.
57. *Id.*

A. ACA

In 2010, Congress passed the Patient Protection and Affordable Care Act (ACA).[58] The ACA is a very expansive law, and it changed a great many aspects of the healthcare system.[59] Among the many changes effected by the ACA is the following preventative services provision:

> A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for . . . (4) with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.[60]

The Health Resources and Services Administration (HRSA) is an agency subset of the United States Department of Health and Human Services (HHS).[61] The HRSA sought the Institute of Medicine's (IOM) recommendations for its guidelines.[62] The IOM's report recommended that insurance plans cover "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."[63] The FDA-approved contraceptive methods include diaphragms, oral contraceptive pills, intrauterine devices, and emergency contraceptives such as Plan B and ulipristal, commonly known as the morning-after pill and the week-after pill, respectively.[64]

On August 1, 2011, HRSA adopted IOM's recommendations.[65] On February 15, 2012, HHS published its rules finalizing the HRSA

58. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). The law was amended a week later. Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

59. Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1283 (W.D. Okla. 2012).

60. *Id.* (quoting 42 U.S.C. § 300gg-13(a) (2010).

61. *Id.* at 1283, n.1.

62. *Id.* at 1283.

63. *Id.* at 1283–84 (quoting *Women's Preventive Services Guidelines*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., http://www.hrsa.gov/womensguidelines/ (last visited Feb. 20, 2016)).

64. *Id.* at 1284 (citing another source).

65. *Id.* (citing 76 Fed. Reg. 46621; 45 C.F.R. § 147.130).

guidelines.[66] The guidelines stated that "[u]nless grandfathered or otherwise exempt, employers' group health plans must provide coverage conforming with the guidelines for plan years beginning on or after August 1, 2012."[67] Some "religious employers" are exempt, as are employers with fewer than fifty employees.[68] Any non-exempt employer that fails to comply with the mandate must pay a fine of $100 per day per affected individual.[69] The fine for failing to provide health insurance altogether is $2,000 per year per full-time employee.[70]

B. Hobby Lobby

The Greens own the Hobby Lobby craft store franchise, as well as the Mardel Christian bookstore franchise.[71] The Hahns own Conestoga Wood Specialties, a closely-held for-profit corporation.[72] The Greens and Hahns brought suit against Kathleen Sebelius, Secretary of the HHS, challenging the validity of the HHS contraceptive mandate under RFRA and the First Amendment's Free Exercise Clause.[73] Specifically, the Greens contended that while their religious beliefs obligate them to provide health insurance to their employees, these beliefs prohibit them from providing abortion-causing drugs and devices.[74] In fact, Hobby Lobby's insurance plans have long explicitly excluded "contraceptive devices that might cause abortions and pregnancy-termination drugs like RU-486."[75] Hobby Lobby argued that it was faced with "an unconscionable choice: either violate the law, or violate their faith."[76] Both families specifically object to four methods of contraception that operate after

66. *Id.*
67. *Id.* (citing 75 Fed. Reg. 41726, 41729).
68. *Id.* To qualify as a "religious employer," the main purpose of the organization must be to teach religious values, the organization must primarily employ persons who share the organization's religious tenets, the organization must primarily serve persons who share the organization's religious tenets, and the organization must be a nonprofit organization under §§ 6033(a)(1), 6033(a)(3)(A)(i), or 6033(a)(3)(A)(iii) of the Internal Revenue Code of 1986, as amended. *Id.*
69. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2762 (2014).
70. *Id.*
71. *Id.* at 2765.
72. *Id.* at 2764.
73. *Hobby Lobby*, 870 F. Supp. 2d at 1283.
74. *Id.* at 1285.
75. *Id.*
76. *Id.* (quoting Complaint ¶ 133).

the fertilization of an egg.[77] They believe these four methods are abortifacients, and to offer these methods as part of their health insurance plan would be tantamount to facilitating abortions, to which the families object on religious grounds.[78]

The Supreme Court sided with the petitioners, holding that: (1) closely-held for-profit corporations, such as Hobby Lobby, fall within the scope of "persons" to whom RFRA applies, and (2) the HHS contraceptive mandate, as applied to Hobby Lobby and others similarly situated, fails the strict scrutiny that RFRA requires.[79]

C. Corporations Are People

In reaching its determination that corporations qualify as "people" within the meaning of RFRA, the Court first evaluated the text of the law itself. Because RFRA does not define the term "person," the Court consulted the Dictionary Act.[80] Pursuant to the Dictionary Act, "the wor[d] 'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[81] There is nothing in RFRA that signals Congressional intent to deviate from the Dictionary Act's definition of "person" to exclude corporations such as Hobby Lobby.[82]

Next, the Supreme Court noted that it has previously entertained both RFRA and free-exercise claims brought by nonprofit corporations.[83] Plus, HHS conceded that a nonprofit corporation can be a "person" under RFRA.[84] Because there is no authority for interpreting the term "person" to include some, but not all corporations, within the context of a single statute, and because nonprofit corporations appear to qualify as people under RFRA, closely-held for-profit corporations such as Hobby Lobby must also qualify.[85] The decision does not, however, impact publicly traded companies with a large number of unrelated shareholders, because it

77. *Hobby Lobby*, 134 S. Ct. at 2762–63.
78. *Id.* at 2759.
79. *Id.* at 2755.
80. *Id.* at 2768.
81. *Id.* (quoting 1 U.S.C. § 1 (2012)).
82. *Id.*
83. *Id.* at 2768–69.
84. *Id.* at 2769.
85. *Id.*

is difficult (if not impossible) to ascertain the sincere religious beliefs of such corporations.[86] But because no such company brought a RFRA claim in this case, the Court did not decide whether RFRA applies to such publicly-traded companies.[87]

The Court also noted the sweeping breadth of RFRA itself as evidence that Congress did not intend to exclude corporations.[88] It stressed this point by emphasizing that Congress went "far beyond" what is constitutionally required.[89] Congress, the Court explained, designed RFRA to provide "very broad protection for religious liberty."[90] But according to Justice Ginsburg, "RFRA's purpose was 'only to overturn the Supreme Court's decision in *Smith*,' not to 'unsettle other areas of the law.'"[91]

However, in context, it is clear that Congress's concern about "unsettl[ing] other areas of law" primarily involved inadvertently burdening religious organizations in other ways.[92] It was not, as Ginsburg contends, an attempt to proactively limit the scope of RFRA to avoid unsettling other areas of law in general.[93] Specifically, Congress mentioned that rights granted to religious organizations under the Establishment Clause shall remain in effect, that religious accommodations under Title VII shall be unchanged, and that "granting" rights should not be construed as "denying" rights.[94] Although it also specified that religious organizations distributing literature are still subject to generally applicable time, place, and manner restrictions to their free speech, the bulk of Congress's focus seemed to involve not incidentally burdening a *religious organization's* other established rights.[95]

From a policy perspective, the Supreme Court has, in recent years, also shown its concern for protecting entities and corporations by expanding constitutionally-protected individual rights to cover them. In 2010, in *Citizens United v. Federal Election Commission*,[96]

86. *Id.* at 2774.
87. *Id.*
88. *Id.* at 2767–68.
89. *Id.* at 2767.
90. *Id.*
91. *Id.* at 2791 (Ginsburg, J., dissenting) (quoting S. REP. NO. 103-111, at 12 (1993)).
92. S. REP. NO. 103-111, at 12–13 (1993).
93. *Hobby Lobby*, 134 S. Ct. at 2791 (Ginsburg, J., dissenting).
94. S. REP. NO. 103-111 at 13–15 (1993).
95. *Id.* at 13.
96. 558 U.S. 310 (2010).

the Court held that "the Government may not suppress political speech on the basis of the speaker's corporate identity" and that restricting corporate expenditures for electioneering communications violated those First Amendment free speech rights.[97] Then, in 2012, the Court reinforced these protections by holding that a Montana statute banning corporate expenditures, which support or oppose a candidate or political party, violated the corporation's free speech rights.[98] Though this idea is still a point of contention for many,[99] it is consistent with recent precedent. Therefore, it is unsurprising that the Court held in this case that privately-held corporations are "people" for the purposes of RFRA's protections.

True to form, the Supreme Court also expressed concern about disincentivizing businesses from incorporating in the *Hobby Lobby* opinion. It explained, "we reject HHS's argument that the owners of the companies forfeited all RFRA protection when they decided to organize their businesses as corporations rather than sole proprietorships or general partnerships."[100] Supporting its conclusion that corporations qualify as "people" within the meaning of the statute, the Court explained, "A corporation is simply a form of organization used by human beings to achieve desired ends."[101] The Court elaborated that extending constitutional or statutory rights to corporations effectively protects the rights of the people involved with the corporation, including shareholders, officers, and employees.[102] While HHS and the dissent argued that RFRA should not apply to corporations because corporations cannot exercise religion, the Court explained that, "allowing Hobby Lobby, Conestoga, and Mardel to assert RFRA claims protects the religious liberty of the Greens and the Hahns."[103]

Justice Ginsburg pointed out, however, that a person doing business as a sole proprietorship, for example, is incentivized to incorporate to separate him- or herself from the entity in order to

97. *Id.* at 365 (explaining that "[s]ection 441b's restrictions on corporate independent expenditures are therefore invalid and cannot be applied to Hillary").

98. Am. Tradition P'ship, Inc. v. Bullock, 132 S. Ct. 2490, 2491 (2012).

99. *See* Adam Winkler, *Corporations Are People, and They Have More Rights Than You*, HUFFINGTON POST (Aug. 30, 2014, 5:59 PM), http://www.huffingtonpost.com/adam-winkler/corporations-are-people-a_b_5543833.html.

100. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014).

101. *Id.* at 2768.

102. *Id.*

103. *Id.* at 2769.

escape personal liability for the entity's obligations.[104] It seems unfair, she explained, for this person to effectively be a corporation when it is convenient to escape liability, but then to also be a person when that is convenient to help the company dodge federal regulatory legislation.[105] However, this apparent injustice was statutorily created, and could therefore be statutorily remedied. Perhaps Justice Ginsburg's problem isn't with the Court's interpretation of RFRA, but rather with RFRA itself.

D. Strict Scrutiny

RFRA essentially imposes a form of strict scrutiny on federal laws and regulations which substantially burden the exercise of religion, requiring that the government establish that its law: "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that interest."[106]

E. Substantial Burden

HHS argued the contraceptive mandate does not impose a substantial burden because the connection between providing health-insurance coverage and destruction of an embryo is too attenuated.[107] As HHS explained, an embryo would only be destroyed if an employee chose to use one of the four contraception methods at issue.[108] The Court rejected this argument on two grounds: (1) this argument does not address the issue of whether the mandate imposes a substantial burden on the objecting parties' ability to conduct business in accordance with their religious beliefs; and (2) this argument really addresses whether the religious belief asserted is reasonable, a question the federal courts "have no business addressing."[109] It continued, "[I]t is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our 'narrow function . . . in this context is to determine' whether the line drawn reflects 'an honest conviction.'"[110] The Greens and Hahns

104. *Id.* at 2797 (Ginsburg, J., dissenting).
105. *Id.*
106. *Id.* at 2779 (quoting 42 U.S.C. § 2000bb-1(b) (2012)).
107. *Id.* at 2777.
108. *Id.*
109. *Id.* at 2778.
110. *Id.* at 2779 (quoting Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 716 (1981)).

believe that the four contested contraception methods are tantamount to abortion; the parties do not dispute that this represents an honest conviction.[111]

This argument is tautological, though. Finding an honest conviction only establishes that the Greens' and Hahns' religious practice is burdened.[112] The Court does not seem to acknowledge a mechanism by which it can determine whether that burden is *substantial*.[113] If petitioners have honest beliefs, the law is necessarily a substantial burden; if the government tries to establish that the burden is insubstantial, it necessarily engages in a forbidden analysis of the religion's merits. This essentially elevates every incidental burden on an honestly-held religious conviction to the level of "substantial burden," and forbids any discussion to the contrary.

To further justify its holding that the mandate imposes a substantial burden, the Court characterized the fine for failure to comply with the HHS contraceptive mandate as economically "severe."[114] Aggregating the total cost of the fines over the course of a year, the Court found that continuing to offer group health plans that exclude the contraceptives at issue would result in fines of $457 million for Hobby Lobby, $33 million for Conestoga, and $15 million for Mardel.[115] Dropping health insurance coverage altogether would result in fines of $26 million for Hobby Lobby, $1.8 million for Conestoga, and $800,000 for Mardel.[116]

It is unclear from the opinion what these companies earn in profit each year, or what percentage of the businesses these sums represent. According to *Forbes*, Hobby Lobby earned roughly $3.3 billion in revenue from January through October 2014.[117] Assuming Hobby Lobby didn't earn another dollar in 2014, this would still make the $26 million fine for dropping employee coverage less than 0.79% of Hobby Lobby's annual revenue.

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111. *Id.*
112. *Id.* at 2798 (Ginsburg, J., dissenting).
113. *Id.*
114. *Id.* at 2775.
115. *Id.* at 2775–76.
116. *Id.* at 2776.
117. *America's Largest Private Companies*, FORBES, http://www.forbes.com/companies/hobby-lobby-stores/ (last updated Oct. 2014).

An *amicus* brief in support of HHS further argued that the $2,000 per employee penalty for failing to provide health insurance was actually less than the cost of providing insurance, and therefore eliminated any substantial burden.[118] But the Court rejected this argument as well.[119] First, the Court noted that this argument was not raised below and was not raised by any party.[120] Next, the Court pointed out that this argument ignores the fact that the Greens' and Hahns' religious beliefs require them to provide health insurance for their employees.[121] Because their beliefs require both that they provide health insurance for their employees and that they not facilitate post-fertilization contraception methods, the substantial burden could not be mitigated.[122]

Finally, the Court explained that simply comparing the raw cost of the $2,000 penalty for dropping coverage altogether with the raw cost of providing health insurance coverage omits other costs.[123] Namely, it ignores the cost to the company of becoming a less competitive employer for failing to offer health insurance.[124] Furthermore, the Court doubted that either the Congress that enacted RFRA or the Congress that enacted the ACA would have found it reasonable to force a business to decide between violating its sincerely held religious beliefs and making all of its employees lose their healthcare plans.[125]

Presumably, though, the Congress that enacted the ACA anticipated that many employers would have to choose between providing plans that comply with the new standards and dropping coverage altogether, since that is what the law mandates.[126] And though the Congress that passed RFRA intended the scope to be sweeping,[127] it is unclear whether it intended to make all incidental burdens on honestly-held religious beliefs necessarily "substantial."[128]

118. *Hobby Lobby*, 134 S. Ct. at 2776.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 2777.
123. *Id.* at 2776–77.
124. *Id.*
125. *Id.* at 2777.
126. *Id.* at 2762.
127. *Id.* at 2767.
128. *See id.* at 2798 (Ginsburg, J., dissenting).

F. Compelling Governmental Interest

RFRA requires the government to demonstrate a compelling governmental interest in applying the challenged law specifically "to the person."[129] The Court rejected most of HHS's purported compelling governmental interests, such as "promoting public health" and "gender equality" as being too broadly-framed to qualify under RFRA.[130] However, HHS also asserted that it has a compelling interest in ensuring all women have access to contraception without cost sharing.[131] The Court assumed arguendo that this was sufficiently compelling, notwithstanding the numerous exceptions to the mandate (including the grandfathered plans exception).[132]

G. Least Restrictive Means

Once the government establishes a compelling interest, it must also establish that the law, as applied to the people claiming a substantial burden, is the least restrictive means for furthering that interest.[133] Here, the Court explains that the government did not demonstrate that it lacks other, less restrictive means of achieving its asserted goal of providing all women access to contraception without cost sharing.[134] One such alternative, it opines, would be for the government to pay for the four contraceptives at issue to any woman unable to obtain it due to her employers' religious objections.[135] HHS has not demonstrated that this alternative is unviable.[136] The Court explained further that the cost of providing the four contraceptives at issue would likely be minor in light of the overall cost of the ACA.[137] Finally, RLUIPA requires the government to sometimes incur expenses "to avoid imposing a substantial burden on religious exercise."[138]

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129. *Id.* at 2779 (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006) (quoting 42 U.S.C. § 2000bb-1(b) (2014)).
130. *Id.* (quoting Brief for HHS in No. 13-354, at 46, 49).
131. *Id.*
132. *Id.* at 2780.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 2781.
138. *Id.* (quoting 42 U.S.C. § 2000cc-3(c) (2014)).

In fact, there is already a system in place for the government to cover the cost of religious exemptions such as these.[139] When a nonprofit organization with a religious objection self-certifies that it opposes providing coverage for contraceptive services, the insurance issuer or third-party administrator must exclude such coverage from the group health plan and pay separately to cover the services.[140] The insurance issuer or third-party administrator may not pass these costs down to the organization, the group health plan, or the patients.[141] The Court suggested that the government could presumably just extend this mechanism to also accommodate closely-held for-profit companies with religious objections, such as Hobby Lobby and Conestoga Wood Specialties.[142] It noted this is actually a more effective means of accomplishing its stated goal than if these organizations dropped insurance coverage altogether and forced their employees to pay for individual plans in order to receive these free services.[143]

However, it is entirely possible this alternative is untenable in practice. Hobby Lobby alone employs 23,000 people.[144] Obviously not every Hobby Lobby employee is female, but female dependents of male (and female) workers are also affected.[145] And of course, the decision is not limited to the petitioners in this suit. According to a 2000 study, 52% of Americans work for a "closely-held" corporation.[146]

And it is possible, if not likely, that at least some of these other closely-held corporations may object on religious grounds to aspects other than the four contraceptives at issue in *Hobby Lobby*. These closely-held corporations could, in theory, object on religious

139. *Id.* at 2782.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 2783.
144. *America's Largest Private Companies*, FORBES, http://www.forbes.com/companies/hobby-lobby-stores/ (last updated Oct. 2014).
145. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2787 (2014) (Ginsburg, J., dissenting).
146. Aaron Blake, *A Lot of People Could Be Affected by the Supreme Court's Birth Control Decision—Theoretically*, WASH. POST: THE FIX (June 30, 2014), http://www.washingtonpost.com/blogs/the-fix/wp/2014/06/30/a-lot-of-people-could-be-affected-by-the-supreme-courts-birth-control-decision/; *see also* Schulyer Velasco, Hobby Lobby *Decision: Eight Important Numbers to Know*, CHRISTIAN SCI. MONITOR (July 1, 2014), http://www.csmonitor.com/Business/2014/0701/Hobby-Lobby-decision-Eight-important-numbers-to-know/90-percent.

grounds to any number of provisions in any number of laws. Requiring the government to assume the cost of every mandate every closely-held corporation objects to quickly snowballs past the point of economic feasibility.

The Court then distinguished the contraceptive mandate from services like immunizations by explaining that the government's interest in preventing the spread of communicable diseases is fundamentally different from its interest in ensuring all women have access to contraception without cost sharing.[147] It noted in particular that the "least restrictive means" of providing the respective services would be different.[148] But the HHS listed "promoting public health" among its compelling interests for issuing the contraceptive mandate.[149] This is presumably the same interest furthered by immunization services.

It is also unclear how requiring the government to absorb the cost of providing contraception services is fundamentally different from requiring the government to absorb the cost of providing immunizations. Though the spread of communicable diseases might seem to be a more compelling interest, which affects more people more severely, the least restrictive means of accomplishing both goals appears to be the same. Furthermore, there is no precedent to support the idea that the more compelling a government interest, the more it can restrict RFRA rights even when less restrictive alternatives are available.

IV. RAMIFICATIONS OF THE *HOBBY LOBBY* DECISION

The very same concerns expressed in *Smith* and *Flores* are also implicated in the *Hobby Lobby* decision. Namely, RFRA carves out an exception from every federal law for contentious religious objectors.[150] As discussed above in Section III(b)(ii)(1), the Court does not address the question of whether the burden on a person's religious beliefs is substantial. Instead, it asks only whether the belief is sincerely held.[151] Because it is difficult to disprove a person's

147. *Hobby Lobby*, 134 S. Ct. at 2783.
148. *Id.*
149. *Id.* at 2779 (quoting Brief for HHS in No. 13-354, at 46, 49) (citations omitted).
150. *Id.* at 2787 (Ginsburg, J., dissenting).
151. *Id.* at 2779.

subjective belief, and even the smallest potential burdens on religious exercise qualify, the potential for abuse is worrisome.

Hobby Lobby alone employs 23,000 people.[152] This decision will impact every female employee, as well as every female dependent covered under the plans.[153] But of course Hobby Lobby, Mardel Christian, and Conestoga Wood Specialties aren't the only closely-held corporations affected by this decision. Allowing every closely-held corporation to object to federal laws it deems inconvenient on the basis of religious objection has the potential to cause "havoc."[154]

The Court had other concerns, though. It insisted that allowing the government to require all employers to provide coverage for all legal medical procedures under RFRA would pave the way for mandatory third-trimester abortions and assisted suicide.[155] This result, it explains, would exclude conscientious religious objectors from participating in this nation's "economic life."[156]

While these extreme hypotheticals certainly reveal the Court's deepest concerns and fears, they do not compellingly justify its decision. First, there is a big difference between requiring an unwilling patient to undergo an unwanted mandatory third-trimester abortion or assisted suicide and requiring an unwilling employer to offer a group health insurance plan which covers such procedures in jurisdictions where they are already legal. One forcibly violates a citizen's bodily integrity while the other amounts to a tax or fine.

Secondly, the notion that enforcing such a mandate would cause these religious objectors to give up their businesses and opt out of American "economic life" is unsupportable. There are doubtlessly many state laws of general applicability, which incidentally burden religious exercise. Since state laws are not covered under RFRA,[157] and these burdens generally fall short of Free Exercise Clause protection,[158] corporations are still subject to these burdens.

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152. *Americas Largest Private Companies*, FORBES, http://www.forbes.com/companies/hobby-lobby-stores/ (last updated Oct. 2014).

153. *Hobby Lobby*, 134 S. Ct. at 2787 (Ginsburg, J., dissenting).

154. *Id.*

155. *Id.* at 2783.

156. *Id.*

157. City of Boerne v. Flores, 521 U.S. 507 (1997).

158. Emp't Div., Dep't. of Human Res. of Or. v. Smith, 494 U.S. 872, 874 (1990).

On the other hand, as Justice Ginsburg noted in her dissent, "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[159] The Court does not adequately explain why its unsupported fear that corporations will withdraw from American economic life trumps the long-established reality that women unable to control their reproductive lives are unable to participate equally in economic and social life.

Perhaps the answer lies in considering the *Hobby Lobby* decision's place in the broader conversation between Congress and the Supreme Court on the appropriate level of protection for free exercise rights. Since the *Smith* decision, there has been a virtual ping-pong match wherein the Supreme Court issues a decision, warning about the dangers inherent in protecting free exercise rights too vigorously, followed by a congressional statute, lamenting the Supreme Court's failure to adequately protect these important rights, and so forth.

A notable difference distinguishing *Hobby Lobby* from *Smith* and *Flores* is that in *Smith* and *Flores*, the Supreme Court cautioned against the dangers inherent in providing such broad free exercise protections in order to strike down the requested religious exemptions. By contrast, the Supreme Court seemingly ignores its reasoning in *Smith* and *Flores* in order to uphold the religious exemption at issue in *Hobby Lobby*. So far Congress has not heeded the Supreme Court's warnings about the dangers of carving out religious exceptions from every general applicable law. It first passed RFRA, then bolstered it by passing RLUIPA and the AIRFA Amendments.

If popular opinion originally motivated Congress to bolster religious protections, perhaps popular opinion can similarly motivate it to change course now. Furthermore, by effectively invalidating one of Congress's own laws (the contraceptive mandate portion of the ACA), the *Hobby Lobby* decision may make the Supreme Court's point finally resonate with Congress in a way that the Supreme Court's previous warnings seemingly haven't.

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159. *Hobby Lobby*, 134 S. Ct. at 2787 (Ginsburg, J., dissenting) (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 856 (1992)).

V. PROPOSED SOLUTIONS

The *Hobby Lobby* decision has been widely criticized by the public.[160] However, much of the popular backlash against the *Hobby Lobby* decision misses the mark. Many people conflate the First Amendment Free Exercise Clause protections with those protections granted by RFRA.[161] They therefore overestimate both the scope of the *Hobby Lobby* decision and the obstacles standing in the way of a solution.[162] The result has been a lot of misdirected rage aimed at the Supreme Court.[163]

But it is important not to lose sight of the issue, especially because the solution is very attainable. *Hobby Lobby* is not actually a constitutional decision. It does not dictate that the First Amendment permits corporations to ignore the contraceptive mandate portion of the ACA. Rather, it instructs that this right is granted by RFRA, a Congress-enacted piece of legislation.[164] Because Congress enacted both the ACA and RFRA, the law can be changed by popular opinion. The American public can use its voting power to either put pressure on the existing members of Congress, or to change the makeup of Congress in order to change the law. It is therefore important to redirect public opinion away from the Supreme Court and toward Congress to implement change.

There are three main ways Congress could change the law: (1) amend the ACA, such that the provision does not run afoul of RFRA; (2) amend RFRA, limiting its scope such that the ACA, and future laws like it, are not affected; or (3) repeal RFRA entirely.

The first option—amending the ACA—would probably be the most difficult of the three potential solutions. While it is theoretically possible for Congress to amend the ACA in a way that develops a scheme to make all health plans cover all recommended forms of

160. *See* Staci Zaretsky, *Angry Mob Takes to Twitter to Scream at SCOTUSBlog for Hobby Lobby Decision*, ABOVE THE LAW (July 1, 2014, 10:15 AM), http://abovethelaw.com/2014/07/angry-mob-takes-to-twitter-to-scream-at-scotusblog-for-hobby-lobby-decision/.

161. *Id.*; *see also* Jamie Fuller, *How the Internet Blamed the Wrong Twitter Handle for Today's* Hobby Lobby *Ruling*, WASH. POST: THE FIX (June 30, 2014), http://www.washingtonpost.com/news/the-fix/wp/2014/06/30/how-the-internet-blamed-the-wrong-twitter-handle-for-todays-hobby-lobby-ruling/.

162. *Id.*

163. *Id.*

164. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785 (2014).

contraception without running afoul of RFRA, the difficulties in doing this in practice quickly become apparent.

First, it assumes that this is even possible in practice. It is likely that closely-held corporations, such as Hobby Lobby, will feel that any employee receiving such a benefit as a result of her employment with or connection to Hobby Lobby is tantamount to facilitating abortions, even if the government, for example, paid the portion of plan premiums that covered these services and required the insurance company to keep the money in two separate funds.[165] Presumably at some point, the corporation's claims might become too attenuated to establish a "substantial burden," but it is extremely unclear from the decision when, if ever, that occurs.

Nonetheless, supposing arguendo that it were possible either to get *Hobby Lobby* to agree to a scheme, or for the burden imposed by such a scheme to dip below the critical "substantial" threshold line, that has resolved the issue for only one corporation. Other corporations may view the scheme as substantially burdening their free exercise of religion in other ways or for other reasons. And because the standard is what the corporation subjectively believes, in theory, two members of the same religion—perhaps even the same church—could potentially view different aspects of the law as unduly burdensome.

To avoid this, Congress could completely overhaul the ACA to cut out the corporate middleman and simply have the government provide or subsidize group health insurance for employees of all religious organizations and closely-held corporations. This, however, would require a major overhaul of the law as well as the mechanisms currently in place to provide these employees with health insurance. Flooding the medical exchanges with all these extra employees, for example, could very easily cause problems for the whole system, if not carefully planned for and managed. Indeed, there appears to be a more elegant solution.

165. This was the rationale behind several employers' objections to filling out a form informing the government that they objected on religious grounds to the contraceptive mandate. *See* Reply Brief of Appellants at 5, Little Sisters of the Poor Home for the Aged v. Sebelius, 134 S. Ct. 1022 (2014) (No. 13-1540), 2014 WL 1653856, at *11. Docket available at http://www.supremecourt.gov/search.aspx?filename=/docketfiles/13a691.htm. Lower court's decision available at http://www.becketfund.org/wp-content/uploads/2014/07/2014.12.27-Order-denying-PI.pdf.

Alternatively, instead of attempting to craft an ACA amendment that complies with RFRA, Congress could amend the ACA to apply, notwithstanding RFRA, effectively carving out an exemption from RFRA for the ACA. Ultimately, however, simply amending the ACA doesn't really fix the bigger problem. While it would effectively overturn the *Hobby Lobby* decision as it applies to the contraceptive mandate, it is not the best solution for fundamentally fixing the potential problems RFRA can cause. Such a scheme would require Congress to manually fix every law it fears RFRA will undermine. But RFRA threatens to undermine essentially every federal law. A piecemeal approach of effectively carving out an exception to an exception in order to make every federal law whole again is therefore not the best way to fix all of RFRA's potential pitfalls.

The second two options—either amending or repealing RFRA—seem fraught with far fewer problems and do not require radically changing the current state of religious accommodation.

First, Congress could amend RFRA. Just as easily as it expanded the scope of RFRA's protections by passing RLUIPA, it can pass another law limiting the scope back down. The biggest challenge here would probably be getting Congress to agree where to draw the line. If the constitutional protections, which leave in place laws of general applicability which incidentally burden religious exercise, are insufficient, what is sufficient, and why? How does Congress adequately balance the rights of people (and closely-held corporations) to freely exercise their chosen religion with the need for the nation's federal laws to have teeth? It is a difficult question for a single person to answer, much less a majority of the two houses of Congress.

Perhaps, then, a more elegant solution would be for Congress to repeal RFRA altogether. After all, this was done with respect to state laws in *Flores*, and business does not appear to have come to a screeching halt as a result. While this appears at first glance to provide less protection for religious liberties, any unjust result can be mitigated. Just as several states (including, eventually, Oregon) exempted sacramental peyote use from its drug laws, so too could Congress amend its own laws to mitigate any unjust result.

Although it is, in general, not always easy to get Congress to agree to pass a law, presumably if the burden is significantly unjust, Congress can band together, as it did when originally passing RFRA

and RLUIPA, to create specific exceptions to specific laws. This is preferable to a blanket exception to all federal laws. Under RFRA, in its current state, when Congress finally does come together to pass sweeping legislation like the ACA, the law is poked so full of exemption holes that its full force and effect crumble. This is precisely the danger the Supreme Court warned of in the *Smith* decision.

Of course no solution is perfect. The primary concern with leaving the decision to the legislative process about which religious liberties should be proactively protected is that minority religions may not get the same protections as more popular religions. This concern is definitely valid—whenever protections are essentially left to the majority to enforce, minorities are often unprotected.

However, safeguards already exist within the existing constitutional framework to protect minority religions. Because these must be laws of general applicability, the majority is still unable to specifically target an unpopular religion with a burdensome law.

Furthermore, the passage of RFRA following the *Smith* case shows that the majority can and does stand up to correct unjust results when a new law of general applicability burdens long-established religious practice. Of course the system may not be perfect, and religions that are more stigmatized may not get the same benefit of legislative protection that a more popularly-supported religion gets. But under the current system, a person can simply create a new religion to avoid complying with any federal laws they don't like. No system is perfect, and falling back on the constitutional protections, while relying on Congress to mitigate unjust results, is preferable to the alternatives.

VI. JUSTIFICATIONS FOR THE PROPOSAL

Congress changing the law eloquently solves the two main problems. In the smaller sense, the concern that corporations get to trounce all over their female employees' (and dependents') reproductive rights will be resolved. Closely-held corporations will be required to comply with all generally-applicable federal laws that incidentally burden their religious practice just as they are already required to comply with all such state laws. No longer will the women covered under these companies' plans or the federal

government have to worry about coming up with alternative options for meeting the individuals' healthcare needs.

In the broader sense, Congress no longer has to worry about essentially undermining every federal law it passes. Laws that Congress deemed important enough to pass in the first place will regain their "teeth," and the policies underlying these laws will again thrive without being potentially undermined by a critical mass of exemptions.

Furthermore, urging Congress to fix the injustices created by its law is the most productive use of public outrage. It is, quintessentially, why the public has the right to vote and change the makeup of Congress. And because the *Hobby Lobby* decision deals only with the protections afforded under RFRA, as opposed to the Free Exercise Clause of the First Amendment, there are no constitutional implications.

Amending the law also assuages the Supreme Court's ever-present concerns about overstepping its boundaries on issues that can be adequately resolved through the popular vote and political process. But Congress's utilization of the political process to implement RFRA in direct response to an unjust result for the employees in *Smith* was overkill. Simply put, as explained in *Smith*, these rights can be adequately protected by the political process, and do not require blanket protection at the expense of all generally-applicable laws.[166]

VII. CONCLUSION

Since 1990 when the Supreme Court issued its decision in *Smith*, Congress and the Supreme Court have engaged in a lengthy back-and-forth political struggle over the appropriate level of First Amendment free exercise protection. In *Smith*, the Court saw past the unfortunate consequences that would inevitably befall the sympathetic defendants in front of it to establish the general principle that keeping laws of general applicability in full force and effect is more important than protecting the rights of the people to exercise their chosen religion freely and without burden. Outraged by the unjust result that befell these particular defendants, Congress acted swiftly to reverse the Supreme Court's ruling to the full extent

166. Emp't Div., Dep't. of Human Res. of Or. v. Smith, 494 U.S. 872, 890 (1990).

possible. But perhaps it acted too quickly, and without its eye on the bigger picture.

The Supreme Court, outraged itself that Congress would attempt to overturn one of the Court's rulings so quickly and so substantially, reemphasized the drastic and sweeping impacts a law like RFRA would have, and invalidated RFRA as applied to the states for being too out of proportion to any perceived remedial objective.

And back and forth it went over the years until *Hobby Lobby*, where the Supreme Court appeared to reverse course, finally upholding an asserted religious exemption under RFRA. Although the Court expressed that its reasons for doing so were a concern for protecting the rights of people who incorporate, it is probably no coincidence that it chose to uphold the exemption when applied to a law Congress itself had passed.

Although this battle might have been about the First Amendment's Free Exercise Clause when it began, by the time it has reached *Hobby Lobby*, the Constitution is no longer part of the dialogue. RFRA is responsible for this result. And because the problem is statutory, as opposed to constitutional, it is much easier to fix. Because the Supreme Court's decision in *Hobby Lobby* is all about the proper way to interpret RFRA (as opposed to the Constitution), changing (or ideally, repealing) RFRA eliminates the need for this interpretation, and as a result, the problems that arise from it.