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Religious Freedom and (Other) Civil Liberties: Is There a Middle Ground?

*Abner S. Greene**

INTRODUCTION: VALUE PLURALISM AND THE MIDDLE GROUND

Some people believe in an extrahuman source of normative authority, in a God who created the world and everything in it and whose normative dictates are knowable and obligatory. Others believe the opposite—we might call them atheists, or materialists, or naturalists. To some extent both sides can get along just fine; religious worship, and secular practice (to the extent it exists), can occur in separate places, separate lives, without either needing to give way. But sometimes one side makes a demand that impinges on the other side. A law may be expressly and predominantly based in a contested, core belief of one side or the other. Or an otherwise unobjectionable law may have effects that harm the practices of one side or the other. Whatever result we endorse to these dilemmas—permitting (or not) laws based expressly in contested comprehensive views; accommodating (or not) beliefs or practices adversely affected by otherwise valid legislation—there will be a cost, one way or the other.

These dilemmas could exist in either direction: We could consider law expressly based in theological doctrine problematic or law expressly based in some contested secular belief problematic. We could consider a claim for religious accommodation worthy of note or we could consider a claim for secular accommodation worthy of note. Or some combination of all of these. Our constitutional culture, though, works from a premise of secularism, at least in the following way: law may have religious underpinnings, but it may not be merely the expression of God's will. We are not a theocracy.¹ Also, with lots of details to be worked out, we are sympathetic to claims of religious folk that sometimes law will harm their practices. Although the exact contours of the "religious purpose" Establishment Clause test are contested, and although the proper constitutional boundaries of accommodation and exemption are contested, there should be some easy cases where express

* Leonard F. Manning Professor, Fordham Law School. Thanks to Paul Horwitz, Julie Kalish, and John Nagle for helpful comments. Thanks also to Nomi Stolzenberg, Doug NeJaime, and all the organizers of the fascinating and provocative conference that gave rise to this set of papers: *Religious Accommodation in the Age of Civil Rights*, Harvard Law School, April 3–5, 2014.

¹ If we were, and we took the kinds of harm I'm discussing here seriously, then we would be talking about accommodation for nonbelievers from these expressions of God's will.

backing of legislation on sectarian grounds is improper² or where an accommodation would harm no one and benefit an otherwise beleaguered religious minority.

To some extent, the Supreme Court's religion clauses jurisprudence pre-*Smith* reflected this understanding.³ On Establishment Clause grounds, the Supreme Court invalidated legislation expressly based in religious justification.⁴ The Court permitted some legislative accommodation of religion.⁵ And the Court said the Free Exercise Clause requires exemptions from state action that burdens religious practice, even if unintentionally.⁶ Even after *Smith* changed the doctrinal landscape regarding required exemptions, the Religious Freedom Restoration Act (RFRA) for the federal government,⁷ and state RFRAs,⁸ insist on a robust approach to religious exemptions.⁹

My argument in *The Political Balance of the Religion Clauses*¹⁰ was an attempt at locating this middle ground, too. We might read the Establishment and Free Exercise Clauses in tandem to produce the following conclusion: Legislation may not be based in express, predominant religious argumentation. Such a capturing of the legislative process excludes from meaningful participation in the political process those who don't share the dominant religious beliefs. Justice Souter stated a similar concern in his majority opinion in *McCreary County*, when he explained that state action backed by express, predominant religious purpose "stirs up . . . strife" and "make[s] outsiders of nonadherents."¹¹ But if we are to limit the role of religion in lawmaking

² I recognize this is a disputed matter among scholars, even though there is a well-settled set of Supreme Court cases so holding. See *infra* note 4. See also Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1614–33 (1993).

³ See *Emp't Div. v. Smith*, 494 U.S. 872, 908–09 (1990) (holding that strict scrutiny does not apply to Free Exercise Clause claims stemming from the incidental effect of generally applicable laws).

⁴ See *Edwards v. Aguillard*, 482 U.S. 578, 596–97 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 61 (1985); *Epperson v. Arkansas*, 393 U.S. 97, 113 (1968). See also *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 881 (2005) (after *Smith*).

⁵ See *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338–40 (1987). See also *Cutter v. Wilkinson*, 544 U.S. 709, 725–26 (2005) (after *Smith*).

⁶ See *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 145–46 (1987); *Thomas v. Review Bd.*, 450 U.S. 707, 720 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 235–36 (1972); *Sherbert v. Verner*, 374 U.S. 398, 409–10 (1963). *Yoder* is a true case of required exemption from generally applicable law; the other three—all unemployment compensation cases—arguably are not, but rather protections against administrative discrimination against religion. See Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1280 (1994).

⁷ See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014); *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 439 (2006). But see *City of Boerne v. Flores*, 521 U.S. 507, 526 (1997) (invalidating RFRA as applied to state and local governments).

⁸ See generally Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466 (2010).

⁹ Also, the Court has held that the religion clauses require exception from employment anti-discrimination law for church ministerial positions. See *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012).

¹⁰ Greene, *supra* note 2.

¹¹ *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 863 (2005).

in this way, then we have constrained religious folk in how they may advance what they believe to be true in the political realm. Such limitation on the political process undermines the legitimacy of the state's claim for uniform adherence to enacted law. Exemptions (even *prima facie* only, i.e., subject to a balancing test to account for harm to others) are an appropriate antidote, or compensation, for religious believers. Even if one doesn't accept the precise contours of this compensation argument, the point is that we have reached a tenable middle ground about keeping religion out of law (for the most pronounced situations) and keeping law out of religion (ditto).

This was an interpretive claim about our Constitution. In my book *Against Obligation*, I advance a political theoretic argument for accommodations beyond religious practice.¹² Here is a summary of the case: We do not have a moral duty to obey the law, and the state does not have a legitimate claim on our legal compliance.¹³ I canvass various arguments for political obligation, rejecting each as not powerful enough to back the state's claim for uniform obedience to law. Thus, I first discuss and reject agent-centered arguments for political obligation—from consent, fair play, and political participation. Consent would properly ground political obligation, but viewed as either express or implied, it doesn't exist sufficiently. A duty of fair play may ground some political obligations for some people, but it is also too weak to ground a general duty to obey the law. Political participation may be necessary for political obligation (at least a right to political participation is), but it is also insufficient. It is not general enough, and it is not clear enough that when people vote or otherwise participate in governance they thereby understand themselves as bound by resulting laws.

I then turn to status-based claims for political obligation—a natural duty to obey just institutions and associative obligation. My principal objections to the natural duty argument are that it is based in a conception of justness that is too weak to support a general moral duty to obey the law and that it trades off a conception of reasonableness that does not adequately account for those whose religious, cultural, ethnic, tribal, or family norms insist on something different. I treat the argument for associative obligation at greatest length. There are serious claims that we owe our fellow citizens a duty to obey the law, claims that are separate from the fair play, natural duty, or consequentialist arguments to which they are sometimes related. But although we owe certain obligations to those with whom we have real associations (family, friends, colleagues), it is a stretch to extend this idea to citizens *qua* citizens and to a moral duty to obey the law.

Finally, I explore consequentialist, systemic stability arguments for political obligation—the kind of argument one most often hears in casual conversation. 'If we don't have a moral duty to obey the law, then people will go

¹² See generally ABNER S. GREENE, *AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY* (2012).

¹³ I advance an argument for the correlativity or coextensivity of political obligation and political legitimacy, relying on a narrow but strong conception of political legitimacy. See *id.* at 24–34.

off in their chaotic different directions, and the system will collapse.’ In rejecting this kind of claim, I discuss and reject an argument against self-interest and an argument from settlement. These arguments either improperly assume the conclusion about systemic costs (while often failing to account for costs from being law-abiding) or they advantage those whose norms fall toward the acceptable middle, in similar fashion to problems with the argument from a natural duty to obey just institutions.

Once I conclude that there are no good arguments—separately or combined—for political obligation and political legitimacy, I then have set the predicate for an argument for accommodation. Similarly to my “political balance” argument, but more broadly writ, I claim that to ameliorate the sting from the otherwise unfounded insistence on uniform legal obedience, the state should accommodate those who live according to norms that differ from those of the law—norms that may be based in religion, culture, ethnicity, tribe, or family.¹⁴ I also offer an affirmative rather than compensatory argument for accommodations, grounded in value pluralism. There are many sources of norms by which people live their lives, the state’s laws being just one. It is proper for the state, when it can, to recognize and accommodate the various norms by which people live. Sovereignty should be seen as permeable through the state’s law and into our separate sources of norms. I then explore how we might account for these sprawling, centrifugal norms, while still running a stable system from the center.

The question will always be in the details: How do we evaluate the need for uniform enforcement versus the need for accommodation? To insist on one or the other to the extreme is to insist on the truth of one’s position in a way that threatens a certain kind of fundamentalism, a sureness of one’s position, which is improper both as a matter of political theory and as a matter of constitutional law.¹⁵ In the remainder of this article, I first discuss contemporary works by intellectual historians, each of whom resists the kind of pluralism I advance.¹⁶ I then criticize Ronald Dworkin’s final book¹⁷ for adopting both too expansive a view of religion and too narrow a view of how to protect it. Next, I evaluate the Court’s holding in the most recent

¹⁴ Such accommodations should be subject to a balancing test, to assure they do not cause significant harm to others.

¹⁵ In addition to my “political balance” argument discussed above regarding the religion clauses, I have argued that our Constitution generally requires a kind of agnosticism/multiple repositories of power. See generally Abner S. Greene, *Civil Society and Multiple Repositories of Power*, 75 CHI.-KENT L. REV. 477 (2000); Abner S. Greene, *The Irreducible Constitution*, 76 SAN DIEGO J. CONTEMP. LEGAL ISSUES 293 (1996); Abner S. Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 COLUM. L. REV. 1 (1996). See also PAUL HORWITZ, *THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION* (2011).

¹⁶ For fairly recent support for pluralism in the political arena, see J. DONALD MOON, *CONSTRUCTING COMMUNITY: MORAL PLURALISM AND TRAGIC CONFLICTS* 8–9, 220–21 (1993); JAMES TULLY, *STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY* 7, 191 (1995); ROBERT K. VISCHER, *CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE* 103, 304 (2010).

¹⁷ RONALD DWORKIN, *RELIGION WITHOUT GOD* (2013).

religious accommodation case, *Hobby Lobby*,¹⁸ admiring its concern for such accommodation but critiquing its treatment of whether the law in question places a substantial burden on religious practice. Before concluding, I offer some brief thoughts on whether we should exempt from anti-discrimination law small business owners who object on religious grounds to providing services to same-sex couples in the setting of weddings or other commitment ceremonies.

I. AGAINST THE MIDDLE GROUND: TELEOLOGY FROM THEISTS AND ATHEISTS

Three modern works of western intellectual history display nicely the way that thinking about proper human ends, i.e., teleological thinking, can be done by both religious and anti-religious folk, and how value pluralism has to fight off attacks from both sides. The point of this discussion is to help advance my claim that both as a matter of political theory and as a matter of domestic constitutional law, the proper political (though not necessarily personal) position on truth is an open-ended agnosticism, and neither a classical nor post-Enlightenment sureness.

In *After Virtue*, Alasdair MacIntyre critiques modern societies for lacking the shared grounding for the kinds of moral claims that such societies nonetheless still make.¹⁹ And he constructs a case for understanding human ends in a classical, virtue-based way, that although drawn from the specifics of one's time and place nonetheless transcend such localism. Although he critiques modernism for its pluralism, his more interesting critique is of modernists who are not pluralists, who share his desire for finding right answers no matter one's culture, but who lack (he claims) the ability to ground such answers.

MacIntyre's constructive piece canvasses conceptions of virtue through Homer, Plato, Aristotle, and others. He develops a context-based theory of virtue while resisting the charge of pluralism or relativism this might entail. Regarding Homeric depictions, MacIntyre says that "morality and social structure are in fact one and the same in heroic society . . . Morality as something distinct does not yet exist. Evaluative questions *are* questions of social fact."²⁰ Moving on to Athens and Plato, MacIntyre claims the Greeks "[took] it for granted that the milieu in which the virtues are to be exercised and in terms of which they are to be defined is the polis . . . Plato's account of the virtuous man is inseparable from his account of the virtuous citizen."²¹ This point is about both the political nature of man and the situatedness of virtue. And for Aristotle, in a given community, we judge based on a

¹⁸ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

¹⁹ See generally ALASDAIR MACINTYRE, *AFTER VIRTUE* (3d ed. 2007).

²⁰ *Id.* at 123.

²¹ *Id.* at 135, 141.

“wide range of agreement in that community on goods and virtues,” i.e., a “shared recognition of and pursuit of a good.”²² After developing the conception of a “practice,” MacIntyre offers a provisional definition of virtue: “A virtue is an acquired human quality the possession and exercise of which tends to enable us to achieve those goods which are internal to practices and the lack of which effectively prevents us from achieving any such goods.”²³

So there is no separating our proper human ends—what is good and virtuous—from our specific practices; no use, that is, trying to be de-contextualized modern-day rationalists. “I can only answer the question ‘What am I to do?’ if I can answer the prior question ‘Of what story or stories do I find myself a part?’”²⁴ But, according to MacIntyre: (a) There are still right answers:

An Aristotelian theory of the virtues . . . presuppose[s] a crucial distinction between what any particular individual at any particular time takes to be good for him and what is really good for him as a man. It is for the sake of achieving this latter good that we practice the virtues.²⁵

Our situatedness doesn’t “entail that the self has to accept the moral *limitations* of the particularity of those forms of community.”²⁶ “[T]here may be better or worse ways for individuals to live through the tragic confrontation of good with good.”²⁷ (b) That proper human ends are located through specific practices entails neither relativism nor pluralism. Even without a modern notion of neutral standards, “it is possible for one . . . tradition to defeat another in respect of the adequacy of its claims to truth and to rational justification.”²⁸ MacIntyre expounds on this in the Postscript to the Second Edition by saying that a moral understanding may:

successfully transcend[] the limitations of its predecessors and in so doing provide[] the best means available for understanding those predecessors . . . [W]e have the best possible reason to have confidence that future challenges will also be met successfully, that the principles which define the core of a moral scheme are enduring principles.²⁹

MacIntyre’s critique is primarily posed as a (supposed) paradox:

[O]n the one hand [current positions on morality] seem to presuppose a reference to some shared impersonal standard in virtue of which at most one of those contending parties can be in the

²² *Id.* at 155.

²³ *Id.* at 191 (emphasis omitted).

²⁴ *Id.* at 216.

²⁵ *Id.* at 150.

²⁶ *Id.* at 221.

²⁷ *Id.* at 224.

²⁸ *Id.* at xiii.

²⁹ *Id.* at 270.

right, and yet on the other the poverty of the arguments adduced in support of their assertions . . . suggest strongly that there is no such standard.³⁰

That is, he critiques the post-Enlightenment attempt to provide a rational justification of morality independent of a teleological foundation of the classical sort (such as God).³¹ “The project of providing a rational vindication of morality ha[s] decisively failed In a world of secular rationality religion could no longer provide such a shared background and foundation for moral discourse and action.”³² And then philosophy failed at this too.³³ MacIntyre describes the modern predicament starkly:

[T]he price paid for liberation from what appeared to be the external authority of traditional morality was the loss of any authoritative content from the would-be moral utterances of the newly autonomous agent. Each moral agent now spoke unconstrained by the externalities of divine law, natural teleology or hierarchical authority; but why should anyone else now listen to him?³⁴

Charles Taylor’s rich and rewarding *Sources of the Self* is a “history of the modern identity,” i.e., “what it is to be a human agent: the senses of inwardness, freedom, individuality, and being embedded in nature which are at home in the modern West.”³⁵ He concludes that “this [modern] identity is much richer in moral sources than its condemners allow, but that this richness is rendered invisible by the impoverished philosophical language of its most zealous defenders.”³⁶ This is similar to MacIntyre’s “paradox” point.³⁷ Also similarly to MacIntyre, Taylor discusses the necessary frameworks and baselines for moral understanding, while simultaneously developing an account of morality that requires “intrinsic description,” criteria independent of facts, and a “best account” of our actual moral practice.³⁸ Such an account works from located specifics to our best conclusions about what is really the case morally, not just what may be locally or contingently the case. In the end, as does MacIntyre, Taylor bemoans the loss of a theistic anchor.

Taylor argues that “[f]rameworks provide the background, explicit or implicit, for our moral judgments, intuitions, or reactions in any of . . . three dimensions.”³⁹ He defends the “strong thesis that doing without frameworks

³⁰ *Id.* at ix.

³¹ *See id.* at 39.

³² *Id.* at 50.

³³ *See id.*

³⁴ *Id.* at 68.

³⁵ CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY*, at ix (1989).

³⁶ *Id.* at x–xi.

³⁷ *See id.* at 339.

³⁸ *See id.* at 5–8, 58, 71–74.

³⁹ *Id.* at 26.

is utterly impossible for us.”⁴⁰ Our sense of self is linked to moral terms;⁴¹ and it too is ineluctably contextualized/socialized.⁴² But right answers cannot be located just in local practice. Instead, Taylor insists that we take “intrinsic description seriously, that is, descriptions of the objects of our moral responses whose criteria are independent of our de facto reactions.”⁴³ Taylor writes that questions of how we should deal with others and questions about our own dignity (and development of a full life) are linked:⁴⁴ “[T]hey all involve . . . ‘strong evaluation,’ that is, they involve discriminations of right or wrong, better or worse, higher or lower, which are not rendered valid by our own desires, inclinations, or choices, but rather stand independent of these and offer standards by which they can be judged.”⁴⁵ Our best account of our moral practices works from the inside, the inside of our lived experience and reasoned conclusions from that experience. Just as we develop a sense of truth in the sciences, “[t]here is no reason to proceed differently in the domain of human affairs.”⁴⁶ “There cannot be [relevant moral] considerations . . . outside the perspectives in dispute and which would nevertheless be decisive.”⁴⁷ “[W]hat metaconsiderations can overrule our best account of our actual moral experience?”⁴⁸

This is neither relativism nor pluralism, but what one might call grounded realism. It is an attractive position—one I share—but it does not require, politically or constitutionally, the kind of firmness of interpretive moral conclusion that we might otherwise reach according to this best account. There are good reasons to have a more agnostic view about what is right in a complex multi-cultural and multi-religious society, even if one believes that Taylor’s moral realism is correct.⁴⁹

Much of Taylor’s book is an intellectual history of the development of the modern mind and sense of self, the movement away from classical teleological sources and away from related conceptions of authority. Thus, he discusses the move toward locating authority in the self, from Augustine to Descartes to Locke to Montaigne. Locke is crucial here; he “rejected any form of the doctrine of innate ideas”;⁵⁰ his thinking was anti-teleological regarding both knowledge and morality. From Locke and Descartes we get the “essential opposition to authority of modern disengaged reason.”⁵¹ They (and followers) ask us “to think it out ourselves.”⁵² Ordinary life becomes a

⁴⁰ *Id.* at 27.

⁴¹ *See id.* at 3, 32.

⁴² *See id.* at 36–40.

⁴³ *Id.* at 7. This is similar to Ronald Dworkin’s understanding of interpretation. *See generally* RONALD DWORIN, JUSTICE FOR HEDGEHOGS, pt. 2 (2011).

⁴⁴ Dworkin’s work is also similar in this respect. *See* DWORIN, *supra* note 43, at ch. 9.

⁴⁵ TAYLOR, *supra* note 35, at 4.

⁴⁶ *Id.* at 69.

⁴⁷ *Id.* at 73.

⁴⁸ *Id.* at 99.

⁴⁹ *See* MOON, *supra* note 16, at 54, 103; VISCHER, *supra* note 16, at 86.

⁵⁰ TAYLOR, *supra* note 35, at 164.

⁵¹ *Id.* at 167.

⁵² *Id.*

focus.⁵³ As does MacIntyre, Taylor discusses the move away from classical and in particular theistic sources of morality. We have moved from God as the source of morals to “moral sources” as “ontologically diverse.”⁵⁴ And in a normative rather than descriptive mode, Taylor bemoans this. He claims that the best explanation of the significance of human life involves a God.⁵⁵ He writes that as “great as the power of naturalist sources might be, the potential of a certain theistic perspective is incomparably greater.”⁵⁶ And he says that “adopting a stripped-down secular outlook . . . involves stifling the response in us to some of the deepest and most powerful spiritual aspirations that humans have conceived. This . . . is a heavy price to pay.”⁵⁷

So despite their rich descriptive intellectual histories of the development of the modern mind, MacIntyre and Taylor ultimately hold out hope for a return to some kind of theistic or otherwise classical notion of how to do and be good. By contrast, consider Anthony Pagden’s recent celebration of a different notion of who we are and how we can best locate doing and being good. His book *The Enlightenment* is primarily an easily accessible, enjoyable intellectual history of the development of Enlightenment and post-Enlightenment thinking.⁵⁸ But his normative position is very much on display as well. His is an argument for a cosmopolitan, universal human rights understanding of morality, ungrounded by God, and with little room for cultural or any other kind of pluralism. It stands, thus, in illustrative contrast to *After Virtue* and *Sources of the Self*. All three books are impressive canvasses of Western thought and the development from classical to modern approaches, but while MacIntyre and Taylor stress the need to return to or at least accept theism as a ground for morals, Pagden heads in the opposite direction.

Pagden explains that at the core of the Enlightenment was an “exalted view of human rationality and of human benevolence, and with a belief, measured and at times skeptical, in progress and in the general human capacity for self-improvement.”⁵⁹ Enlightenment (and post-Enlightenment) thinkers also stressed individual autonomy and are the “source of most modern liberal, tolerant, undogmatic, and secular understandings of politics and [serve] as the intellectual origins of all modern forms of universalism.”⁶⁰ Pagden leaves little doubt throughout the book that “the Enlightenment was profoundly anti-religious.”⁶¹

Pagden at times nods toward those in the Enlightenment who broadened their horizons from Europe to other lands, and began understanding

⁵³ See *id.* at pt. 2.

⁵⁴ *Id.* at 401.

⁵⁵ See *id.* at 342.

⁵⁶ *Id.* at 518.

⁵⁷ *Id.* at 520.

⁵⁸ See generally ANTHONY PAGDEN, *THE ENLIGHTENMENT: AND WHY IT STILL MATTERS* (2013).

⁵⁹ *Id.* at x.

⁶⁰ *Id.*

⁶¹ *Id.* at xiv.

“difference as well as similitude.”⁶² Some thinkers were what we might call experts in comparative studies; for them, “[t]he purpose of the ‘human sciences’ was to know mankind as a species, and the best way to do that was through a detailed examination of their ‘manners,’ ‘customs,’ ‘*moeurs*.’”⁶³ For example, Pagden discusses some of the Enlightenment’s interest in Tahiti and China.⁶⁴

But Pagden’s interest in cultural difference—his and the Enlightenment thinkers he describes—is ultimately not about defending normative pluralism. Rather, the single most important Enlightenment claim was for a “single global community—a ‘cosmopolis.’”⁶⁵ This is perhaps Pagden’s main theme, the one he seems most interested in developing in the book. Enlightenment thinkers wanted to recover a vision “of a unified and essentially benign humanity, of a potentially cosmopolitan world,”⁶⁶ without theism. We share a common identity with each other (just as humans); if we appreciate our love for relatives and others close to us because we identify with them, then we should take the next steps to ever broader circles of affinity, with all persons.⁶⁷ The concept of mutual recognition is key here.⁶⁸ Montesquieu and Diderot rephrased an old idea: “an image of concentric circles, which moved steadily outward from the individual and the family to the homeland or the *patria*, until finally they reached the whole of humanity.”⁶⁹ This “was an image repeated . . . by virtually all of the thinkers of the Enlightenment.”⁷⁰ We can understand “humankind [as having] an identity independent of God, a reason for recognizing all peoples as of equal worth, and of embracing some kind of common good, without endowing them with immortal souls or thinking of them as pale, if identical, images of the divine.”⁷¹

Pagden develops this concept of cosmopolitan recognition in various ways. One is how thinkers transformed observations about what we might call ‘third-world’ places into understanding our ultimate human similarities and ways of binding us together. Thus, describing Diderot on Tahiti: “It is the image of a people at the very beginning of the process that will carry them inexorably toward civilization.”⁷² And he describes Wolff and Vattel searching for “a scientifically grounded set of premises for a universal law on which all reasonable, rational human beings could agree, no matter what their religious beliefs or national allegiances might be.”⁷³ Another angle on cosmopolitan recognition as a theme is Pagden’s discussion of the develop-

⁶² *Id.* at 22.

⁶³ *Id.* at 178.

⁶⁴ *See id.* at ch. 5, 6, 8.

⁶⁵ *Id.* at 44.

⁶⁶ *Id.* at 66.

⁶⁷ *See id.* at 74.

⁶⁸ *See id.*

⁶⁹ *Id.* at 293–94.

⁷⁰ *Id.* at 294.

⁷¹ *Id.* at 94.

⁷² *Id.* at 242.

⁷³ *Id.* at 340.

ing understanding of commerce as something to bind together different peoples.⁷⁴ The apotheosis of this focus on mutual recognition among all humans and the development of a cosmopolitan approach was Kant's *Toward Perpetual Peace, a Philosophical Project*, which Pagden discusses in detail.⁷⁵ In short, for Kant, nations of the world (which should be republics) should bind together into a kind of league, fulfilling humanity's correlative cosmopolitan right/obligation.⁷⁶ Kant's notion of "cosmopolitan right," says Pagden, was "the inescapable conclusion of the Enlightenment project."⁷⁷

In the end, Pagden applauds the anti-theistic bent of Enlightenment thinking, celebrating the turn toward individual autonomy and reason, which can bind us together regardless of religion, culture, race, etc.⁷⁸ As for the anti-theism, philosophers and scientists of the 17th century "marginaliz[ed] theology," and thereby "undermined the idea that there could exist one single source of knowledge or one single source of authority."⁷⁹ Pagden summarizes the classical to modern move: The polis is no longer the "fulfillment of an a priori plan on the part of nature (or the divinity)."⁸⁰ Now it is "nothing more than a rational calculation intended to ensure the continuation of the species."⁸¹ Summarizing many thinkers, Pagden explains that "[t]he claims of Hume and Diderot, of D'Alembert and Voltaire, of Helvetius, Holbach, and Condorcet . . . had effectively discredited the idea that any kind of religious understanding might prove a true source of knowledge."⁸²

Pagden's focus on the anti-theism of the Enlightenment is a tamer and more descriptive version of claims made in a more vigorously normative fashion by such contemporary thinkers as Richard Dawkins, Daniel Dennett, Sam Harris, and Brian Leiter.⁸³ All of these authors are concerned about religious claims made without the kind of evidence we insist on when doing science.⁸⁴ Thus, Leiter writes:

If what distinguishes religious beliefs from other important and meaningful beliefs held by individuals is that religious beliefs are both insulated from evidence and issue in categorical demands for action, then isn't there reason to worry that religious beliefs, as

⁷⁴ See *id.* at 255–62.

⁷⁵ See *id.* at 347–64.

⁷⁶ See *id.*

⁷⁷ *Id.* at 370.

⁷⁸ See *id.* at 406–08, 415.

⁷⁹ *Id.* at 32. Should we not, though, be concerned about reliance on a "single source of authority" when celebrating the possibility of human reason discovering true answers to moral questions, answers that may then apparently be followed across the globe?

⁸⁰ *Id.* at 62.

⁸¹ *Id.*

⁸² *Id.* at 148.

⁸³ See generally RICHARD DAWKINS, *THE GOD DELUSION* (2006); DANIEL C. DENNETT, *BREAKING THE SPELL: RELIGION AS A NATURAL PHENOMENON* (2006); SAM HARRIS, *THE END OF FAITH: RELIGION, TERROR, AND THE FUTURE OF REASON* (2004); BRIAN LEITER, *WHY TOLERATE RELIGION?* (2013).

⁸⁴ See also CHRISTOPHER HITCHENS, *GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING* 5 (2009).

against other matters of conscience, are *far more likely* to cause harms and infringe on liberty?⁸⁵

Harris says we should make “the same evidentiary demands in religious matters that we make in all others.”⁸⁶ Dawkins argues that we should not be forever agnostic about God’s existence, because we can evaluate that case with evidence;⁸⁷ he also rejects the argument for not applying standard rules of evidence to the question of God’s existence.⁸⁸ (The upshot for Dawkins: “There Almost Certainly Is No God.”)⁸⁹ Dennett also critiques some religious beliefs for failing to comply with scientific standards of inquiry.⁹⁰ But as Alvin Plantinga maintains, one can be a good person of science, including acceptance of evolutionary theory, and still believe in a divine force behind all of it, in a generative and/or normative sense.⁹¹ Says Thomas Nagel, “If the God hypothesis makes sense at all, it offers a different kind of explanation from those of physical science”⁹² One can, that is, see evidence-based scientific inquiry and theistic belief or faith as existing on different planes.⁹³ A comprehensive pluralism would make space for a faith-based way of knowing, so long as action in that space does not significantly harm others.⁹⁴

II. RONALD DWORKIN’S *RELIGION WITHOUT GOD*

Whether morality and the good as substance—how to be and what to be, one might say—are properly grounded in a perhaps difficult but knowable set of truths—from God or right reason or otherwise—is not something I can answer here or on which I need take a position. I have tried to show that many modern thinkers share an important quality even as they divide: the quality of wanting some kind of sure grounding for how we should live both toward others and ourselves. Whether this grounding is in God or in an ef-

⁸⁵ LEITER, *supra* note 83, at 59.

⁸⁶ HARRIS, *supra* note 83, at 35.

⁸⁷ See DAWKINS, *supra* note 83, at 70, 91.

⁸⁸ See *id.* at ch. 4.

⁸⁹ *Id.* at 137.

⁹⁰ See DENNETT, *supra* note 83, at 267–68.

⁹¹ See ALVIN PLANTINGA, WHERE THE CONFLICT REALLY LIES: SCIENCE, RELIGION, & NATURALISM 38, 63 (2011). See also DANIEL C. DENNETT & ALVIN PLANTINGA, SCIENCE AND RELIGION: ARE THEY COMPATIBLE? 2–4, 9, 65–66 (2011).

⁹² THOMAS NAGEL, SECULAR PHILOSOPHY AND THE RELIGIOUS TEMPERAMENT: ESSAYS 2002–2008 at 22 (2010).

⁹³ See Abner S. Greene, *Religion and Theistic Faith: On Koppelman, Leiter, Secular Purpose, and Accommodations*, 49 TULSA L. REV. 441, 441, 445–48, 455–56 (2013) (reviewing LEITER, *supra* note 83, and ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY (2013)); Michael W. McConnell, *Why Protect Religious Freedom?*, 123 YALE L.J. 770, 788 (2013) (reviewing LEITER, *supra* note 83); Michael Stokes Paulsen, *Is Religious Freedom Irrational?*, 112 MICH. L. REV. 1043, 1063 n.44 (2014) (reviewing LEITER, *supra* note 83).

⁹⁴ Some religious belief may be based in evidence; here I am just saying it need not be and for many it is not. See McConnell, *supra* note 93, at 786–87; Paulsen, *supra* note 93, at 1060, 1061 n.39.

fort to use human reason without theism, the ideas are teleological, i.e., understanding human beings as having knowable ends that do not differ in their essentials. My approach, in this piece and elsewhere, has been to show that neither works politically or constitutionally; rather, agnosticism regarding value follows from a rejection of political obligation (and legitimacy) and from a more affirmative case for value pluralism.

Thus, I support accommodations/exemptions, even more broadly than religion,⁹⁵ but let's focus on religious ones. RFRA is sensible, if applied sensibly. Before turning to my thoughts on RFRA as refracted through *Hobby Lobby*, first a pause to discuss Ronald Dworkin on exemptions. Dworkin is the latest in a series of scholars to reject the case for religious accommodation.⁹⁶ In his final work, *Religion Without God*,⁹⁷ Dworkin advances a characteristically provocative and complex thesis. I will first describe his basic argument, then offer a few thoughts on his definition of religion ("without God"), and then turn to his case against religious accommodation. His arguments are no more persuasive than those offered by scholars who preceded him along this path.

Dworkin contends that religion is "deeper than God."⁹⁸ It is a "deep, distinct, and comprehensive worldview: it holds that inherent, objective value permeates everything."⁹⁹ Theism is just one possible manifestation or consequence of this worldview.¹⁰⁰ Key to Dworkin's argument is a Humeian commitment to a fact-value distinction. Moreover, Dworkin is an ungrounded realist; values and moral truths are real, and not grounded in anything further.¹⁰¹ We know them through experience, reason, and intuition, not through some external authority. There is, thus, an element of faith behind science, math, and religion (understood broadly); "we accept felt, inescapable conviction rather than the benediction of some independent means of verification."¹⁰² According to Dworkin, the core problem with understanding religion as theistic, as God-based (or, as I have put it elsewhere, as involving reliance on an "extrahuman source of normative authority"¹⁰³), is that it mixes up cause and effect, i.e., it improperly assumes there can be a God who (or that) grounds value, rather than the other way around. "The

⁹⁵ For a broad-reaching argument for accommodation of cultural diversity, see TULLY, *supra* note 16, at 30.

⁹⁶ See generally BRIAN BARRY, *CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM* (2001); LEITER, *supra* note 83; Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991) (arguing against compelled exemptions).

⁹⁷ DWORKIN, *supra* note 17.

⁹⁸ *Id.* at 1.

⁹⁹ *Id.*

¹⁰⁰ Dworkin's arguments about a comprehensive unity of value are a short version of the case he makes at length in his magisterial *Justice for Hedgehogs*. See DWORKIN, *supra* note 43.

¹⁰¹ See DWORKIN, *supra* note 17, at 15.

¹⁰² *Id.* at 19.

¹⁰³ See GREENE, *supra* note 12, at 150.

conviction that a god underwrites value . . . presupposes a prior commitment to the independent reality of that value,”¹⁰⁴ claims Dworkin, adding that the “value part does not depend—cannot depend—on any god’s existence or history.”¹⁰⁵ In other words:

Theists assume that their value realism is grounded realism. God, they think, has provided and certifies their perception of value: of the responsibilities of life and the wonders of the universe. In fact, however, their realism must finally be ungrounded. It is the radical independence of value from history, including divine history, that makes their faith defensible.¹⁰⁶

I have three responses. First, Dworkin’s approach is not a very good interpretation of religion in our constitutional culture. Religion in America is primarily about theism, about faith in God and what follows from that, about reliance on an extrahuman source of normative authority in various ways, some problematic (if used as the express, predominant source of binding law), some in need of assistance (if harmed by state discrimination or even by neutral laws of general applicability).

Second, it’s not clear why Dworkin needs to assimilate the concepts of value and religion. His theory of value is complex and capacious; it’s never clear why he feels the need to describe the fact (if it is one) that “inherent, objective value permeates everything”¹⁰⁷ as a religious attitude.

Third, I would suspect that many religious folk (I myself am agnostic) take it on faith (and perhaps reason from evidence) that God comes first, value second. Whether and how such value is knowable could still be a complex question, and one could still be a values and morals realist without being an ungrounded one. That is, one could believe that value and moral norms are just the case; that it is up to us with our admittedly limited powers to figure out right answers; that most of this comes from experience, reason, and intuition; but that there is an extrahuman source of normative (and probably creative) authority behind all of it. There’s nothing inherently contradictory about this. One may believe in the relationship between fact and value in this way (the fact of God’s existence grounding value), but reject a different assertion of a fact-value relationship, i.e., a more classical teleological understanding that culture- and community-specific practices determine value and morality. That notion—that because things have been a certain way, that way is good and valuable—has nothing to do with the belief that God came first, value second.

With an expansive definition of religion in hand, Dworkin rejects any special protection for religious freedom. Rather, political liberty should recognize a right to what Dworkin calls “ethical independence,”¹⁰⁸ i.e., “gov-

¹⁰⁴ DWORKIN, *supra* note 17, at 1–2.

¹⁰⁵ *Id.* at 9.

¹⁰⁶ *Id.* at 22.

¹⁰⁷ *Id.* at 1.

¹⁰⁸ *Id.* at 131.

ernment must never restrict freedom just because it assumes that one way for people to live their lives . . . is intrinsically better than another”¹⁰⁹ Dworkin explains the difference between protecting religious freedom specially and his ethical independence approach, which focuses on policing a government’s reasons for regulation:¹¹⁰

We should consider . . . abandoning the idea of a special right to religious freedom with its high hurdle of protection and therefore its compelling need for strict limits and careful definition. We should consider instead applying, to the traditional subject matter of that supposed right, only the more general right of ethical independence. The difference between these two approaches is important. A special right fixes attention on the subject matter in question: a special right of religion declares that government may not constrain religious exercise in any way, absent an extraordinary emergency. The general right to ethical independence, on the contrary, fixes on the relation between government and citizens: it limits the reasons government may offer for any constraint on a citizen’s freedom at all.¹¹¹

My response is twofold. (a) As with Dworkin’s unusual definition of religion that insists on assimilating it to his broader concept of value, here too Dworkin unusually seeks to assimilate protection for religious freedom to something else, i.e., limits on the state’s ability to treat us as children. (b) There are two more specific claims that Dworkin makes in critiquing a more standard approach to religious accommodations that are mistaken.

(a) I agree that the state should not regulate in ways that deprive us of our ethical independence, i.e., that belittle our efforts at shaping the good life and that insist on the superiority of certain ways of living.¹¹² But we can, and have, built some bulwarks against this bad kind of state intrusion into dignity. I am thinking of our (sometimes maligned) substantive due process jurisprudence¹¹³ and our (also sometimes maligned) rule against laws based

¹⁰⁹ *Id.* at 130.

¹¹⁰ *See id.* at 131.

¹¹¹ *Id.* at 132–33.

¹¹² By contrast, I support a thick perfectionism when it comes to state speech as opposed to state regulation. The state often does, appropriately, use purse strings and other non-coercive methods to advance often contested views of the good. *See generally* Abner S. Greene, *Government Endorsement: A Reply to Nelson Tebbe’s Government Nonendorsement*, 98 MINN. L. REV. HEADNOTES 87 (2013); Abner S. Greene, *State Speech and Political Liberalism*, 28 CONST. COMMENT. 421 (2013) (reviewing COREY BRETTSCHEIDER, *WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY? HOW DEMOCRACIES CAN PROTECT EXPRESSION AND PROMOTE EQUALITY* (2012), and JAMES E. FLEMING AND LINDA C. McCLAIN, *ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES* (2013)); Abner S. Greene, *Government Speech on Unsettled Issues*, 69 FORDHAM L. REV. 1667 (2001); Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1 (2000).

¹¹³ *See* *Lawrence v. Texas*, 539 U.S. 558 (2003); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

on express, predominant religious purpose.¹¹⁴ These lines of case law examine the reasons for state action and reject those that either treat a person's body as the state's or would ground general regulation in express, contested, sectarian religious views. We don't need to displace what might otherwise be a valid protection for religious freedom to gain protection against violation of ethical independence.

(b) Dworkin doesn't believe there is an otherwise valid protection for religious freedom. But his critical commentary on religious accommodations is flawed.¹¹⁵ First, Dworkin says that to administer a scheme of religious accommodations, we would "seem to have no firm way of excluding even the wildest ethical eccentricity from the category of protected faith."¹¹⁶ This problem is made worse by Dworkin's expansive definition of religion, but is arguably present even with a more standard definition. However, it's really not such a problem. Although courts don't question the content of religious beliefs, there is room to assure sincerity. We could let judges use normal standards of evidence to see if people have the kind of deeply held beliefs in life's objective, intrinsic meaning and nature's objective, intrinsic value,¹¹⁷ just as we let judges use normal standards of evidence to test the sincerity of a claim of theistic religious belief.

Second, Dworkin claims that in a scheme of religious accommodation, "an exemption for one faith from a constraint imposed on people of other faiths discriminates against those other faiths on religious grounds."¹¹⁸ This isn't right.¹¹⁹ Careful case by case assessment of the substantiality of the burden on religious exercise and the ability to craft carve-outs without significant harm to others (i.e., does the state really need uniform enforcement of this law, in this case?) will indeed lead to some accommodation claimants winning and others losing. But this is no different from litigation under any complex legal test, and if properly explained in comparison to winners, losers should not see their losses as discrimination.¹²⁰

¹¹⁴ See *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 881 (2005); *Edwards v. Aguillard*, 482 U.S. 578, 596–97 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 61 (1985); *Epperson v. Arkansas*, 393 U.S. 97, 113 (1968).

¹¹⁵ Although most of Dworkin's discussion clearly resists any special right to religious accommodation, he does also say this: "If an exception can be managed with no significant damage to the policy in play, then it might be unreasonable not to grant that exception." DWORKIN, *supra* note 17, at 136.

¹¹⁶ *Id.* at 124.

¹¹⁷ See *id.* at 11.

¹¹⁸ *Id.* at 125.

¹¹⁹ See, e.g., *Goldman v. Weinberger*, 475 U.S. 503, 519–22 (1986) (Brennan, J., dissenting) (contending that case by case judicial inquiry can properly distinguish practices deserving exemption from those not so deserving).

¹²⁰ Why Dworkin would think this kind of scheme would lead to discrimination against the losers "on religious grounds," DWORKIN, *supra* note 17, at 125, is a mystery, unless the court or legislature crafting the accommodation was in fact making the judgment according to the prevailing religion's view of truth, and then that would be wrong.

III. THE VALUE OF RFRA, AND THE MISTAKE OF *HOBBY LOBBY*

A little background before getting into my critique of *Hobby Lobby*: From 1963 to 1990, the Court said it was applying strict scrutiny to state action that incidentally imposed substantial burdens on religious exercise. As many have pointed out, this strict scrutiny was different from strict scrutiny in Equal Protection Clause race cases, where strict really means strict. In the Free Exercise Clause setting, the government pretty much always prevailed, making the scrutiny not really strict.¹²¹ With the peyote decision, *Smith*,¹²² the Court finally stated it would not apply strict scrutiny to neutral laws of general applicability that substantially burden religious exercise.¹²³

The Court has not overruled *Smith*, but in response to that decision, Congress enacted RFRA, which purports to “restore the compelling interest test as set forth in *Sherbert . . . and Yoder*.”¹²⁴ Under RFRA, government “shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability,”¹²⁵ unless it can show that applying the law to the person is the least restrictive means to further a compelling government interest.¹²⁶ Because of federalism reasons, however, in *City of Boerne*¹²⁷ the Court invalidated RFRA as it applies to state and local governments.

But RFRA stands as applied to the federal government, and in *O Centro Espirita*, a unanimous Court easily concluded that a small religious group deserved a RFRA exemption from federal drug laws for an otherwise proscribable hallucinogenic tea.¹²⁸ Chief Justice Roberts’ opinion made clear that once a RFRA claimant shows a substantial burden on religious exercise, for the federal government to prevail on rebuttal, it must show strong reasons for applying the law to the claimant. That the government grants similar accommodations elsewhere, and that the risk of diversion of the controlled substance is low, undercut the government’s rebuttal. Justice Blackmun had made virtually identical points in his *Smith* opinion, which supported a con-

¹²¹ For the exceptions, when the state lost, see *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136 (1987); *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

¹²² *Emp’t Div. v. Smith*, 494 U.S. 872 (1990).

¹²³ Justice Scalia’s opinion for the Court was somewhat inaccurate in describing the prior case law, in particular, in failing to see *Wisconsin v. Yoder*, 406 U.S. 205 (1972), as a strong holding for a constitutionally compelled Free Exercise Clause exemption from an otherwise valid law. Describing *Yoder* as a case about hybrid rights, see 494 U.S. at 881, misses the clear Free Exercise Clause basis for the holding.

¹²⁴ 42 U.S.C. § 2000bb(b)(1) (2009). See also 42 U.S.C. § 2000bb(a)(5) (2009) (“[T]he compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests”).

¹²⁵ 42 U.S.C. § 2000bb–1(a) (2009).

¹²⁶ See 42 U.S.C. § 2000bb–1(b) (2009).

¹²⁷ *City of Boerne v. Flores*, 521 U.S. 507 (1997). For a discussion of the separation of powers aspects of the holding, see GREENE, *supra* note 12, at 236–39.

¹²⁸ *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 419 (2006).

stitutionally compelled exemption to Oregon's controlled substances laws for the Native American Church's ritual religious use of the hallucinogenic drug peyote.¹²⁹ But that opinion was a dissent. Not only could the Court not muster a majority for this approach in *Smith*, it is hard to imagine it mustering a majority for this approach pre-*Smith*. The pre-*Smith* case law was much more government-favorable. At least from the easy, unanimous *O Centro Espirita* opinion, it seems that RFRA did not just restore the kind of weak strict scrutiny that prevailed pre-*Smith*. It ushered in a regime that is more protective of religious freedom, appropriately supporting pluralism, balancing of interests, and hesitation about the government's claims on universal, uniform obedience to law.

How much more protective is a key question in *Hobby Lobby*.¹³⁰ The Court addressed whether privately held corporations should receive an exemption, under RFRA, from a Department of Health and Human Services (HHS) regulation implementing the Patient Protection and Affordable Care Act.¹³¹ (I will refer to the combination of the statute and regulation as "Obamacare.") Under the law and regulation, most corporations must provide group health insurance for their employees, coverage which includes contraception.¹³² Some religious employers, such as Hobby Lobby, claim that some forms of Obamacare-covered contraception may produce abortions. These employers say providing health-care coverage in this way violates their religious beliefs and substantially burdens their exercise of religion.¹³³ Under *Smith*, Hobby Lobby would lose a Free Exercise Clause challenge, because the Obamacare law and regulations are neutral rules of general applicability, i.e., they do not target religion, although they may affect religious practice. *Smith* requires only a rational basis test in such settings, and here the federal government has a rational basis for insisting that Hobby Lobby, along with other corporations, cover the cost of the birth control in question. But under RFRA, Hobby Lobby stated a plausible claim of a substantial burden on its religious exercise (although as I shall discuss in detail, this claim should have failed), and the statute then puts the federal government to the compelling interest/least restrictive means test.

I will not address three key aspects of Justice Alito's majority opinion. The first is whether a corporation such as Hobby Lobby is a "person" under

¹²⁹ See *Emp't Div. v. Smith*, 494 U.S. 872, 907–21 (1990) (Blackmun, J., dissenting).

¹³⁰ See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). I am skirting here, and elsewhere in this article, the complex statutory interpretive question regarding precisely if and how RFRA grants protection for religious exercise greater than under the Free Exercise Clause as interpreted prior to *Smith*. The core of my discussion is about the substantial burden test, rather than about what constitutes a compelling government interest or least restrictive means, and there's no reason to think what constitutes a substantial burden on religious exercise varies between the RFRA setting and the Free Exercise Clause setting (before or after *Smith*).

¹³¹ *Id.* at 2759.

¹³² For relevant statutory and regulatory background, see generally *id.* at 2760–64; *id.* at 2788–90, 2791–93 (Ginsburg, J., dissenting).

¹³³ See *id.* at 2755.

RFRA.¹³⁴ The second is the relevance of RFRA's incorporation of the Religious Land Use and Institutionalized Persons Act's definition of religious exercise, to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."¹³⁵ The third is the linchpin of the holding—that the federal government can ensure that Hobby Lobby's female employees get Obamacare-covered birth control free of charge, without Hobby Lobby having to pay for it. The way the government can do this, insists Alito,¹³⁶ is to treat the for-profit Hobby Lobby as if it were a religious nonprofit (such as a religious hospital or school), permitted under the statute to certify its objection to paying for the birth control in question to the insurance carrier or third-party administrator.¹³⁷ The carrier or administrator then provides the birth control, cost-free not only to the employees but also to the religiously objecting employer. This is a more judicially creative use of the least-restrictive means test in the religious freedom setting than we've seen before. I leave it to others to assess its validity.

I am interested here in Justice Alito's discussion, in Part IV of his opinion, of this question: Does the requirement that Hobby Lobby pay for group health insurance that includes some birth control methods it deems religiously objectionable constitute a substantial burden on the corporation's religious exercise? Hobby Lobby's owners argued that some of the Obamacare-covered birth control might terminate human life after conception, and as such is religiously objectionable to them.¹³⁸ But RFRA does not grant a *prima facie* exemption (subject to government rebuttal) for sincerely held religious beliefs. It grants such an exemption if the law substantially burdens a claimant's religious exercise. One would think that this statutory issue, as any statutory issue, is a subject for judicial interpretation, and that courts would develop, case by case, a statutory interpretive understanding of what constitutes a substantial burden on religious exercise.¹³⁹ Thus, one

¹³⁴ See *id.* at 2767–75; *id.* at 2793–97 (Ginsburg, J., dissenting).

¹³⁵ See 42 U.S.C. § 2000cc-5(7)(A). See also 42 U.S.C. § 2000bb-2(4). To make an obvious but perhaps needed point, this is a definition of religious exercise, and not of other portions of RFRA (such as substantial burden, compelling interest, and least restrictive means).

¹³⁶ See *Hobby Lobby*, 134 S. Ct. at 2781–83.

¹³⁷ Or maybe just certify its objection to HHS itself. See *Wheaton College v. Burwell*, 134 S. Ct. 2806, 2807 (2014) (order granting temporary injunction) (holding that: religious college may certify objection to providing coverage for contraceptive services to HHS; circuits have divided on the issue whether requiring religious nonprofits to certify their objections to the insurance carriers or third-party administrators violates RFRA; and the order "should not be construed as an expression of the Court's views on the merits," *id.* at 2807).

¹³⁸ None of the opinions challenges the sincerity of that belief, although case law does permit sincerity of religious belief to be judicially scrutinized. See *Frazer v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829, 833 (1989).

¹³⁹ Unless there is a special problem of religious liberty with this kind of judicial investigation. Just as we properly understand the religion clauses to bar judicial inquiry into the truth of religious belief, so perhaps we should understand the religion clauses to bar judicial inquiry into the substantiality of a law's burden on religious exercise. Justice Stevens said something similar in a few opinions. See, e.g., *Goldman v. Weinberger*, 475 U.S. 503, 512–13 (1986) (Stevens, J., concurring); *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring in the judgment). And near the end of her *Hobby Lobby* dissent, Justice Ginsburg

would have expected Alito to engage in some analysis of the substantiality of the burden on Hobby Lobby's religious exercise, taking into account Hobby Lobby's views on the subject, but in no way deferring to such views.

But, alas, in Part IV.C, the majority opinion simply defers to Hobby Lobby's views, and thus fails to examine whether the law places a substantial burden on Hobby Lobby's religious exercise. I will get to this critical problem with the majority opinion in a bit. Before doing so, I will discuss a few earlier problems with Justice Alito's analysis in Part IV. In Part IV.A, Alito points out that the corporation's owners "have a sincere religious belief that life begins at conception,"¹⁴⁰ and thus that the requirement that they pay for health insurance coverage of the birth control in question "demands that they engage in conduct that seriously violates their religious beliefs."¹⁴¹ The statute, however, refers to substantial burden on religious exercise, not belief. This is not a big deal in the end. Hobby Lobby is obviously arguing that having to pay for what it believes to be religiously forbidden is a burden on its religious exercise. And Alito does at times refer properly to the burden as being on religious exercise.¹⁴² But elsewhere his focus again is on whether there is a burden on beliefs.¹⁴³

Moving on to a more significant problem with the opinion, Justice Alito points out that if Hobby Lobby fails to pay for its employees' group health insurance, it would have to pay a "substantial" amount of money as a tax.¹⁴⁴ And at the end of Part IV.C, when concluding that the regulatory provision in question places a substantial burden on Hobby Lobby's religious beliefs, Alito refers to the "enormous sum of money" Hobby Lobby would have to pay if it didn't cover the birth control in question.¹⁴⁵ The price for disobeying the law, though, can't be what constitutes a substantial burden on religious exercise, unless the claimant religiously objects to paying taxes (which the Alito opinion, in dicta, says would not give claimant a RFRA exemption¹⁴⁶). The statutory question is whether state action has substantially burdened religious exercise; Hobby Lobby believes that paying for abortions is sinful, and thus that complying fully with the Obamacare health care coverage requirement substantially burdens its exercise of religion. The penalty (or tax) for disobeying the law isn't itself a substantial burden on religious exer-

sounds an alarm about this matter, as well. *See* 134 S. Ct. at 2805–06 (Ginsburg, J., dissenting). If the religion clauses properly interpreted bar such inquiry, then we'd be stuck with a tough question regarding RFRA—should we ask courts to ignore the threshold question of substantial burden, and defer to a claimant's view on the subject, or should the whole statute be struck down as unconstitutional, on the ground that it asks courts to do something improper? Although as I suggest below the Court deferred to Hobby Lobby on this issue, there's no indication that the Court thought the Constitution required it to do so.

¹⁴⁰ *Hobby Lobby*, 134 S. Ct. at 2775.

¹⁴¹ *Id.*

¹⁴² *See, e.g., id.* at 2775.

¹⁴³ *See id.* at 2779.

¹⁴⁴ *See id.* at 2776.

¹⁴⁵ *Id.* at 2779.

¹⁴⁶ *See id.* at 2783–84.

cise—isn't claimed to be, and isn't. The *in terrorem* effect of such a penalty or tax gives teeth to the operative legal burden to buy health insurance that includes birth control coverage, but it cannot be the case that the amount of the penalty or tax determines what constitutes a substantial burden on religious exercise. Otherwise, we might say that a statute imposing a nominal penalty or tax (say, a dollar) doesn't constitute a substantial burden on religious exercise, even though the operative legal burden does so. The proper RFRA question is whether the legal demand to do X or to fail to do Y substantially burdens the religious exercise in question, not whether the threat of what will happen otherwise does so.

This was no different in the Free Exercise Clause unemployment compensation cases, which arose in a different setting from *Hobby Lobby*. Those cases involved laws that said 'if you fail to accept work you are qualified to do, you have to have a good reason, or else you can't get unemployment compensation.' The key holding in each case was that the state must consider good faith religious refusal to accept certain work a good reason, at least when it is administering a fact- and case-specific regime of determining good cause for work refusal.¹⁴⁷ There's no operative legal provision in those cases telling the claimants to do or not to do something. State law didn't require Sherbert to work on her Sabbath.¹⁴⁸ It didn't substantially burden her religious exercise in that way. Sherbert's private employer required her to work on her Sabbath,¹⁴⁹ and that employer wasn't subject to the Free Exercise Clause of the First Amendment, which applies to state action only. If there was a substantial burden from state action, it was because Sherbert was faced with a serious threat if she failed to work on her Sabbath—no money if the state denied her claim for unemployment compensation—and thus the state's administration of the unemployment compensation fund was properly subject to Free Exercise Clause scrutiny. In the *Hobby Lobby*-type case—as with most (all?) cases involving laws that are truly of general applicability—there is a regulatory regime requiring X or forbidding Y. Regardless of the substantiality of the penalty for failing to comply with such a regulatory regime, claimants may make out a prima facie RFRA claim (and could have made out a prima facie Free Exercise Claim pre-*Smith*) by showing the substantiality of the 'do X' or 'don't do Y' burden on their religious exercise, even if the 'or else' threat is a pittance. But if the 'do X' or 'don't do Y' burden is legally insubstantial, it cannot become legally substantial just because the penalty for disobeying is high.

¹⁴⁷ See *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 138–40 (1987); *Thomas v. Review Bd.*, 450 U.S. 707, 709–12, 719–20 (1981); *Sherbert v. Verner*, 374 U.S. 398, 399–401, 403–06, 409 (1963).

¹⁴⁸ See *id.* at 403.

¹⁴⁹ See *id.* at 399.

Thus, we should distinguish language in the unemployment compensation cases about what sort of state action creates a significant or substantial burden on religious exercise. In *Sherbert* the Court wrote:

The ruling [denying Sherbert unemployment compensation] forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.¹⁵⁰

In *Thomas* the Court wrote:

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.¹⁵¹

So state action that places indirect pressure on religious exercise may constitute a substantial burden, and one of my points (developed below) is that the indirectness of the burden on Hobby Lobby should matter in determining whether the burden is substantial. One might thus argue that the Court has already decided (in the *Sherbert* line of cases) that indirect burdens on religious exercise may be substantial.

But remember my point from a few paragraphs ago. In the *Sherbert* line of cases, other than the state's role in granting or denying unemployment compensation, there was no state action at all. In those cases, it's as if the state is saying to Sherbert, 'work on your Sabbath, or else don't get paid,' and it's as if the state is saying to Thomas, 'produce armaments in violation of your religious precepts, or else don't get paid.' The 'or else' in the *Sherbert* line of cases is essential to the presence of state action, because otherwise there is no initial 'do X' or 'don't do Y' from the state. The indirectness in *Hobby Lobby* is of a different sort—the government's compulsion is direct, it tells Hobby Lobby to do something; it's the further choice by some employees that leads Hobby Lobby to claim the government has forced it to enable a religiously wrongful act. One can debate whether this kind of attenuation renders the burden on Hobby Lobby's religious exercise insubstantial; I discuss that issue below. But the fact that the burden is indirect, in the sense described here, is not the same as the way the burden in the *Sherbert* line of cases was indirect. We should distinguish state action that burdens religious exercise by compelling or forbidding conduct—where we can assess

¹⁵⁰ *Id.* at 404.

¹⁵¹ *Thomas v. Review Bd.*, 450 U.S. 707, 717–18 (1981).

whether such imperatives impose substantial burdens, without attention to the nature of the ‘or else’—from state action where the only way to assess substantiality is to consider the magnitude of the threat or offer from the state (as in the unemployment compensation cases), because otherwise there is no state action.

After dispensing in Part IV.B with an alternate theory advanced by amici supporting HHS’ position, Justice Alito turns in Part IV.C to what he deems HHS’ and the dissent’s “main argument” for why the Obamacare birth control coverage requirement “does not impose a substantial burden on the exercise of religion,” namely, that “the connection between what the objecting parties must do [provide the relevant health insurance coverage] and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated.”¹⁵² It’s the employee, not the employer, who chooses how to use her health insurance and thus who in some instances chooses to use covered birth control (the ends of which are objectionable to the employer), or so HHS and the dissent maintain, says Alito.¹⁵³ What follows is inscrutable. Alito writes:

This argument dodges the question that RFRA presents (whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*) and instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable).¹⁵⁴

Putting aside again as harmless error Alito’s insistence on referring to religious beliefs instead of exercise, HHS’ and the dissent’s “attenuation” argument is not a challenge to the reasonableness (or truth, one might add) of Hobby Lobby’s religious beliefs. It is a legal argument about what constitutes a substantial burden on religious exercise under RFRA.

Justice Alito then explains that Hobby Lobby believes paying for the birth control in question would be immoral (on religious grounds), insofar as doing so would enable or facilitate another’s wrongful act.¹⁵⁵ Alito adds that whether and when such enabling or facilitating is wrongful is a difficult religious and moral question.¹⁵⁶ “HHS and the principal dissent,” claims Alito, “in effect tell the plaintiffs that their beliefs are flawed.”¹⁵⁷ This is wrong. HHS’ and the dissent’s argument isn’t about whether Hobby Lobby is correct on moral, philosophical, or religious grounds. It is a legal argument about what constitutes a substantial burden on religious exercise under RFRA. Unless there is a statutory or constitutional reason to defer to Hobby

¹⁵² *Hobby Lobby*, 134 S. Ct. at 2777.

¹⁵³ *See id.*

¹⁵⁴ *Id.* at 2778.

¹⁵⁵ *See id.*

¹⁵⁶ *See id.*

¹⁵⁷ *Id.*

Lobby's views on this question,¹⁵⁸ Alito should at this point, but does not, join legal issue with HHS and the dissent and get into the thicket of what types of burdens on religious exercise are properly deemed "substantial" under RFRA.

Justice Alito next discusses *Thomas*, for the unobjectionable point that it was not for courts to question the reasonableness of Thomas' belief that it was religiously wrong for him to make weapons but not to make the steel for such weapons. He uses this point from *Thomas* to continue in this way: Hobby Lobby "sincerely believe[s] that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial."¹⁵⁹ Of course not. But the RFRA question isn't whether Hobby Lobby's beliefs are mistaken or insubstantial; rather, the statutory question is whether the law places a substantial burden on Hobby Lobby's religious exercise, and Hobby Lobby's views on that issue must be considered, but cannot be dispositive, unless we have turned resolution of litigation over to one side of the dispute. Quoting from *Thomas*, Alito adds, "our 'narrow function . . . in this context is to determine' whether the line drawn reflects 'an honest conviction,' and there is no dispute that it does."¹⁶⁰ Indeed, there is no dispute on that issue, but that's not the issue.

Finally, Justice Alito states a legal conclusion: "Because the contraceptive mandate forces [plaintiffs] to pay an enormous sum of money . . . if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs."¹⁶¹ As discussed above, the substantial burden inquiry should be about what the law requires or forbids claimant to do, not about the *in terrorem* penalty/tax. There's no analysis in the majority opinion of whether paying for group health insurance is, under RFRA, a substantial burden on Hobby Lobby's religious exercise, when some employees sometimes choose to use such insurance to ends Hobby Lobby deems objectionable on religious grounds. Alito thinks this is a tough moral and religious question that the Court should not decide;¹⁶² but RFRA requires the Court to decide it.¹⁶³

So, what about the key question: does the Obamacare requirement that Hobby Lobby purchase health insurance for its employees—coverage that includes some birth control methods to which Hobby Lobby objects on religious grounds—substantially burden Hobby Lobby's religious exercise? Justice Ginsburg offers three reasons why we should think not: (i) The law "carries no command that Hobby Lobby . . . purchase or provide the contraceptives they find objectionable,"¹⁶⁴ and, one might add, no command that

¹⁵⁸ See *supra* note 139.

¹⁵⁹ *Hobby Lobby*, 134 S. Ct. at 2779.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² See *id.* at 2778.

¹⁶³ In concurrence, Justice Kennedy also has nothing helpful to say about the substantial burden part of the RFRA formula. See *id.* at 2785 (Kennedy, J., concurring).

¹⁶⁴ *Id.* at 2799 (Ginsburg, J., dissenting).

Hobby Lobby perform abortions or permit abortions to be performed on premises (remember it is the supposed abortifacient quality of the birth control in question to which Hobby Lobby objects). (ii) The law requires Hobby Lobby to “direct money into undifferentiated funds that finance a wide variety of benefits under the comprehensive health plans,”¹⁶⁵ thus, one might add, establishing the generality of the program in question. (iii) “[T]he decisions whether to claim benefits under the plans are made not by Hobby Lobby . . . , but by the covered employees and dependents, in consultation with their health care providers,”¹⁶⁶ i.e., the connection between Hobby Lobby and the end to which it objects (the use of certain contraceptives covered under federal law) is attenuated in the way that proximate cause is often thought to be broken in law, by the independent volition of a third party. I agree with Justice Ginsburg that these factors combined are sufficient to render the burden on Hobby Lobby’s religious exercise insubstantial as a matter of law.

Once we accept that “substantial burden” is a legal, statutory term that courts (and others) must interpret, we may consider analogies to other situations in which parties claim that the law will improperly attribute to them beliefs or practices to which they object. Hobby Lobby objects to providing, under legal compulsion, a benefit that is otherwise unobjectionable—health care insurance—because Obamacare permits its employees to use that benefit for a purpose to which Hobby Lobby objects on religious grounds. There is an attenuation, an indirectness to the burden here; each Hobby Lobby employee takes that health care insurance benefit and decides how to use it, from a long list of possibilities permitted under the law. The benefit is also a general one, in two senses—it applies to many employees, of companies run according to religious principles and otherwise; and it covers many health care options. These facts—of indirectness and generality—are of critical importance in at least three areas of First Amendment law. The lesson from these areas of doctrine is not favorable to Justice Alito’s *Hobby Lobby* opinion.

First: Government provides money for schooling. That money may be for specific things such as books or computers or teacher salaries, or it may more generally be for tuition payments, either via targeted vouchers or via tax expenditures such as deductions or exemptions for money spent on schooling. The constitutional objection has been that the use of public funds in religious schools implicates the government in religious education, improper under the Establishment Clause. The answer from the Court has not been that it is fine for the state to teach religious doctrinal truths. Rather, the answer has been that even if the state’s money is ultimately used in a way that advances the school’s religious mission, the state is not legally implicated. There are some complexities here. Money that goes directly to a church school’s bank account is still subject to possible ‘as-applied’ chal-

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

lenges, i.e., even if the program is facially okay (say, money for books and computers for both secular and religious schools), it may be subject to constitutional challenge if plaintiff can show that the books and computers are ultimately used to teach religious doctrine.¹⁶⁷ But an important subset of these school funding cases involves money not going directly to church schools, but rather passing through the hands of private individuals.

Thus, in *Mueller*, parents received tax deductions for private school tuition, secular and religious.¹⁶⁸ Most of the usage was for religious schools, and the kids in such schools were being taught religious doctrine (among other things) through the money made available by the tax break.¹⁶⁹ But this program was upheld.¹⁷⁰ Similarly, in *Witters*, the Court permitted a blind student to use state funds for vocational education for the handicapped in a graduate program for the ministry.¹⁷¹ The funds enabled religious training, but again the Court was okay with that because the program was general and the money first passed through Witters' hands.¹⁷² He decided where to use it, and that individual choice breaks the link to a possible Establishment Clause violation.¹⁷³ Finally, in *Zelman*, the most robust and far-reaching of these precedents, the Court upheld the use of state-funded tuition vouchers, even though used predominantly in private religious schools.¹⁷⁴ The Court took an expansive view of generality—the vouchers were not only part of a law that allowed use in secular as well as religious schools (though used overwhelmingly in religious ones), but also were part of the broader state-backed K-12 education system, predominantly secular.¹⁷⁵ And the parents chose how to use the vouchers—whether to walk across the street, as it were, to the church school with the state's money, was the parents' choice, although the state enabled this and knew it was likely to happen in many cases.¹⁷⁶ The generality of the benefit and the individual choice serve to break any possible Establishment Clause violation link to the state. This is so even though the moneys are thoroughly intermingled and used, in part, to teach religious doctrine, something the state is otherwise forbidden to do.¹⁷⁷

Attribution matters here to the proper legal outcome. There's no natural answer—different people have different, reasonable views about what

¹⁶⁷ See *Mitchell v. Helms*, 530 U.S. 793, 840–44, 857 (2000) (O'Connor, J., concurring in the judgment). The Court has also held that direct funding of religious school teacher salaries (as part of a more general funding program) is unconstitutional even if for secular courses, because of the risk that such teachers will teach the gospel, as it were, and because of the entanglement concern with government monitoring to hedge against that risk. See *id.* at 859–60 (O'Connor, J., concurring in the judgment); *City of Grand Rapids v. Ball*, 473 U.S. 373, 386–87 (1985); *Lemon v. Kurtzman*, 403 U.S. 602, 614–22 (1971).

¹⁶⁸ *Mueller v. Allen*, 463 U.S. 388, 391 (1983).

¹⁶⁹ See *id.* at 405.

¹⁷⁰ See *id.*

¹⁷¹ *Witters v. Wash. Dep't of Services for the Blind*, 474 U.S. 481 (1986).

¹⁷² See *id.* at 488–89.

¹⁷³ See *id.*

¹⁷⁴ *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

¹⁷⁵ See *id.* at 650–51.

¹⁷⁶ See *id.* at 652–53.

¹⁷⁷ See *id.*

counts as attribution. Hobby Lobby's substantial burden argument is a kind of attribution argument. In Hobby Lobby's view, its health insurance payments enable or assist in the procurement of abortions, and thus we may reasonably attribute such abortions to Hobby Lobby. But only if this attribution argument is correct, I am claiming, is it appropriate to conclude (under RFRA) that Hobby Lobby's religious exercise has been substantially burdened. Once we move away from the patently incorrect deference to Hobby Lobby regarding what counts as a substantial burden, we may then appropriately look to how the law in other areas considers claims of improper enabling, or attributing. The church school funding cases are illustrative here—even though it's true, in one sense, that the state is helping to fund religious doctrinal education, we put that aside because the programs are general (they're not only to help church schools) and individual parents and/or students choose how and where to use the benefit. That breaks the link to the state, and thus obviates the possible constitutional violation. We do not properly legally attribute the doctrinal religious education to the state. Same here, by analogy: Group health insurance is general in many senses—many companies, including the Hobby Lobbies of the world, are covered; many employees are covered; many health care benefits are covered. Individuals choose whether and how to use their health insurance. This attenuation of the connection to Hobby Lobby is enough to render the burden on its religious exercise, from funding health care, insubstantial, because it is not legally proper to attribute the abortifacient outcomes (if there are such) to Hobby Lobby.¹⁷⁸

Second: The Court has held that if public schools open space for various forms of expression, they may not deny such space to religious groups (or expression)—that would violate the Free Speech Clause—and permitting religious groups to use such space does not violate the Establishment Clause.¹⁷⁹ The Free Speech Clause holding is not what interests me here. On the Establishment Clause point, the state is enabling religious exercise when, for example, it makes public school classroom space available for bible study after school (which it has to do under the Free Speech Clause if it

¹⁷⁸ In all of the settings I'm discussing in this analysis, it is easier to see how indirectness breaks the legal attribution link than it is to see how generality does. Indirectness is a proxy for standard proximate cause analysis. The generality point is about establishing the proper level of categorization for what the relevant actor is doing—or, perhaps, is best seen as doing. Thus, if a state gives tuition vouchers for secular and religious schools, it is benefiting religion just as much as if it gives the vouchers for religious schools only. (Assuming that the same number of parents/children use the vouchers at church schools in both scenarios.) But we see the state as endorsing religion only in the latter setting. And thus we attribute the religious education to the state only in the latter setting. Something similar, I am claiming, is going on in the *Obamacare-Hobby Lobby* situation: if the federal government were insisting only that employers pay for employees' contraception that (arguably) may produce abortions, we should see that in a different light than (as is actually the case) if the federal government insists that employers pay for a broad array of health-care services and products.

¹⁷⁹ See *Good News Club v. Milford Cent. Sch.* 533 U.S. 98 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981). We are not talking about the school's own expression, either during class instruction or otherwise.

opens such space for other expressive activities). But the facts of generality and individual choice matter here too, just as they do in the funding cases. The classrooms are available after school to student groups generally—not just to religious groups. And the students choose which groups to join, which expression to engage in. Although the schools are aware that by opening such space they will facilitate or enable religious exercise (among other things), we do not properly attribute the religious exercise—or any other expression that takes place in the classrooms after school—to the state. The state provides the general benefit, as it were, and then the generality and individual choice break any reasonable attribution link to the state.

The analogy to *Hobby Lobby* should be clear. Obamacare insists on a broad package of health insurance benefits to a broad array of persons employed by a broad array of companies; some companies object to some of those benefits on religious grounds; but it is their employees who choose which benefits to take, which not to take, from the broad array of choices. Sure, Hobby Lobby's paying the insurance premiums enables and facilitates what it objects to religiously (along with lots that it doesn't object to religiously). No more so, though, than the state enables and facilitates the religious expression of student groups in public school classrooms after school; no more so than the state enables religious doctrinal teaching through tuition vouchers. It is wrong to attribute to Hobby Lobby any particular medical act performed with the insurance moneys. Wrong legally that is; paying for group health insurance that may be used by some employees for some health care to which Hobby Lobby objects on religious grounds is not a "substantial burden" on Hobby Lobby's religious exercise, if we are to understand that term in a sensible way that fits with other areas of the law.

Third: The Court has developed a robust set of 'right not to speak' cases, or perhaps better put, 'right not to foster the state's or another person's speech' cases. Sometimes called the rule against 'compelled speech,' this line of cases started with *Barnette*, in which the Court considered West Virginia's requirement that school kids salute the flag and say the pledge of allegiance, and held that objecting students must be given a right to remain silent.¹⁸⁰ It continued with *Maynard*, in which the Court assessed New Hampshire's requirement that state license plates bear the motto "Live Free or Die," and held that objecting car owners must be given a right to cover up the motto.¹⁸¹ And it continued in (among other cases) *Hurley*, in which the Court held that Massachusetts may not require the organizer of the annual St. Patrick's Day parade (considered a private speech act) to host speech with which it disagreed (a gay and lesbian Irish-American group that wished to march with a banner so proclaiming).¹⁸² The exact doctrinal hook for these holdings is a

¹⁸⁰ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

¹⁸¹ *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

¹⁸² *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 581 (1995).

bit tricky, as I have argued elsewhere,¹⁸³ but they are widely understood as a kind of negative Free Speech Clause right.¹⁸⁴

Here I am interested in a set of cases that, although involving speech compelled by the government (or the fostering of another's speech compelled by the government), came out the other way, i.e., in which the Court distinguished the *Barnette* line of cases. In *PruneYard*, the Court upheld a California requirement that privately owned shopping centers allow all manner of speaker and leafleter on premises.¹⁸⁵ In *Southworth*, the Court upheld compelled student activities fees at the University of Wisconsin,¹⁸⁶ even though for some students some uses of such fees were objectionable, and even though the Court had held in two prior cases that we usually have a right not to fund speech of private parties to which we object.¹⁸⁷ And in *FAIR*, the Court allowed the federal government to insist that law schools host the speech of military recruiters, in a manner equal to speech of other legal recruiters, even though the schools objected to such hosting.¹⁸⁸ All three cases involved clear examples of the State compelling private parties to host or foster the speech of others, apparently violating the understanding of the right not to speak from the *Barnette* line of cases. So what was different?

In each of these three cases, the state action in question required the private party to host a kind of public forum, open to all (relevant) speakers.¹⁸⁹ Just as when the state opens a public forum it may not discriminate based on subject matter or point of view, and thus we do not properly attribute any resulting speech to the State,¹⁹⁰ so when a private party is compelled to host a version of a public forum we do not properly attribute any resulting speech to such party. The generality and choice factors break the link. Generality is clear in all of these cases; choice results from various speakers choosing to enter the shopping center premises to speak, or from various student groups choosing to speak with student activities funds, or from various legal recruiters engaging in expression on law school campuses. The hosts, under legal compulsion, have enabled and facilitated speech they don't like, but that's not enough for constitutional concern.

¹⁸³ See Abner S. Greene, *(Mis)Attribution*, 87 DENVER U. L. REV. 833, 839–44 (2010); Abner S. Greene, *The Pledge of Allegiance Problem*, 64 FORDHAM L. REV. 451, 473–87 (1995).

¹⁸⁴ See FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY*, 80–85 (1982).

¹⁸⁵ *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980).

¹⁸⁶ *Bd. of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 233–35 (2000).

¹⁸⁷ See *Keller v. State Bar of Cal.*, 496 U.S. 1, 14–17 (1990); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232–37 (1977). *But see* *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560–67 (2005) (holding no such right exists if funding government speech).

¹⁸⁸ *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 70 (2006). The law actually imposed a funding condition on universities, but the Court treated it as if it imposed a direct obligation. *See id.* at 59–60.

¹⁸⁹ There are two caveats: (i) the hosts could get out of the game entirely by ceasing to own the shopping center, or ceasing to have compelled student activities fees, or ceasing to allow any legal recruiters on campus; (ii) only relevant speakers were required to be hosted—by which I mean only funded student groups in *Southworth*, 529 U.S. 217, and only legal recruiters in *FAIR*, 547 U.S. 47.

¹⁹⁰ See Abner S. Greene, *Speech Platforms*, 61 CASE W. RES. L. REV. 1253 (2011).

Again the analogy to *Hobby Lobby* should be clear. Obamacare benefits are broad and the choice of which to claim is that of the individual employee; although *Hobby Lobby* is enabling and facilitating (in some sense) whatever results from a claimed benefit, we should not legally attribute any such outcome (such as abortion) to *Hobby Lobby*.

The constitutional concerns in *Hobby Lobby* and in the three types of cases I have covered are different, but those differences should not matter for purposes of this discussion. In *Hobby Lobby*, there is a statutory right protecting the free exercise of religion, and a question whether generality and indirectness render a burden on such exercise legally insubstantial. In the school funding cases and the public school classroom cases, there is a question whether generality and indirectness remove any actionable Establishment Clause concern. In the compelled speech cases, the question is whether generality and indirectness obviate a possible Free Speech Clause violation. Maybe, one might argue, we should think differently about free exercise of religion than we do about Establishment or Free Speech. Furthermore, in the Establishment Clause cases, the question is whether generality and indirectness remove proper attribution to the state, whereas in the Free Speech Clause and RFRA settings, the question is whether generality and indirectness remove proper attribution to the individual (or corporate) claimants.

These differences do not matter if the underlying parallels regarding generality and indirectness track something similar in each setting. I believe they do. In each setting, the question is whether, under legal compulsion, the relevant actor (the government, in the Establishment Clause cases; the individual, in the Free Speech Clause and RFRA cases) should be thought to have enabled something that we properly deem legally harmful, requiring redress. That determination, in turn, requires that we think about when we do and don't attribute certain outcomes to either the government or a private person (or corporation). Thus, I have suggested, regarding the relevant cases discussed above, that we do not, legally, attribute to the state the advancement of religious doctrine in the school funding or classrooms cases; that we do not, legally, attribute the various views that are aired to the host of speech in the compelled speech cases; and that we should not, legally, attribute possibly abortifacient outcomes from some birth control to companies that are required to pay for their employees' health insurance, in the RFRA free exercise of religion setting.

IV. ANTI-DISCRIMINATION LAW AND SAME-SEX MARRIAGE

Finally, a word about another issue that arose during this conference:¹⁹¹ the conflict between the increased recognition of same-sex marriage and religious beliefs to the contrary. Specifically, should businesses providing per-

¹⁹¹ *Religious Accommodation in the Age of Civil Rights*, Harvard Law School, April 3–5, 2014.

sonal services to couples planning a wedding (or legally recognized commitment ceremony)—say, photography¹⁹² or cake-making¹⁹³—receive exemptions from anti-discrimination laws that cover sexual orientation? Free Exercise Clause doctrine would say no; these are laws of general applicability and therefore rational basis scrutiny only would apply. But what if we were to challenge *Smith* (as I have) or seek to apply a relevant state RFRA? I will assume for purposes of argument that the application of anti-discrimination law in these settings might impose a substantial burden on the religious exercise of some providers of the services in question. The question then would be whether the state has a compelling interest in applying the anti-discrimination law, and whether there is no less restrictive alternative to doing so.

The answer, I believe, is not specific to religion, but rather should track our understanding of the scope of the right of intimate association.¹⁹⁴ Of signal importance to this discussion is Justice Brennan’s majority opinion in the *Jaycees* case.¹⁹⁵ There, he laid out the right of intimate association, explaining that “certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State.”¹⁹⁶ Family relationships are the paradigm of intimate association;¹⁹⁷ abstracting from that, we might say that “freedom of association as an intrinsic element of personal liberty”¹⁹⁸ is “distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship.”¹⁹⁹ On the other hand, “a large business enterprise”²⁰⁰ is “an association lacking these qualities.”²⁰¹ Between the poles of family and large businesses “lies a broad

¹⁹² See *Elane Photography, LLC v. Willock*, 309 P.3d 53 (NM 2013), *cert. denied*, 134 S. Ct 1787 (2014).

¹⁹³ See *Craig v. Masterpiece Cakeshop, Inc.*, CR 2013-0008 (Co. Admin. Ct., Dec. 6, 2013), <http://perma.cc/Z7RA-YFS4>.

¹⁹⁴ Although *Boy Scouts v. Dale*, 530 U.S. 640 (2000), turned on the right of expressive association, and that case involved a state anti-discrimination law, it is hard to see how the Boy Scouts’ expressive association was infringed, and easier to see the case as one of intimate association (although not necessarily correctly decided as such). See Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 856–68 (2007) (exploring this possibility and other parental liberty theories). In any event, *Dale* is about a group not wanting to accept someone as a member, 530 U.S. at 644–45, which is not the factual scenario I am addressing here.

¹⁹⁵ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618–20 (1984).

¹⁹⁶ *Id.* at 618–19.

¹⁹⁷ See *id.* at 619–20.

¹⁹⁸ *Id.* at 620.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State.”²⁰²

Justice Brennan then determined that the Jaycees were too large and unselective to receive the protection of the right of intimate association, and thus were properly subject to Minnesota anti-discrimination law regarding gender (and other protected characteristics).²⁰³ What about a small, closely held business, that provides personal services from the hands of the business owners—say, photographing events or baking cakes for events? On the one hand, such businesses are not large or detached in terms of the ownership-worker-client relationships. They do share some qualities of family or friendship for which we should think the right of intimate association would attach. On the other hand, they are businesses, holding themselves out to the public as taking money in exchange for services, and covered by various federal, state, and local laws regarding public accommodations. (Of course whether such laws should be limited by a right of intimate association is the question, so that a particular law is capacious enough to cover a small mom and pop business cannot itself answer the question at hand here.)

Perhaps the answer should be a bright-line rule—you may bake a cake for whomever you want, or refuse to bake a cake for whomever you want, if you are doing so out of love, charity, or gift. But once you decide to do so as a business, for money, you forfeit your right to discriminate in your clientele (at least regarding grounds covered by law). This is so, on both ends, whether your reasons are religious or secular. On the other hand, as Robert Vischer has suggested, when we are dealing with “roughly fungible goods and services”²⁰⁴ and there is a sufficient market for the relevant good or service, we might do better to protect the conscience of the small business owner and ask the customer to hire another service provider, who does not share the conscience-based objection to same-sex marriage. I will not try to resolve the problem in this piece.

CONCLUSION

If we are to take value pluralism seriously, in the political/legal realm, we must be cautious about when and where we insist on the correctness of our beliefs about the good, and also about the right and the just. When religious adults choose to live their lives in a way that seems quite different from how we would live ours—either in what they enjoy as valuable or in how they order their affairs with each other—we should not insist that law trump such practices, absent clear evidence of harm to others. There will be many hard questions: Have the adults chosen freely, or freely enough? What about their children? What constitutes cognizable harm to others that should trump

²⁰² *Id.*

²⁰³ *See id.* at 621.

²⁰⁴ VISCHER, *supra* note 16, at 28.

religious freedom, and how much harm? As a template, though, strict scrutiny of state action substantially burdening religious exercise makes sense for a nation committed not only to liberal values, but also to recognizing a plurality of norms regarding how best to live, especially considering the tenuous grounding the state has to insist on its position at all times.

