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When Free Exercise Is A Burden: Protecting "Third Parties" In Religious Accommodation Law

Kara Loewentheil

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ABSTRACT

During the 2014 U.S. Supreme Court term, the Court considered two challenges to the contraceptive coverage requirement of the Affordable Care Act. These cases attracted enormous attention, and brought a new urgency to the principle that requests for religious accommodations should be weighed against any burdens such accommodations would impose on "third parties," who are more accurately termed "existing rights-holders." However, neither courts nor scholars have provided a consistent or principled way of thinking through how to evaluate such burdens and how to weigh them against free exercise rights. This Article takes up that challenge, using the example of the contraceptive-coverage cases to demonstrate the ways in which existing doctrine fails to do justice to the impact of accommodations on existing rights-holders. Having identified the flaws in current thinking, this Article proposes a novel theoretical framework for performing this balancing, focusing on equality-implicating burdens on both religious objectors and existing rights-holders. It also provides guidance on how to use existing doctrine to vindicate these concerns, drawing particular attention to the ways in which understanding the interests of existing rights-holders would change our understanding of when a law is generally applicable, what constitutes a compelling state interest, and how to understand when a law is narrowly tailored to meet both practical and expressive goals. This Article provides insight into the issues before the Supreme Court in a way that will remain relevant regardless of the Court's ultimate holdings in these cases, and argues that the contraceptive-coverage requirement, properly understood, withstands scrutiny under both the Constitution and the Religious Freedom Restoration Act.

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I. INTRODUCTION

As of March 2014, close to 100 lawsuits have been filed under the First Amendment and the Religious Freedom Restoration Act (the RFRA),[1] challenging the "contraceptive coverage requirement"[2] of the Patient Protection and Affordable Care Act (the ACA or the Affordable Care Act) (colloquially known as Obamacare).[3] More than half of these suits have been brought by for-profit employers with religious objections to providing insurance coverage for contraception.[4] The conflict between religious believers and the secular state is an age-old one,[5] but this iteration of it is distinctly modern, combining questions of the reach of the regulatory state, the nature and purpose of free exercise rights, women's social and economic equality, and a lightning-rod political debate. This conflict is among the most important religious accommodation cases of the

1. *Challenges to the Federal Contraceptive Coverage Rule*, AM. CIV. LIBERTIES UNION, https://www.aclu.org/reproductive-freedom/challenges-federal-contraceptive-coverage-rule (last updated Feb. 28, 2014); *see* U.S. CONST. amend. I; 42 U.S.C. § 2000bb-1 (2012). Seventy-eight of these 90 cases remain pending. *Challenges to the Federal Contraceptive Coverage Rule*, *supra*.

2. This requirement is also widely known as the contraception mandate, or contraception coverage mandate, but I have chosen to use the more neutral phrase contraceptive coverage requirement. For a convincing explanation of why "mandate" is an inaccurate descriptor, see Marty Lederman, Hobby Lobby *Part III—There Is No "Employer Mandate,"* BALKINIZATION (Dec. 18, 2013) [hereinafter *Hobby Lobby Part III]*, http://balkin.blogspot.com/2013/12/hobby-lobby-part-iiitheres-no-employer.html; Marty Lederman, Hobby Lobby *Part III-A—Does Federal Law Substantially Pressure Employers to Offer Health Insurance Coverage in Violation of Religious Obligations, Even Though There is No "Employer Mandate"?*, BALKINIZATION (Dec. 28, 2013) [hereinafter *Hobby Lobby Part III-A]*, http://balkin.blogspot.com/2013/12/hobby-lobby-part-iii-adoes-federal-law.html ("[F]ederal law does not actually impose a duty on [employers] to offer . . . contraception coverage. To be sure, the law does require that contraception . . . be included in any health insurance plan the employers offer to their employees. But the law does not *require* them to offer health insurance to their employees at all.").

3. 42 U.S.C. § 300gg-13(a)(4) (requiring health insurance to cover preventive care for women "as provided for in comprehensive guidelines supported by the Health Resources and Services Administration"); *see Women's Preventive Services Guidelines*, HEALTH RES. & SERVS. ADMIN., http://www.hrsa.gov/womensguidelines/ (last visited Mar. 18, 2014) (including contraception methods and counseling among the women's preventive services guidelines).

4. *Challenges to the Federal Contraceptive Coverage Rule*, *supra* note 1.

5. *See, e.g.*, *Mark* 12:17.

last decades, and we will only see more like it.[6] No wonder, then, that these cases have produced a circuit split.[7] The Third Circuit has held against the religious objectors on the grounds that corporations do not have free exercise rights,[8] as has the Sixth Circuit.[9] On the other side, the Tenth, Eighth, Seventh, and D.C. Circuits have held—or suggested they will hold—either that corporations do have free exercise rights or that corporate shareholders can pursue RFRA lawsuits in their individual capacities, and that the contraception coverage requirement violates the RFRA[10] because it imposes a substantial burden on the plaintiffs' free exercise rights[11] and the state either has no compelling interest[12] or, if it does, has not narrowly tailored the regulation to achieve that interest.[13] In November 2013, the Supreme Court granted certiorari in two of these cases,[14] with oral

6. *See, e.g.*, Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. (forthcoming 2014) (manuscript at 8) ("[T]he biggest problem for religious liberty in our time is deep disagreements over sexual morality . . . . [including] abortion, contraception, emergency contraception, sterilization, gay rights, and same-sex marriage.").

7. At least one of these opinions was issued after full consideration on the merits. Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 389 (3d Cir.), *cert. granted*, 134 S. Ct. 678 (2013). Others have been thorough opinions based on full briefings on motions for injunction pending appeal. *See, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1147 (10th Cir.), *cert. granted*, 134 S. Ct. 678 (2013); Annex Med. v. Sebelius, No. 13-1118, 2013 WL 1276025, at *3 (8th Cir. Feb. 1, 2013). Because review of these motions includes de novo review of the legal questions, and the standard for relief is generally "likelihood of success on the merits," these opinions provide a fairly reliable preview of how the Court will rule on the substance. *See Hobby Lobby Stores*, 723 F.3d at 1128. Even if some of the courts rule differently at a later stage, the confusion and discord in the cases as they currently stand is proof enough of the problem with the doctrine explored in this Article.

8. *Conestoga Wood*, 724 F.3d at 388.

9. Eden Foods, Inc. v. Sebelius, 733 F.3d 626, 633 (6th Cir. 2013); Autocam Corp. v. Sebelius, 730 F.3d 618, 628 (6th Cir. 2013).

10. Korte v. Sebelius, 735 F.3d 654, 687 (7th Cir. 2013); Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1215–19 (D.C. Cir. 2013); *Hobby Lobby Stores*, 723 F.3d at 1190; *Annex Med.*, 2013 WL 1276025, at *3; Order Granting Stay of Appeal, O'Brien v. U.S. Dep't of Health & Human Servs., No. 12-3357 (8th Cir. Nov. 28, 2012), *available at* http://www.aclu.org/files/assets/obrien_cir_ct_order_to_stay.pdf.

11. *See, e.g.*, *Hobby Lobby Stores*, 723 F.3d at 1137–38.

12. *See, e.g.*, *id.* at 1143.

13. *See, e.g.*, *id.* at 1144; *Korte*, 735 F.3d at 687 ("[T]he government has . . . . not made *any* effort to explain how the contraception mandate is the least restrictive means of furthering its stated goals . . . .").

14. Conestoga Wood Specialties Corp. v. Sebelius, 134 S. Ct. 678 (2013) (mem.); *Hobby Lobby*, 134 S. Ct. 678 (2013) (mem.).

argument held on March 25, 2014.[15]

But will the Supreme Court be able to make any more sense of these claims than have the U.S. Courts of Appeals? It is no surprise that these cases have produced such divergent results because the problem lies not with the courts, but with the doctrine. The First Amendment imposes a higher threshold requirement on plaintiffs than does the RFRA, but both require the state to satisfy strict scrutiny once a plaintiff has passed a threshold—for a First Amendment claim, showing that a law is not neutral or generally applicable,[16] and for a claim under the RFRA, showing that it imposes a substantial burden on free exercise.[17] The problem is that these doctrines—and by extension much of our scholarship on the subject—frames the conflict as being between the state and the religious objector.[18] But, as the contraceptive coverage requirement cases make clear, this relationship is often not the only one—and not even the most important one—at stake.

Rather, some religious accommodation cases govern not only the relationship between the state and the objector, but also a variety of conflicts and relationships between the religious objectors and other rights holders. In the case of the contraceptive coverage requirement, religious accommodation doctrine governs an important relationship between the religious objectors and the women whose contraceptive coverage would be blocked if religious accommodations were granted. In this Article, I argue that, in contrast to the one-size-fits-all application of religious accommodation law to free exercise claims, we can and should make a crucial distinction in sorting such cases: the necessary distinction being

15. Oral Argument Schedule for the Session Beginning March 24, 2014, SUPREME COURT OF THE U.S., http://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentViewer.aspx?Filename=MonthyArgumentCalMarch204.html (last visited Mar. 18, 2014). The two cases have been consolidated. *Conestoga Wood*, 134 S. Ct. at 678.

16. *See* Emp't Div. v. Smith, 494 U.S. 872, 885–86 (1990) (rejecting strict scrutiny because the law in question *was* generally applicable).

17. 42 U.S.C. § 2000bb-1(b) (2012); Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430–31 (2006).

18. *See, e.g.*, Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466, 470 (2010) (opining that under current Supreme Court jurisprudence "the government has the right to treat religious people unreasonably"); Edward Whelan, *The HHS Contraception Mandate vs. the Religious Freedom Restoration Act*, 87 NOTRE DAME L. REV. 2179, 2181 (2012) (framing the article's titular conflict as solely an analysis of the burdens placed on the religious actor).

between cases in which the state's primary interest is its own efficient administration of a government law or program and cases in which the state is primarily representing significant, often equality-implicating interests of third parties who are dependent on the state for enforcement of their existing rights. Our religious accommodation jurisprudence has no principled or systematic framework for taking the interests of third parties affected by religious accommodations into account. Courts and scholars have occasionally noticed that such conflicts may exist,[19] and with the advent of lawsuits regarding the contraceptive coverage requirement, they have been forced to confront them more directly.[20] But neither has suggested any systematic way of thinking about or resolving them that transcends the ill-fitting constraints of the current doctrine while remaining within the context of free exercise law. That is the lacuna this Article attempts to fill.

Part II acquaints the reader with the current outcomes of the contraceptive coverage requirement cases and the issues at stake in the litigation. Part III provides an introduction to religious accommodation law. Part IV identifies what is missing from these cases and from religious accommodation law more generally: a consistent and principled way to include the rights of "third parties" in the rights balancing of free exercise law. As a legal matter, the applicable doctrinal frameworks—the "neutral and generally applicable" framework outlined in *Employment Division v. Smith* for First Amendment claims and RFRA's substantial burden test of the RFRA[21]—are asking an overlapping but different sets of questions, both of which are ill-suited to evaluating the criteria I pose here. Thus, Part V proposes an alternative framework and illustrates the way the principles that inform this novel approach can be utilized to gain a better understanding of existing case law. I draw particular attention to the ways in which understanding the interests of third parties—more accurately termed existing rights-holders (ERHs)—would change our understanding of when a law is generally applicable, what constitutes a compelling state interest, and how to determine when a law is narrowly tailored to meet

19. *See, e.g.*, United States v. Lee, 455 U.S. 252, 261 (1982) ("Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees."); Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1512 (1999) ("[T]he religious reasons for [one's] actions can't, by themselves, justify harms to others.").

20. *See infra* Part II.

21. *See* 42 U.S.C. § 2000bb-1(b); Emp't Div. v. Smith, 494 U.S. 872, 879–80 (1990).

both practical and expressive goals. Throughout this Article, I use the contraceptive coverage requirement cases to illustrate the principles at stake, and to demonstrate the ways in which recognizing the rights of ERHs would improve the doctrinal fit, helping us better understand why the contraceptive coverage requirement, even if it imposes a substantial burden on religious employers, nevertheless satisfies strict scrutiny and should be upheld.

II. THE CONTRACEPTIVE COVERAGE REQUIREMENT LITIGATION THUS FAR

A. *The Problem: Contraceptive Access*

1. *Why Congress Passed the ACA*

a. *Practical problem*. There are approximately 66 million American women of reproductive age (13–44).[22] More than half these women (37 million) are in need of contraception to prevent unintended pregnancy[23]—and that does not even include the 1.5 million women in the country who take contraception solely for medical reasons other than pregnancy prevention.[24] Unintended pregnancy is an incredibly common occurrence; nearly half of the pregnancies in the United States each year are in this category,[25] and this number has stayed relatively steady for years.[26] By age 45, more than half of American women will have had an unintended pregnancy.[27]

Skeptics, in particular those supporting broad-based religious

22. JENNIFER J. FROST ET AL., GUTTMACHER INST., CONTRACEPTIVE NEEDS AND SERVICES, 2010, at 7 (2013), *available at* http://www.guttmacher.org/pubs/win/contraceptive-needs-2010.pdf. This is the most up-to-date data available as national data collection often lags by several years.

23. *Id.*

24. RACHEL K. JONES, GUTTMACHER INST., BEYOND BIRTH CONTROL: THE OVERLOOKED BENEFITS OF ORAL CONTRACEPTIVE PILLS 3 (2011), *available at* http://www.guttmacher.org/pubs/Beyond-Birth-Control.pdf.

25. Lawrence B. Finer & Mia R. Zolna, *Shifts in Intended and Unintended Pregnancies in the United States, 2001–2008*, 104 AM. J. PUB. HEALTH, Feb. 2014, at S43, S45 tbl.1.

26. *See* Lawrence B. Finer & Stanley K. Henshaw, *Disparities in Rates of Unintended Pregnancy in the United States, 1994 and 2001*, 38 PERSP. ON SEXUAL & REPROD. HEALTH 90, 92 (2006) (estimating the unintended pregnancy rate in past years at around 40 percent).

27. GUTTMACHER INST., FACT SHEET: FACTS ON INDUCED ABORTION IN THE UNITED STATES 1 (2014), *available at* http://www.guttmacher.org/pubs/fb_induced_abortion.pdf.

exemptions from the contraceptive coverage requirement, have expressed doubt that any real barriers exist to contraception access in America,[28] or that access to contraception would actually prevent unintended pregnancy or improve women's health.[29] In fact, financial and access barriers prevent

28. *See, e.g.*, Whelan, *supra* note 18, at 2186–87. In an argument typical of this line of thought, Whelan states:

> According to a June 2010 Guttmacher Institute "fact sheet" on contraceptive use in the United States, "Nine in 10 employer-based insurance plans cover a full range of prescription contraceptives." Further, HHS Secretary Sebelius's announcement acknowledges that even when employers "do not offer coverage of contraceptive services" to their employees, "contraceptive services are available at sites such as community health centers, public clinics, and hospitals with income-based support." Not to mention, of course, the countless pharmacies and doctors who dispense contraceptives. It cannot be seriously maintained that there is a general problem of lack of access to contraceptives.

Id. (footnotes omitted). In fact, both public health experts and the U.S. government maintained that, at the time the ACA was passed, there existed a very real problem of lack of access to contraceptives. *See* Press Release, U.S. Dep't of Health & Human Servs. (Jan. 20, 2012), *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html (expressing optimism that a newly promulgated rule implementing the ACA would "increas[e] access to important preventive services"); *see also* FROST ET AL., *supra* note 22, at 8 (estimating that in 2010, due to their low income level, more than 19 million women needed publicly funded contraceptive services if they were to receive any contraceptive services at all, yet only 9 million actually received assistance); Rachel Benson Gold, *Family Planning and Health Care Reform: The Benefits and Challenges of Prioritizing Prevention*, 12 GUTTMACHER POL'Y REV., Winter 2009, at 19, 19, *available at* http://www.guttmacher.org/pubs/gpr/12/1/gpr120119.pdf (noting that at the time, most health insurance did not provide adequate coverage of family planning services, and that even if it did, 20 percent of all women and 40 percent of poor women lacked *any* insurance whatsoever). The fact that nine of 10 employer-based insurance plans cover contraceptives does nothing for the many American women who do not have access to insurance through an employer-based plan, nor for those women whose access is conditioned on copayments, deductibles, or other forms of cost sharing that make contraceptives cost prohibitive. Access to contraceptives through facilities like community health centers is dependent on access to such facilities and may be restricted to particular forms of contraception that are not preferable—or even appropriate—for an individual woman's health needs. JENNIFER J. FROST ET AL., GUTTMACHER INST., VARIATION IN SERVICE DELIVERY PRACTICES AMONG CLINICS PROVIDING PUBLICLY FUNDED FAMILY PLANNING SERVICES IN 2010, at 27 (2012), *available at* http://www.guttmacher.org/pubs/clinic-survey-2010.pdf (describing significant "service delivery challenges" for community health centers and family-planning clinics, including a reduced scope of services and inventory).

29. *See generally, e.g.*, Helen M. Alvaré, *No Compelling Interest: The "Birth Control" Mandate and Religious Freedom*, 58 VILL. L. REV. 379, 431 (2013) (providing a lengthy critique of the view that greater access to contraception would prevent unintended pregnancies or improve women's overall health).

many women—particularly poor women and women of color—from accessing either the best contraceptive method for them, or any contraceptive method at all.[30] Women using no form of contraception have an 85 percent chance of experiencing an unintended pregnancy,[31] and the 11 percent of women using no form of contraception give rise to 50 percent of the unintended pregnancies in the nation.[32] The lack of access to affordable and effective contraception is, therefore, a very real one.[33] Low-income women, whose access to health care is most improved by the ACA, have the most trouble accessing contraception due to financial barriers, and low-income women have higher rates of unintended pregnancy than higher income women.[34] These women are also more likely to suffer negative impacts from an unintended pregnancy.[35]

30. *See* Finer & Zolna, *supra* note 25, at S46–S47 (noting that the unintended pregnancy rate is higher for poor women and women of color). There are a number of factors that influence the selection of a contraceptive method. *See* Jennifer J. Frost & Jacqueline E. Darroch, *Factors Associated with Contraceptive Choice and Inconsistent Method Use, United States, 2004*, 40 PERSP. SEXUAL & REPROD. HEALTH, . 94, 94–95 (2008). One important issue is whether the woman has a health or medical condition that makes certain forms of contraception contraindicated. In addition, the most reliable, effective, and longest lasting methods of contraception—long-term hormonal contraceptives—have the highest up-front cost and require a doctor to administer them, which puts them out of reach for many women. *See* INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 105 (2011). Recent studies have shown that the vast majority of women would prefer to use safe, long-lasting hormonal contraceptives and choose to do so when cost barriers are removed. For instance, in 2002 the California Kaiser Foundation Health Plan eliminated copayments for the most effective forms of contraception and use of these methods increased substantially. Debbie Postlethwaite et al., *A Comparison of Contraceptive Procurement Pre- and Post-Benefit Change*, 76 CONTRACEPTION 360, 362 & tbls. 1–2 (2007).

31. Adam Sonfield, *The Case for Insurance Coverage of Contraceptive Services and Supplies Without Cost-Sharing*, 14 GUTTMACHER POL'Y REV. 7, 7 (2011), *available at* http://www.guttmacher.org/pubs/gpr/14/1/gpr140107.pdf.

32. Sharon Worcester, *LARCs Hold Key to Reducing Unplanned Pregnancy Rate*, OB. GYN. NEWS (July 24, 2013), http://www.obgynnews.com/index.php?id=11146&cHash=071010&tx_ttnews[tt_news]=214147.

33. In this frame, access to contraception is a public health issue. But access to contraception may also be understood as a civil rights measure that promotes women's equality in political, economic, and civil society. *See infra* Part V.A.3 for a thorough discussion of this issue.

34. Finer & Henshaw, *supra* note 26, at 94.

35. COMM. ON UNINTENDED PREGNANCY, INST. OF MED., THE BEST INTENTIONS: UNINTENDED PREGNANCY AND THE WELL-BEING OF CHILDREN AND FAMILIES 1 (Sarah S. Brown & Leon Eisenberg eds., 1995) (listing several consequences of unintended pregnancy, some of which would affect low-income women more severely).

b. *Expressive problem.* The lack of access to contraception is not only a practical matter—it is a symbolically significant one. Symbolic or expressive benefits may be an important reason for a given law's passage and not at all subsidiary to the practical benefit. In fact, the practical benefit may be an expression of the overarching symbolic notion of equality, rather than the other way around.[36] As one scholar has recognized, "[d]iscrimination has both instrumental and symbolic consequences. . . . [D]iscrimination is about insult and psychic injury as well as access to goods, and the state's interest in avoiding those harms may be very strong indeed."[37] Think of an antidiscrimination law: the practical goal of the law is to prevent tangible forms of discrimination, such as difficulty accessing public accommodations, housing, or equal legal status, but the expressive goal of the law is to announce a public policy against that form of discrimination and to emphasize the equality of people who are part of the marginalized group.[38] In that way, there are unlikely to be many laws legislating equality on a practical level that do not have expressive equality functions as well, although there may be some laws that are primarily expressive but have less practical impact.[39] Further, there is mounting social

36. *See, e.g.*, Alex Geisinger & Michael Ashley Stein, *A Theory of Expressive International Law*, 60 VAND. L. REV. 77, 81 (2007) ("By expressive law, we mean the impact that law and legal process have on individual behavior . . . by affecting the social, or normative, meaning of that behavior."); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 989 (1995) (suggesting the right to abortion is a specific benefit that furthers a broader notion of gender equality); Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 755 (1998) ("An expressive harm is one that results from the ideas or attitudes expressed through a governmental action rather than from the more tangible or material consequences the action brings about."); Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 819 (2007) (noting the dignitary importance of women's control over their reproductive lives in the context of legal restrictions on reproductive rights); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2027–28 (1996) ("A society might . . . insist on an antidiscrimination law for expressive reasons even if it does not know whether the law actually helps members of minority groups."); *cf.* Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 90 (2013) ("[I]n the American constitutional order, community judgment about the meaning of 'unjust exclusion' can evolve.").

37. Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 210 (1995).

38. *See* Sunstein, *supra* note 36.

39. Imagine, for instance, a situation in which a religious Jew, who owns a chain of convenience stores frequented both by members of the Jewish community and

science evidence that many of the practical impacts of inequality, like poorer health and economic outcomes, are linked to the psychological harm and stress caused by inequality and discrimination,[40] which suggests the practical functions of a law often cannot be disentangled from its expressive functions, at least when it comes to the law's effects.

The Supreme Court recognized more than 20 years ago that control over reproduction is essential to women's participation in modern society. As it explained in *Planned Parenthood v. Casey*, "[t]he ability of women to participate equally in the economic and social life of the [n]ation has been facilitated by their ability to control their reproductive lives."[41] This interest has both practical and symbolic aspects: as a practical matter, women need access to contraception to be equal members of society, and the relationship of this need to social and political equality means that

the general public, installs two doors at the entrance of each store, one for men and one for women. Hearing this, the government passes a law outlawing this practice. The store owner challenges the law, arguing that religious obligations prevent unmarried men and women from coming into physical contact with one another because the women may be menstruating and would therefore be ritually unclean. Thus, the two doors are necessary to prevent any accidental contact. What's the problem?

My instinct is that the state would be well within its rights to outlaw this practice because it seems to be a pure example of the separate-but-equal doctrine, a formalistic separation that nevertheless conveys a clear dignitary harm. Separate doors would force members of the public to conform to practices that convey a particular religious message about the female body—one linked to antiquated ideas about gender-based physical difference—and that contribute to gender hierarchy. There is no practical harm, assuming customers are allowed to use the store equally and the doors are equally convenient. But there is a symbolic dignitary and equality harm, and it is equally deserving of remediation, while the religious objection is undeserving of protection in this instance.

An interesting question that must go unanswered here is how the scope of publicity of a law or exemption is related to its impact. There is a publicity element to expressive laws and norms that requires society to be aware of them. However, in many of the cases I treat here, publicity is not a problem because conflicts between religious believers and social equality interests tend to be high-profile ones.

40. *See, e.g.*, Chiquita A. Collins & David R. Williams, *Segregation and Mortality: The Deadly Effects of Racism?*, 14 SOC. F. 495, 500–01 (1999); Brea L. Perry et al., *Racial and Gender Discrimination in the Stress Process: Implications for African American Women's Health and Well-Being*, 56 SOC. PERSP. 25, 28 (2013).

41. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992). Other courts have also recognized the link between contraception and women's equality, specifically in the context of health care coverage for contraceptives. *See, e.g.*, Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1271, 1276–77 (W.D. Wash. 2001) (holding that it was sex discrimination and a violation of Title VII for an employer to offer health care coverage but not cover contraceptives).

contraceptive discrimination against women sends a normative message about the unimportance—or undesirability—of women's equality.[42] As Reva Siegel has persuasively demonstrated:

> [T]he sex equality approach to reproductive rights views control over the timing of motherhood as crucial to the status and welfare of women, individually and as a class. Arguments from the sex equality standpoint appreciate that there is both practical and dignitary significance to the decisional control that reproductive rights afford women, and that such control matters more to women who are status marked by reason of class, race, age, or marriage. Control over whether and when to give birth is practically important to women for reasons inflected with gender-justice concern: It crucially affects women's health and sexual freedom, their ability to enter and end relationships, their education and job training, their ability to provide for their families, and their ability to negotiate work-family conflicts in institutions organized on the basis of traditional sex-role assumptions that this society no longer believes fair to enforce . . . .[43]

Because contraception is essential for ensuring women's social and political equality,[44] health care plans that cover all types of preventative care needed by men but do not cover one of the most basic forms of preventative care needed by women create the implication that women are second-class citizens, that using contraception and avoiding pregnancy is a woman's personal problem, and that women's social and political equality are personal problems that are not a matter of national concern.[45]

42. *See* Siegel, *Sex Equality Arguments for Reproductive Rights*, *supra* note 36.

43. *Id.* at 818–19.

44. *See, e.g.*, *id.*; *see also* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) ("Researchers have shown that access to contraception improves the social and economic status of women. Contraceptive coverage, by reducing the number of unintended and potentially unhealthy pregnancies, furthers the goal of eliminating this disparity by allowing women to achieve equal status as healthy and productive members of the job force." (footnote omitted)); Perry Dane, Doctrine and Deep Structure in the Contraception Mandate Debate 4 (July 21, 2013) (unpublished manuscript), *available at* http://ssrn.com/abstract=2296635.

45. *See* Dane, *supra* note 44 ("[T]he contraception mandate is important. Not only does it promote specific health needs, it also vindicates the national interest in women's equality and reproductive choice.").

B. *The Solution: The Contraceptive Coverage Requirement*

The contraceptive coverage requirement arose out of efforts to address this significant public health issue. The ACA requires private health insurance plans to provide coverage for certain preventative services without cost sharing.[46] Subsection 2713(a)(4) of the ACA directed the Health Resources and Services Administration (the HRSA) to develop "comprehensive guidelines" addressing preventative care and screening for women.[47] The result, developed by the Institute of Medicine, was a set of guidelines that includes "contraceptive methods and counseling" and defines those as "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."[48]

But the contraceptive coverage requirement, which took effect on August 1, 2012,[49] does not apply to everyone. Individual and employee health care insurance plans, including self-insured employer plans,[50] must provide coverage for preventative care unless they are "grandfathered" in.[51] In addition, the regulations allow the HRSA to provide an exemption

46. 42 U.S.C. § 300gg-13(a) (2012). Cost sharing occurs when an insured has to pay a copay, coinsurance premium, deductible, or other fee for the service. *See* Frederick Mark Gedicks, Am. Constitution Soc'y for Law & Policy, With Religious Liberty for All: A Defense of the Affordable Care Act's Contraception Coverage Mandate 2 (2012) (unpublished manuscript), *available at* http://ssrn.com/abstract=2163631.

47. 42 U.S.C. § 300gg-13(a)(4).

48. *Women's Preventive Services Guidelines*, *supra* note 3.

49. *Id*.

50. A self-insured plan "is one in which the employer assumes the financial risk for providing health care benefits to its employees," rather than paying premiums to an insurance company for coverage. *Self-Insured Group Health Plans*, SELF-INS. INST. AM., http://www.siia.org/i4a/pages/Index.cfm?pageID=4546 (last visited Mar. 18, 2014).

51. The grandfathering exemption is available to plans that existed as of March 23, 2010, have at all times since then had at least one person under coverage, and have not substantially changed since that time. 45 C.F.R. § 147.140(a)(1) (2013). A grandfathered plan will cease to come under the exception if it makes any substantial change in the future. Substantial changes that would deprive a grandfathered plan of its status include significantly cutting or reducing benefits; raising charges associated with coinsurance copayments, or deductibles beyond permissible amounts; lowering employee contributions by more than 5 percent; or adding or decreasing annual limits on what the insurer will pay. 45 C.F.R. § 147.140(g)(1).

The ACA also provides that companies with fewer than 50 employees who do not provide health insurance are exempted from paying the annual tax; however, companies with fewer than 50 employees who do provide health insurance must

from the contraceptive coverage requirement (not the preventive services coverage requirement overall) for religious employers.[52] The regulations, newly revised in July 2013, define a "religious employer" as one that "is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended."[53] The referenced sections of the IRS Code refer to "churches, their integrated auxiliaries, and conventions or associations of churches,"[54] as well as "the exclusively religious activities of any religious order,"[55] which are not required to submit tax returns under the Code.[56] In practical terms, religious employers under the regulations consist primarily of houses of worship, churches, synagogues, and the like.[57] These employers are entirely exempted from the contraceptive coverage requirement.[58] The religious employer exemption applies to group health plans and health insurance issuers for plan years beginning on or after August 1, 2013.[59]

The regulations also provide an "accommodation" for "eligible organizations," which are religiously affiliated nonprofit organizations like universities and social service agencies.[60] These organizations may choose not to offer contraceptive coverage, in which case the insurance company

provide contraceptive coverage. *See* 26 U.S.C. § 4980H(a), (c)(2) (2012) (defining "large employer"); 42 U.S.C. § 300gg-13(a) (requiring contraceptive coverage for every offered plan without regard to employer size).

52. 45 C.F.R. § 147.131(a).

53. *Id.*

54. 26 U.S.C. § 6033(a)(3)(A)(i).

55. *Id.* § 6033(a)(3)(A)(iii).

56. *Id.* § 6033(a)(1), (3).

57. *See, e.g.*, ERIN ARMSTRONG, NHELP BREAKS DOWN PREVENTIVE HEALTH SERVICES STANDARDS & CONTRACEPTIVE COVERAGE UNDER THE ACA 3 (2012) *available at* http://www.healthlaw.org/about/staff/erin-armstrong/all-publications/ACA-Contraceptive-Coverage (explaining that the exception covers mostly "houses of worship"); Gedicks, *supra* note 46, at 1 ("[The contraceptive coverage requirement] exempts churches that largely employ and serve persons of their own faith, but not religious employers who hire and serve large numbers of employees who do not belong to the employer's religion or who otherwise reject its anti-contraception values."); Timothy Stoltfuz Jost, *Religious Freedom and Women's Health—The Litigation on Contraception*, 368 NEW. ENG. J. MED. 4, 4 (2013) ("[R]eligious employers [is] defined to include churches and other nonprofit entities that exist for the inculcation of faith and primarily serve and hire adherents to a particular religious faith.") (internal quotation marks omitted).

58. 45 C.F.R. § 147.131(a).

59. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,889 (July 2, 2013).

60. *See* 45 C.F.R. § 147.131(b).

or third-party administrator (for self-insured plans) must make contraceptive coverage available to employees free of charge and without requiring any additional or separate enrollment or any cost sharing.[61] The regulations define eligible organizations as follows:

> (1) The organization opposes providing contraceptive coverage for some or all of any contraceptive services required to be covered [by the regulations] on account of religious objections.
>
> (2) The organization is organized and operates as a nonprofit entity.
>
> (3) The organization holds itself out as a religious organization.
>
> (4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the[se] criteria . . . and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation . . . applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of the Employment Retirement Income Security Act of 1974.[62]

In other words, any nonprofit organization that holds itself out as religious can self-certify that it opposes providing contraceptive coverage, and as long as it fills out and makes available the self-certification form correctly and in a timely manner, its insurance company or third-party administrator (for self-insured organizations) is required to provide contraceptive coverage at its own cost.[63] This regulation applies to any insurance plans starting on or after January 1, 2014, with a safe harbor until that date.[64] The same requirement, with the same effective date, applies to student health insurance plans run by nonprofit religious educational institutions that oppose offering contraceptive coverage.[65] The regulations,

61. *Id.* § 147.131(c).

62. *Id.* § 147.131(b).

63. The regulations provide for third-party administrators for self-insured companies to recoup the costs of the contraceptive coverage through a credit toward the fees they are otherwise required to pay in the federal health insurance exchanges. *See Id.* § 156.50(d).

64. Coverage of Certain Preventive Services under the Affordable Care Act, 78 Fed. Reg. at 39,871.

65. 45 C.F.R. § 147.131(f).

however, contain no enforcement mechanism to ensure coverage.[66]

For-profit businesses that are run by individuals or families who have religious objections to providing insurance coverage for contraception[67] are required to provide coverage if their insurance plan is not subject to another exemption (i.e., they must comply if they have more than 50 employees and their insurance plan does not qualify for grandfathered status, or if they have less than 50 employees but choose to provide health insurance).[68] Companies that violate the contraceptive coverage requirement are subject to hefty fines.[69]

66. *See Id.* § 147.131(b)(4); Laycock, *supra* note 6 (manuscript at 17). Even so, some nonprofit religious organizations object to the accommodation and have filed suit claiming it violates the First Amendment and the RFRA. *See, e.g.*, Class Action Complaint at 2–4, Little Sisters of the Poor Home for the Aged v. Sebelius, No. 1:13-cv-02611-WJM-BNB, 2013 WL 6839900 (D. Colo. Dec. 27, 2013).

67. Some objectors object to providing insurance coverage for contraception for any reason. *See, e.g.*, *Little Sisters of the Poor Home for the Aged*, 2013 WL 6839900, at *3 ("[The employer] does not provide, and has never provided coverage for, or access to, contraception . . . ."). Other objectors would cover some forms of contraception when prescribed for medical purposes (i.e., to treat a medical condition unrelated to pregnancy) even though the medication would still act like a contraceptive. *See, e.g.*, Catholic Diocese of Beaumont v. Sebelius, No. 1:13-cv-709, 2014 WL 31652, at *3 n.4 (E.D. Tex. Jan. 2, 2014) ("[C]ontraceptives may be covered when provided for medically necessary, non-contraceptive purposes . . . ."). In keeping this objection, many objectors are consistent with the Catholic "double-effect doctrine," which allows for the use of contraceptives to treat nonpregnancy-related medical conditions despite their secondary contraceptive effect. *See* Alison McIntyre, *Doctrine of Double Effect*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/double-effect/ ("A doctor who believed that abortion was wrong, even in order to save the mother's life, might nevertheless consistently believe that it would be permissible to perform a hysterectomy on a pregnant woman with cancer. In carrying out the hysterectomy, the doctor would aim to save the woman's life while merely foreseeing the death of the fetus.") (last updated Sept. 7, 2011).

68. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. at 39,875 ("[T]he definition of eligible organization . . . does not extend to for-profit organizations."). For these businesses, the contraceptive coverage requirement took effect August 1, 2012. *Id.* at 39,870. However, at least one high-profile objector and current litigant against the mandate, Hobby Lobby, has publicly stated that a "loophole" has been found enabling it to move the date on which its insurance year starts, thereby avoiding covering contraceptives or paying the hefty fines associated with violation. Eric Marrapodi, *Hobby Lobby Finds Way Around $1.3-Million-a-Day Obamacare Hit—for Now*, CNN: BELIEF BLOG (Jan. 11, 2013), http://religion.blogs.cnn.com/2013/01/11/hobby-lobbys-1-3-million-obamacare-loophole/.

69. *See, e.g.*, 26 U.S.C. § 4980D(a), (b) (2012) (assessing fines of $100 a day per employee); 26 U.S.C. § 4980H (assessing annual taxes for noncompliance); *see also* Michael P. Warsaw, Op-Ed., *Contraception, Against Conscience*, N.Y. TIMES, Feb. 21,

C. *The Problem with the Solution: The Lawsuits*

No sooner was the contraceptive coverage requirement promulgated than religious objectors began filing lawsuits seeking accommodation (i.e., exceptions) under both the First Amendment and the RFRA. The details of each individual lawsuit are less important here than the common themes in their claims, which are largely congruent, not least because one nonprofit religious organization, the Becket Fund, has taken the lead in filing lawsuits against the contraceptive coverage requirement in various venues.[70] While this Article provides examples from particular lawsuits in this subpart, it is not meant to be an exhaustive summary of every lawsuit filed against the contraceptive requirement.

As of March 2014, almost 100 lawsuits had been filed, with 82 still pending.[71] Thirty-five of those lawsuits still pending were filed by religiously affiliated nonprofits like those covered by the July 2013 regulations providing an accommodation.[72] Forty-four of those still pending were filed by for-profit businesses owned by individuals or families who have religious objections to providing insurance for contraception.[73] The plaintiffs range from very large corporations such as Hobby Lobby, a chain of 573 hobby and craft stores with approximately 22,000 employees,[74] to smaller businesses such as K & L Contractors, which has 90 employees.[75] But the arguments run the same course: the plaintiffs in these cases claim that being required to provide insurance coverage for contraception—specifically forms of contraception that the plaintiffs believe are abortifacients, which for some plaintiffs extend to only certain forms of contraception and for other plaintiffs extend to all forms—is contrary to their religious beliefs.[76] Specifically, the plaintiffs allege that being forced to

2012, http://www.nytimes.com/2012/02/22/opinion/why-ewtn-wont-cover-contraception.html (estimating $600,000 in yearly fines for noncompliance).

70. *Our Cases*, BECKET FUND FOR RELIGIOUS LIBERTY, http://www.becketfund.org/u-s-litigation/our-cases/ (last visited Mar. 18, 2014).

71. *Challenges to the Federal Contraceptive Rule*, *supra* note 1.

72. *Id.*

73. *See id.* Three of these cases were filed in conjunction with nonprofit organizations. *Id.*

74. *Hobby Lobby Stores, Inc.*, INSIDE VIEW, http://www.insideview.com/directory/hobby-lobby-stores-inc (last updated March 1, 2014).

75. *See* Korte v. Sebelius, 735 F.3d 654, 662 (7th Cir. 2013).

76. *See, e.g.*, *id.* at 662–63 (plaintiffs oppose covering all forms of contraception); Autocam Corp. v. Sebelius, 730 F.3d 618, 621 (6th Cir. 2013) (plaintiffs oppose covering all forms of contraception); Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 382 (3d Cir.) (plaintiffs

cover contraception is a violation of their free exercise rights, both because the contraceptive coverage requirement is not neutral or generally applicable and thus cannot withstand strict scrutiny under the Constitution and/or because the contraceptive coverage requirement is a substantial burden on their free exercise rights and cannot withstand strict scrutiny under the RFRA.[77]

Both the district courts and U.S. Courts of Appeals have split in their consideration of these lawsuits,[78] although those that have found for the plaintiffs have addressed only the RFRA claims.[79] Currently a circuit split exists on the merits of these cases. The Third and Sixth Circuits have held that for-profit corporations do not have free exercise rights and have, therefore, refrained from reaching the substantive merits of the claims.[80] The Tenth Circuit, however, recently issued an en banc ruling reversing a prior panel opinion and held that the plaintiffs had made out a substantial likelihood of success on the merits of their RFRA claim.[81] On similar grounds, the D.C. Circuit recently reversed a district court's denial of a preliminary injunction.[82] Meanwhile the Eighth and Seventh Circuits have granted several motions for injunctions pending appeal from plaintiffs whose suits for preliminary injunctions were denied in the district courts.[83] In November 2013, the Supreme Court granted certiorari in two of these cases[84] and oral arguments were heard on March 25, 2014.[85]

oppose covering emergency contraception), *cert. granted*, 134 S. Ct. 678 (2013); Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1124–25 (10th Cir.) (plaintiffs oppose covering emergency contraception and intrauterine devices), *cert. granted*, 134 S. Ct. 678 (2013); Annex Med. Inc. v. Sebelius, No. 13-1118, 2013 WL 1276025, at *1 (8th Cir. Feb. 1, 2013) (plaintiffs oppose covering all forms of contraception); Grote v. Sebelius, 708 F.3d 850, 852 (7th Cir. 2013) (plaintiffs oppose covering abortifacient drugs, contraception, and sterilization).

77. *See, e.g.*, *Conestoga Wood*, 724 F.3d at 380.

78. *See* Order Denying Injunction at 2, Eden Foods v. Sebelius, 733 F.3d 626 (6th Cir. 2013) (No. 13-1677) (selecting a few exemplary cases).

79. *See, e.g.*, *Hobby Lobby Stores*, 723 F.3d at 1145; *Grote*, 708 F.3d at 853.

80. *Eden Foods*, 733 F.3d at 632; *Autocam Corp.*, 730 F.3d at 627–28; *Conestoga Wood*, 724 F.3d at 385.

81. *Hobby Lobby Stores*, 723 F.3d at 1147.

82. Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1224 (D.C. Cir. 2013).

83. Annex Med. v. Sebelius, No. 13-1118, 2013 WL 1276025, at *3 (8th Cir. Feb. 1, 2013); *Grote*, 708 F.3d at 855; Korte v. Sebelius, 528 F. App'x 583, 588 (7th Cir. 2012).

84. Conestoga Wood Specialties Corp. v. Sebelius, 134 S. Ct. 678 (2013) (mem.); Sebelius v. Hobby Lobby Stores, Inc., 134 S. Ct. 678 (2013) (mem.).

III. THE LANDSCAPE OF FREE EXERCISE: A BRIEF HISTORY OF MODERN RELIGIOUS ACCOMMODATION LAW

The conflicting outcomes of the contraceptive coverage requirement cases thus far should be no surprise because they are a natural outcome of an unavoidable problem in the doctrine. Many of us share a normative sense that there is something wrong with granting religious accommodations that impose serious burdens on nonbelievers, but neither RFRA nor free exercise case law, taken alone, provide a consistent and principled way of thinking through how to balance such hardships against constraints on free exercise rights. Before we can do this work, however, we must have a baseline knowledge of the conventional understanding of both the purpose of religious accommodation law and the doctrine regarding free exercise rights under the First Amendment and the RFRA.

First, a definition: A "religious accommodation" or a "religious exemption" is permission granted to religious believers—sometimes by a court, sometimes by an executive or legislature[86]—either to refrain from an act otherwise required by a secular civil law (such as sending one's children to high school through the age of 16)[87] or to allow an act otherwise prohibited by a secular civil law (such as using a controlled substance in religious ceremonies)[88] on the grounds that their religion prohibits, requires, or motivates them to act or refrain from acting in the particular manner specified.[89] American law and legal scholarship tend to focus discussion on how frequently and how broadly accommodations should be

85. Oral Argument Schedule for the Session Beginning March 24, 2014, *supra* note 15. The two cases were consolidated. *Conestoga Wood*, 134 S. Ct. at 678.

86. *See, e.g.*, Perry Dane, *Exemptions for Religion Contained in Regulatory Statutes*, ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES 559, 559 (Paul Finkelman ed., 2006) ("Statutory religion-based exemptions can be categorized in a variety of ways. Some create specific exemptions; others create general regimes of exemption. Some accommodate minority religious beliefs; others protect religious self-governance. Some demonstrate a willingness to put aside state interests; others further state interests in the face of the fact of religious diversity.").

87. *See* Wisconsin v. Yoder, 406 U.S. 205, 207–09 (1972).

88. *See* Emp't Div. v. Smith, 494 U.S. 872, 874 (1990).

89. This question is distinct from the question of what exactly constitutes "free exercise," which remains, in general, a neglected and undertheorized area in accommodation law, with no satisfactory framework yet advanced. *See, e.g.*, Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437, 474 (1994). *But see* Whelan, *supra* note 18, at 2182 ("There can be no serious dispute that a person engages in an 'exercise of religion' . . . when, for religious reasons, he performs, or abstains from performing, certain actions.").

granted,[90] but treats the existence and general desirability of religious accommodations as a given.[91] In this subpart, I provide a brief overview of the theoretical frameworks proposed by scholars for supporting accommodation law in our domestic legal tradition, as well as the applicable doctrinal standards currently in place because we cannot understand where this framework is falling short without a concept of what it entails.

A. *The Purpose and Scope of Religious Accommodation Law*

Religious accommodation law may be the one area in which almost everyone is a legal realist, eschewing a bright-line conceptual rule and embracing the vagaries of context-dependent factual scenarios.[92] Most

90. *See infra* Part III.A. This is not to deny the very real differences between a position calling for broad accommodations for almost any religious objector who cares enough to seek one and a position calling for a much narrower scope of exemptions. *Compare, e.g.*, Christopher Wolfe, *Free Exercise, Religious Conscience, and the Common Good*, *in* CHALLENGES TO RELIGIOUS LIBERTY IN THE TWENTY-FIRST CENTURY 93, 108 (Gerard V. Bradley, ed., 2012), *with*, *e.g.*, Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1248 (1994). Such differences are discussed more thoroughly in Part III.A.

91. *See, e.g.*, ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 107 (2013) (citing a "consensus that it is appropriate for *someone* to [craft religious accommodations]"). *But see generally* Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012) (questioning the constitutional and theoretical value of religion, including of free exercise and religious accommodations). However, this is not always the case. Scholars analyzing other traditions have noted the ways in which a culture and legal system may play a constitutive role in shaping religious doctrine and its corresponding claims on the democratic process. *See* BRIAN BARRY, CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM 33–34 (2001). Thus, the tolerance—or even enthusiasm—in the United States for accommodating claims of religious conscience pitted against otherwise applicable secular laws may be a function not only of our particular constitutional guarantee of "free exercise" of religion, but of a cultural and political heritage that prizes the exercise of individual conscience over social cohesion or governmental attempts to legislate for the greater good. *See id.* ("[C]laims based on religion are more likely to be sympathetically received by outsiders than claims based on custom, especially in largely Protestant (or ex-Protestant) countries, in which there is a traditional reluctance to 'force tender consciences'.")

92. *See, e.g.*, KOPPELMAN, *supra* note 91, at 3–4. *But see* MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 173 (2008) ("But, in practical terms, only two courses are open to us: either deny accommodations altogether or allow them, on some basis that we can reasonably restrict and administer.").

domestic scholars writing today agree that religious objectors should receive some level of accommodation from laws that impact their religious exercise, even if they disagree on almost everything else.[93] But before we reach the question of how often accommodations should be granted, we must grapple with the divide in the literature over the purpose of religious accommodations. While this is a question that can be debated at the purely theoretical level, this Article describes a tension present in American free exercise law, both constitutional and statutory, and for my purposes here I take that context for granted; we are already in a world that gives some deference—although the degree is contested—to religious exercise. However, we still must have some understanding of *why*—what is the purpose of religious accommodation law in our domestic system?

The standard narrative has often been that religion occupies a special place in American life and constitutional law, either for explicitly religious reasons—because God exists and the state should favor activity in his name—or for secularized versions of the argument—religion produces social good, is essential to human flourishing, and should be protected on that basis.[94] A persuasive (if smaller) set of scholars, however, has argued that constitutional free exercise doctrine is better explained by viewing free exercise as a right meant to *protect* religious believers from discrimination, rather than to privilege religion above other forms of social or spiritual activity.[95] This position is echoed by judges as well.[96]

93. But not all scholars agree. *See* Schwartzman, *supra* note 91, at 1353 ("The problem . . . is that religion cannot be distinguished from many other beliefs and practices as warranting special constitutional treatment. As a normative matter, religion is *not* special.").

94. For a concise overview of the theoretical debate on this issue, see Andrew Koppelman, Response, *Religion's Specialized Specialness*, 79 U. CHI. L. REV. DIALOGUE 71, 71–72 (2013). There is also something of a practical argument in the literature—that "[p]rotecting religious liberty reduces human suffering [because] people do not have to choose between incurring legal penalties and surrendering core parts of their identity," and that protecting religious liberty "reduces social conflict." Laycock, *supra* note 6 (manuscript at 4).

95. *See* MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 272 (arguing that free exercise is properly constitutionally constrained by the "no-harm principle," which prioritizes the public good); Eisgruber & Sager, *supra* note 90, at 1248; *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532–33 (1993) (noting the roots of the Free Exercise Clause in historical examples of the state discriminating against religious believers); Emp't Div. v. Smith, 494 U.S. 872, 886 (1990) (noting that overly broad religious accommodation rights would produce "a private right to ignore generally applicable laws [that would be] a constitutional anomaly"). While Douglas Laycock would likely not align himself with this position, he is persuasive in his reading of *Smith* and *Lukumi* as being

I align myself with the latter explanation in this Article for several reasons: it better explains the case law, it is normatively more attractive, and it provides an inherent limiting principle that is particularly useful for my analysis here. The first two justifications are self-explanatory. As to the third, if religion is to be privileged, then there is no principled way of knowing when to draw the line with regard to infringements on other people's rights. But if free exercise is about protecting the social and civil equality of religious believers compared to nonbelievers, then we can see that the equality of nonbelievers is an important limiting principle when determining the scope of allowable religious accommodations. I thus presume this purpose of free exercise law and the consequent principle that religious accommodations should be allowed if the challenged law or regulation impacts the equality of religious believers, but they are not to be accorded special privileges above and beyond that. In other words, we might choose to extend religious accommodations beyond those that are equality-implicating in situations in which there will be no significant negative impacts on other rights holders, but we should not be required—either constitutionally or as a matter of public policy—to do so. There are a number of consequences that flow from this position. Many of them are explored in the rest of this Article. The primary framing implications to bear in mind, however, are (1) that the purpose of religious accommodation is to protect religion from discrimination, not to privilege religious believers above other citizens, and (2) that this principle has structural implications for the ways in which we think about the importance of religious exercise in our constitutional system and the weight that such rights should have when they come into conflict with other rights.

The attractiveness of this "protection, not privilege" principle in this context can be illustrated simply by looking at the alternative. For those who believe religion should be privileged, there is no clear answer to the

animated by an "equality rule." Laycock, *supra* note 6 (manuscript at 5).

96. *See, e.g.*, Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1231 (D.C. Cir. 2013) (Edwards, J., concurring in part and dissenting in part) ("Through the entire history of Free Exercise jurisprudence, the Supreme Court has remained true to the principle that the Free Exercise Clause does not ensure freedom from any regulation to which a party holds a religious objection. Indeed, the Court has consistently recognized that any such rule would be problematic because it 'would place beyond the law any act done under claim of religious sanction.'" (quoting Cleveland v. United States, 329 U.S. 14, 20 (1946))); *see also* Reynolds v. United States, 98 U.S. 145, 167 (1878) ("To permit [polygamy as a religious exemption to laws forbidding it] would be to . . . permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.").

question of when to grant accommodations as a general matter. For most domestic scholars writing on these issues today, it is taken for granted that religious objectors "must get 'something' but not 'too much,'"[97] and that the particulars of a given case, plus however closely it may or may not align with the facts of prior precedential rulings, determine whether a religious accommodation will be or should be granted.[98] This, predictably, leads to—or is merely an explanation intended to justify—a level of doctrinal chaos. The received scholarly wisdom is generally that "the American law of religious liberty makes no sense. It has been called 'unprincipled, incoherent, and unworkable,' 'a disaster,' 'in serious disarray,' 'chaotic, controversial and unpredictable,' 'in shambles,' 'schizoid,' and 'a complete hash.'"[99] Even those scholars attempting to stitch together an overarching theory of free exercise law generally find themselves unable to drill down much past general principles.[100] Given the assumption that religious accommodations are, at base, policy determinations that must be made by judges or legislatures, it is clear that "[t]he decision whether to treat religion specially involves balancing the good of religion against whatever good the generally applicable law seeks to pursue."[101] But here we circle back to the crucial question: when should that good against which religious rights must be balanced take precedence?[102]

97. Eisgruber & Sager, *supra* note 89, at 452.

98. *See, e.g.*, Swanner v. Anchorage Equal Rights Comm'n, 513 U.S. 979, 982–83 (1994) (Thomas, J., dissenting on denial of certiorari) (describing "considerable confusion" among state courts applying Free Exercise Clause precedent).

99. KOPPELMAN, *supra* note 91, at 4 (footnotes omitted).

100. Andrew Koppelman, for instance, in his recent book *Defending American Religious Neutrality*, argues that constitutional religious doctrine—encompassing both the Free Exercise and the Establishment Clauses—is, in fact, coherent when one assumes that the government is free to prioritize religion over other forms of civic society and life but not to prioritize any *particular* religion over another. *See id.* at 3–4. Koppelman and others in his camp make a virtue out of the doctrine's hostility to synthesizing attempts at any level more detailed than this one. *See, e.g.*, NUSSBAUM, *supra* note 92, at 173. But in doing so, they join the great majority of scholars in understanding religious accommodation in American law as having the strong flavor of a policy determination. *See, e.g.*, Eisgruber & Sager, *supra* note 89, at 459 ("Congress and the states must calibrate exemptions appropriate to particular policy domains."). To be clear, I do not think Koppelman would consider this a fault in his argument, and neither do I, at this level of generality.

101. KOPPELMAN, *supra* note 91, at 11.

102. For an example of a recommendation that the Court move toward a more nuanced balancing test, see Donald L. Beschle, *Does A Broad Free Exercise Right Require A Narrow Definition of "Religion"?*, 39 HASTINGS CONST. L.Q. 357, 384–85 (2012).

That is the concern animating this Article. In making these policy determinations, "any religious exemption regime must reconcile religious objectors' claims with the countervailing private rights and interests of others."[103] The questions with which I am concerned here are (1) how do we do so? and (2) can we, contrary to the accepted wisdom, develop a principled system for doing so, at least in cases that implicate equality rights? But before turning to that project, the next subpart provides a quick review of the legal framework currently in place because its concerns—although admittedly often inchoate—will help guide us along the way.

B. *Doctrine Along the Accommodation Spectrum*

Regardless of the theoretical frameworks animating the scholarship on religious accommodations, any proposal that exists outside the realm of political theory must take into account the fractured history of American religious accommodation law. In order to highlight the existing strands of reasoning on religious accommodations, as well as the ways in which they fail to cohere into a systematic approach, this subpart briefly reviews the current doctrinal standards applicable to free exercise claims against the federal government under the Constitution and the RFRA.[104]

1. *Constitutional Law*

The story of 20th century American free exercise law is complicated and contested, and one to which this Article cannot do full justice. To the extent that the history of religious accommodation law before the 1990 landmark *Smith* case is relevant to statutory interpretation under the RFRA, it is covered in the following subpart.[105] This subpart discusses only the current constitutional standard as articulated in *Smith* and several cases that followed it.

Smith was brought by two members of the Native American Church

103. Volokh, *supra* note 19, at 1502; *see also* KOPPELMAN, *supra* note 91, at 108 (referring to the "marginal cost" religious accommodations may impose in arguing they should be allowed "unless the marginal cost is too high"); Laycock, *supra* note 6 (manuscript at 3); Dane, *supra* note 44. In fact, even those supporting a broad accommodation regime recognize that, at least in some circumstances, accommodations must be denied in order "to prevent tangible harm to third persons who have not joined the faith [of the objectors]." Douglas Laycock, Essay, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883, 886 (1994).

104. 42 U.S.C. § 2000bb-1 (2012).

105. *See infra* Part III.B.2.

who were fired from their jobs as drug rehabilitation counselors at a private facility because they had admitted to using peyote as part of their religious practice.[106] When the petitioners applied for unemployment benefits, the State of Oregon denied their applications because they had been terminated for work-related "misconduct."[107] The Oregon Supreme Court granted plaintiffs relief on First Amendment grounds, but the U.S. Supreme Court reversed, explaining that while the First Amendment clearly prohibits any government regulation of religious *beliefs*,[108] "an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law," such as the Oregon controlled-substance statute in question.[109] So long as a law is neutral and generally applicable, it does not violate the First Amendment.[110]

Post-*Smith* cases from the Supreme Court have been fairly rare.[111] Three years after *Smith*, the Court decided *Church of the Lukumi Babalu Aye v. City of Hialeah*, in which plaintiffs who practiced Santeria challenged city ordinances that regulated animal slaughter in a way that prohibited their sacrificial rites.[112] The Supreme Court, in holding for the plaintiffs, took the opportunity in *Lukumi* to flesh out the principles of "neutral and generally applicable" that had been advanced in *Smith.* The Court explained that a law is not generally applicable if it "in a selective manner impose[s] burdens only on conduct motivated by religious belief."[113] If these criteria sound difficult to disentangle, it's because they are: "Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied."[114] One of the primary concerns of *Smith* and *Lukumi* is whether religious exercise is being singled out for unfavorable or discriminatory treatment—if not, the likelihood of a constitutional violation is low.[115] In

106. Emp't Div. v. Smith, 494 U.S. 872, 874 (1990).
107. *Id.*
108. *Id.* at 877.
109. *Id.* at 878–79.
110. *See id.* at 879–82.
111. Laycock, *supra* note 6 (manuscript at 4).
112. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 528 (1993).
113. *Id.* at 543.
114. *Id.* at 531.
115. This interpretation of the Free Exercise Clause did not arise with *Smith. See, e.g.*, Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 389–91 (1990) (holding that a challenged tax was "not a tax on the right to disseminate religious information, ideas, or beliefs *per se*" and therefore did not violate the Free Exercise

sum, after *Smith* and its progeny, strict scrutiny only applies, as a federal constitutional matter, to laws that are not neutral or generally applicable.

2. *Statutory Law: The Religious Freedom Restoration Act*

Smith appeared to announce a fairly bright-line rule for deciding religious accommodation claims under the U.S. Constitution. For many, however, it was not a welcome decision. The modern era of pre-*Smith* religious accommodation law, which began in the 1960s, was believed by many to have offered greater protection for religious objectors than the *Smith* opinion seemed to allow.[116] The RFRA was passed in response to *Smith* to "restore" this previous framework,[117] and thus, it is impossible to understand the Act and its effects without a brief overview of the doctrine it purported to reinstate.

The modern pre-*Smith* regime began with *Sherbert v. Verner*, which "launched the constitutional exemption regime."[118] The plaintiff in *Sherbert* was a Seventh-day Adventist who had been fired by her employer for refusing to work on the Sabbath (Saturday), and was subsequently denied unemployment benefits by the state on the basis of her refusal to work on Saturdays.[119] The Court held in her favor, explaining that the plaintiff's religious exercise had been burdened because "[t]he ruling 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."[120] Given this burden, the Court explained that the government had to have a "compelling state interest" in its law and that even if it had one, it must also "demonstrate that no alternative forms of regulation would combat such abuses without

Clause).

Further, even in some cases in which the state is singling out religion, there still may not be a constitutional violation. In *Locke v. Davey*, the Court held that a Washington statute prohibiting state scholarship recipients from using the funding to pursue devotional degrees was not a violation of free exercise, even though the law singled out religion, because, *inter alia*, the consequences were much milder than the criminal and civil penalties at issue in *Lukumi*. *See* Locke v. Davey, 540 U.S. 712, 720 (2004).

116. *See* Lupu, *supra* note 37, at 186 n.68 (describing the reaction of law professors and politicians to the decision).

117. *See id.* at 187.

118. Volokh, *supra* note 19, at 1473.

119. Sherbert v. Verner, 374 U.S. 398, 399–401 (1963).

120. *Id.* at 404.

infringing First Amendment rights."[121] This became known as the "compelling interest" test.[122]

The other central case in the pre-*Smith* regime was *Wisconsin v. Yoder*, in which Amish plaintiffs challenged their conviction for violating a state compulsory education law by arguing that the law, which required children to attend school until age 16, violated their free exercise rights because it impermissibly exposed their children to secular and worldly values.[123] The Court agreed with the State that, "having a high responsibility for education of its citizens, [it had the power] to impose reasonable regulations for the control and duration of basic education."[124] But that right, the Court noted, was "not totally free from a balancing process" with competing rights, like the right to free exercise and the right of parents to direct their children's education.[125] In this case, the Court found that compulsory education past eighth grade "contravenes the basic religious tenets and practice of the Amish faith,"[126] and therefore, the State was required to pass the compelling interest test.[127] Undertaking what it dubbed a "searching inquiry," the Court determined that, as applied to the particular circumstances of the Amish and their children between the point at which they graduated eighth grade and the point at which they turned 16, the government interest in compulsory education was less compelling than it was as applied to the general public, and that the State had not shown the necessity of the law with sufficient particularity.[128]

This was the background against which the *Smith* decision was understood. While some law professors spoke up in defense of *Smith*,[129] public, political, and most scholarly opinion was decidedly against the

121. *Id.* at 406–07.

122. The Court followed *Sherbert* with three more unemployment cases, all of which applied the compelling interests test to find that the plaintiffs were entitled to accommodation of their religious exercise. Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829, 835 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 139–40 (1987); Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 718 (1981); *see also* Eisgruber & Sager, *supra* note 89, at 446.

123. Wisconsin v. Yoder, 406 U.S. 205, 208–11 (1972).

124. *Id.* at 213.

125. *Id.* at 213–14.

126. *Id.* at 218.

127. *See id.* at 221.

128. *See id.* at 228–29.

129. *See, e.g.*, William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 308–09 (1991) (undertaking to defend the substance of, if not the form and crafting of, *Smith*).

decision,[130] which provoked a "massive outcry."[131] The decision "galvanized a large number of diverse religious groups as well as various civil rights organizations" in opposition to the Court's ruling.[132] Their concern was not allayed by the lower court decisions that followed *Smith*, in which both state and federal courts found against a variety of plaintiffs seeking religious accommodations,[133] including a Hmong family that objected to a mandatory autopsy law.[134] After a petition for rehearing failed, various religious and civil rights groups, including the National Association of Evangelicals, the ACLU, and Concerned Women for America—a gathering of unlikely bedfellows—began to lobby for a legislative solution.[135] The result was the RFRA, which was first introduced in Congress in July 1990, a mere three months after *Smith* came down.[136] The RFRA's purpose was made explicit in its text: "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened."[137] After some skirmishing in Congress related to abortion politics,[138] the bill was signed into law by President Bill Clinton on

130. *See* Lupu, *supra* note 37, at 186–87 & nn.68–70.

131. *Id.* at 186. In fact, the congressional response to *Smith* appears to be a classic example of backlash. Such backlash occurs when a Supreme Court opinion codifying what may have already been inevitable as a matter of legislative or juridical evolution produces outrage and opposition among stakeholders in the political and judicial process, and prompts not only grassroots organizing but legislative reform aimed at undoing the Court's intervention. For a general overview of backlash theory, see Cass R. Sunstein, *Backlash's Travels*, 42 HARV. C.R.-C.L. L. REV. 435 (2007). For a discussion of possible critiques of backlash theory, see Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 390 (2007).

132. Robert F. Drinan & Jennifer I. Huffman, *The Religious Freedom Restoration Act: A Legislative History*, 10 J.L. & RELIGION 531, 531 (1994).

133. *See id.* at 532.

134. Yang v. Sturer, 750 F. Supp. 558, 558–59 (D.R.I. 1990) (holding that the family was not entitled to emotional distress damages caused by a medical examiner performing an autopsy on their son despite their religious objection because the law did not violate the *Smith* standard).

135. *See* Drinan & Huffman, *supra* note 132, at 533.

136. *Id.*

137. 42 U.S.C. § 2000bb(b)(1) (2012) (citations omitted); *see* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 218–19 (1994).

138. Given the reaction to *Smith*, many observers expected the RFRA to sail through Congress quickly, but in fact the bill stalled shortly after it was introduced, mostly due to opposition by the United States Catholic Conference and several antiabortion groups. Drinan & Huffman, *supra* note 132, at 534. As a result of this

November 16, 1993.[139] The final text of the RFRA was short and to the point:

> (a) In general
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.[140]

opposition, several key supporters distanced themselves from the bill. Laycock & Thomas, *supra* note 137, at 236–37. Ironically, given the current contraceptive coverage requirement cases being brought under the RFRA, opposition to the bill centered around the concern that the RFRA would be used to protect women's right to access abortion services. *Id.* at 236. At the time, many advocates and policymakers believed that the Court was close to overturning *Roe v. Wade*. *Id.* at 237. The fear was that once *Roe* was overturned, a woman would be able to access abortion services by claiming that having an abortion was part of the free exercise of her religion, and that the RFRA would be used to force courts to grant women accommodations from state abortion bans. *Id.* at 236.

In 1992, however, the Supreme Court decided *Planned Parenthood of Southeastern Pennsylvania v. Casey*, and with the central aspects of *Roe* affirmed, concern about the RFRA acting as a kind of *Roe* substitute became moot. *Id.* at 237; *see* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 869 (1992) ("It is . . . imperative to adhere to the essence of *Roe*'s original decision, and we do so today."). Language was added to the bill to make clear that the RFRA was not intended to affect a woman's right to abortion one way or the other. Laycock & Thomas, *supra* note 137, at 237–38. This guaranteed the support of important antiabortion legislators such as Illinois Representative Henry Hyde. *Id.* Having satisfied these and other concerns, the RFRA passed through Congress. *See id.* at 238–39 (discussing concerns about the RFRA's effect on the tax-exempt status of religious organizations); Drinan & Huffman, *supra* note 132, at 538–40 (discussing concerns about the RFRA's effect on prison administration); Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L. REV. 575, 582–83 (1998) ("When the abortion issue collapsed [after *Casey*] . . . the opposition to RFRA among religious groups disappeared with it." (footnote omitted)).

139. Drinan & Huffman, *supra* note 132, at 541.

140. 42 U.S.C. § 2000bb-1(a)–(b). The statute also included Congressional

These few lines of text, however, have not proved particularly simple to apply. The compelling interest test, described as a monolithic standard in the statute's purpose, was in fact several tests, applied in different ways, rarely consistently, and with no easily discernible coherent framework or set of principles for lower courts to apply.[141]

findings and a statement of purpose, which read, respectively:

> (a) Findings
>
> The Congress finds that—
>
> (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
>
> (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
>
> (3) governments should not substantially burden religious exercise without compelling justification;
>
> (4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
>
> (5) the 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.
>
> (b) Purposes
>
> The purposes of this chapter are—
>
> (1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
>
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb.

The federal government was not alone in responding to *Smith* in this manner; many state legislatures also passed state versions of the RFRA, with text identical to, similar to, or only somewhat related to the RFRA's text. For a thorough account of state RFRAs and their impact as of 2010, see Lund, *supra* note 18, at 474–79 (describing the variation in state RFRAs and concluding that they have had limited effect in practice).

141. A variety of scholars have argued that, contrary to popular belief, the pre-*Smith* regime was not a consistently protective era. *See, e.g.*, HAMILTON, *supra* note

The Supreme Court has done little to clarify matters. After the RFRA was passed, the Court's first pronouncement on it came via *City of Boerne v. Flores*, in which the Court struck down the RFRA as it applied to the states as a violation of Congress's power under Section Five of the Fourteenth Amendment but upheld the law as it applied to the federal government.[142] In 2006, in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, the Court heard a case with a fact pattern very similar to those in *Smith*, and held, in contrast to the constitutional holding in *Smith*, that the RFRA protected the right of a religious sect to use hoasca, a controlled substance, in their religious rites even though such use violated federal

95, at 211–14 (arguing that *Smith* upheld the dominant—and correct—themes of prior precedents and was therefore not a departure from past practice); Eisgruber & Sager, *supra* note 89, at 446 ("[O]utside the charmed precincts of unemployment benefits and the *Sherbert* quartet, those seeking religious exemptions from otherwise valid laws have prevailed on only one occasion: in *Wisconsin v. Yoder* . . . ."); Lund, *supra* note 18, at 473 (noting that the RFRA "require[s] what *Sherbert/Yoder* only purported to require"); Lupu, *supra* note 37, at 177 ("Excepting only a line of unemployment cases in which *Sherbert*-like issues were raised, the Supreme Court ruled for the government and against the free exercise exemption claimant in *every* decision rendered between 1972 and 1990." (footnote omitted)); Volokh, *supra* note 19, at 1484 (describing the pre-*Smith* Supreme Court as "unwilling[] to enforce strict scrutiny really strictly").

Instead, some scholars convincingly demonstrate that the pre-*Smith* standard was "strict in theory but feeble in fact." Eisgruber & Sager, *supra* note 90, at 1247. Despite the purported stringency of the standard, "[o]ne way or another, accommodation claimants . . . regularly lost" at all levels of adjudication. Eisgruber & Sager, *supra* note 89, at 446; *see also* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1110 (1990). In sum, "[o]ne might fairly say that when *Smith* arrived, much of the law of free exercise was drifting in a slow downward spiral, offering less protection to religion with every passing Term." Lupu, *supra* note 37, at 186; *see also* Volokh, *supra* note 19, at 1495 ("As with the case law of many other constitutional provisions (such as the Free Speech Clause), the *Sherbert*-era constitutional exemption framework was a complex body of law, with not one but several tests."). *But see* Laycock & Thomas, *supra* note 137, at 224 (arguing that the seminal cases in this line of precedent "subordinate[] religious liberty only to 'interests of the highest order,' and . . . only to avoid 'the gravest abuses, endangering paramount interests'" (footnote omitted)). Scholars are not alone in this assessment. *See* Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1233–34 (D.C. Cir. 2013) (Edwards, J., concurring in part and dissenting in part).

142. *See* City of Boerne v. Flores, 521 U.S. 507, 534 (1997). In response, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA), basing its power on the Spending and Commerce Clauses and implementing the RFRA standard for institutionalized persons and for claims brought against land-use regulations by those seeking religious accommodations. 42 U.S.C. §§ 2000cc–2000cc-1 (2012). In 2005, the Supreme Court held that the RLUIPA section pertaining to prisoners did not violate the Establishment Clause. *See* Cutter v. Wilkinson, 544 U.S. 709, 719–20 (2005).

law.[143] Apart from these pronouncements, the Court has been largely silent on the RFRA's application.

While federal appellate courts have had, by necessity, more experience with deciding RFRA cases, their decisions have not provided a cohesive method of interpreting the statute. In the 20 years since the RFRA was passed, surprisingly little scholarship has been produced surveying its effect. To some extent this may be because the RFRA has become part of the statutory landscape—or because it has proved an anemic protection for religious claimants.[144] After the RFRA was passed, one scholar reviewing the case law to that point concluded that when it came to the substantial-burden threshold, "[t]he developing case law . . . discloses no consistent theory—indeed, very little theory at all—through which the concept should be understood,"[145] and that courts' treatment of the strict scrutiny clause was characterized by "an uncertain version of the Act's 'compelling interest/least restrictive means' provision."[146] When the same author revisited the question of the RFRA's impact in another article five years after its passage, his conclusion was much the same.[147]

Nevertheless, given that the RFRA exceeds the constitutional floor for free exercise protections and is statutory, courts will often have to consider RFRA claims in order to avoid reaching the constitutional claim. Further, with the passage of the Affordable Care Act, the RFRA has

143. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 425, 432–33 (2006).

144. *See* Matthew Nicholson, Note, *Is* O Centro *a Sign of Hope for RFRA Claimants?*, 95 VA. L. REV. 1281, 1282 (2009). It is worth noting, however, that Nicholson's article relies on analyses performed in the earlier years of the RFRA, in 1998 and 1999. *See id.* at 1281–82 nn.5–6. Nicholson is not alone in this—in fact, there appears to have been no scholarly analysis of the RFRA's impact on religious exercise claims since this period almost 15 years ago. Such an analysis is beyond the scope of this Article, but state RFRAs, like their federal model, appear to have had little impact. *See* Lund, *supra* note 18, at 467 (noting that as of 2010, 16 states have RFRA statutes "but claims under them are exceedingly rare," with four of those states having no cases under their state RFRA). The renewed attention to the RFRA brought along by the contraceptive coverage requirement cases may stimulate new scholarship on these questions.

145. Lupu, *supra* note 37, at 202.

146. *Id.* at 175.

147. Lupu, *supra* note 138, at 576 (placing blame for the evisceration of the RFRA standard's protective potential on courts' interpretation of the substantial-burden element). Some, however, believe that Congress was clear in incorporating *all* of pre-RFRA doctrine. *See* Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1236 (D.C. Cir. 2013) (Edwards, J., concurring in part and dissenting in part).

reentered the spotlight as one of the main vehicles through which the political and judicial branches are mediating the cultural conflict around access to contraception, sexual rights, and religious belief.[148] Thus, the lack of clarity surrounding the appropriate scope and interpretation of the RFRA contributes significantly to the incoherence in religious accommodation law in the courts.

IV. WHAT'S MISSING FROM THIS PICTURE: THE EXISTING RIGHTS-HOLDER

The *Smith* standard and the RFRA, such as they are, may provide a workable framework for a certain traditional kind of religious accommodation case: that in which the relationship in question is *primarily* between the religious objector and the state, and the state's interest in resisting an accommodation rests *mostly* on the efficient and consistent administration of its laws. I mean these italics to acknowledge the fact that, as addressed in this Part, there are always effects on other parties.[149] The question is which effects we should take into consideration.

The interest in efficient administration is the one generally emphasized in the landmark cases of both the pre- and post-*Smith* regimes.[150] But this view of the interests at issue in free exercise cases elides an important—and different—religious accommodation question: what to do when a request for religious accommodation will impact not so much the state's interest in efficient administration of its laws, but the interests of other, nonobjecting citizens who would be negatively affected by an accommodation granted to a religious objector, particularly when their interests and such effects arise from or have an impact on higher order equality rights? For this latter type of case, neither the neutral and generally applicable standard of *Smith* nor the substantial-burden standard of the RFRA asks the right questions or produces the right answers in a consistent manner. Although one example cannot illustrate all the complexities of the issues here, I use the contraceptive coverage requirement as an example throughout this Part to make both the theory and the practice here more concrete.

148. *See, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1128–44 (10th Cir.), *cert. granted*, 134 S. Ct. 678 (2013).

149. Eisgruber & Sager, *supra* note 90, at 1290.

150. *See, e.g.*, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430 (2006); Sherbert v. Verner, 374 U.S. 398, 406–08 (1963).

A. *A New Distinction*

1. *The Usual Story: Efficient Administration and Public Order*

In many cases the traditional free exercise model, which pits a religious objector's free exercise rights against the state's interest in efficient and uniform administration of its laws, is a perfectly appropriate match for the interests involved. Several of the classic religious accommodations cases are cases of this type. For instance, in *Sherbert*, the case brought by the Seventh-day Adventist who was denied unemployment benefits because she refused to work on her Sabbath, the state argued unsuccessfully that its compelling interest was preventing fraudulent unemployment compensation claims by people seeking undeserved religious exemptions.[151] In the unemployment insurance cases that followed *Sherbert* the government's interests were likewise rooted in consistent administration of the law for the sake of efficiency and order.[152] Similarly, in *Braunfeld v. Brown*, Orthodox Jews challenged a Sunday-closings law on free exercise grounds, arguing that because their businesses already closed on Saturday for religious reasons, being forced to remain closed on Sunday put them at an economic disadvantage.[153] The Supreme Court accepted the state's argument that allowing exemptions would undermine the efficient administration of the law and pose the potential for fraudulent requests for exemptions.[154]

My concern here is not why efficient administration was considered sufficient to defeat requests for religious accommodations in some cases but not in others; such apparent inconsistencies may be reconcilable on the details or may be evidence of the inconsistency of pre-*Smith* doctrine. The important point here is that there exists a class of cases in which the state's most compelling interest in enforcing a general civil law against a religious objector lies in the state's enforcement of its own interests, generally those of efficient administration,[155] and not in the protection or promotion of the

151. *Sherbert*, 374 U.S. at 407–09.

152. *See* Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829, 835 (1989) (rejecting the state court's concern that an exemption might result in "a mass movement away from Sunday employ"); Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 718–19 (1981).

153. Braunfeld v. Brown, 366 U.S. 599, 601 (1961).

154. *Id.* at 608–09.

155. *See, e.g.*, Hernandez v. Comm'r, 490 U.S. 680, 699–700 (1989); United States v. Lee, 455 U.S. 252, 261 (1982).

rights of other citizens.[156]

2. *The New Story: Existing Rights-Holders*

But not all cases primarily involve a conflict between the rights of religious objectors and the state's interest in the efficient administration of laws. In fact, in another set of cases, this model obscures the fact that the core conflict of interests and rights is between religious objectors and those other citizens whose interests—particularly higher order equality interests—would be impaired if religious objectors were granted accommodations. In the contraceptive coverage requirement cases, for example, the conflict is between the women who have a legal entitlement to insurance coverage for contraceptive care under the Affordable Care Act and the religious employers who object to being required to provide that coverage. In this subpart I propose a vocabulary for these kinds of cases, and explain the ways in which the traditional model fails to consistently account for the important questions raised in these instances.

a. *Terminology*. "Third party" is the traditional term used to describe individuals or groups who do not have a religious objection to a law, but might be affected by an accommodation granted to a religious objector.[157] I want to resist this generic phrase, however, and offer a more specific term instead. The language we use to talk about a problem shapes the way that we are able to think about both the problem and the potential solutions,[158] and to call people who suffer negative externalities when religious accommodations are granted "third parties" immediately positions them as, at best, incidental to the central relationship between the religious objector and the state. My point here, from which the rest of the analysis flows, is that before the religious objector comes along, there already exists a primary relationship on which we should focus—the relationship between the state that has passed the law in question and any individuals or groups who benefit from the law, particularly when the benefits implicate their equality rights. The religious objector's interjection automatically shifts the

156. That is not to say that in such cases there are never impacts on third parties that a court might consider. *See Lee*, 455 U.S. at 261 ("Granting an exemption . . . to an employer operates to impose the employer's religious faith on the employees.").

157. *See, e.g.*, Dane, *supra* note 44, at 6 ("third parties"); Laycock, *supra* note 6 (manuscript at 3) ("others"); Laycock, *supra* note 103, at 886 ("third persons"); Volokh, *supra* note 19, at 1502 ("others").

158. *See* James Boyd White, Essay, *Thinking About Our Language*, 96 YALE L.J. 1960, 1962 (1987).

focus of the rights-based discourse away from this preexisting relationship. This preexisting relationship is one of support from the state for the rights of the group the law targets for benefits, and of dependence by the rights-holders on the state for protection of those rights. But the relationship framed by standard religious accommodation law is between the state and the religious objector, and is nearly always framed in terms of the State oppressing the religious objector and the objector seeking freedom from said oppression.[159]

Thus, I call this group existing rights-holders, or ERHs for short. This does not obscure the fact that religious objectors may possess a right to religious accommodation—or at least a claim to such a right that we should take seriously in this conversation, whether or not we determine ultimately that as a doctrinal or policy matter it should be granted. We thus have objecting rights holders—those seeking religious accommodations—and preexisting nonobjecting right holders—those for whose benefit the law was passed and who not only do not object to the law, but may very much wish for it to be enforced.[160] Rather than create an enormously unwieldy acronym for preexisting nonobjecting rights holders, I use existing rights-holders, or ERHs, instead.

b. *Theoretical justifications*. It is well established that rights are distributional, not just vis-à-vis the individual and the state, but vis-à-vis individuals and each other. A right granted to a given party may both provide an entitlement to act or refrain from acting to one party while also depriving another party of the corresponding ability.[161] For instance, a legal

159. *See, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1137–38, 1144–45 (10th Cir.) (undertaking the substantial-burden analysis yet devoting little attention to the interests of Hobby Lobby employees), *cert. granted*, 134 S. Ct. 678 (2013).

160. Often these people are the intended beneficiaries of the government action in question, but this does not necessarily have to be the case. If the benefits were an unintended consequence of the government action, that could affect the application of the RFRA standard, particularly with respect to the evaluation of the government's interest. *See infra* Part V.B.2. Objecting beneficiaries may also exist: those who were the intended (or unintended) beneficiaries of the government's action but who object to the law—in other words, they disagree with the government that the law is in their best interests. These beneficiaries' most salient characteristic is their religious objection; they are therefore not relevant to this analysis.

161. I use "distributional" as a concept distinct from the technical meanings of the pair of linked concepts called "corrective justice" and "distributive justice." "Corrective justice governs the normative relationship between one individual and another, while distributive justice governs the web of interconnected relationships of a

system that allows for private property and has a tort of trespass distributes to one party the right to possess a piece of land and bar others from stepping on it, and correspondingly takes away from all other parties the right to step on that land whenever they choose. An easement through a piece of land, to continue the property example, distributes a piece of the preexisting property right held by the landowner back to the holder of the easement.

The same is true for free exercise rights and the religious accommodation rights that are granted pursuant to them. To be sure, not all effects caused by religious accommodations are of the same magnitude or deserving of the same concern. There are many diffuse instances of burden shifting, some of which may be inevitable in the modern regulatory state.[162] For example, "[i]f the state must make exemptions to health and education laws, then society will have to pick up the cost if those seeking exemptions become sick or unproductive and need public assistance to care for themselves."[163] This kind of indirect cost to other citizens, however, is largely a financial one that is spread across a large base of taxpayers, resulting in a small practical burden for any individual nonobjector.[164]

In some instances, however, the result of a religious accommodation will be a very real and significant burden on ERHs. These are generally instances in which the law challenged by a religious objector was passed to protect or convey a significant right or benefit on individuals or groups, most or all of whom have no religious objection to the law and who often welcome its protections or effects. Such impacts may be practical, like the right to access contraception without a copay,[165] but such impacts may also be expressive, as with the contraceptive coverage requirement's message

society." Jeffrey Berryman, *The Compensation Principle in Private Law*, 42 LOY. L.A. L. REV. 91, 98 (2008). However, the sense in which distributive justice relates to the "web of interconnected relationships of a society" is the same sense in which, when we think about rights as distributional, we can see how granting a right or entitlement to one party may easily distribute a benefit to that party that does not get distributed to another party, or that in fact prevents another party from acting in a way that he or she would prefer absent the law in question.

162. *See* Eisgruber & Sager, *supra* note 89, at 455 ("The transfer of burdens from religious to secular interests will not always be . . . obvious . . . . [but a] transfer will take place any time that government has a legitimate interest in denying an exemption.").

163. Eisgruber & Sager, *supra* note 89, at 455.

164. *See id.* ("[M]oney not paid by religious actors must necessarily come from secular sources.").

165. *See supra* Part II.B.

about the centrality of women's reproductive rights to social and economic equality.[166]

The question of which rights should be given the most deference and when and why is addressed *infra*. For now, all I mean to establish is that religious accommodation rights—like all rights—operate distributionally, and granting religious accommodations may operate to deny ERHs access to important practical or expressive benefits of the law.

B. *An Old Framework*

The traditional kind of case, in which the state's interest lies in the efficient administration of its laws, may in fact be well-captured by the existing doctrine, whether constitutional or statutory. Under those doctrines, once a religious objector has passed some kind of threshold—proving a law is not neutral or generally applicable for a First Amendment claim, or showing a substantial burden on the objector's religious exercise for a claim under the RFRA—a court must apply strict scrutiny, evaluating both the state's compelling interest and whether the law is narrowly tailored to achieve that end. But when it comes to the second set of cases, in which ERHs have the real interests at stake, the doctrine is often a poor fit.

This is not to say that the Supreme Court has been insensible to the impacts of religious accommodations on nonobjecting parties. It has recognized, for instance, that while religious accommodations should perhaps be more leniently granted if "[t]he freedom asserted by [an objector] does not bring [the objector] into collision with rights asserted by any other individual,"[167] accommodations should not be permitted if they "impose the [objector's] religious faith [on others]."[168] Several of the major free exercise cases have indicated a sensitivity to the ways in which the state may be conferring benefits on or protecting the rights of citizens in ways that religious accommodations would frustrate. For instance, in one of the earliest modern religious accommodation cases, *Prince v. Massachusetts*, a Jehovah's Witness was prosecuted for violating a law prohibiting children from selling publications on the street when she brought her nine-year-old niece and ward with her to do so.[169] She

166. *See supra* Part II.A.1.b.

167. Braunfeld v. Brown, 366 U.S. 599, 604 (1961) (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 630 (1943)).

168. *See* United States v. Lee, 455 U.S. 252, 261 (1982).

169. Prince v. Massachusetts, 321 U.S. 158, 160–61 (1944).

challenged the law as a violation of her First Amendment rights on the grounds that it violated her religious beliefs.[170] The Court, however, rejected her claim, holding that the state had a superseding interest in "protect[ing] the welfare of children."[171] The Court attributed this interest not just to the state in its own regard, but to the state as the representative of the law's beneficiaries (children), explaining that "[i]t is the interest of youth itself, and of the whole community, that children be safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens."[172] The Court voiced a concern that allowing religious exemptions to this law would subject children to anything from "emotional excitement" to "psychological or physical injury."[173] In other words, the Court understood the purpose of the law to be the protection of children's right to not be compelled to perform child labor (selling publications, whether newspapers or religious tracts, on the street), and saw the state as having passed the law in order to protect and represent that interest.

Further, the Court has recognized that there may be important, expressive equality norms even with regard to laws whose primary effect on ERHs would be symbolic, not practical. In *Bob Jones University v. United States*, Bob Jones University, a fundamentalist Christian school, was stripped of its nonprofit tax-exempt status after the IRS determined it did not qualify as a nonprofit organization under the IRS code because its official rules prohibited admittance of applicants in an interracial marriage and prohibited interracial dating or marriage between current students (enforced through expulsion), and these rules were contrary to public policy.[174] The university argued its policies on interracial dating were based on sincere religious belief and it was therefore entitled to an accommodation—i.e., a reversal of the IRS's decision and a restoration of its nonprofit tax-exempt status.[175] But the Court rejected the request. As the Court explained, "racial discrimination in education violates a most

170. *Id.* at 164.

171. *Id.* at 165.

172. *Id.*

173. *Id.* at 169–70.

174. Bob Jones Univ. v. United States, 461 U.S. 574, 580–82 (1983). The ruling was based on the idea that the purpose of tax-exempt status was to encourage charities operating with a public purpose and not in a way contrary to established public policy, and that the United States had an established public policy against racial segregation and discrimination in education. *See id.* at 586, 592–93.

175. *Id.* at 602–03.

fundamental national public policy, as well as rights of individuals,"[176] because "racial discrimination in education violates deeply and widely accepted views of elementary justice."[177] The government's interest in eradicating racial discrimination in education was a "fundamental, overriding" one that "substantially outweigh[ed] whatever burden denial of tax benefits place[d] on petitioners' exercise of their religious beliefs."[178] The bottom line, according to the Court, was that "however sincere the rationale may be, racial discrimination in education is contrary to public policy."[179] Moreover, the discrimination was impermissible to such a degree that it outweighed any infringement on the university's free exercise rights.[180]

The Court has also dealt with what we might call a hybrid case—one in which the state invoked its interest in the efficient administration of a regulatory system, but the Court was nonetheless sensitive to the impacts an accommodation would have on ERHs. In *United States v. Lee*, for instance, an Amish business owner sued the Government alleging that being required to pay social security taxes violated his free exercise rights, and those of his Amish employees, because the Amish believe they have a religious responsibility to provide for their elders and the social security tax implied they would not do so.[181] The Court accepted the plaintiff's contention but nevertheless denied an accommodation, holding that the Government had a compelling interest in the efficient and consistent application of the social security system.[182] In doing so, the Court specifically singled out the burden that such an exemption would place on non-Amish employees (or ERHs), noting that Congress had included an exemption for self-employed Amish but not for Amish who employed non-Amish workers because "granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees."[183]

176. *Id.* at 593.

177. *Id.* at 592.

178. *Id.* at 604.

179. *Id.* at 595.

180. *See id.* at 604. The Court did not engage in any detailed analysis of the second prong of strict scrutiny; rather, it merely stated that no less restrictive means were available. *See id.*

181. United States v. Lee, 455 U.S. 252, 254–55 (1982).

182. *Id.* at 258–59.

183. *Id.* at 261. This question of imposing an employer's religious faith on an employee is sometimes a useful proxy for the rights of ERHs, but it does not map perfectly. In some instances it may cover situations in which a religious believer has an

An additional source of support for judicial recognition of the impacts of religious accommodations on ERHs can be found in cases brought under the Religious Land Use and Institutionalized Persons Act (RLUIPA),[184] in which courts are routinely called upon to analyze the impact of an accommodation in light of the government's compelling interest in maintaining the order of prisons and the safety and security of prisoners and staff.[185] The Supreme Court, in analyzing an RLUIPA claim, has explained that courts considering these cases must "take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries."[186] As the Court explained, "[s]hould inmate requests for religious accommodations become excessive, *impose unjustified burdens on other institutionalized persons*, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition."[187] Prison is a special case—the vulnerability of institutionalized persons and the heightened level of control required and exercised by prison officials intensifies both the claims for free exercise rights and the interests weighed against them. This is not a perfect analogy because most citizens are not prisoners (although we all live under the purview of various regulatory bodies that constrain our choices). Nevertheless, to the extent that ERHs are dependent on state enforcement of a law conveying a practical or dignitary benefit or right, they stand in relation to the state in a position

equality-implicating right and an ERH does not. In other situations, it may not be capable of fully expressing the significance of the impact on ERHs whose equality rights may be severely and negatively affected in ways that are not exactly about the imposition of someone else's religious practice on them, but rather the impact of that religious exercise on their independent rights.

184. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (2012). Although some cases were decided under the RFRA before *City of Boerne*, the same substantive standard applies before and after; the case only limited the scope of the situations in which the statute could be applied. *See* City of Boerne v. Flores, 521 U.S. 507, 534 (1997) (expressing concern about the RFRA's "considerable . . . intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens"). For an example of a Circuit Court of Appeals using its RLUIPA case law to interpret the substantial-burden element of an RFRA claim, see Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1138 (10th Cir.), *cert. granted*, 134 S. Ct. 678 (2013).

185. *See, e.g.*, Singson v. Norris, 553 F.3d 660, 662–63 (8th Cir. 2009).

186. Cutter v. Wilkinson, 544 U.S. 709, 720 (2005). In the prison context, nonbeneficiaries means those prisoners not requesting the accommodation, as well as prison administrators, staff, and anyone else involved in prison life who would not be a beneficiary of a requested accommodation. *See id.* at 722 (evaluating the impact of accommodations on "other significant interests" within the prison system).

187. *Id.* at 726 (emphasis added).

reminiscent of a prisoner dependent for safety and security on prison officials whose interests must not be sacrificed to the free exercise rights of others.

With these examples we can see that the pre-*Smith* constitutional framework—now applicable through the RFRA—is not completely insensitive to the kinds of concerns I have explicated here. Nevertheless, generally speaking, the legal standards do not have a consistent way of taking account of these impacts. Under *Smith*, the state need not satisfy strict scrutiny unless a law is not neutral or not generally applicable—in other words, broadly speaking, an accommodation is not required unless the law was passed to target religion or applied to do so.[188] This standard is overinclusive because it may forbid laws that remedy the effects of religiously based actions on ERHs—instances in which the law might have been passed to "target" religious action for legitimate reasons.[189] But it is also underinclusive because it may insulate from review situations in which the government could provide an accommodation that satisfies the rights of all parties, but is not required to do so because the law did not target religion and only imposes serious burdens as an incidental effect.[190] Under the RFRA, a religious objector need only show that a law is a substantial burden on his or her religious exercise in order to get to strict scrutiny.[191] But, whether the law is a substantial burden on religious exercise may be entirely beside the point—the law may, for instance, impose that burden in the service of remedying an equally great social inequality.

To some extent, strict scrutiny is meant to address the fact that sometimes religion may be targeted under the First Amendment or religious exercise may be substantially burdened under the RFRA, but for, essentially, reasons good enough that the state should be allowed to target or burden it anyway. But in this case, the tool of strict scrutiny, as it is traditionally understood, is a very blunt instrument for the task at hand

188. *See* Emp't Div. v. Smith, 494 U.S. 872, 878–79 (1990).

189. This potential is not lost on those seeking to invalidate anti-discrimination laws. *See, e.g.*, 2007 Iowa Acts 626 (codified at IOWA CODE § 216.7 (2014)) (amending the Iowa Civil Rights Act to prohibit discrimination in public accommodations on the basis of sexual orientation); *see also* Verified Petition at 27, Odgaard v. Iowa Civil Rights Comm'n, No. CV 046451 (Iowa Dist. Ct. Oct. 7, 2013), *available at* http://www.becketfund.org/wp-content/uploads/2013/10/Odgaard-Complaint.pdf (seeking a declaration that a decision not to host same-sex weddings for religious reasons is not discrimination, or alternatively, that the amended Iowa Civil Rights Act infringes on free exercise rights).

190. *See Smith*, 494 U.S. at 882.

191. 42 U.S.C. § 2000bb-1 (2012).

because it is often a poor fit for the distinction I draw here.

While higher order practical and expressive rights may be recognized as compelling government interests,[192] the "narrow tailoring" analysis merely asks whether the law in question is the least restrictive means of accomplishing the state's interest; it rarely addresses ERHs or third-party interests generally.[193] To the extent it does so, it must shoehorn this concern into the compelling interest test by framing the state's compelling interest as the protection of third parties from the imposition of someone else's religion on them.[194] Although this gestures at the correct framing of the problem, the problem is not so much protecting third parties from being forced to participate indirectly in someone else's religious practices or suffer for them, but is rather—or additionally—that ERHs sometimes have independently existing interests, both practical and expressive, which are subordinated to religious interests when accommodations are granted. Some of these interests may rise to the level of a compelling interest with regard to the state's interest in protecting them,[195] but some may not and yet may be worthy of protection and capable of being protected in ways that would also protect the rights of religious objectors.

An additional problem arises from the fact that the state's interests are usually understood, even when aimed at protecting third parties, to be largely practical or concrete. By not consistently creating space to consider the expressive functions of the law, the narrow tailoring analysis fails to address the appropriate question. Imagine, for instance, a law that is passed to promote both expressive and practical equality rights held by ERHs. The practical goals this law attempts to achieve could be pursued in other ways that would not infringe on religious accommodation rights, but the expressive goals could not. The narrow tailoring analysis would likely strike

192. "May" is not necessarily "will." For instance, the Tenth Circuit, sitting en banc, held in a contraceptive coverage requirement case that public health and women's equality were not compelling interests for the purposes of the RFRA. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1143 (10th Cir.), *cert. granted*, 134 S. Ct. 678 (2013). This holding is an excellent example of what can go wrong when the doctrine does not provide a systematic way of thinking about ERHs and their interests.

193. *See, e.g.*, *id.* at 1143–44 (evaluating only strong state interests and the exemptions requested by a plaintiff, and quickly dismissing any concern about impacts on the employees of plaintiffs seeking exemptions).

194. *See* United States v. Lee, 455 U.S. 252, 261 (1982) ("[G]ranting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees.").

195. *See Lee*, 455 U.S. at 258–59 (holding that the government's interest in maintaining social security's "fiscal vitality" is compelling).

down the law because it tends to focus only on the practical impacts and does not consistently consider the expressive import of the law. The standard may also be underinclusive because it allows the state to deny accommodations when it can satisfy narrow tailoring, whether as to practical or expressive impacts, even if there is an alternative compromise solution that would protect the rights of religious objectors *and* those of ERHs.

V. REFRAMING THE EXERCISE: A NEW PROPOSAL FOR ACCOMMODATIONS THAT AFFECT ERHS

Now that we have a sense of some of the ways in which the existing doctrinal framework is a poor fit for cases in which granting religious accommodations would endanger the rights of ERHs, the question becomes what we should do about it. In this Part I first propose a hypothetical framework for thinking about these scenarios and adjudicating the rights they implicate, before turning to what movements in that direction can reasonably be accomplished using the existing doctrine—in both cases using the contraceptive coverage requirement cases as a working example.

A. *Reasoning from a Blank Slate*

If the *Smith* and RFRA standards are poor fits for situations in which granting religious accommodations would negatively impact the rights of ERHs—insofar as they ask a set of questions that may sometimes get at the right questions but are not consistently structured to address them—we must consider what would be a better set of questions to ask. In this subpart, I argue that once we identify—or identify a way of identifying—the set of cases in which there are sufficiently weighty ERH interests at stake to merit deviation from the standard doctrinal framework, the question should be whether the state can provide a solution that respects all the rights in question. In other words, can the state make everyone happy? If so, it should have an obligation to do so. If not, however, the party with equality-implicating rights should "win," and if both sides have equality-implicating rights at stake, the state should have discretion—as existing doctrine allows—to choose to advance one set of equality-implicating interests over another.

1. *What Interests Matter?*

If it is true that the standard doctrinal framework is a poor fit for situations in which there are conflicts among groups of rights holders over

religious accommodations, and also true that almost any law will have some form of distributional effect on nonobjectors, however trivial, the initial threshold question is how to determine which cases are close enough to the standard form—state versus objector—to be appropriately treated using the standard doctrine, and which are sufficiently different to merit a different approach. To some extent, like almost everything else in religious accommodation law, this will be an exercise in policy. And yet, we must draw the line.

Given that, under the RFRA, a court must apply strict scrutiny to a challenged law once a religious objector has shown a substantial burden on religious exercise,[196] it seems only fitting that a similar threshold would be appropriate for the protection of ERHs.[197] Of course, in a hypothetical world the RFRA framework need not have any bearing on a test designed from scratch, and yet, despite the valid complaints about the vagueness of the substantial-burden standard,[198] the word *substantial*, when imbued with actual meaning, makes sense as a mid-level threshold. We do not want every effect on religious objectors or ERHs to trigger the state's obligation to make everyone happy—if it can—because that would collapse the test. Nor do we want to set the bar so high that the state is rarely called upon to make everyone happy because the aim is to expand the universe of rights that can be fairly exercised by all parties without an undue burden on the state. A substantial burden is not *de minimis*, nor is it exceedingly rare.

Thus, in this hypothetical world, when a court considers a claim for religious accommodation, it would ask itself whether there is a substantial burden on the objector's religious exercise *and* whether there is a substantial burden on ERHs. If neither side has a substantial interest, the *Smith* or RFRA frameworks are sufficient. If, however, one side (or both) has a substantial interest or would experience a substantial burden, then the alternative framework explicated here would apply. One advantage of replicating the substantial-burden threshold is that it ties the fates of

196. 42 U.S.C. § 2000bb-1 (2012).

197. The constitutional standard is not as flippable—it would not make sense to ask whether a law being challenged by a religious objector was neutral and generally applicable as to ERHs because damage to ERHs' rights would be the unintended consequence of any accommodation granted, not of the law itself.

198. The phrase *substantial burden* "could be read broadly, [but] it might also be read to incorporate all of the holdings that significantly restricted application of heightened scrutiny even before *Smith*." Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 51 (1994).

religious objectors and ERHs together in a way that stymies normative weighting of the scale in one direction or the other. If the substantial-burden threshold is in fact a low one, as some scholars argue,[199] then the threshold for effects on ERHs would be similarly low, and the converse is true as well.

In the context of the contraceptive coverage requirement, clearly there are ERHs—women who have a legal right to contraceptive coverage under the Affordable Care Act—whose rights are directly implicated by the religious accommodations sought by objectors. The next question, then, is whether the rights on either or both sides are substantial. Women's interests in free access to contraception are substantial for all of the reasons discussed in Part II—access to contraception promotes women's health and economic equality, and facilitates their equal participation in the workforce.[200] The question of whether religious objectors have a substantial interest at stake is a closer one. Several scholars addressing the question have made convincing arguments that if being required to provide contraceptive coverage is any burden at all, it is not substantial.[201] This is largely because the burden is indirect and comparable to the many other regulations to which businesses must subject themselves in order to participate in the labor market.[202] In addition, the employers are free to

199. *See supra* note 141.

200. *See supra* Part II.A.1.b.

201. *See, e.g.*, *Hobby Lobby Part III*, *supra* note 2; Caroline Mala Corbin, Essay, *The Contraception Mandate*, 107 NW. U. L. REV. 1469, 1479 (2013).

202. Scholars like Caroline Corbin have pointed out that this indirect "facilitation" is analogous to the facts in *Zelman v. Simmons-Harris*, in which the Supreme Court held that the availability of federal funds to religious schools through the use of voucher programs did not violate the Establishment Clause. Corbin, *supra* note 201, at 1477; *see* Zelman v. Simmons-Harris, 536 U.S. 639, 662–63 (2002). In the contraceptive coverage requirement cases, as in *Zelman*, the money spent on "objectionable" uses of contraception is so only "as a result of the genuine and independent decisions of private individuals." Corbin, *supra* note 201, at 1477; *see Zelman*, 639 U.S. at 662. Similarly, Frederick Mark Gedicks argues insurance coverage is just another form of employee compensation, and "[i]t is axiomatic that religious employers have no religious liberty right to limit the spending of employee compensation to conform to the employer's religious sensibilities." Gedicks, *supra* note 46, at 11. The courts hearing the contraceptive coverage challenges have gone both ways on the merits of this indirect-action. *Compare, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1137 (10th Cir.) (calling the indirect-action argument "fundamentally flawed"), *cert. granted*, 134 S. Ct. 678 (2013), *with* Order Denying Injunction, *supra* note 78, (calling the potential burden on the objector "too attenuated" to qualify as substantial). *See also* Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1237–38 (D.C. Cir. 2013) (Edwards, J., concurring in part

forgo providing insurance coverage entirely and pay a relatively affordable tax instead.[203] Nevertheless, for the purpose of playing out this argument in the given case study and because several of the courts to hear these cases have found that the plaintiffs pass this threshold, let us assume that the burden is in fact substantial.

2. *Can the State Make Everyone Happy?*

In a situation in which both sides have substantial interests—or put another way, are in danger of having a substantial burden imposed upon them—the question for the court to answer should not be, "Is the state justified in imposing this burden on the objector?" or, as the courts are implicitly asking, "Is the religious objector justified in imposing this burden of accommodation on the ERH?" Instead, it should be, "Can the state make everyone happy?" In other words, is there a solution the state can provide that would alleviate the substantial burden on the objector's religious exercise *and* that would prevent ERHs from suffering a substantial burden caused by the accommodation?

Take, for instance, a law requiring hospital staff to participate in emergency care being challenged by a religious objector who is a Jehovah's Witness and believes that participating in blood transfusions is against the will of God. The objector need not be a doctor—which would be unlikely—but could be lower level medical staff or even nonmedical assistant staff. Being required to participate in a blood transfusion might be considered a substantial burden on that individual's exercise of religion. But granting a blank-check accommodation that allows them to refuse to participate in blood transfusions regardless of context would certainly be a substantial burden on patients who might suffer health consequences or death due to this refusal. These patients would be the ERHs in this scenario. The question should then be whether the state could create a compromise solution—for instance, allowing religious objectors to decline to participate in blood transfusions as long as there is substitute medical personnel available to perform the action, and perhaps requiring hospitals to have such personnel available during every shift (presumably a very minor burden on hospitals, because emergency rooms are not generally staffed entirely by Jehovah's Witnesses).[204]

and dissenting in part).

203. *See* Hobby Lobby *Part III*, *supra* note 2.

204. *Cf. The Limits of Conscientious Refusal in Reproductive Medicine*, ACOG COMMITTEE OPINION (Am. Coll. of Obstetricians & Gynecologists, Washington, D.C.), Nov. 2007, at 5, *available at* http://www.acog.org/~/media/

To ask whether the state can make everyone happy is an easy shorthand, but it elides an important question: what level of feasibility should be required to trigger the state's responsibility to provide a solution that protects the interests of both religious objectors and ERHs? In the example above, the cost to the state is minimal—the state merely needs to amend its law to allow for both the accommodation and the back-up protection for ERHs.[205] But what if the cost were more substantial, requiring a large financial outlay or the provision of physical or institutional infrastructure? In the contraceptive coverage requirement cases, the question is whether the state can provide a solution that would allow religious objectors who choose to provide health insurance to do so without providing coverage for the forms of contraception to which they object, while protecting both the practical and expressive benefits of the contraceptive coverage requirement for their female employees. This question clearly has similarities to the narrow tailoring analysis performed under the strict scrutiny standard, and I address the question in that framework in subpart V.B. Here, though, reasoning outside the doctrine, the question is a close one. Could the state conceivably provide free contraception to all the women in the country of childbearing age? Certainly as a purely hypothetical matter, it could do so. But at what cost? A single-payer system for only one form of preventative health care would not make economic sense. Contraception saves health care dollars because it prevents more significant outlays on childbirth and on illnesses that can be managed or treated with contraception.[206] That is how risk pooling works. But to create a single-payer system only for contraception would divorce those savings from the health insurance marketplace and leave the state simply paying for contraception out of pocket without receiving the benefits of those preventative dollars because private companies would be

Committee%20Opinions/Committee%20on%20Ethics/co385.pdf?dmc=1&ts=201402T1622240840 ("Providers with moral or religious objections should . . . ensure that referral processes are in place so that patients have access to the service that the physician does not wish to provide.").

205. This leaves aside, of course, the feasibility of actually getting legislation passed or amended by state or federal legislatures, but if that were the criteria almost any solution would be impossible given current legislative gridlock. To the extent possible, courts should therefore be empowered to carve out not only accommodations, but corresponding ERH protections, from challenged laws in order to avoid the delay of waiting for legislative action.

206. *See* Max Fisher, *The Fiscal Conservative's Case for Spending More Money on Birth Control*, ATLANTIC (Mar. 14, 2012), http://www.theatlantic.com/business/archive/2012/03/the-fiscal-conservatives-case-for-spending-more-money-on-birth-control/254442/.

providing all other health care (outside the context of Medicaid and Medicare).

A more plausible solution might be to provide for-profit employers with the same accommodation that has been offered to nonprofit organizations; those organizations do not have to provide contraceptive coverage directly but merely must self-certify that they object, which triggers a requirement on the part of their insurance provider or third-party administrator to provide contraceptive coverage to their employees.[207] Assuming adequate enforcement mechanisms, of the kind currently lacking in the regulations, this would be a practically plausible alternative.[208]

Even setting aside the practical impacts, there is the question of the expressive benefits of the law. Could the state provide a solution that protects religious objectors' free exercise rights while maintaining both the

207. This is the accommodation purportedly provided in the regulations for religiously affiliated nonprofit organizations and educational institutions, and such an accommodation could theoretically ameliorate the practical burden on women seeking contraceptive coverage while also alleviating the burden, if any, on religious objectors. *See* 45 C.F.R. § 147.131 (2013). In fact, those regulations contain no enforcement mechanism. *See id.*; Laycock, *supra* note 6 (manuscript at 17). Nor do they contain any check on the ability of organizations to self-select out of contraceptive coverage. 45 C.F.R. § 147.131(b). They are not adequate as currently drafted to ameliorate even the practical concern, much less the expressive one. In other words, rather than providing a compromise that enforces the rights of all parties, this compromise is heavily weighted toward the religious objectors, leaving the ERHs no way of actually enforcing their rights.

208. In reality, numerous lawsuits have been filed against the nonprofit accommodation by religiously affiliated organizations, which claim that even having to self-certify their objection is a substantial burden on their religious exercise. *See, e.g.*, Catholic Diocese of Beaumont v. Sebelius, No. 1:13-cv-709, 2014 WL 31652, at *7–8 (E.D. Tex. Jan. 2, 2014); Little Sisters of the Poor Home for the Aged v. Sebelius, No. 13-cv-2611-WJM-BNB, 2013 WL 6839900, at *15 (D. Colo. Dec. 27, 2013); Grace Schools v. Sebelius, No. 3:12-CV-459 JD, 2013 WL 6842772, at *12 (N.D. Ind. Dec. 27, 2013); Mich. Catholic Conference v. Sebelius, No. 1:13-CV-1247, 2013 WL 6838707, at *6–8 (W.D. Mich. Dec. 27, 2013).

Given these objections, there is a very real possibility that, even if this accommodation were offered to for-profit employers who have religious objections to providing contraception, said employers would reject it as not being sufficiently protective of their free exercise. In that case, the answer would be easy: if religious employers insist that even certifying their own objection is a substantial burden on their free exercise, then the state cannot make everyone happy. Given the importance of the practical and expressive benefits of the contraceptive coverage requirement for women's equality, the state would be justified in refusing the kind of accommodation sought by the objectors and requiring compliance with the proffered accommodation. This is a form of the zero-sum conflicts I identify in Part V.A.3, *infra*.

practical and expressive benefits of the contraceptive coverage requirement? This too, is a close question. The state's commitment to women's social and economic equality, demonstrated through the assumption of collective responsibility for women's ability to control their reproductive health and destinies, would be deeply undermined by allowing religious accommodations too freely. But if the state applied the nonprofit exemption to for-profit religious businesses—with a rigorous enforcement apparatus—the expressive and dignitary harms to women would certainly be reduced. Reduced, but not eliminated; establishing this exemption regime would still validate the idea that religious objections to contraception are worthy of accommodation, even when the burden on religious objectors is fairly attenuated. Nevertheless, assuming that religious objectors would find this compromise satisfying, such an accommodation would have the benefit of removing the practical burden on religious employers while also sending the expressive message that religious scruples should be accommodated so long as they do not vitiate the benefits of the law.

3. *If Not, Who Gets to Be Happy? Equality-Implicating Rights Take Precedence*

So much for a situation in which the state can please all involved. But what should happen when the state cannot easily satisfy both the religious objectors and the ERHs? There will be situations in which the rights of religious objectors and ERHs fundamentally conflict in a zero-sum way: to protect one set of rights will necessarily mean not protecting the other. This is the case, for instance, with the nonprofit religious organizations that reject the regulation's self-certification exemption process. In this subpart, I propose that we prioritize equality-implicating rights in performing this balancing analysis and when both sides have equality-implicating rights at stake, the state should be empowered to choose which rights to privilege.

To determine that religious objectors or ERHs have substantial interests at stake does not necessarily help us know how to prioritize such interests. But once over that threshold, some effects should be of greater concern to us than others. Specifically, we should be particularly concerned about these effects when the impact of an accommodation would be to diminish or deny equality-related rights, whether those are constitutional equality rights, statutory equality rights that have a constitutional gloss, or other rights that are meant to implement or enforce constitutional equality

rights.[209] Scholars are in agreement that religious objections should not be allowed when the "marginal cost is too high"[210] because religious freedom "simply can't extend to actions that impair others' rights or impose improper externalities on others."[211] If the core of free exercise doctrine is the desire to protect religious exercise from discrimination that would render believers unequal to other citizens,[212] its protections should only extend so far as they do not undermine the equality of nonbelievers on the other side. Thus, even those who believe that few government interests are compelling in the religious accommodation context *should* acknowledge that the limited category may include equality norms.[213] And when such equality interests exist, they are not the kinds of norms that are suitable candidates for compromise based on other people's religious beliefs.[214]

But how might we flesh out this notion of equality-implicating free exercise claims? Given that the doctrine has not focused on this element of religious accommodation law, the cases do not give us much to go on. But

209. This is true both simply as an order of magnitude in the importance of the right, and also for structural reasons having to do with the role of religious accommodations in ensuring equality. *See supra* Part III.A; *cf.* William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 493–94 (2001) (defining "super-statute" as "a law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does 'stick' in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law," and discussing super-statutes—and their corresponding "quasi-constitutional flavor"—in the context of identity-based social justice movements).

210. KOPPELMAN, *supra* note 91, at 108.

211. Volokh, *supra* note 19, at 1511.

212. For an explanation of why I adopt this position on the purpose of religious accommodations, see *supra* Part III.A. *See also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537–38 (1993); HAMILTON, *supra* note 95, at 214–16; Eisgruber & Sager, *supra* note 90, at 1248. *But see, e.g.*, Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1515–16 (1990) (suggesting the Free Exercise Clause is meant to encourage religious proliferation rather than simply to protect religion against discrimination).

213. *See* Laycock & Thomas, *supra* note 137, at 226 ("In fact, the Supreme Court has found a compelling interest in only three situations in free exercise cases. In each, strong reasons of self-interest or prejudice threatened unmanageable numbers of false claims to exemption, *and* the laws at issue were essential to express constitutional norms or to national survival: racial equality in education, collection of revenue, and national defense." (footnotes omitted)).

214. Volokh, *supra* note 19, at 1532 ("[I]f there really is a right . . . not to be discriminated against on certain grounds, . . . then the law must be able to protect this right whenever it's jeopardized, even if it's jeopardized by only a relatively few religiously motivated employers, landlords, doctors, or patients.").

we can at least reason by a process of elimination. Equality rights do not confer an absolute right to self-determine what aspects of human life or practice are equality-implicating, so it cannot be that religious objectors can categorize any action or omission they experience as religiously infused as implicating an equality right. Nor can ERHs characterize any benefit conferred or right recognized by the state as being equality-implicating simply because it is convenient, useful, or desired. Conversely, any rights that directly affect the ability to participate in civil society on a status basis, like restrictions on voting, or marriage, or bans or limitations on core religious practices are clearly equality-implicating. The hard cases are those in the middle—but this is where the balance of religious and nonreligious equality-implicating rights may provide some guidance. The same core areas of social concern that rise to the level of equality-implicating rights for ERHs should apply for religious objectors: in areas like housing discrimination, employment discrimination, family law, reproductive rights, voting rights and the like, the Supreme Court and the legislature have increasingly made clear that there is a national priority in eradicating discrimination, whether it is effectuated through constitutional interpretation or legislative decisionmaking.[215] Thus, unemployment benefits denied to those who cannot work on Saturdays for religious reasons, as in *Sherbert*[216] and its progeny, may well be equality-implicating, whereas the ability to send one's children out to proselytize on the street, as in *Prince*,[217] may not be. In other words, equality-implicating rights are those that affect the basic civil equality of citizens—or, conversely, relate to discrimination against protected characteristics or groups, like race, gender, age, national origin, and sexual orientation. If an antidiscrimination law protects a given group or characteristic, then a substantial burden on such a group's rights caused by a religious accommodation is likely equality-implicating.[218]

215. *See, e.g.*, Johnson v. California, 545 U.S. 162, 172 (2005) (acknowledging "the overriding interest in eradicating discrimination from our civic institutions"); Georgia v. Ashcroft, 539 U.S. 461, 490 (2003) ("The purpose of the Voting Rights Act is to prevent discrimination . . . and to foster our transformation to a society that is no longer fixated on race."); McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 357–58 (1995) (describing a host of statutes that are "part of an ongoing congressional effort to eradicate discrimination in the workplace").

216. Sherbert v. Verner, 374 U.S. 398, 399–401 (1963).

217. *See* Prince v. Massachusetts, 321 U.S. 158, 161–62 (1944).

218. *See* Elizabeth Sepper, *Contraception and the Birth of Corporate Conscience*, AM. U. J. GENDER SOC. POL'Y & L. (forthcoming 2014) (manuscript at 41) ("[D]ecisions characterizing employment benefits . . . as a substantial burden . . . have potentially radical consequences . . . .").

Religion, of course, is a protected category as well and some substantial burdens on religious exercise will also be equality-implicating; this standard protects both "sides." But, just as with impacts on ERHs, not all substantial burdens on religious exercise are properly understood as equality-implicating.[219] The purpose of religious accommodation law is to protect religion from discrimination—not to privilege it.[220] To the extent that religious objectors seek accommodations that are necessary to preserve their core civil equality rights vis-à-vis nonbelievers, their claims may be equality-implicating. To the extent, however, that religious objectors seek special treatment or accommodations for their religious exercise in ways that do not affect those interests, they may not be equality-implicating.[221]

In evaluating equality-implicating laws, it is important to consider the expressive function of a law along with its practical effects. Imagine, for instance, a religious objection to laws forbidding racial or sexual discrimination in housing. Theoretically, the state could establish a national system of subsidized public housing that ensures that, practically speaking, no one would be deprived of access to housing on the basis of race or sex. Similarly, if we imagine a religious objection to public accommodation laws forbidding racial discrimination in restaurants or hotels, the state could theoretically establish a national network of restaurants and hotels to ensure that African-American travelers always have somewhere to stay and eat. But even to state these hypotheticals is to dismiss them as absurd. And that is not simply because, as a practical matter, these seem realistically impossible as solutions. There is a deeper problem: there are symbolic and expressive elements of discrimination that rise above its practical effects, and even the most outlandish solutions would not eradicate these elements—indeed, such solutions might highlight them. The problem with requiring the state to establish a network of hotels and restaurants around the country to fill the gaps left by hotel and restaurant owners who object to serving African-American patrons on religious grounds would not be only—or even primarily—the expense and logistical difficulty (or impossibility) of doing so, but also the dignitary and expressive harm of such a "separate but equal" regime. Establishing these state-run public accommodations would telegraph to citizens that the

219. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 535 (1997) ("When the exercise of religion has been burdened . . . , it does not follow that the persons affected have been burdened any more than other citizens.").

220. *See* Eisgruber & Sager, *supra* note 90, at 1248.

221. *See Prince*, 321 U.S. at 165.

religious objection to racial equality was a legitimate reason to opt out of our society's basic constitutional equality norms and that, while the state might act to take up the *practical* slack, the dignitary harm was not worth remedying. Worse, the more the state accommodates free exercise claims that produce this kind of expressive norm, the more it codifies discrimination against nonbelievers.[222] Similarly, however, we must be sensitive to the equality-implicating rights of religious believers. The same kind of status-based, dignitary harms that a group or set of individuals may suffer when their interests are subordinated to religious beliefs or customs may also be experienced by religious believers when their beliefs or customs are subordinated to secular goals or priorities that conflict with their religious beliefs.

Given the premise of prioritizing equality-implicating interests, a situation in which there are equality-implicating interests on one side but not the other becomes easy to resolve. If the impact on ERHs would be substantial, but not equality-implicating, then such effects, if they cannot be ameliorated by the state, should be tolerated. Conversely, however, religious accommodations should only be allowed to take precedence over ERHs' interests when the religious interest or exercise at stake is equality-implicating. Even when there is a substantial burden on religious exercise, if it would impact equality-implicating rights of ERHs the religious accommodation must be subordinated to the civil equality of ERHs.

In some cases—the most difficult cases—there may be equality-implicating interests on both sides. That is the argument made by for-profit employers who object to the contraceptive coverage requirement. For instance, they argue that that the regulation forces them to act against their conscience in order to engage in commerce on an equal basis with nonbelievers.[223] Although there is a convincing argument to be made that the burden on religious employers is not substantial,[224] for the sake of argument here, I assume that it is substantial. If the burden were

222. *See* Schwartzman, *supra* note 91, at 1374 ("By singling out religion for special treatment, the government discriminates . . . against nonbelievers and sends a message that their views have an inferior status in the law.").

223. *See, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1140–41 (10th Cir.) (summarizing Hobby Lobby's argument that the contraceptive coverage requirement creates a choice between compromising one's religious beliefs or facing a significant disadvantage in the employee market), *cert. granted*, 134 S. Ct. 678 (2013); *see also* Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1217–18 (D.C. Cir. 2013).

224. *See supra* Part V.A.1.

substantial, it would also be equality-implicating, at least for those employers who believe they have a religious obligation to provide health insurance in general,[225] because it prevents religious believers from participating in commercial life on equal footing with nonbelievers and forces them to choose between violating their religious beliefs (either by not providing insurance at all or by providing contraceptive coverage) or going out of business.[226] I want to stress that these interests are arguably only equality-implicating for those businesses whose owners believe they have a religious obligation to provide insurance in the first place. As other scholars have ably demonstrated, it is entirely economically feasible to simply not provide health insurance to one's employees, pay the relevant tax instead, and thus avoid providing coverage for contraception.[227] Such an employer might become less desirable as an employer in the hiring marketplace, but that is simply how the market works.[228]

Nevertheless, for the sake of argument, let us assume that there are religious employers who have a religious conviction that they are required to provide health insurance in general and a religious conviction that they cannot provide insurance coverage for birth control. Let us also assume that the state is not in a position to provide a solution that would respect the rights of the objectors and the ERHs. This would include a situation in which the religious objectors reject the accommodation proffered by the state, as with the nonprofit organizations that are rejecting the statutory accommodation requiring certification. The statement made by that rejection is that the accommodation does not respect their rights. In that scenario, we have a zero-sum situation.

When faced with a zero-sum conflict, the state should have the discretion to prioritize one set of equality-implicating interests over another. This is the essential outcome of the legislative process: certain choices will have to be made that advantage one set of individuals and disadvantage another.[229] In our current doctrinal framework, such choices

225. *See* Annex Med., Inc. v. Sebelius, No. 13-1118, 2013 WL 1276025, at *1 (8th Cir. Feb. 1, 2013).

226. *See* Hobby Lobby *Part III*, *supra* note 2.

227. *See id.*

228. *See id.* Alternatively, the market effect on the employer's appeal to potential employees might be negligible because Hobby Lobby employees "would still be eligible for government-subsidized health insurance on the exchange." *Id.*

229. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 452 (1988) ("A broad range of government activities—from social welfare programs to foreign aid to conservation projects—will always be considered essential to the spiritual

are constrained by free exercise rights. But in this hypothetical imagining, if the state is unable to protect equality-implicating rights that are in direct conflict, either because it is not practically feasible or because one side does not believe any compromise can be endured, then the state should have the latitude to choose a side.[230] This rationale also holds for situations in which both sides have substantial interests at stake, but neither side has equality-implicating ones.

When applied to the contraceptive coverage requirement cases brought by for-profit employers who believe they have a religious obligation to provide insurance *and* a religious obligation to not cover contraceptives, and who would reject the accommodation currently offered to nonprofit organizations, we have a zero-sum situation. The state should therefore be authorized to choose, as it is currently attempting to choose, the equality interests of the ERHs—the women whose coverage is guaranteed by the law—over the religious objectors.

B. *Working with Reality*

Having laid out an argument for why we should privilege the rights of ERHs over those of religious objectors when there are equality-implicating

well-being of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion. The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion. The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours. That task, to the extent that it is feasible, is for the legislatures and other institutions.").

230. There is a nontrivial argument to be made that when it comes to a conflict between the equality-implicating rights of religious believers and the equality-implicating rights of nonbelievers, there is something inherently more unfair about allowing religious objectors to exercise their rights, even their equality-implicating rights, in a way that imposes equality-implicating harms on ERHs, who have done nothing to deserve such harms other than possess characteristics—often inherent, unchangeable, and historically the basis of discrimination and marginalization—that bring them in the way of the objectors' religious exercise. If the default status would be that ERHs had access to their full complement of equality-implicating rights, allowing religious objectors to limit those rights in order to advance their own seems normatively unfair. That, however, is a fundamentally normative argument that does not necessarily follow as a matter of logic from the argument of this Article, nor is there an existing doctrinal place for this principle to act as a tie breaker. Thus, although I want to flag it here, I do not argue it should be, or can be, a part of the infrastructure I suggest.

interests at stake, the fact remains that current doctrine does not directly endorse this framework.[231] Thus, in this subpart I explore how we might effectuate these principles in the context of the existing doctrine. As my analysis of the case law shows, the doctrine already supports an indirect method implementing these priorities,[232] but it could be interpreted and applied more forcefully to protect these rights, particularly by recognizing the expressive aspect of laws, regulations, and enforcement decisions. I use the contraceptive coverage requirement cases here, again, to illustrate my points.

1. *First Amendment*

The standard for religious accommodations under the First Amendment is currently that no accommodation is required as long as a law is neutral and generally applicable.[233] A law is not neutral if its "object [or purpose] . . . is to infringe upon or restrict practices because of their religious motivation."[234] A law is not generally applicable if it "in a selective manner impose[s] burdens only on conduct motivated by religious belief."[235] If these criteria sound difficult to disentangle, it's because they are: "Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied."[236] If a challenged law is not neutral or not generally applicable, a court will apply strict scrutiny.[237] To survive strict scrutiny, the challenged law "must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests."[238] This is known as the "compelling interests standard."[239]

In other words, as long as the purpose of a law was not to discriminate

231. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430–31 (2006) (holding RFRA claims are to be evaluated with regard only to the burden on the particular claimant); *see also* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1143 (10th Cir.) (finding that a countervailing equality interest is important, but formulated too broadly to be compelling), *cert. granted*, 134 S. Ct. 678 (2013).

232. *See supra* Part IV.

233. *See* Emp't Div. v. Smith, 494 U.S. 872, 879–82 (1990).

234. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

235. *Id.* at 543.

236. *Id.* at 531.

237. *Id.* at 546.

238. *Id.*

239. *See id.*

against religion, religious objectors must obey it regardless of any "incidental" effects on their religious practices.[240] By "incidental" the Court means, essentially, effects that were not the motivating reason for passing the law.[241] Insofar as this standard makes no bones about requiring that religious believers comply with the same laws as everyone else most of the time, it necessarily intervenes less frequently in favor of religious objectors—and against the interests of ERHs—than a more accommodating standard might (forgive the pun).[242]

The first point at which the insights of this Article would help courts better apply free exercise doctrine is the question of whether a law is generally applicable. If courts considered the expressive element of a challenged law, they would see that some laws that *appear* to be not generally applicable at first glance are in fact generally applicable after all. A case in point is the contraceptive coverage requirement. The plaintiffs in these cases have argued that the requirement is not generally applicable because the regulations include exemptions for grandfathered health care plans and for employers with fewer than 50 employees.[243] But these exemptions are not from the contraceptive coverage requirement. These are exemptions from the ACA as a whole.[244] If the contraceptive coverage

240. *Id.* at 531.

241. *See id.* at 533–34.

242. Of course, this standard could theoretically end up giving short shrift to the interests of ERHs. For instance, what if the state passed a law that was designed to confer a practical or dignitary benefit (or both) on a group of people, but was also designed to circumscribe a religious practice of denying that benefit or imposing a dignitary harm on that group of people? In that case, a court might very well strike down the law as nonneutral or not generally applicable. But in practice, because most plaintiffs seeking an accommodation from civil laws are incidentally burdened rather than being targets of the challenged laws, many requests for religious accommodations never make it past this initial threshold.

243. *See, e.g.*, Mich. Catholic Conference v. Sebelius, No. 1:13-CV-1247, 2013 WL 6838707, at *9 (W.D. Mich. Dec. 27, 2013); Roman Catholic Archbishop of Wash. v. Sebelius, No. 13-1441 (ABJ), 2013 WL 6729515, at *29–30 (D.D.C. Dec. 20, 2013); Univ. of Notre Dame v. Sebelius, No. 3:13-cv-01276-PPS, 2013 WL 6804773, at *17 (N.D. Ind. Dec. 20, 2013).

244. *See* Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1241 (D.C. Cir. 2013) (Edwards, J., concurring in part and dissenting in part) ("Furthermore, contrary to the Gilardis' suggestion, employers with fewer than fifty employees are not specifically exempted from the Mandate. Rather they are exempt altogether from being required to provide health coverage under the Affordable Care Act. Small businesses that do elect to provide health coverage—as many do in order to offer more competitive benefits to employees and to receive tax benefits—must provide coverage that complies with the Mandate." (citation omitted)); *see also* 26 U.S.C. § 4980H(a),

requirement included exemptions only from that requirement for grandfathered plans and small employers, the expressive function of the law would indeed be seriously undermined by the state's own exemptions because it would mean that contraceptive coverage is unimportant enough to allow for multiple exemptions for various reasons. But that frames the situation incorrectly. In fact, the requirement applies to any employer who is covered by the ACA and therefore required to provide health care or to pay the tax if it chooses not to provide coverage.[245] An exemption for for-profit employers would not be just one more exception either practically or symbolically; instead, it would seriously undermine both the function and the message of the law. This is especially true because, as everyone acknowledges, the number of grandfathered plans is expected to shrink dramatically over time as employers make the many routine changes to their coverage that have the incidental effect of removing their plans from the grandfathered category.[246] In addition, employers with fewer than 50 employees do not have to provide coverage, but if they choose to do so, they must provide contraceptive coverage as well.[247] Thus, the expressive message of the law is loud, clear, and consistent: contraceptive coverage is a matter of national importance for women's equality, and anyone who provides health insurance under the ACA must include it. An exemption for religious employers on contraceptive coverage alone would send an entirely different message than the exemption for small businesses that are not required to provide insurance of any kind. Religious employers are thus in the same position as small-business employers with respect to the requirement: they do not have to provide health insurance—they can pay the tax instead—but if they do, they must provide contraceptive coverage.

If a law is not neutral and generally applicable, strict scrutiny then applies.[248] This is the other place in the doctrine where the joints create the most room for play. The state's duty to prove it has a compelling interest in the application of the law, along with its duty to prove that the law is the

(c)(2)(A) (2012).

245. *See* 42 U.S.C. § 300gg-13(a).

246. *See, e.g.*, Korte v. Sebelius, 735 F.3d 654, 661 (7th Cir. 2013); Elizabeth Weeks Leonard, *Can You Really Keep Your Health Plan? The Limits of Grandfathering under the Affordable Care Act*, 36 J. CORP. L. 753, 775 (2011).

247. Laycock, *supra* note 6 (manuscript at 36–37); *see also* Annex Med., Inc. v. Sebelius, No. 13-1118, 2013 WL 1276025, at *3 & n.3 (8th Cir. Feb. 1, 2013) (enjoining the enforcement of the contraception mandate on an employer with fewer than 50 employees that provided insurance to its employees).

248. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

most narrowly tailored method of promoting that interest, provides an opportunity, albeit a mediated one, to make the distributional effects of religious accommodation rights on other citizens part of the judicial inquiry process. I call this mediated because the standard only allows for recognition of the rights of other citizens—including enforcement-dependent rights holders—to the extent that the state represents those interests. More specifically, the opportunity exists only to the extent that the state has a compelling interest in promoting those rights or interests—and, as a practical matter, the state will only be successful in promoting or protecting those rights or interests if it has also crafted a narrowly tailored method of doing so. To combine the language of the standard with the language of the framework I have suggested in this Article, the state should be said to have a compelling interest in applying its laws when granting a requested religious accommodation that would result in ERHs losing the right or benefit the law was passed to confer or protect, particularly when that right is equality-implicating.[249] To be clear, this compelling interest exists on two levels. There is the interest in promoting and protecting the rights, particularly equality rights, of the ERHs in general, and then there is also a compelling interest in protecting the specific rights of the specific ERHs who are in danger of losing access to the right or benefit if the accommodation is granted.

The contraceptive coverage requirement cases, again, provide a useful example. In arguing in support of the contraceptive coverage requirement, the Department of Justice has raised both practical financial impact and symbolic equality concerns. The government has advanced several compelling interests, "including better treatment of conditions unrelated to pregnancy for which contraceptives are often prescribed, improvement of the health of pregnant women and newborn children, reduction in the cost of employer-sponsored health care plans, reduction in workplace inequalities between men and women, and reduction in the disparate health care costs borne by men and women."[250] As the government has persuasively argued, the lack of health insurance coverage

249. Note that this should be distinguished from a zero-sum situation vis-à-vis the state, since any religious accommodation granted to a plaintiff will necessarily mean that the state loses the right to enforce the law against the plaintiff. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 435–37 (2006) (crafting a religious exemption to the Controlled Substances Act).

250. *See* Gedicks, *supra* note 46, at 15 (footnotes omitted); *see also, e.g.*, Brief for the Appellees at 32–33, Korte v. Sebelius, 735 F.3d 654 (7th Cir. 2013) (No. 12-3841), 2013 WL 874983, at *32–33 (asserting the primary interests are public health and gender equality).

for contraception has tangible and concrete effects on women's economic interests, not just for the obvious reason—women have to pay for a form of health care men do not—but because the lack of contraceptive care coverage in health insurance adds significant costs to women's health care expenditures compared to those incurred by men and forces some women to forgo preventive care, including contraceptive care, entirely.[251] Thus, "[c]ontraceptive coverage . . . furthers the goal of eliminating this disparity by allowing women to achieve equal status as healthy and productive members of the job force."[252] This is not only in the general interest of the American economy, of course, but in the specific interest of women as compared to men because they are not on equal competitive footing in the economic and employment sphere because of the disproportionate economic burden.[253] Hence, "[f]ailure of otherwise comprehensive insurance plans to cover prescription contraceptives is a significant form of sex discrimination."[254] Further, the government has specifically highlighted its interest in ameliorating discrimination against historically marginalized groups, including women. The government brief filed in *Geneva College v. Sebelius*, for instance, quotes the Supreme Court's opinion in *Roberts v. United States Jaycees*, explaining the "importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain

251. *See* INST. OF MED., *supra* note 30, at 19; Frederick Mark Gedicks & Rebecca G. Van Tassell, Essay, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, HARV. C.R.-C.L. L. REV. (forthcoming 2014) (manuscript at 29–30).

252. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012); *see also* Cornelia T.L. Pillard, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy*, 56 EMORY L.J. 941, 976 (2007) ("Women cannot participate in society, learn, earn, govern, and thrive equally without the ability to determine whether and when to become mothers.").

253. These arguments are repeated in the government's briefs in other contraceptive coverage requirement cases. *See, e.g.*, Defendants' Memorandum of Law in Support of Their Motion to Dismiss Plaintiffs' Amended Complaint at 28–30, Geneva Coll. v. Sebelius, 929 F. Supp. 2d 402 (W.D. Pa. 2013) (No. 2:12-cv-00207-JFC), 2012 WL 9512411; Defendants' Memorandum in Opposition to Plaintiffs' Motion For Preliminary Injunction at 23–25, Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278 (W.D. Okla. 2012) (No. 5:12-CV-01000-HE); Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction at 20–22, Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106 (D.D.C. 2012) (No. 1:12-CV-1635-RBW), 2012 WL 5903966.

254. Pillard, *supra* note 252, at 967.

disadvantaged groups, including women."[255] In addition to this compelling interest, the state also has a compelling interest in protecting the contraceptive coverage of the specific women who would be impacted by a religious accommodation. The state conveyed this right to the women in question and should be understood to have a compelling interest in protecting that right, especially because it is an equality-implicating one.[256]

255. Defendants' Memorandum of Law in Support of Their Motion to Dismiss Plaintiffs' Amended Complaint, *supra* note 253, at 29 (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 626 (1984) (internal quotation marks omitted)). *Geneva College* includes for-profit businesses as plaintiffs. *Geneva Coll.*, 929 F. Supp. 2d at 411. However, this brief would be on point even if the case did not include for-profit businesses as plaintiffs because the arguments for the state interest in the contraceptive coverage requirement apply, if anything, even more forcefully to for-profit businesses. For more on the relationship between reproductive rights and equality, see Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992); Siegel, *Sex Equality Arguments for Reproductive Rights*, *supra* note 36.

To be sure, there are practical dimensions to this argument about equality—equality is both a practical and a symbolic matter. But a concern about inequality, even when tethered to or arising from practical consequences, has a strong normative valence not always present when the government legislates for other reasons. *See* Sunstein, *supra* note 36, at 2044 ("Antidiscrimination law is often designed to change norms so as to ensure that people are treated with . . . dignity and respect."). Given this, even the state's attempt to fix the practical implications of inequality conveys a strong expressive and symbolic norm about the importance of gender equality and women's participation in the workforce and civic life. *See* Siegel, *Sex Equality Arguments for Reproductive Rights*, *supra* note 36.

256. Appellate courts have also recognized that in some cases, when a law is passed to convey a right or benefit, a religious accommodation might conflict with the very purpose for which the law was passed. In *Graham v. Commissioner*, the Ninth Circuit considered a claim by plaintiffs seeking a tax deduction for donations to the Church of Scientology. Graham v. Comm'r, 822 F.2d 844, 846 (9th Cir. 1987), *judgment aff'd sub nom* Hernandez v. Comm'r, 490 U.S. 680 (1989). In an opinion written by then-Judge Kennedy—shortly thereafter elevated to the Supreme Court—the panel concluded that although the government cannot simply rely on its general interest in passing a law in order to rebuff exemption requests, "that principle is best applied where the underlying rule is not tied directly to the purpose of the program." *Id.* at 853. In the Supreme Court's canonic employment-compensation cases, such as *Sherbert*, the underlying purpose of the rule had been to dispense unemployment insurance, and so the exemptions allowed the plaintiffs to obtain that benefit despite their religious beliefs. Sherbert v. Verner, 374 U.S 398, 407–09 (1963). In the case of Scientology's tax-exempt status, however, the underlying purposes of the rule were to promote charitable gifts and donations to "certain organizations" and "the maintenance of a sound and uniform tax system," and creating an exemption for Scientologists would directly conflict with those goals. *Graham,* 822 F.2d at 852. Thus, Kennedy wrote, when "the purpose of granting the benefit is squarely at odds with the creation of an exception, we think the government is entitled to point out that the creation of an

Finally, the state has a compelling interest in maintaining the expressive message of the contraceptive coverage requirement, which requires that for-profit employers be subject to the same requirement as all other for-profit employers regulated by the ACA. [257]

The second part of the compelling interest test requires the state to show that the law is narrowly tailored to achieve the law's aim.[258] Here too, consciousness of the impact of a religious accommodation on ERHs can find a home even within the current doctrinal standard. If the state's compelling interest is understood to include protecting the rights of ERHs, then the narrow tailoring analysis changes as well. Laws that might not be narrowly tailored to achieve the state's interest in administration might very well be narrowly tailored to achieve the state's interest in protecting ERHs.[259] In addition, courts should recognize that the state's solution may be narrowly tailored to promote the expressive function of a law that implicates equality norms. In other words, there may be cases in which the state could conceivably have produced a more narrowly tailored practical solution to a given problem, but could not produce a more narrowly tailored solution that would respect the expressive equality norms at stake.

In the case of the contraceptive coverage requirement, when thinking through what feasibility requirement should apply to the state's duty to accommodate all rights when possible, many of my points apply to the narrow tailoring analysis as well. A single-payer contraceptive insurance program run by the state would make no financial sense at all;

exception does violence to the rationale on which the benefit is dispensed in the first instance." *Id.* at 853. The opinion in *Graham* is not entirely clear about how this consideration fits into the compelling interest test, which it turns to *after* discussing the way in which this exemption would undermine the very purpose of the rule. *See id.* Nevertheless, the court's meaning is clear: when a religious accommodation not only does not further the purpose of the underlying rule, but directly contradicts it, requests for accommodation should not be granted as leniently. *See id.* In this case, the interest asserted was the government's administrative efficiency, not the direct distribution of a benefit or right to other citizens, but the logic applies even more so when the state has passed a law to convey practical *and* symbolic benefits on a group in need of protection. *See id.* at 852.

257. *See supra* notes 210–12 and accompanying text; *cf.* Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983).

258. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993).

259. *See* United States v. Lee, 455 U.S. 252, 258 (1982) (stating that while administration is a component, "[t]he social security system in the United States serves the public interest by providing a comprehensive insurance system with a variety of benefits available to all participants").

contraceptives are only cost-saving if the same party that pays for the contraceptives would reap the benefits of reduced costs in childbirth and other illnesses treated or prevented with contraception. That is simply a fact of how insurance works.[260] If the for-profit employers would accept an accommodation like the one currently offered to nonprofit employers, but with a rigorous enforcement mechanism, then the current contraceptive coverage requirement might not be as narrowly tailored as it should be, even taking the expressive function of the law into account. But if the for-profit employers would reject that compromise, like some of the nonprofit organizations currently suing to evade it, then the state's application of the requirement is already as narrowly tailored as it can get.

2. *Religious Freedom Restoration Act*

Thus goes the First Amendment argument. As a practical matter, courts are more likely to decide these kinds of cases under the RFRA, both so as to avoid the constitutional question, and because the RFRA is generally understood as an easier standard for a religious objector to satisfy and thus must be addressed even if the plaintiff's claims do not merit constitutional relief.[261]

As a brief refresher, the standard imposed on the federal government by the RFRA is that the government may not "substantially burden a person's exercise of religion" unless doing so furthers a "compelling governmental interest" and is "the least restrictive means" of doing so.[262] In other words, if there is a substantial burden on a plaintiff's religious exercise, strict scrutiny applies. This subpart reviews the ways in which the "substantial burden" element and the strict scrutiny analysis under the RFRA are amenable to consideration of ERHs and their interests.[263]

260. *See* 1 STEVEN PLITT ET AL., COUCH ON INSURANCE 3D § 1:6 (rev. ed. 2009). Under this hypothetical single-payer system, the government would pay premiums but employers would inequitably reap the benefits of reduced costs later, having paid nothing to begin with.

261. *See, e.g.*, Hankins v. Lyght, 441 F.3d 96, 107 (2d Cir. 2006); Lund, *supra* note 18, at 485 ("RFRAs are supposed to be more powerful than the Free Exercise Clause.").

262. 42 U.S.C. § 2000bb-1(b) (2012).

263. The strict scrutiny analysis under the RFRA is slightly different than the constitutional version because while the constitutional version of strict scrutiny in the religious accommodation context post-*Smith* sometimes appears to apply the standard compelling interest test, the RFRA requires a compelling interest in applying the law to the particular plaintiff seeking an accommodation. *Compare* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546–47 (1993) (applying only the

a. *Substantial burden*. Assuming an exercise of religion has been established, the substantial burden analysis is the next step in an RFRA claim.[264] For scholars on the far end of the spectrum toward a position supporting religious accommodation on demand, the substantial burden requirement is a "very low threshold" that covers more or less anything a religious claimant says it does.[265] For others, Supreme Court case law suggests that

> when government imposes a religiously neutral, generally applicable obligation that can be satisfied in multiple ways, some of which do not substantially burden religious exercise, the obligation does not constitute a "substantial burden" even if the nonburdensome alternatives are more difficult, more expensive, or less preferred by the religious organization or individual.[266]

In other words, substantial burden may mean only a little or quite a lot, and there is no agreement on which one it is. But without giving substantial burden some significant meaning, the RFRA standard becomes a lazy gatekeeper, requiring the state to meet a high burden in order to refuse almost any religious accommodation.[267] The test becomes

standard strict scrutiny test to the challenged law), *with* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430–31 (2006) ("RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law "to the person"—the particular claimant whose sincere exercise of religion is being substantially burdened." (quoting 42 U.S.C. § 2000-bb(1)(b))).

264. *See, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1137 (10th Cir.), *cert. granted*, 134 S. Ct. 678 (2013).

265. *See* Whelan, *supra* note 18, at 2183–84.

266. Gedicks, *supra* note 46, at 13. Here again the purported problem with evaluating the sincerity of a religious claim as to the impact of a required action or a prohibition of action tends to make courts—and scholars—skittish about performing any evaluative work on this aspect of the claim. *See, e.g.*, *Hobby Lobby Stores*, 723 F.3d at 1137 (declining to inquire "into the theological merit of the belief in question"); Alan E. Garfield, *The Contraception Mandate Debate: Achieving a Sensible Balance*, 114 COLUM. L. REV. SIDEBAR 1, 16 (2014) (noting that any approach other than always finding a substantial burden "might amount to judicial second-guessing of a believer's faith."). And yet, the basic laws of statutory and case law construction—after all, the statutory language is based on case law—would seem to require that the term "substantial" have *some* meaning that differentiates a substantial burden from a regular, nonsubstantial one. *See* TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001).

267. For a prescient discussion of the slippery slope this would entail, see Autocam Corp. v. Sebelius, No. 1:12-CV-1096, 2012 WL 6845677, at *7 (W.D. Mich. Dec. 24, 2012), *aff'd*, 730 F.3d 618 (6th Cir. 2013).

inordinately unbalanced—a lax substantial-burden threshold followed by a requirement that the state show a compelling interest in denying the accommodation means that relatively light burdens on religious exercise will often take precedence over comparatively significant burdens on ERHs if the burdens on ERHs do not fit easily into the standard compelling interest prong, either because preventing such burdens is not recognized as a legitimate state interest or because preventing such burdens does not rise to the level of compelling even if the burdens on ERHs from an accommodation would be heavier than the burden on the objector's religious exercise.[268] Thus, courts would do well to imbue "substantial" with serious meaning as part of the RFRA test.

With regard to the contraceptive coverage requirement cases, other scholars have convincingly argued that the burden, if any, is not substantial, largely because the burden, if any, is so indirect.[269] Having a religious objection to the ways in which an employee will use employee compensation cannot constitute a substantial burden on religious exercise, if for no other reason than that the result would be absurd.[270] There is a

268. *See* Corbin, *supra* note 201, at 1476 (suggesting that deference to assertions that a burden is substantial would favor objectors "at the expense of the people who will be burdened by the accommodation").

269. *See, e.g.*, *id.* at 1479; Gedicks, *supra* note 46, at 12–13.

270. *See* Corbin, *supra* note 201 ("[P]roviding a salary above minimum wage 'facilitates' contraception use by making it more affordable, yet no one would argue that religiously affiliated organizations should be exempt from minimum wage laws as a result."). As one district court judge considering a claim against the contraceptive coverage requirement under the RFRA lucidly explains, the idea that any burden is substantial if a plaintiff says so would have disastrous consequences:

> Plaintiffs argue, in essence, that the Court cannot look beyond their sincerely held assertion of a religiously based objection to the mandate to assess whether it actually functions as a substantial burden on the exercise of religion. But if accepted, this theory would mean that every government regulation could be subject to the compelling interest and narrowest possible means test of RFRA based simply on an asserted religious basis for objection. This would subject virtually every government action to a potential private veto based on a person's ability to articulate a sincerely held objection tied in some rational way to a particular religious belief. Such a rule would paralyze the normal process of governing, and threaten to replace a generally uniform pattern of economic and social regulation with a patchwork array of theocratic fiefdoms.

Autocam Corp., 2012 WL 6845677, at *7. Another of the lawsuits against the contraceptive coverage requirement bears this out, with the plaintiff in *Annex Medical v. Sebelius* insisting that, despite having fewer than 50 employees, and thus being exempted from the ACA as a whole, his religion *requires* him to provide insurance

whole range of products employees might buy that could merit religious disapproval from their employers: alcohol, condoms, in vitro fertilization treatments, and firearms, to name a few. But let us assume for the sake of argument that there is a substantial burden, particularly for the subset of for-profit employees who have a religious obligation to provide health insurance coverage as well as a religious obligation not to cover contraceptives. Once an RFRA plaintiff has passed this threshold, the court must apply strict scrutiny to the law.

b. *Strict scrutiny*. Much of the strict scrutiny test operates similarly under the RFRA as under the First Amendment, and the arguments discussed in the First Amendment subpart apply here. The crucial distinction is that, as currently formulated, the standard under RFRA is not whether the government has a compelling interest in the law *in general*, but whether the government has a compelling interest in applying the law *to the specific* plaintiff seeking an accommodation.[271] This requirement makes it difficult, as the test is currently understood, for the government to succeed at showing a compelling interest because the scale of government interest in something like public health, for example, exists at a scale that may not be impeded by granting an accommodation to a single employer with a few dozen, or even a few hundred, employees.[272] Moreover, in the context of a law that is passed with some religious exemptions included, those same exemptions, which the government would have made in order to accommodate religious institutions and to avoid targeting religious exercise in violation of the Constitution, are then used as proof that the government does not have a compelling interest in uniform application of the law because it has already voluntarily exempted certain groups of

coverage but *prohibits* him from providing contraceptive coverage. Annex Med., Inc. v. Sebelius, No. 13-1118, 2013 WL 1276025, at *1 (8th Cir. Feb. 1, 2013).

271. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430–31 (2006); *see* Laycock, *supra* note 6 (manuscript at 35). *But see* Gedicks, *supra* note 46, at 15 (listing government interests found to be compelling in other contexts without specifying the government's compelling interest in applying the contraceptive coverage requirement to the plaintiff in question).

272. *See Gonzales*, 546 U.S. at 431 (stating "broadly formulated interests justifying the general applicability of government mandates" are unlikely to be compelling as applied to particular objectors). *But see* United States v. Lee, 455 U.S. 252, 258–59 (1982) (finding that a broad efficiency interest was compelling because a system "providing for voluntary participation would be . . . difficult, if not impossible, to administer").

people who object on religious grounds.[273]

This analysis would proceed differently if concerns for the rights of ERHs were more clearly understood to be part of the state's compelling interest. As noted, the state should be understood to have a compelling interest in protecting the rights or benefits it has conferred on ERHs as individuals, apart from its more general concern in advancing its legislative goals or public policy. The essential point is that the specificity of the RFRA standard—under which the state must show a compelling interest in applying the law in question to a given plaintiff—provides a more even playing field when we recognize that the state may have compelling interests in protecting the benefits or rights of the plaintiff's employees as individuals.

Further, the state may also—or may instead—have a compelling interest in maintaining the expressive force of its law. As discussed, one problem the government often faces in arguing for a compelling interest in a challenged law is that there is a scope or scale problem, which is exacerbated by the existence of any accommodations or exemptions the government has willingly made for similar or different reasons than those motivating a given plaintiff's claim for accommodation.[274] To some extent this seems to turn accommodation law into a numbers game; if the government has already exempted 500 employers with 10,000 total employees from the law through various carve outs, it might not have a compelling interest in enforcing it against a single additional employer with 10, 100, or 1,000 employees—who knows what the magic number might be—but it would have a compelling interest in enforcing it against a single additional employer with, say, 15,000 employees.[275] To the extent that this is a logical outcome of the doctrine (which is arguable), it does not apply to a law's expressive, equality-implicating function, which is unsuitable for a numbers game. The state should have a compelling interest in conveying

273. For an example of this logic in action, see Whelan, *supra* note 18, at 2187–88 (objecting to the exemptions for grandfathered plans and small employers).

274. There are additional problems with this line of argument apart from those most relevant here. For instance, it seems to have troublesome policy implications—it might imply that the legislature would be better off not trying to accommodate religion at all during the drafting process for fear that any accommodations will later be used to invalidate the law in this manner.

275. *See* Laycock, *supra* note 6 (manuscript at 16) ("[A]s the size and number of the businesses seeking exemption expands, the government's compelling-interest argument becomes stronger, and as the number of shareholders expands, the claim of personal moral responsibility for the acts of the corporation becomes more attenuated.").

this dignitary or symbolic equality benefit upon each and every individual party to whom it applies in a way that is not susceptible to arguments about efficient administration or execution. Here too, the existence of other exceptions from the law that would be damaging to an efficient-administration argument may not be as relevant to an ERH-protecting argument because the message communicated by the exceptions may be different.

When applied to the contraceptive coverage requirement cases, this rereading of the RFRA allows us to see the ways in which, even if the plaintiffs have met the substantial-burden threshold, the state nevertheless has a compelling interest in the already-recognized goals of promoting public health and promoting women's equality, but also in the underappreciated goals of protecting the insurance coverage of the individual women employed by a given plaintiff and maintaining a consistent expressive message about women's equality and contraceptive access, which would be negated by allowing religious for-profit employers to opt out of providing the kind of coverage that all other employers covered by the ACA who choose to provide insurance must offer.

VI. CONCLUSION

The current doctrine applicable to religious accommodation claims—whether under the First Amendment or under the RFRA—may be reasonably well-suited to cases in which the primary conflict of interests is between the religious objector's free exercise and the state's interest in efficient administration. However, it is ill-suited to the important subset of cases in which the primary conflict lies between religious objectors and ERHs whose interests or rights would be negatively impacted or completely blocked by a grant of religious accommodation to an objector. This is particularly true when these ERHs have equality-implicating rights at stake. While current doctrine can be argued to obliquely support an emphasis on these interests, a framework that places a positive obligation on the state to respect *all* of the substantial rights involved when possible—and that prioritizes equality-implicating rights when not possible—would do a better job of vindicating the purpose of religious accommodation rights and of protecting ERHs from the negative impact of accommodations. The contraceptive coverage requirement of the Affordable Care Act promotes crucial equality rights for women, both practical and expressive. To that end, while the state might be well-advised to offer an accommodation that preserves those goals while also respecting religious objections—one much like the current accommodation granted to

religious nonprofits, but with a rigorous enforcement mechanism—if religious objectors refuse that compromise, the state should be empowered to enforce the contraceptive coverage requirement on religious and nonreligious employers alike.