Interpreting Hobby Lobby to Not Harm LGBT Civil Rights

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INTERPRETING HOBBY LOBBY TO NOT HARM LGBT CIVIL RIGHTS

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In this essay I argue that the dual obligations of the political branches to provide for the common good, while at the same time protecting the free exercise of religion, can be achieved only if the Supreme Court’s recent decision in Burwell v. Hobby Lobby Stores is interpreted narrowly along the lines suggested by Justice Kennedy in his concurring opinion. An interpretative problem arises because the logic of Justice Alito’s majority opinion could be read to suggest not just that any intrusion on religious freedom by laws of general applicability requires, under the Court’s interpretation of the Religious Freedom Restoration Act of 1993 (RFRA), the presence of a compelling state interest and that the intrusion be the least restrictive possible, but that the least restrictive prong in effect, obviates any intrusion whatsoever on the private sector. This essay hopes to make clear why this broader interpretation of the opinion is not warranted, notwithstanding the logic of Justice Alito’s opinion.

Section I briefly describes what the Court said in Hobby Lobby, what some of the concerns of the dissent were, and why the view expressed by Justice Kennedy in his concurring opinion—which provided the necessary fifth vote in the case—is so important. Section II discusses what Congress meant when it passed RFRA and why courts need to ask that question. Section III describes the concerns of the LGBT civil rights community and why those concerns should rise to a compelling state interest. Section IV presents the practical problem involved in trying to provide adequate civil rights legislation while holding such legislation hostage as the least restrictive intrusion on religious freedom. Finally, Section V focuses on the need for the government to protect equality as a basic right.

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I. WHAT THE HOBBY LOBBY COURT SAID

*Hobby Lobby* is the name of three cases consolidated before the United States Supreme Court considering whether a regulation affecting employee health plans, which were promulgated by the Department of Health and Human Services (HHS) under the Affordable Care Act (ACA), violated the employers' religious freedom. The regulation required for-profit employers, who were not grandfathered in and who employed more than fifty employees, “to provide ‘coverage, without cost sharing’ for ‘[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling.’” The employers in these cases alleged that because four of the approved contraceptive methods prevent a fertilized egg from adhering to a uterus, the regulation makes them complicit in providing abortions in violation of their religious beliefs.4

The Supreme Court, per Justice Alito’s majority opinion, found that Congress adopted RFRA following the Court’s prior decision in *Employment Division Department of Human Resources of Oregon. v. Smith*, 5 which held that the First Amendment was not violated when a state denies unemployment benefits to Native Americans who lose their jobs following ingestion of peyote as part of a religious ritual.6 The *Smith* Court held that the state did not need to establish a compelling interest under the First Amendment if its intrusion on the free exercises of religion was based on a law of general applicability that on its face was religiously neutral.7

According to the Court, Congress, in passing RFRA, wanted to reaffirm a previously held view that “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” unless 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.”8 Moreover, RFRA, as adopted by Congress in 1993, specifically states that it applies to all federal and state law and the implementation of that law, whether statutory or otherwise, and whether adopted before or after enactment of the Act. That, however, has not been fully the law for some time: “[a]s applied to a federal agency, RFRA is based on the enumerated power that supports the particular agency’s work, but in attempting to regulate the States and their subdivisions, Congress relied on its power under section 5 of the Fourteenth Amendment to enforce the First Amendment.”9 In *City of Boerne v. Flores*, the Court “held that Congress had overstepped its Section 5 authority because ‘[i]he

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4. *Id.* at 2762-63.
6. *Id.* at 890.
7. *Id.*
9. *Id.* (citing *City of Boerne v. Flores*, 521 U.S. 507, 516-17 (1997)).
stringent test RFRA demands ‘far exceed[ed] any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in Smith.’\(^\text{10}\) Consequently, only those federal legislative and regulatory intrusions on the free exercise of religion that meet the strict scrutiny requirements of RFRA would be allowed unless the language of the legislation specifically disavows application of RFRA.

Thus, RFRA was designed to raise a profound challenge to all current and future federal legislation designed to serve the common good, except where a post-RFRA statute specifically disavows its application. This was evidenced in *Hobby Lobby*. The corporation’s owners used RFRA to challenge the HHS contraception requirement arguing that the requirement did not pass the statutory test required in RFRA. Beyond that, *Hobby Lobby* expanded who would be permitted to bring such a challenge to laws of general applicability. This was apparent from the Court’s recognition that a closely held corporation, such as Hobby Lobby, can “exercise religion” and the Court’s determination that Congress employed the legal fiction that corporations are “persons” under RFRA.\(^\text{11}\)

The Court stated that “[a] corporation is simply a form of organization used by human beings to achieve desired ends. . . . When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.”\(^\text{12}\) On this point two of the dissenters, Justices Ginsberg and Sotomayor, argued that for-profit corporations differ fundamentally from nonprofit corporations: “Workers who sustain the operations of those [for-profit] corporations commonly are not drawn from one religious community.”\(^\text{13}\) Moreover, nothing in the legislative history of RFRA indicates Congress ever intended that the Act should apply to for-profit corporations.\(^\text{14}\) Justices Kagan and Breyer, who also dissented, found no need to reach this issue because, in their view, “the plaintiffs’ challenge to the contraceptive requirement fails on the merits.”\(^\text{15}\) From these justices points of view that conclusion could be based, at least in part, on the majority’s own willingness to “assume that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA . . . .”\(^\text{16}\) Where all the dissenters disagreed with the majority concerned the issue of whether HHS’s regulation met the second tenet of RFRA, which requires that the intrusion be “the least restrictive means of furthering that compelling governmental interest.”\(^\text{17}\)

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10. *Id.* (citing *Flores*, 521 U.S. at 533-34).
11. *Id.* at 2768.
12. *Id.*
13. *Id.* at 2795 (Ginsburg, J., dissenting).
14. *Id.* at 2796.
15. *Id.* at 2806 (Breyer & Kagan JJ., dissenting). Justices Breyer and Kagan did not join Part III-C-1 of Justice Ginsburg’s dissent. *Id.*
16. *Id.* at 2780 (majority opinion).
To the contrary, the majority claimed that “[t]he most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers’ religious objections.”\(^{18}\) However, the dissent argued that:

the Government has shown that there is no less restrictive, equally effective means that would both (1) satisfy the challengers’ religious objections to providing insurance coverage for certain contraceptives (which they believe cause abortions); and (2) carry out the objective of the ACA’s contraceptive coverage requirement, to ensure that women employees receive, at no cost to them, the preventive care needed to safeguard their health and well being.\(^{19}\)

As Justice Ginsburg’s opinion noted, “Impeding women’s receipt of benefits ‘by requiring them to take steps to learn about, and to sign up for, a new [government funded and administered] health benefit’ was scarcely what Congress contemplated.”\(^{20}\) Additionally, Justice Ginsburg questioned, “[W]here is the stopping point to the ‘let the government pay’ alternative?”\(^{21}\) One senses in Justice Ginsburg’s dissent the dual fears that women will now be forced to meet hurdles by virtue of their sex and that the approach could be a pathway to undoing a number of civil liberty protections that, over the years, Congress and states have provided for women and others.

The dissent saw the majority’s position as potentially opening the floodgates to a very wide range of legal challenges to laws of general applicability whenever they occur if it could be argued that compliance could implicate a religious belief of the owners. That, in effect, would mean that closely held companies providing all kinds of services would now be in a position to claim an exemption from having to provide their services to those whose actions they might have a religious disagreement with. For example, businesses providing reception halls, catering services, photography services, day care services, and so forth could now claim an exemption from having to provide these services, without fear of violating anti-discrimination statutes. Such discrimination could apply to individuals or groups, such as gays or lesbians putting together a same-sex wedding or raising a family or even employees suffering gender dysphoria. This could keep employees from transitioning because they may not be able to keep their job or have their employer’s health plan pick up the medical costs of their health care. Moreover, this doesn’t even consider that there may be large areas of the country where only one or two businesses are providing these needed services because the areas are rural and less populated, and thus, if exemptions are allowed, the people in these areas may very well have to go without these services. Granted, at this

\(^{18}\) *Hobby Lobby*, 134 S. Ct. at 2780.

\(^{19}\) *Id.* at 2801-02 (Ginsburg, J., dissenting).

\(^{20}\) *Id.* at 2802 (quotation omitted).

\(^{21}\) *Id.*
point the exemptions could be claimed only by closely held for-profit businesses but that could affect a very large population, as many large businesses are closely held, like the Hyatt Corporation.\textsuperscript{22}

The dissent was also not convinced by the majority’s statement that “[t]oday’s cases . . . are ‘concerned solely with the contraceptive mandate.’”\textsuperscript{23} Or that its opinion was not intended to provide a shield “that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction.”\textsuperscript{24} As Justice Ginsburg wrote in response, even if it were true that the result here would not encompass other areas where, for example, antidiscrimination laws might apply, “approving some religious claims while deeming others unworthy of accommodation could be ‘perceived as favoring one religion over another,’ the very ‘risk the Establishment Clause [also part of the First Amendment] was designed to preclude.’”\textsuperscript{25} Here Justice Ginsburg was pointing to the Court’s willingness to seemingly disallow certain kinds of religious exemptions for race while including others.

In light of these very serious concerns for the wide logic of the majority’s position, it is worth noting that Justice Kennedy, who added the necessary fifth vote to the Court’s 5-4 decision, wrote a separate concurrence expressing a far narrower view of the breadth of the \textit{Hobby Lobby} decision. First, in regard to the specific contraceptive issue at stake in the case, Justice Kennedy noted, “There are many medical conditions for which pregnancy is contraindicated. It is important to confirm that a premise of the Court’s opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees.”\textsuperscript{26} This is no trivial addition, especially since Justice Alito’s majority opinion, in assuming the presence of a compelling interest, said very little for why this was so. In effect, Justice Kennedy is suggesting that there may be times a religious exemption will be overridden by a compelling interest in a woman’s health.

Second, Justice Kennedy’s opinion provides a caveat to the concern that Justice Alito’s opinion could open the floodgates to a wide range of religious objections to all sorts of laws of general applicability. Justice Kennedy writes that his agreement with the majority that a less restrictive intrusion was available in \textit{Hobby Lobby} was based on there “existing, recognized, workable, and already-implemented framework to provide coverage[,]” referring to the exception HHS had previously granted nonprofit organizations expressing religious beliefs.\textsuperscript{27} He also found HHS’s distinguishing between not-for-profit

\begin{thebibliography}{99}
\bibitem{22}See Nadja Brandt, \textit{A Hyatt Heir Who Thinks Small Is Beautiful}, BLOOMBERG BUSINESS, Feb. 16, 2012, http://www.businessweek.com/articles/2012-02-16/a-hyatt-heir-who-thinks-small-is-beautiful. Besides Hobby Lobby, the Hyatt hotel company is a closely held corporation with operations across the United States and in several foreign countries employing thousands of people.

\bibitem{23}\textit{Hobby Lobby}, 134 S. Ct. at 2805 (Ginsburg, J., dissenting) (quoting \textit{id.} at 2783 (majority opinion)).

\bibitem{24}\textit{id.}

\bibitem{25}\textit{id.} (quoting U.S. v. Lee, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring)).

\bibitem{26}\textit{id.} at 2786 (Kennedy, J., concurring).

\bibitem{27}\textit{id.}
\end{thebibliography}
and for-profit religious believers” burdensome because “it may treat both equally by offering both of them the same accommodation.”\textsuperscript{28} In other words, Justice Kennedy wasn’t saying that in all cases it should be the government’s responsibility to provide whatever services are being denied, as would be the case if the government had to pick up the bill, like the Alito opinion suggested. Government is not in the business of providing many kinds of private sector services that most people often need. In this particular case, HHS had already found a way to provide the service for nonprofits that Justice Kennedy thought might be extended to closely held for-profit corporations.

Perhaps the most troubling and yet in an ironic way safeguarding aspect of the \textit{Hobby Lobby} decision is that there are these two very different readings of what the opinion stands for. If one reads the Alito opinion in the way its logic would seem to suggest, which is the way that the dissent reads it, the potential for damage to laws of general applicability, especially civil rights laws, is great. On the other hand, that same decision, if read more narrowly along lines following Justice Kennedy’s concurring opinion, could very well limit its reach to only the particular circumstances there present. In other words, it would have very limited precedential effect. Of course, which reading will finally win the day is the ultimate question and also what makes the opinion so troubling by its being left open.

\section*{II. LET’S NOT FORGET CONGRESS}

At this point, it should not be forgotten that \textit{Hobby Lobby} was a case involving federal statutory, not constitutional, interpretation. That means that Congress could, if it so chose, resolve the interpretative problem by clarifying its intent when it passed RFRA. The Court relies on Congress having passed, subsequent to RFRA, the Religious Land Use and Institutionalize Persons Act (RLUPIA), which partly amended RFRA by deleting from the latter a specific reference to the First Amendment.\textsuperscript{29} The Court takes the latter to indicate that Congress meant RFRA, at least by the time it passed RLUPIA in 2000, to provide a broader protection than would otherwise have been available under the First Amendment. This was not merely to just re-track prior First Amendment case law before \textit{Smith}. The Court’s point being if Congress meant otherwise, its dropping of the reference to the First Amendment in RFRA would have been unnecessary. But obviously if the Court misread Congress’ intent or Congress

\textsuperscript{28} Id. \textsuperscript{29} Id. at 2761-62; see 42 U.S.C. §2000cc—5(7)(A) (2000). Arguably, this could have resulted from the fact that in \textit{City of Boerne v. Flores}, Justice Kennedy wrote in his majority opinion, “The power to interpret the Constitution in a case or controversy remains in the Judiciary.” \textit{City of Boerne v. Flores}, 521 U.S. 507, 524 (1997). Although Justice Kennedy was focusing on the Fourteenth Amendment, arguably the same argument would apply equally to the First Amendment. “If Congress could define its own powers by altering the Fourteenth Amendment’s meaning, no longer would the Constitution be ‘superior paramount law, unchangeable by ordinary means.’ It would be ‘on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it.’” \textit{Id.} at 529 (citing \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137, 177 (1803)).
wants to change what it originally intended, Congress is certainly free to adjust
the likely impact of RFRA in future cases through the normal legislative process.

Indeed, Senators Patty Murray (D-WA) and Mark Udall (D-CO), an
original sponsor of RFRA, have already introduced a bill in Congress, the
"Protect Women's Health from Corporate Interference Act [(PWHCIA)],"\textsuperscript{30} to
limit the impact of RFRA. PWHCIA "prohibits employers from refusing to
provide health services, including contraception, to their employees if required
by federal law."\textsuperscript{31} The problem, of course, with getting that law passed is the
apparent disfunctionality of Congress to do very much of substance these past
several years. Besides the usual differences in viewpoint often expressed
between Democrats and Republicans, at the time of this writing the House of
Representatives is controlled by Republicans, the Senate by Democrats.
Moreover, the Republican Party is split between those more mainstream
Republicans who sometimes seek compromises with Democrats and Tea Party
Republicans who oppose any extension of governmental authority and tend to be
very protective of religious beliefs. This was illustrated when Senate
Republicans were able to prevent the Murray/Udall bill from going forward by
exercise of the filibuster rule.\textsuperscript{32} Indeed, that this split along ideological lines
should now play such a significant role in dividing the parties on this issue is
interesting because protecting the free exercise of religion originally brought
both Democrats and Republicans together in passing RFRA.

Indeed, it is no doubt worth emphasizing Congress' explicit statement in
Section two of RFRA:

(b) PURPOSES—The purposes of this Act 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.\textsuperscript{33}

In passing RFRA out of committee, the House Judiciary Committee Report
specifically states: under its Summary and Purpose that RFRA "responds to the
Supreme Court's decision in \textit{Employment Division Department of Human
Resources of Oregon v. Smith} by creating a statutory right requiring that the

\textsuperscript{30} News Releases, HOBBY LOBBY: Murray, Udall Introduce Legislative Fix to Protect
Women's Health in Aftermath of Supreme Court Decision, (July 9, 2014), http://www.murray.senate.gov/public/index.cfm/newsreleases?ContentRecord_id=25277c4f-00ee-45af-aded-3d0365e6ec09.

\textsuperscript{31} Sahil Kapur, Senate Dems Ready to Unveil Bill Reversing Hobby Lobby Ruling, TALKING

\textsuperscript{32} Kyung M. Song, Senate GOP Blocks Patty Murray's Contraception Coverage Bill, THE

(1993).
compelling governmental interest test be applied in cases in which the free exercise of religion has been burdened by a law of general applicability."

Similarly, the Senate Report follows along the same line:

[RFRA] is intended to restore the compelling interest previously applicable to free exercise cases by requiring that government actions that substantially burden the exercise of religion be demonstrated to be the least restrictive means of furthering a compelling governmental interest. The Committee expects that the courts will look to free exercise cases decided prior to Smith for guidance in determining whether the exercise of religion has been substantially burdened and the least restrictive means have been employed in furthering a compelling governmental interest.

What is clear from both of these reports is Congress’ original intent in passing RFRA was to go back to the previous condition of free exercise protections that the Court had recognized prior to Smith, not to broaden those protections further. I point this out because the Murray/Udall bill does not suggest Congress is charting any new aspect of free exercise protections in passing RFRA. Congress is just restating in more clear language what it previously meant in passing RFRA. If that doesn’t speak to congressional intent, what would? Still, as things stand currently in Congress, it appears more likely that it will be up to the courts, following Justice Kennedy’s concurring opinion in Hobby Lobby, to limit any overreach that might be assigned to Justice Alito’s opinion being extended to areas Congress did not intend to restrict at the time RFRA was passed.

III. THE IMPACT FOR LGBT CIVIL RIGHTS

For the LGBT community, the primary concern of a too broad interpretation of Hobby Lobby is the exception it might provide to state and federal civil rights legislation designed to protect members of the community against discrimination in employment, housing, and public accommodations. The exception might manifest itself by employers objecting to employees undergoing, for example, gender transition surgery, notwithstanding a medical diagnosis of gender dysphoria. It could also, and very likely will, implicate services provided to same-sex couples by landlords refusing to rent an apartment to same-sex couples, by hotel and other public accommodations refusing to rent wedding suites or rooms for same-sex wedding receptions, by photographers, florists, DJs, caterers, and others also refusing to provide services at same-sex wedding receptions, and so forth. These issues could be especially problematic in small towns where these services are only available through one or two companies. It is against these legitimate background concerns that fear over a too-broad reading of the Hobby Lobby decision is couched.


One recent national example of this concern was the decision by Lambda Legal, the American Civil Liberties Union, Gay and Lesbian Advocates and Defenders, the National Center for Lesbian Rights, and the Transgendered Law Center to withdraw support for the current version of the Employment Non-Discrimination Act (ENDA) pending in Congress. As passed by the Senate in the fall of 2013, the Act provides:

It shall be an unlawful employment practice for an employer—

1. to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual’s actual or perceived sexual orientation or gender identity; or

2. to limit, segregate, or classify the employees or applicants for employment of the employer in any way that would deprive or tend to deprive any individual of employment or otherwise adversely affect the status of the individual as an employee, because of such individual’s actual or perceived sexual orientation or gender identity.

The problem these civil rights groups are concerned with centers on the religious exemption presently written into the Act. That provision provides:

a. In General.—This Act shall not apply to a corporation, association, educational institution or institution of learning, or society that is exempt from the religious discrimination provisions of title VII of the Civil Rights Act of 1964.

b. Prohibition on Certain Government Actions.—A religious employer’s exemption under this section shall not result in any action by a Federal Agency, or any State or local agency that receives Federal funding or financial assistance, to penalize or withhold licenses, permits, certifications, accreditations, contracts, grants, guarantees, tax-exempt status, or any benefit or exemptions from that employer, or to prohibit the employer’s participation in programs or activities sponsored by that employer.

36. In a joint statement issued July 8, 2014, these groups assert:

ENDA’s discriminatory provision, unprecedented in federal laws prohibiting employment discrimination, could provide religiously affiliated organizations—including hospitals, nursing homes and universities—a blank check to engage in workplace discrimination against LGBT people. The provision essentially says that anti-LGBT discrimination is different—more acceptable and legitimate—than discrimination against individuals based on their race or sex. If ENDA were to pass and be signed into law with this provision, the most important federal law for the LGBT community in American history would leave too many jobs, and too many LGBT workers, without protection. Moreover, it actually might lessen non-discrimination protections now provided for LGBT people by Title VII of the Civil Rights Act of 1964 and very likely would generate confusion rather than clarity in federal law. Finally, such a discrimination provision in federal law likely would invite states and municipalities to follow the unequal federal lead. All of this is unacceptable.


Federal, State, or local agency. Nothing in this subsection shall be construed to invalidate any other Federal, State, or local law (including a regulation) that otherwise applies to a religious employer exempt under this section.\(^{38}\)

The aforementioned groups are concerned that the kind of exemption ENDA includes could, especially if broadly interpreted, undermine the antidiscrimination prohibition ENDA represents. For one thing, since ENDA is a federal statute, if it does not include a provision specifically excluding RFRA from applying, then any limitation on the right to discriminate would be subject to the state showing both a compelling interest and that the limitation “is the least restrictive means of furthering that compelling governmental interest.”\(^{39}\) Additionally, if *Hobby Lobby* is interpreted broadly, it loosens the shackles that the Court has traditionally applied to its interpretation of federal statutes to avoid overly broad interpretations—thus also opening the door to the fear that a conservative Court might be willing to adopt a broader interpretation of the religious exemptions than might have otherwise been intended.\(^{40}\)

For example, ENDA does not apply to corporations and institutions “exempt from the religious discrimination provisions of title VII of the Civil Rights Act of 1964.”\(^{41}\) The Equal Employment Opportunity Commission (EEOC), which oversees Title VII applications in the private sector has stated:

Under established case law, this Title VII exception applies only to those institutions whose “purpose and character are primarily religious.” That determination is to be based on “[a]ll significant religious and secular characteristics.” Although no one factor is dispositive, significant factors that courts have considered to determine whether an employer is a religious organization for purposes of Title VII include: whether the entity is not for profit, whether its day-to-day operations are religious (e.g., are the services the entity performs, the product it produces, or the educational curriculum it provides directed toward propagation of the religion?); whether the entity’s articles of incorporation or other pertinent documents state a religious purpose; whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or other religious organization; whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees; whether the entity holds itself out to the public as secular or sectarian; whether the entity regularly includes prayer or other forms of

\(^{38}\) *Id.* § 6.


\(^{41}\) Employment Non-Discrimination Act of 2013, H.R. 1755, 113th Cong. § 6 (as passed by Senate, Nov. 7, 2013).
worship in its activities; whether it includes religious instruction in its curriculum, to the extent it is an educational institution; and whether its membership is made up of coreligionists.\textsuperscript{42}

If the limitations the EEOC considers on what corporations or institutions can be threatened by Title VII's antidiscrimination provisions are themselves weakened, then the opportunities for discrimination, including among for-profit closely held corporations, are substantially increased notwithstanding passage of ENDA.

These civil rights groups made this clear to the White House when they proposed, prior to the summer of 2014, to have President Obama sign an executive order banning those who contract with the federal government from discriminating in hiring decisions based on sexual orientation or gender identity. After \textit{Hobby Lobby}, conservative religious leaders renewed an earlier request that the order include "a robust religious exemption, like the provisions in the Senate-passed ENDA[].\textsuperscript{43}" As these leaders described it, "extension of protection for one group [should] not come at the expense of faith communities."\textsuperscript{44} Of course, the problem is determining when some protection comes "at the expense of faith communities" from when an exemption operates merely to disguise discrimination.

Surely, it is reasonable that a religious community might afford a hiring preference to members of its own faith community. Indeed, the Illinois Human Rights Statute, like its California counterpart, specifically states with respect to for-profit companies that:

"Employer" does not include any religious corporation, association, educational institution, society, or non-profit nursing institution conducted by and for those who rely upon treatment by prayer through spiritual means in accordance with the tenets of a recognized church or religious denomination with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, society or non-profit nursing institution of its activities.\textsuperscript{45}

Exemptions such as these arguably serve to preserve the integrity of the religious enterprise by specifying that the work performed is directly related to the institution's religious activities. It is difficult to believe, however, that the integrity of the work of the faith community is preserved when the exemption is

\begin{footnotes}
\item[42.] Letter from Reed L. Russell, Legal Counsel for the U.S. Equal Emp't Opportunity Comm'n, to Kevin Cummings, Branch Chief at the Dep't of Homeland Sec. (Dec. 28, 2007) (alteration in original), available at http://www.eeoc.gov/eeoc/foia/letters/2007/religious_organization_exception_dec_28_2007.html (this letter was written in response to a request for public comment from a federal agency or department and does not constitute an official opinion of the Commission).
\item[44.] Id.
\item[45.] 775 ILL. COMP. STAT. ANN. 5/2-101(B)(2) (West 2015).
\end{footnotes}
applied to work only distantly related to the organization’s mission, such as janitorial or other support services.

Indeed, such exemptions make perfect sense if the activity requires an ordained ministry or even “treatment by prayer or spiritual means alone in accordance with the tenets and practices of a recognized church or religious denomination . . . .”46 But it is far from clear that a secretary, janitor, or grounds maintenance personnel should fall under the protection. Indeed, bringing these other services within the ambit of the protection more likely undercuts the very purpose the law was designed to serve:

To secure for all individuals within Illinois the freedom from discrimination against any individual because of his or her race, color, religion, sex, national origin, ancestry, age, order of protection status, marital status, physical or mental disability, military status, sexual orientation, or unfavorable discharge from military service in connection with employment, real estate transactions, access to financial credit, and the availability of public accommodations.47

It was because of concerns such as these that civil rights groups began to withdraw their support for the proposed presidential order.48 In the end, the White House agreed to a more common and less controversial religious exemption to protect religious organizations: “[R]eligious groups with federal contracts may hire and fire based on religious identity, but not give them any exception to consider sexual orientation or gender identity. Churches are also able to hire ministers as they see fit.”49

Still, the problem of how wide ranging to make a future religious exemption, as more and more states adopt antidiscrimination protections, isn’t going away with the White House compromise. Moreover, in light of the Hobby Lobby decision, it is likely that the problem will resurrect itself even over existing protections, at least insofar as the companies affected can be considered closely held corporations. This more than any other reason is why Justice Alito’s majority opinion in Hobby Lobby is so dangerous.

IV. PROTECTING EQUALITY WITHOUT SACRIFICING A BASIC RIGHT

There is no doubt that in the United States individuals have a right to the free exercise of religion and that the free exercise of religion is a fundamental right. It is also apparent that actions required to be taken by the government on behalf of the common will sometimes conflict, if not directly or at least indirectly, with the fullest exercise of that right. When this happens, a judgment

46. 320 ILL. COMP. STAT. ANN. 20/2 (West 2015).
47. 775 ILL. COMP. STAT. ANN. 5/1-102 (A) (West 2015).
has to be made as to whether the interference is significant enough that allowing it would be inconsistent with the claim that the right to religious freedom is fundamental. The way that judgment has traditionally been made, at least prior to *Smith*, and the way RFRA requires it be made, is to require first that the state show a compelling interest for the imposing action it is requiring, and second that the requirement go no further than the minimum necessary to achieve the state’s compelling interest. Only if both of these conditions are met is the state’s potential interference with religion justified since no right, not even a fundamental right, is deemed absolute. That is to say, no right is such that it trumps any conceivable concern; only in the case of fundamental rights, it should trump concerns generally thought to be less compelling.

The government is only able to interfere with an individual’s right when the individual is not upholding the basic principles of “public order and the common good.” Whether a harm results to another is to some extent a matter of individual perspective, so it is important that the harm identified be objectively verifiable. This is especially true when the common good is at risk, since government, under our Constitution, has a duty not only to protect our basic rights but also to provide for the common good equally to all. Indeed, that such a duty exists is founded on the very reasons why governments exist. Where conflicts of duty arise is where government appears unable or unwilling to fulfill both of its duties, probably because the boundaries between the duties are not clearly defined. That is why it is so important that the harm be objectively verifiable, at least provisionally, without begging any questions. For example, in the case of abortion, the standards for limiting it must take into account women’s health concerns, as well as bureaucratic regulations that can be independently justified and do not unduly burden a woman’s decision. And although the point where a burden becomes “undue” is controversial, the

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50. See supra Part II.
51. See, e.g., Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) (“Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense.”).
52. See BLACK’S LAW DICTIONARY 342 (10th ed. 2014).
54. See id. at 803-07 (giving various examples of how harm has been determined).
55. U.S. CONST. pmbl.

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

Id.
56. See id.
57. As Justice Stevens states in his partially concurring, partially dissenting opinion in *Casey*:

In my opinion, a correct application of the “undue burden” standard leads to the same conclusion concerning the constitutionality of these requirements. A state-imposed burden on the exercise of a constitutional right is measured both by its effects and by its character: A burden may be “undue” either because the burden is too severe or because it lacks a legitimate, rational justification.

requirement that "an undue burden" be shown gives rise to a discourse over how it is established.

This general concern with offsetting fundamental individual rights against the public good, in the case of the free exercise of religion, means allowing the believer to follow her faith and conscience by refusing to participate in actions she does not approve of unless doing so will flout the government's obligation to provide for the public order and the common good. The two distinct harms are then weighed by the importance to autonomy generally. While it is certainly a limitation of the religious adherent's freedom to have to supply his employees with certain types of preventative health care contrary to his beliefs, he is still able to manifest other means in support of those beliefs, if he is to remain in business. Examples include supporting candidates who share his beliefs for public office; supporting education programs aimed to encourage others to support the beliefs he adopts; and giving to causes that provide alternatives to abortion, such as single-parent support services or services in support of adoption. By contrast, denial of health care services to employees could, in some instances, lead to loss of life or, in other cases, serious economic deprivation that would likely limit other activities. Thus, the harm to the believer then must be balanced against the potential for physical and economic harm that will be suffered by employees unable to receive needed health care products and services they might need.

In cases like \textit{Hobby Lobby}, the objective harm of how such actions are likely to affect the believer is offset against the harm to women's health if they are unable to receive necessary health care products and services. Only if there is an alternative way to truly satisfy women's health care needs can the requirement be limited.\footnote{As Justice Kennedy in his concurring opinion in \textit{Hobby Lobby} explains: As the Court explains, this existing model [that HHS has set up for nonprofit organizations], designed precisely for this problem, might well suffice [for] distinguishing the instant cases from many others in which it is more difficult and expensive to accommodate a governmental program to countless religious claims based on an alleged statutory right of free exercise. \textit{Burwell v. Hobby Lobby Stores, Inc.}, 134 S. Ct. 2751, 2787 (2014) (Kennedy, J., concurring).} Here it is important to take note that what is being offered is not a utilitarian offset; so much religious freedom for so much health care will produce the greatest happiness or least pain for all those affected by it. Instead, what is being considered is how to navigate between two very important obligations of government. These include the role of government to protect our right to religious freedom while also providing necessary goods and services, like health care, to all on the same basis. Obviously, the navigation has to be based on what is possible in light of what Congress has set out; it's not the Court's role to say what policy is best, but how to navigate the structures our constitutional system allows.

Again, in \textit{Hobby Lobby}, what is being looked at is whether a dispositional harm to the believer/employer is offset by the greater dispositional harm to employees, if employers are allowed to opt-out from providing contraceptives, especially, but not limited to, women for whom, as Justice Kennedy indicates,
"pregnancy is contraindicated." Indeed, to emphasize the point that this is not simply a policy comparison but a determination of appropriate constitutional bounds, Justice Ginsburg, in her dissent, noted: "approving some religious claims while deeming others unworthy of accommodation [as would seem suggested by the majority's view] could be 'perceived as favoring one religion over another,' the very 'risk the Establishment Clause [also part of the First Amendment] was designed to preclude.'

A significant dispositional burden to women's health care occurs because the economic environment for many women of working age is such that health services are often too costly if not included as part of their employer health plans. This harm can also be thought occurrent if there is an immediate threat to women's health by these services not being provided. This does not mean, of course, that health care could not be provided in some other conceivable way. For example, a single-payer, government sponsored, health care plan could have been what Congress had enacted, but it was not. And absent an environment where another choice is realizable (because that is not how Congress framed the ACA), the harm to women's health is clearly present when alternative methods are not. Consequently, where life is juxtaposed against religious freedom, life must take precedence. That would be a compelling interest. And it is particularly so where, as in Hobby Lobby, the employer is a corporation employing thousands of people with outlets in many states, and many of those employees may not share the employers' religious beliefs. For, under these circumstances, it is not reasonable to believe that the employer's religious views on these issues and those of the employees would necessarily coincide.

The approach offered here also provides a more satisfactory analysis for how the decision in Hobby Lobby came about and where its future limits in other cases might lie. For example, in Hobby Lobby both Justice Alito's majority opinion (perhaps to gain Justice Kennedy's assent to a narrower decision than the logic of Alito's opinion might imply) and the dissent accepted that protecting women's health was a compelling state interest. This is made particularly

59. Id. at 2786.
60. Id. at 2805 (Ginsburg, J., dissenting) (quoting United States v. Lee, 455 U.S. 252, 263, n.2 (1982) (Stevens, J., concurring)).
61. "Philosophers often distinguish dispositional from occurrent believing. This distinction depends on the more general distinction between dispositions and occurrences. . . . A dispositional claim is a claim, not about anything that is actually occurring at the time, but rather that some particular thing is prone to occur, under certain circumstances." ERIC SCHWITZGEBEL, BELIEF (Edward N. Zalta ed., Summer ed. 2015) available at http://plato.stanford.edu/entries/belief/#2.l.
62. In Hobby Lobby, the Court consolidated three cases, each involving closely held, for-profit corporations: Conestoga Wood Specialties, employing over 950 people in wood working specialties; Hobby Lobby, employing more than 13,000 in over 500 stores across the United States; and Mardel, employing 400 persons in 35 Christian bookstores. Hobby Lobby, 134 S. Ct. at 2763-65 (citations omitted).
63. See id. at 2780. "We will assume that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA . . . ." Id. Justice Ginsburg in dissent argued:

[T]he ACA provides further compelling interests in public health and women's well being. Those interests are concrete, specific, and demonstrated by a wealth of empirical evidence. To
evident by Justice Kennedy's separate concurring opinion. However, where the
majority and dissent disagreed was over whether HHS had in effect established a
precedent in the nonprofit sector for both protecting women's health without
inhibiting the free exercise of religion. Justice Kennedy, by clarifying that the
majority's position could be justified based on an already established practice
limited its otherwise broader application that might have seriously endangered
the government's ability to provide for women's compelling health care needs.
This is important because, had no such precedent existed, the result in 
Hobby Lobby could have been more clearly very damaging.

This approach also provides a crucial argument for future civil rights groups
who fear that 
Hobby Lobby could spell the end of civil rights laws, especially
those affecting the LGBT community. Those in the LGBT community may be
denied needed services or, perhaps, may not be hired at all. This is a result of
religious differences that occur, for example, in same-sex marriages and
transgender contexts. Justice Kennedy's view suggests that, at least, he might be
inclined to look further at who might be protected more than Justice Alito, who
only mentioned racial discrimination as unlikely to be effected by the Court's
holding in 
Hobby Lobby.

Perhaps a better view is that any form of discrimination that is likely to
undermine a person's basic freedom and well-being ought to receive protection
from religious discrimination as a material element of basic equality, at least
where the legislature has made a determination to do so and no obvious way to
accommodate both interests is otherwise available. This view is consistent with
Justice Kennedy's opinion. Since basic freedom and well-being are most often
affected when a person's access to employment, housing, and public
accommodations are denied, it would seem that in these areas the kinds of
protections that, for instance, the LGBT community is most concerned about
should remain protected, notwithstanding the Alito opinion in 
Hobby Lobby.

Several reasons support this conclusion. First, housing, employment, and public

recapitulate, the mandated contraception coverage enables women to avoid the health problems
unintended pregnancies may visit on them and their children. . . . The coverage helps safeguard
the health of women for whom pregnancy may be hazardous, even life threatening.

Id. at 2799 (Ginsburg, J., dissenting) (citation omitted).

64. Here Justice Ginsburg argued:

[The Government has shown that there is no less restrictive, equally effective means that would
both (1) satisfy the challengers' religious objections to providing insurance coverage for certain
contraceptives (which they believe cause abortions); and (2) carry out the objective of the ACA's
contraceptive coverage requirement, to ensure that women employees receive, at no cost to them,
the preventive care needed to safeguard their health and well being.

Id. at 2801-02.

65. See id. at 2783 (majority opinion). Justice Alito disputed the dissent's concern and provided
that the majority's argument:

[R]aises the possibility that discrimination in hiring, for example on the basis of race, might be
cloaked as religious practice to escape legal sanction. . . . Our decision today provides no such
shield. The Government has a compelling interest in providing an equal opportunity to participate
in the workforce without regard to race, and prohibitions on racial discrimination are precisely
tailored to achieve that critical goal.

Id. (citation omitted).
accommodations are essential ingredients to not only living a decent and self-fulfilling life, but to survival itself. Second, it will not be the case that alternatives for these services may be generally available, especially if there are only a few providers of these services in particular geographic areas. Third, legitimating inequality by for-profit businesses employing and serving often widely diverse groups of people is likely to breed great resentment within the disenfranchised group that feels itself unwelcome in the communities where this discrimination occurs. Finally, those who might otherwise discriminate are not compromising their religious beliefs when the common good of a pluralistic society requires fair accommodation with those with whom one disagrees.

VI. CONCLUSION

This essay has sought to show that initial reactions by civil rights groups to the Supreme Court’s decision in Hobby Lobby were not unfounded. Depending on how the opinion is interpreted, there could be a real threat to future civil rights cases, especially for the LGBT community where religion is sometimes used to threaten access to employment, housing, and public accommodations. On the other hand, while the Court’s opinion in Hobby Lobby could be read as having this dire effect, it need not have to be. Justice Kennedy’s necessary fifth vote to the majority decision, along with the reasons he offered for it in his concurring opinion, lends some hope to the view that the long-term effect of Hobby Lobby might be confined to situations where the government itself has provided an alternative to achieving the compelling interest it seeks to protect. This result is by no means certain. At the very least, Hobby Lobby represents a wake-up call for civil rights groups, especially those in the LGBT community, to not be caught off-guard when planning future cases or agreeing to the inclusion of overly broad religious exemptions in future civil rights legislation.