What Impact the Supreme Court’s Recent Hobby Lobby Decision Might Have for LGBT Civil Rights?

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I. Introduction

II. The *Hobby Lobby* Case

   A. The Majority Opinion
   B. Justice Kennedy’s Concurring Opinion
   C. The Dissenting Opinions

III. Present and Possible Future LGBT Private Sector Protections

IV. What’s Happened since the Supreme Court’s *Hobby Lobby* Decision?

V. What Did Congress Really Intend When It Enacted RFRA?

VI. Reading *Hobby Lobby* Broadly Will Undermine the Constitutional Obligation of the Political Branches to Provide for the Common Good

VII. Reading *Hobby Lobby* Narrowly Preserves the Legitimacy of the Court and Its Role as Protector of Human Rights

   A. How Legitimacy Comes into Play
   B. Protecting Human Rights

VIII. Conclusion
I. Introduction

The U.S. Supreme Court’s recent decision in *Burwell v. Hobby Lobby*¹ has created shockwaves of concern among civil rights groups questioning whether for-profit corporations can assert a religious exemption from civil rights legislation under a 1993 federal law, the Religious Freedom Restoration Act (RFRA).² The matter is of particular concern in the LGBT community given the possible impact it could have on services traditionally offered to those getting married as more and more states legalize same-sex marriage. The Court’s conservative majority opinion, written by Justice Alito and signed onto by Chief Justice Roberts, and Justices Scalia, Thomas, and Kennedy (Justice Kennedy also wrote a concurrence), suggests the decision should be read narrowly as affecting only the question of whether companies could opt out based on their sincerely held religious beliefs from sharing costs of providing certain contraceptives under the Patient Protection and Affordable Care Act, of 2010 (ACA).³ Still, because the language of the opinion appears to sweep far more broadly, this article will attempt to clarify what limits the opinion actually sets for itself along with what broader jurisprudential concerns would be implicated if the statutory construction the Court offered were indeed to render impotent many federal civil rights protections as applied to certain private businesses. My argument will show that such a broad reading of the Court’s opinion would place the Court in the untenable position of not only ignoring Congress’ intent in enacting RFRA, but also undercutting one of the primary purposes of the political branches, namely, to secure the common good by legislation protecting the basic human rights of everyone.

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Section II will state what the Hobby Lobby case was about, what reasons the Court offered for its decision, and what was the dissent’s concern based on those reasons for future civil rights cases. Section III will deal with the changing civil rights environment brought about by a possible federal, and existing state and local laws prohibiting discrimination of LGBT persons in housing, employment, and public accommodations. The section will focus on LGBT post-Hobby Lobby concerns for the broad religious exemption currently in the proposed federal Employment Nondiscrimination Act (ENDA) and related concerns likely to implicate existing state and local civil rights laws that provide anti-discrimination protection for LGBT persons. Section IV will then consider what has happened since the Hobby Lobby decision was rendered including how some are trying to get around LGBT civil rights protections currently under consideration. Section V will consider whether the Court’s opinion, if read broadly, ignores what Congress intended when it passed the Religious Freedom Restoration Act let alone the majority’s claim that its decision concerned only the contraception mandate of the ACA. Section VI argues that if courts read Hobby Lobby broadly it will undermine the constitutional obligation of the political branches to provide for the common good and their own legitimacy. Finally, section VII shows, both from the standpoints of court legitimacy and protecting human rights, that a narrow reading of the Court’s opinion in Hobby Lobby, consistent with Justice Kennedy concurring opinion, is certainly called for. A brief conclusion (section VIII) then follows.

II. The Hobby Lobby Case

A. The Majority Opinion
In 2010, the United States Congress passed the Patient Protection and Affordable Care Act which, among other things, required without specification employer group health plans to include, with no cost sharing “preventative care and screenings” for women. Thereafter, the federal Department of Health and Human Services (HHS) promulgated regulations requiring all non-exempt organizations “to provide ‘coverage, without cost sharing’ for ‘[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling’” including four contraceptive methods that prevent “an already fertilized egg from developing any further by inhibiting its attachment to the uterus.”

Other regulations of HHS exempt “certain religious nonprofit organizations” from this requirement, while still requiring the insurer to provide these benefits without any cost sharing.

Additionally, ACA “exempts many employers from most coverage requirements” either because the employer is already providing health care coverage (so-called “grandfathered health care plans”) or because the employer employs “fewer than 50 employees.”

Petitioners are owners of three closely held for-profit corporations, employing in one case, Conestoga Wood Specialties, over 950 people in wood working specialties, in Hobby Lobby more than 13,000 in over 500 stores across several states, and in the third case, Mardel, 400 persons in 35 Christian bookstores. All three of these individual lawsuits were consolidated for this litigation. All three claim that their religious faith

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4 Burwell v. Hobby Lobby, 573 at ___.
5 Id. at ___, citing 45 CFR §§147.131(b), 147.131(c).
6 Id. at ___, citing 42 U. S. C. §§18011(a), (e) and 26 U.S.C. §4980H(c)(2).
7 Burwell v. Hobby Lobby, 573 at ___. (citation omitted).
8 The IRS defines a closely held corporation as a corporation that
   • Has more than 50% of the value of its outstanding stock owned (directly or indirectly) by 5 or fewer individuals at any time during the last half of the tax year; and
commits them to believe “that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate past that point.”

They claim that HHS’s requirement that they participate in cost sharing to provide the four above mentioned contraceptive methods violates their religious freedom as provided under RFRA and the free exercise clause of the First Amendment.

Because the Court decides the case under RFRA, it does not address the First Amendment issue.

Under RFRA, “Government may not substantially burden a person’s exercise of religion even if the rule 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.”

In holding that RFRA applied to these petitioners, the Court’s majority opinion first took note that by enacting RFRA, “Congress went far beyond what this Court has held is constitutionally required.”

The Court, per Justice Alito, held that Congress, “by employing a familiar legal fiction [intended to] include corporations within RFRA’s definition of ‘persons’.”

The Court reasoned 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,

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- Is not a personal service corporation.


9 Burwell v. Hobby Lobby, 573 at ___. (citation omitted).
10 See id. at ___.
11 Id. at ___.
12 42 U.S.C. §§2000bb-1(a), (b) (cited by the Court at Burwell v. Hobby Lobby, 573 at ___).
13 Burwell v. Hobby Lobby, 573 at ___.
14 Id. at ___.
the purpose is to protect the rights of these people.”15 The Court then goes on to cite various examples where corporations have been protected as illustrative of protecting the rights of their stakeholders.16 The Court next considered the Dictionary Act’s definition of person to include “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.17 It then went on to assert it saw “nothing in RFRA that suggests a congressional intent to depart from the Dictionary Act definition.”18 As will be shown below, however, the dissent disagrees with this conclusion and many other points the Court makes.

Having decided the term ‘person’ in the Act includes corporations, the Court next took up HHS’s challenge and the dissent’s criticism that a “corporation cannot exercise religion” as required by the statute.19 Here the Court’s majority disagreed with the dissent’s view “that non-profit corporations are special because furthering their religious ‘autonomy … often furthers religious freedom as well’” stating “this principle applies equally to for-profit corporations.”20 The Court’s majority also disagreed with the dissent over whether the profit-making objective might prevent a corporation from the exercise of religion. Citing a previous case, the Court noted that “the exercise of religion’ involves ‘not only belief and profession but the performance of (or abstention from) physical acts’ that are ‘engaged in for religious reasons. …. Businesses practices that are

15 Id. at ___.
16 Id.
18 Burwell v. Hobby Lobby, 573 at ___.
19 Id. at ___ (emphasis added).
20 Id. at __ (citation omitted).
compelled or limited by the tenets of a religious doctrine fall comfortably within that
definition.”

One cannot assume that “all corporations that decline to organize as nonprofits do
so in order to maximize profit.” Nor did the Court believe that Congress passed RFRA
just to codify a disagreement with an earlier holding in Employment Div., Dep’t of
Human Resources of Ore. V. Smith. Here the Court claimed, along with other reasons,
that any doubt about the scope of free exercise established by RFRA was dispelled by a
later amendment (RLUPIA) to the Act that deleted from RFRA a specific reference to the
First Amendment, which arguably would have made its scope more limited based on
prior cases. The Court pushes aside the dissent’s claim that it would be impracticable to
“ascertain the sincere ‘beliefs’ of a corporation” by asserting that the corporations in
these cases were not publically traded entities whose shareholders may not all share the
same religious outlook.

Having decided that RFRA applies to, at least, closely held for-profit
corporations, the Court next moves to consider the substantive aspects of the petitioners
claim that “the HHS contraceptive mandate ‘substantially burden[s]’ the exercise of
religion.” Holding that it does, the Court notes both that the petitioners are not in a
position to simply drop all health care coverage and pay the penalty prescribed by law
since their religious beliefs support providing health insurance and, independent of

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21 Id. at ___ (citation omitted).
22 Id. at ___ (citation omitted).
24 Burwell v. Hobby Lobby, 573 at ___(citing Religious Land Use and Institutionalize
25 Id. at ___.
26 Id. at ___.

religion, the costs of the penalties or providing alternative means to employees to obtain health care would be quite high.\textsuperscript{27} The Court takes note that the petitioners’ belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another.\textsuperscript{28} The Court also argues that the situation faced by these plaintiffs is not analogous to a challenge to general tax revenue used to subsidize things one doesn’t believe in since here “the specific contraceptive methods [petitioners would have to fund] violates their religious beliefs.”\textsuperscript{29} Thus, having found HHS’s mandate to “substantial[ly] burden religion” under RFRA, the Court moves on to consider whether it might be otherwise justified.

Interestingly, the Court finds it unnecessarily to adjudicate the question of whether the ACA provides a compelling reason for the mandate. Instead, the Court states: “We will assume that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA.”\textsuperscript{30} So, the Court moves, without much consideration of the claimed compelling interest involved, to the second prong of the RFRA test, namely, “whether HHS has shown that the contraceptive method is ‘the least restrictive means of furthering that compelling governmental interest.’”\textsuperscript{31}

\begin{footnotesize}
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\item\textsuperscript{27} \textit{Id.} at \__.
\item\textsuperscript{28} \textit{Id.} at \__ (footnote omitted).
\item\textsuperscript{29} \textit{Id.} at \__.
\item\textsuperscript{30} \textit{Id.} at \__.
\item\textsuperscript{31} \textit{Id.} at \__.
\end{itemize}
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Here the Court states 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 beliefs.”32 The Court believes that “both RFRA and her sister statute, RLUPIA, may in some circumstances require the Government to expend additional funds to accommodate citizens’ religious beliefs.”33 But the Court does not decide “whether an approach of that type[,] which HHS has already made for “nonprofit organizations with religious objection] complies with RFRA for purposes of all religious claims.”34 Instead, the Court notes the HHS alternative approach for nonprofits as evidence of a less restrictive means of furthering the state’s compelling interest.

The Court then goes on to discount the dissent’s concern that the breadth of the Court’s opinion is likely to give rise “to a flood of religious objections regarding a wide variety of medical procedures and drugs.”35 Instead, the Court simply claims that HHS has provided no “evidence that any significant number of employers sought exemption, on religious grounds, from any of ACA’s coverage requirements other than the contraceptive mandate.”36 As further support of its position, the Court asserts: “In any event, our decision in these [three] cases is concerned solely with the contraceptive mandate. Our decision should not be understood to hold that an insurance-coverage must necessarily fail if it conflicts with an employer’s religious beliefs.37

32 Id. at ___.
33 Id. at ___ (citation omitted).
34 Id. at ___.
35 Id. at ___.
36 Id. at ___.
37 Id. at ___. 
Finally, Justice Alito challenges the dissent’s claim that the majority’s opinion “raises 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.\footnote{Id. at \_\_\_.} An interesting question at this point would be how broad is the government’s “compelling interest to participate in the workforce?” Would it, for example, provide cover for anti-discrimination laws protecting the LGBT community from employment, housing, and public accommodation discriminations? Justice Alito’s response to Justice Ginsburg dissent seems intended to sidestep this important question.\footnote{Professor “Kent Greenfield, a constitutional and corporate law expert at the Boston College Law School, believes Alito tried to hide the sweeping logic of his opinion” when he limited his response Justice Ginsburg’s criticism only to the question of race. Pema Levy, “Does the Hobby Lobby Decision Threaten Gay Rights? \textit{Newsweek}, July 9, 2014; \url{http://www.newsweek.com/does-hobby-lobby-decision-threaten-gay-rights-258098}. However, ‘Josh Blackman, a law professor at South Texas College of Law, doesn’t believe \textit{Hobby Lobby} will ultimately lead to employment discrimination for various minorities—because the government has a compelling interest in ending such discrimination and there’s no workaround except by simply prohibiting it.” \textit{Id.}}

\textbf{B. Justice Kennedy’s Concurring Opinion}

At this point, it is important to stress that Justice Kennedy added a concurrence to his joining the Court’s opinion in which he stressed a few different points that seem to suggest he might be understanding the Court’s opinion quite differently from how other members of the majority might be perceiving it. First, he states: “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.”

Thus, Justice Kennedy seems to be indicating agreement with a matter that some reading the Court’s opinion might have thought to be left up in the air, namely, whether the compelling interest of the ACA in women’s health met the first prong of the RFRA test.

Where Justice Kennedy obviously disagrees with the dissent concerns the second prong of the RFRA test “that there is an existing, recognized, workable, and already-implemented framework to provide coverage,” referring to the exception HHS had previously granted nonprofit organizations expressing religious beliefs. He also found burdensome HHS’s position in “distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation.” But he does believe that “the Court makes clear, this is not a case where it can be established that it is difficult to accommodate the government’s interest,” possibly suggesting he might have held a different view if the accommodation to be required might undermine protections against discrimination.

In concluding, Justice Kennedy states: “Among the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons, such as employees, in protecting their own interests, interests the

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40 Id. at ___ (Kennedy, J., concurring).
41 Id. at ___ (Kennedy, J., concurring).
42 Id. at ___ (Kennedy, J., concurring).
43 Id. at ___ (Kennedy, J., concurring).
law deems compelling.”\(^{44}\) In support of this view he states: “[a]s 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 government program to countless religious claims based on an alleged right of free exercise.”\(^{45}\) It is interesting to speculate if Justice Kennedy would indeed vote the alternative position if a case comes along involving employment, housing, or public accommodation discrimination, perhaps against LGBT people,

Still, even given Justice Kennedy’s remarks that the \textit{Hobby Lobby} case represented a somewhat unique situation not likely to be often repeated, the dissent was less than persuaded. Justice Ginsberg and three other dissenters, Justices Sotomayor, Breyer, and Kagan, began their disagreement saying: “In a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs.”\(^{46}\) Justice Ginsburg then goes on to state not even this Court nor our prior case law would think the First Amendment to have so great a breadth.\(^{47}\)

\textit{C. The Dissenting Opinions}

The dissent took note that the contraceptive requirement had come about following an amendment to the ACA to offset a “disproportionate burden women carried

\(^{44}\) \textit{Id. at} \underline{___}(Kennedy, J., concurring).
\(^{45}\) \textit{Id. at} \underline{___}(Kennedy, J., concurring).
\(^{46}\) \textit{Id. at} \underline{___}(Ginsburg, J., dissenting).
\(^{47}\) \textit{Id. at} \underline{___}(Ginsburg, J., dissenting).
for comprehensive health care services and the adverse health consequences of excluding contraception from preventative care available to employees without cost sharing.”

That in considering passage of the ACA “the Senate even voted down a so-called ‘conscience amendment,’ which would have enabled any employer or insurance provider to deny coverage based on its asserted ‘religious beliefs or moral convictions.’”

Nor did the dissent believe that RFRA had the breadth the Court assigned it. The legislative history behind RFRA showed it to have come about as a response to this Court’s decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, where the Court had held that the First Amendment’s free exercise clause was not violated after “two members of the Native American Church were dismissed from their jobs and denied unemployment because they ingested peyote at, and as an essential element of, a religious ceremony” in violation of Oregon law. Congress had sought in passing RFRA to restore by way of statute “the compelling interest test” that the Court had previously relied upon in deciding other cases involving free exercise. And the dissent challenged the Court’s position that Congress intended the RLUIPA amendment to RFRA to broaden the First Amendment test. Rather, as the dissent saw it, the amendment was just clarifying “that courts should not question the centrality of a particular religious exercise.”

The four dissenters split over whether it was important to decide if “either for-profit corporations or their owners may bring claims under the Religious Freedom

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48 Id. at ___(Ginsburg, J., dissenting).
50 Id. at ___(Ginsburg, J., dissenting).
52 Id. at ___(Ginsburg, J., dissenting).
Justices Ginsburg and Sotomayor disclaim the Court’s use of the Dictionary Act’s definition noting that it “controls only where ‘context’ does not ‘indicat[e] otherwise.’” Here we find no precedent holding “a for-profit corporation’s qualification for religious exemption.” That is because for-profit corporations differ from nonprofit organizations in that “Workers who sustain the operations of [for-profits] are not drawn from one religious community.” Nor does RFRA indicate Congress ever intended it to apply to for-profits. Indeed, “[t]he Court’s determination that RFRA extends to for-profit corporations is bound to have untoward effects. Although the Court attempts to cabin its language to closely held corporations, its logic extends to corporations of any size, public or private.” On these points, Justices Breyer and Kagan found no need to reach this issue of whether a for-profit corporation could assert a RFRA claim as they saw “the plaintiffs challenge to the contraceptive requirement fails on the merits.”

All four dissenters next addressed the merits of the case inquiring whether “the contraceptive coverage requirement ‘substantially burden[s]’ [petitioners’] ‘exercise of religion.’” Without challenging the owners’ sincerely held religious convictions, the dissent argues that the contraceptive requirement is too attenuated to substantially burden

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53 Id. at ___ (Ginsburg, J., dissenting).
54 Id. at ___ (Ginsburg, J., dissenting).
55 Id. at ___ (Ginsburg, J., dissenting).
56 Id. at ___ (Ginsburg, J., dissenting).
57 Id. at ___ (Ginsburg, J., dissenting).
58 Id. at ___ (Ginsburg, J., dissenting) (footnote omitted).
59 Id. at ___ (Breyer, J. & J. Kagan, dissenting). Justices and Kagan saw no need to join Pt. 3-C-1 of Justice Ginsburg’s dissent.
60 Id. at ___ (Ginsburg, J., dissenting).
petitioners’ exercise of religion.\textsuperscript{61} This is because “the decisions whether to claim
benefits under the plans are made not by [petitioners], but by the covered employees and
dependents, in consultation with their health care providers.”\textsuperscript{62}

The dissent also found that even if the contraceptive mandate burdened
petitioners’ free exercise of religion, the government had nevertheless shown a
compelling interest for it. Recall that the Court’s majority opinion had merely assumed
there was a compelling interest. The dissent argued:

the 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 recapitulate, the mandated contraceptive coverage
enables women to avoid the health problems unintended pregnancies may visit
upon them and their children. The coverage safeguards the health of women for
whom pregnancy may be hazardous, even life-threatening.\textsuperscript{63}

It will be recalled that Justice Kennedy in his concurring opinion also noted that there
might be “medical conditions for which pregnancy is contraindicated.”\textsuperscript{64}

The dissenters also agreed that “the Government has shown that there is no less
restrictive, equality 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.”\textsuperscript{65} As the dissenters stated in
disagreement with the majority’s view: “Impeding women’s receipt of benefits ‘by
requiring them to take steps to learn about, and to sign up for, a new [government funded

\textsuperscript{61} Id. at ___(Ginsburg, J., dissenting).
\textsuperscript{62} Id. at ___(Breyer, J. & J. Kagan, dissenting).
\textsuperscript{63} Id. at ___(Ginsburg, J., dissenting).
\textsuperscript{64} Id. at ___(Kennedy, J., concurring).
\textsuperscript{65} Id. at ___(Ginsburg, J., dissenting).
and administered] health benefit’ was scarcely what Congress contemplate.”66 Moreover, “where is the stopping point to the ‘let the government pay’ alternative” that the majority had suggested?67 Given that the ACA was intended to provide nationwide health care coverage “[w]orking for [petitioners] should not deprive employees of the preventative care available to workers at the shop next door, at least in the absence of directions from the Legislature or Administration to do so.”68 The dissent concludes by questioning the Court statement that “[t]oday’s cases…are solely concerned with the contraceptive mandate. …. Other coverage requirements, such as immunizations, may be supported by different interests…and may involve different arguments about the least restrictive means of providing them”69 One problem, the dissent saw, is that “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.’”70

III. Present and Possible Future LGBT Private Sector Protections

At the time of this writing, Congress has still not passed the Employment Nondiscrimination Act (EDNA).71 That bill, should it be enacted into law, would provide:

It shall be an unlawful employment practice for an employer—

66 Id. at ___(Ginsburg, J., dissenting).
67 Id. at ___(Ginsburg, J., dissenting).
68 Id. at ___(Ginsburg, J., dissenting).
69 Id. at ___(Ginsburg, J., dissenting).
70 Id. at ___(Ginsburg, J., dissenting).
71 HR 1755, S 815 passed the Senate Nov. 7, 2013, currently pending in the House of Representatives.
(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.\(^2\)

Other provisions of the Act prohibit sexual orientation or gender identity
discrimination in employment agencies,\(^3\) labor organization,\(^4\) training programs,\(^5\) or by
way of with whom an individual might associate.\(^6\) ENDA specifically states that it shall
not “be construed to require or permit” preferential treatment or quotas\(^7\) even if done to
offset “an imbalance which may exist with respect to the total number or percentage of
persons of any actual or perceived sexual orientation or gender identity employed.”\(^8\) And
“[o]nly disparate treatment claims”, not “disparate impact claims” may be brought under
the Act.\(^9\) The standard of proof is satisfied “when the complaining party demonstrates
that sexual orientation or gender identity was a motivating factor for any employment
practice, even though other factors also motivated the practice.”\(^10\) The Act was

first proposed in the mid-1990s, ENDA originally “did not include a prohibition
on the basis of gender identity.”\(^11\) That was added in 2007 when a new bill was

\(^{2}\) Id. §4(a).
\(^{3}\) Id. §4(b).
\(^{4}\) Id. §4(c).
\(^{5}\) Id. §4(d).
\(^{6}\) Id. §4(e).
\(^{7}\) Id. §4(f).
\(^{8}\) Id. §4(f)(1).
\(^{9}\) Id. §4(g).
\(^{10}\) Id. §4(h).
\(^{11}\) Rubenstein et al, CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW, 5th
proposed. “But later that year the bill was substituted with two different ones, one addressing sexual orientation and the other gender identity discrimination. The former was approved by the House of Representatives by a vote of 235 to 184. The Senate, however, did not take up the measure, and neither body voted on the gender identity version of ENDA.

It wasn’t until 2013 that “the Senate voted to pass an ENDA bill that included gender identity protection by a vote of 64 to 32.” That bill remains pending in the House of Representatives with uncertain prospects of passing.

ENDA “would provide basic protections against workplace discrimination on the basis of sexual orientation or gender identity.” According to the Human Rights Campaign, an LGBT civil rights advocacy organization, ENDA simply affords to all Americans basic employment protection from discrimination based on irrational prejudice. The bill is closely modeled on existing civil rights laws, including Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act. The bill explicitly prohibits preferential treatment and quotas and does not permit disparate impact suits. In addition, it exempts small businesses, religious organizations and the military.

Currently, “[t]wenty-one states and the District of Columbia have passed laws prohibiting employment discrimination based on sexual orientation, and 18 states and D.C. also prohibit discrimination based on gender identity.” Although providing important protections, a 2013 report from the U.S. Government General Accounting Office or GAO notes that relatively few complaints are being filed in those states affording protections from sexual orientation discrimination or gender identity.

______________________________________________________________
82 Id.
83 Id.
84 Id.
85 Id.
86 http://www.hrc.org/resources/entry/employment-non-discrimination-act
87 Id.
88 Id.
89 Id.
Moreover, “as of April 2013, 434 (88 percent) of the Fortune 500 companies had implemented non-discrimination policies that include sexual orientation, and 282 (57 percent) had policies that include gender identity.”

Of interest for this article are the religious exemptions some of these statutes including ENDA include. Section 6 of ENDA 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 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.

Since the Supreme Court’s decision in *Hobby Lobby*, several significant LGBT organizations have now come out opposing the religious exemption provided in ENDA. In a letter from Kevin Cathcart, Executive Director of Lambda Legal, dated July 8, 2014, Carthart writes: “Today, Lambda Legal joined our partners at the American Civil Liberties Union, Gay and Lesbian Advocates & Defenders, the National Center for

90 Id.
91 Id. §7.
92 “Lambda Legal is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, and transgendered persons.” www.LambdaLegal.org.
Lesbian Rights, and the Transgendered Law Center in announcing our withdrawal of support for the current version of ENDA.”

The concern the letter expressed was

EDNA’s discriminatory provision, **unprecedented in federal laws prohibiting employment discrimination**, could provide religiously affiliated organization—including hospitals, nursing homes and universities—a blank check to engage in workplace discrimination against LGBT people.

The loophole 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 LGBT workers, without the protection ENDA promises.

The letter is concerned that in a post-*Hobby Lobby* world, the courts might interpret ENDA’s religious exemption to afford a broader than intended exclusion of claimed religious organizations—even if they be for-profit companies—from anti-discrimination laws protecting the LGBT community. Nor should the concern of the letter be directed only to ENDA.

Several states have various exemptions for religious organizations as part of their civil rights / anti-discrimination laws. Within that grouping, some states that provide protections against sexual orientation or gender identity discrimination include a religious exemption not too different from the Massachusetts provision which reads:

> Notwithstanding the provisions of any general or special law nothing herein shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, and which limits membership, enrollment, admission, or participation to members of that religion, from giving preference in hiring or employment to members of the same religion or from taking any action with respect to matters of employment, discipline, faith, internal organization, or

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93 Letter from Kevin Cathcart, Executive Director Lambda Legal, (July 8, 2014).
94 Id.
ecclesiastical rule, custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained.\textsuperscript{95}

California, for example, has a fairly elaborate exemption for religious organizations, especially those operating in the health care field, but does limit its exemption to just nonprofit organizations by definition: “‘Employer’ does not include a religious association or corporation not organized for private profit.”\textsuperscript{96}

Of particular significance will be what new religious challenges might arise to existing civil rights laws that protect LGBT people by way of the advent of the legalization of same-sex marriages in various states. Will various religious organizations claim existing religious exemptions to be inadequate? Will the Supreme Court’s decision in \textit{Hobby Lobby} mean that for-profit employers will now be able to seek cover under RFRA from any anti-discrimination law—federal, state or local—that provides, among other things, employment, housing, and public accommodations protections to members of the LGBT community? How will the future of this area of civil rights protections evolve? What arguments post-\textit{Hobby Lobby} are still available to the LGBT community to provide broad civil rights protections against those claiming a religious exemption to discriminate?

Here, it is interesting to note that when same-sex marriage passed in Illinois, the Chicago Tribune reported that the “Illinois gay marriage bill…doesn’t force religious clergy to officiate at same-sex weddings or compel churches to open their doors for ceremonies. But similar safeguards aren’t spelled out for pastry chefs, florists,

\textsuperscript{95} Codified in the Massachusetts General Laws, Title XXI, Chapter 151B, Laws 1987, §1(5).
\textsuperscript{96} Codified in West's Annotated California Codes as Government Code, Sections 12926(d).
photographers and other vendors who, based on religious convictions, might not want to share a gay couple’s wedding day.” 97

The Illinois’ Human Rights Act, which presumably would apply to cases of such as these, provides:

Sec. 1-102. Declaration of Policy. It is the public policy of this State:
(A) Freedom from Unlawful Discrimination. 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. 98

No specific exemption is provided for religious employers. Instead what the act does is, like its California counterpart, provide a definition that excludes for-profit businesses:

“Employer” does not include any corporation, association, educational institution, society, or non-profit nursing institution conducted by and for those who rely on 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. 99

But this just again raises the questions: Will various for-profit religious organizations be successful in using the Hobby Lobby to avoid Illinois’s Human Rights law or those of other states, at least insofar as they apply to sexual orientation and gender identity, especially but not exclusively, in the same-sex marriage area? Will the courts perhaps

98 (775 ILCS 5/1-102) (from Ch. 68, par. 1-102).
99 775 ILCS 5/2-101(B)(2).
treat *Hobby Lobby* as offering a much broader federal exemption than may currently be thought to exist under the various state statutory schemes? What impact might *Hobby Lobby* have on ENDA should it be enacted in its current form?

IV. What’s Happened since the Supreme Court’s *Hobby Lobby* Decision?
The same week the Supreme Court issued its *Hobby Lobby* decision it vacated two lower court judgments remanding them for further consideration in light of *Burwell v. Hobby Lobby*. *Autocam Corp. v. Burwell* was a companion case to *Hobby Lobby* essentially raising essentially the same issues. The other case was *Gilardi v. Department of Health and Human Services*. That case, very similar to *Hobby Lobby*, involved two brothers, equal owners of Freshway Foods and Freshway Logistics, who being adherents to the Catholic faith wanted to exclude for their 400 employees the ACA requirement to provide certain contraceptives with cost sharing with the employees. More tellingly, the Court, in an extraordinary move, granted Wheaton College the week following its *Hobby Lobby* decision an injunction from having to file and mail a copy to its insurer or plan Administrator ESBA Form 700, which the ACA requires to be filed by any nonprofit who objects on religious grounds in sharing costs of providing contraceptive coverage to its students or employees.

Wheaton objected under RFRA to filing the form on the ground that doing so “impermissibly burdens [its] free exercise of its religion” by making it complicit in

100 573 U.S. --- (2014).
101 708 F. 3d 850 (7th Cir. 2013).
triggering the insurer’s obligation to provide contraceptive coverage.\(^{103}\) Justice Sotomayor, joined by Justices Ginsburg and Kagan, filed a strong dissent challenging the Court with deviating from its own precedents, under which “[a]n injunction is appropriate only if...the legal rights at issue are indisputably clear.”\(^{104}\) Here they were anything but clear as “two Courts of Appeal that had addressed similar claims rejected them.”\(^{105}\) Furthermore, the dissent states:

RFRA requires Wheaton to show that the accommodation process “substantially burden[s] [its] exercise of religion.” Congress no doubt meant the modifier ‘substantially’ to carry weight. The Government has given it a simple means to opt out of the contraceptive coverage mandate—and thus avoid any civil penalties for failing to provide contraceptive services—and a simple means to tell its third-party administrator of its claimed exception.

Not every sincerely felt “burden” is a “substantial” one, and it is for courts, not litigants, to identify which are.

The law and regulations require, in essence, that some entity provide contraceptive coverage. A religious nonprofit’s choice not to be that entity may leave someone else obligated to provide coverage instead—but the obligation is created by the contraceptive mandate imposed by law, not by the religious nonprofit’s choice to opt out of it.\(^{106}\)

The dissent then went on to note, “[i]t maybe that what troubles Wheaton is that it must participate in any process the end result of which might be the provision of contraceptives to its employees. But that is a far from a substantial burden on the free exercise of religion.”\(^{107}\)

Prior to the *Hobby Lobby* decision, President Barack Obama had planned to announce an executive order that would have prohibited federal contractors from

\(^{103}\) Id.

\(^{104}\) Id. (citing Turner Broadcasting System, 507 U.S. at 1303).

\(^{105}\) Id.

\(^{106}\) Id.

\(^{107}\) Id.
discriminating on the basis of sexual orientation or gender identity in hiring decisions.\textsuperscript{108} The decision to issue an executive order followed several years of efforts by the Administration to pass ENDA.\textsuperscript{109} A hundred and fifty conservative groups then signed a letter to the president requesting, “that any LGBT executive order respect religious freedom by providing…concrete protections for faith-based service organizations.”\textsuperscript{110} The protections sought included a religious exemption similar to the one adopted by the Senate in passing ENDA along with an anti-retaliation clause to protect organizations from asserting their rights, and a construction clause stating that “\textit{Nothing in this Executive Order shall be evidence of or construed to establish a compelling government interest with respect to a claim under the First Amendment of the Constitution of the United States or under the Religious Freedom Restoration Act of 1993.}”\textsuperscript{111}

What may have initially motivated these groups to seek exemptions in soon-to-be-enacted state laws,\textsuperscript{112} a possible congressional passage of ENDA, and President Obama’s proposed executive order were “two high-profile lawsuits that pit gay rights against

\footnotesize{\textsuperscript{109} Id.}  
\footnotesize{\textsuperscript{111} http://www.nae.net/resources/news/1140-letter-to-the-president-on-lgbt-nondiscrimination.}  
religious freedom.”  

One was *Willock v. Elaine Photography*, which involved a photographer who “refused to photograph a same-sex couple’s commitment ceremony” and was subsequently sued successfully by the couple under the New Mexico’s public accommodations antidiscrimination law.”  

The other was *Bernstein v. Ocean Grove Camp Meeting Association*, in which “the New Jersey Department of Law and Public Safety, Division on Civil Rights found probable cause to credit the allegations of a complaint that a nonprofit ministry organization unlawfully refused to permit a civil union ceremony on a beachfront boardwalk pavilion open to all others for various events and ceremonies.”

Following the Court’s *Hobby Lobby* decision conservative religious leaders no doubt felt a renewed spirit for sending a second letter to the President requesting, “that extension of protection for one group not come at the expense of faith communities.” Specifically, they again requested “a robust religious exemption, like the provisions in the Senate-passed ENDA.”

At approximately the same time, another letter “signed by 101 religious leaders—including representatives of the United Church of Christ, Light of


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Reform Mosque, the United Methodist Church and the Central Conference of American Rabbis—said that allowing such exemption opens laws to even more legal disputes.  

“If selected exemptions to the executive order were permitted, the people who would suffer most would be the people who always suffer most when discrimination is allowed: the individuals and the communities that are already marginalized,” the group said. “Increasingly the obstacles faced by those at the margins is precisely the opposite of what public service can and should do, and is precisely the opposite of the values we stand for as people of faith.”

The latter letter shows an important divide among religious groups over the need for a religious exemption to the president’s order. It reflects the fact that those most harmed by a religious exemption to an antidiscrimination law are exactly those for whom the law was designed to benefit. And it provides the reason why “American civil liberties groups who once backed President Obama’s plan to sign an executive order that would prohibit discriminatory practices by government contractors are withdrawing their support as pressure builds for the president to include a religious exemption.”

What the these civil liberties groups worried about is not that religious institutions might not recognize same-sex marriages; what they were more concerned about is that many will use the cover of a religious objection to same-sex marriage as a shroud to cover over and seemingly legitimize discrimination against LGBT people. This was a point made in a pre- *Hobby Lobby* article, *Marriage Inequality, Same-Sex Relationships, and the Production of Sexual Orientation Discrimination*, by Douglas NeJaime in which he argues that religious exemptions

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118 *Id.*
119 *Id.*
that focus on marriage obscures the centrality of same-sex relationships, the ‘marriage conscience protection,’ which purports to accommodate religious objections to same sex marriage specifically, would in fact burden lesbian and gay men based on their relationships more generally. Through provisions authorizing religious objectors to refuse to ‘treat as valid’ any same-sex marriage and extending religious exemptions to secular, commercial actors, the ‘protection’ would reach far outside the marriage context and permit discrimination against same-sex couples throughout the life of their (marital) relationships.120

What _Hobby Lobby_ did to further NeJaime’s argument was to open the courts to arguably over-broad interpretations of these exemptions to in effect nullify a great part of LGBT civil rights protections already adopted by some states and possibly to be adopted by the federal government if ENDA in its present form were enacted into law. This probably more than any other consideration explains the change of heart pro-civil rights organizations took toward continuing to include these religious exemptions. It also may explain, at least in part, President Obama’s decision to sign the antidiscrimination executive order without the broad offending exemption.121 “[R]eligious groups with federal contracts may, as previously allowed, “hire and fire based on religious identity, but not…[because of] sexual orientation or gender identity.”122

V. What Did Congress Really Intend When It Enacted RFRA?

Since part of the debate between the majority and the dissent in _Hobby Lobby_ concerns what Congress intended when it passed RFRA, it is worth emphasizing that Congress

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120 100 CALIF. L. REV. 1169, 1175 (2012).
122 Id.
explicitly states in Section 2 of the Act, under “CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES” that

(b) PURPOSES—The purposes of this Act are—
(1) 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; and
(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.\(^{123}\)

The Act also states “the term “exercise of religion” means the exercise of religion under the First Amendment to the Constitution,”\(^{124}\) and provides 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.”\(^{125}\)

The report of House Committee on the Judiciary states, under “SUMMARY AND PURPOSE’ that “H.R.1308, the Religious Freedom Restoration Act of 1993, responds to the Supreme Court’s decision in Employment Division Department of Human Resources of Oregon v. Smith by creating a statutory right requiring that the compelling governmental interest test be applied in cases in which the free exercise of religion has been burdened by a law of general applicability.”\(^{126}\) The Report goes on, under DISCUSSION: BACKGROUND AND NEED” to note that “[t]he Free Exercise Clause of the First Amendment states in relevant part that “Congress shall make no law…prohibiting the free exercise [of religion].” However, the clarity of the Constitution has not prevented government from burdening religiously inspired action. .....

Not until the Supreme Court used the compelling governmental interest test in the free exercise context did decisions more protective of religious liberty evolve. In Sherbert v. Verner, the Supreme Court stated the principle that a neutral law that burdens the free exercise of religion may only be upheld if the government can demonstrate that such law is justified by a compelling governmental interest and is the least restrictive means of achieving that interest. .....

The Smith majority’s abandonment of strict scrutiny represents an abrupt, unexpected rejection of longstanding Supreme Court practice.\(^{127}\)

\(^{123}\) P.L. 103-141, 107 Stat. 1488 §2(b) (Nov. 16, 1993)(citations omitted).
\(^{124}\) Id. §5(4).
\(^{125}\) Id. §
\(^{127}\) Id.
The Report then goes onto describe the Smith case and Justice Scalia majority opinion in particular, which “repudiated the use of the compelling governmental interest test.”\(^{128}\) What is clear from the Report was that the Committee saw what they were supporting not as an extension of free exercise protections beyond what the First Amendment previous had been understood to provide, but rather a return to that earlier protection, of which the Court prior to Smith had been supportive. The Report then went on to discuss the impact of the Smith decision noting it brought “religious practices forbidden by laws of general applicability to the lowest level of scrutiny employed by the courts.”\(^{129}\) It then stated that RFRA restores the governmental interest test previously applicable to First Amendment free exercise cases by requiring proof of a compelling justification in order to burden religious exercise. \(\ldots\) It is the Committee’s expectation that the courts will look to free exercise of religion cases decoded prior to Smith for guidance in determining whether or not religious exercise has been burdened and the least restrictive means have been employed in furthering a compelling governmental interest.\(^{130}\)

Nowhere does the Report suggest that the bill when enacted would go beyond what prior to Smith the courts had viewed the First Amendment free exercise clause to protect. Indeed, this point is expressly stated in the “ADDITIONAL VIEWS” attached to the Report stating, “The purpose of H.R. 1308 is to overturn the 1990 decision of the United States Supreme Court in [Smith]. [RFRA] seeks, by statute, to replicate the “compelling state interest test” for the adjudication of free exercise claims which was in place prior to the Supreme Court’s decision in Smith.”\(^{131}\)

\(^{128}\) Id.

\(^{129}\) Id.

\(^{130}\) Id.

\(^{131}\) Id.
Making pretty much the same points, the Report of the Committee on the Judiciary of the Senate states the purpose of RFRA to be a response “to the Supreme Court’s decision in [Smith].”\(^{132}\) In that Report’s “DISCUSSION, BACKGROUND AND NEED” there is a review of the law prior to Smith and how the Court’s decision in that case lowered “the level of constitutional protection for religious practices.”\(^{133}\) In then almost identical language to the House Report, the Senate Report goes on to state:

[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.\(^{134}\)

Of equal if not greater significance of Congress’s intent, is the subsequent statement in the Senate Report that “[p]re-Smith case law makes it clear that only governmental actions that place a substantial burden on the exercise of religion must meet the compelling interest test set forth in the act. The act thus would not require such a justification for every governmental action that may have some incidental effect on religious institutions.”\(^{135}\) I especially note this portion of the Senate Committee report as it impliedly questions the Court extraordinary remedy of an injunction in Wheaton College v. Burwell from having to file and mail a required form for a nonprofit seeking


\(^{133}\) Id.

\(^{134}\) Id.

\(^{135}\) Id.
an exemption from the contraceptive mandate of the ACA, even before the lower courts had the chance to decide on the merits.\textsuperscript{136}

Additionally, because we are dealing here with a piece of legislation in which Congress intended to restore the compelling interest test the Court disavowed in \textit{Smith}, it is both relevant and material to consider statements made on the House and Senate floor by those voting for the bill. While some of those statements are not relevant here because they went to other issues like RFRA’s application specifically to the nations prisons, others are relevant to the dissent’s concern expressed in \textit{Hobby Lobby}, about the limited scope of RFRA’s purposes or narrowness of its substantial burden test. For example, one congressman stated: “This legislation has the narrow purpose of restoring the compelling interest test, as enunciated nearly 30 years ago in Sherbert versus Verner and again in Wisconsin versus Yoder.”\textsuperscript{137} Another congressman more broadly states: “This act restores the longstanding comprehensive and robust reading to the free exercise clause, which we need now more than ever to protect citizens from the power of the modern state.”\textsuperscript{138}

Some others from both Houses of Congress provide examples of perceived encroachments by the government on religious freedom, including “right to be buried in some veteran cemeteries on Saturday or Sunday,” being required “to display fluorescent orange emblems on their horse-drawn carriages,” having autopsies performed in violation of religious beliefs,”\textsuperscript{139} and failing to provide an exemption to allow for minors

\begin{footnotes}
\item[136] See \textit{supra} Sec. IV.
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“sacramental wine used for religious purposes.” An important statement by Sen. Kennedy of Massachusetts, as one of the Senate bill’s sponsors, stated: “The act creates no new rights for any religious practice or any potential litigant. Not every free exercise claim will prevail. It simply restores the long-established standard of review that had worked well for many years, and that requires courts to weigh free exercise claims against the compelling state-interest standard.”

Another Representative, apparently in referring to an earlier Supreme Court opinion, stated, “Justice Blackmun notes, This Court’s prior decisions have not allowed a government to rely on mere speculation about potential harms, but have demanded evidentiary support for a refusal to allow a religious exception.”

Senator Kennedy, on October 26, 1993, introduced an amendment joined by fellow sponsor Senator Hatch inserting ‘substantially’ before ‘burden’. Senator Hatch of Utah then states: “This is consistent with the case law developed by the Court prior to the Smith decision, as thus stated in the committee report. It does not require the Government to justify every action that has some effect on religious exercise. Only action that places a substantial burden on the exercise of religion must meet the compelling State interest set forth in [RFRA].” Congressman Franks of New Jersey notes “[RFRA] is not just about protecting the rights of religious minorities, it is about preserving the constitutional freedom of religion of all Americans. It is time to restore religious freedom to the intended equivalent status of other first amendment

freedoms.” One Congresswoman puts the point more precisely: “The legislation is a simple reaffirmation of our strong commitment to religious liberty in the fullest sense. It states, without equivocation, that there must be a compelling public reason—health, safety, or the like—before religious traditions or observances would be subject to Government restrictions.”

What is most obvious of all these statements, regardless of how robust the speaker might view the First Amendment’s free exercise clause, is that none suggested enacting RFRA would be doing more than what the Court had previously held prior to the *Smith* decision. That before there could be a *substantial burden* placed upon the free exercise of religion, the government would need to show a compelling reason that the burden served. Lesser burdens need not be held to same level of scrutiny, nor would they be necessarily disallowed. And even the majority in *Hobby Lobby* was willing to adopt the view, which the dissent offered specific content to, that the provision affording preventative health services for women was a compelling reason. Both the majority and the dissent also seemed to agree—the majority for sure in reference to race discrimination along with Justice Kennedy in his concurring opinion more open to other areas as well — that compelling reasons might support civil rights legislation. If Justice Kennedy’s view reflects a view likely to be held by a future majority on the Court and not just afforded lip service from the its more conservative members, then notwithstanding Justice Alito’s broad logic, Justice Kennedy’s concurrence is the controlling rationale in the case.

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VI. Reading *Hobby Lobby* Broadly Will Undermine the Constitutional Obligation of the Political Branches to Provide for the Common Good

"We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, 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."¹⁴⁷ Nowhere is the constitutional obligation of the political branches of the federal government more clearly stated than in this *Preamble* to the United States Constitution. There we find the basis of the social contract that unites us as a people since, at least, the original constitution was adopted in 1787. That Constitution has been amended only 27 times in the past 227 years, including the addition of the First Amendment with its very important free exercise of religion clause, added in 1791, as a compromise between Federalists and Anti-federalists who were concerned over centralization of power. And although there have been a significant number of constitutional cases interpreting the document and to a lesser extent its free exercise clause, the idea of maintaining a government capable of balancing the promotion of the common good while securing the blessings of liberty has not faded. Still, as with most aspirations, the devil is in the details. And the Court’s recent statutory interpretation case of *Hobby Lobby* that offsets its prior constitutional decision in *Smith* presents more questions than answers, in particular as to where the balance is to be struck.

*Hobby Lobby* presents an unclear view by the Court of where it thought Congress sought to find this balance. As noted above, *Hobby Lobby* came about after the owners of

¹⁴⁷ U.S. CONST. pmbl.
three closely held corporations objected to paying the costs of the ACA’s mandated contraceptive requirement as part of the health insurance plans for their employees. The case juxtaposes the obligation of Government to protect the free exercise of religion against its obligation to provide preventative health care for women. It asks where is the balance to be struck when these two obligations of government conflict.

For purposes of resolving the case both the majority and the dissent agreed that RFRA had restored the Court’s previous requirement that the state show a compelling interest before it could “substantial[ly] burden” an individual’s free exercise of religion. The majority also held that a closely held corporation could be seen as an extension of the individual owners’ free exercise right. But since corporations can employ many people, who may not all share the religious views of the owners, including the ones involved in *Hobby Lobby*, will there be any way to guarantee the employees’ right to the statutory benefits provided by the ACA when a free exercise claim is at stake? The Court’s answer when looking to the least restrictive means for providing the statutory benefit is to have government provide it directly possibly works in these cases, but only at increased costs to the taxpayer, and leaves open what more narrow solution should government adopt if, for example, a company refuses to provide housing, services, or public accommodations to a same-sex couple because it too might be said to violate the owner’s religious beliefs? What if it were an interracial marriage or marriage between persons of different faiths? Could companies avoid anti-discrimination laws and legitimately refuse to provide facilities or services for a same-sex wedding when it provides those services to opposite-sex couples? Should government then get in the business of providing these services itself, and where, as the dissent points out, is this process to end?
I want to suggest that the only reasonable basis for handling such matters is by way of balancing the potential harms involved. The philosopher, Brian Barry, actually makes this point, in support of Justice Scalia’s majority opinion in *Smith* where Scalia asks if it would require a compelling interest for the state to prohibit the throwing of rice at weddings.\(^\text{148}\) Barry extends Scalia’s question with the following example:

Let us suppose that somebody could convince a court of a sincere belief that no marriage in a church is complete without the throwing of rice. Then the state would have to prove that the prohibition on throwing rice furthered a ‘compelling interest’. On the assumption that the interest served was the avoidance of refuse on the streets, this might be hard to do; and, even if that hurdle were cleared successfully, it would still be necessary to show that there was no less restrictive alternative. It is easy to imagine that a court could invent some elaborate scheme according to which those with appropriate religious convictions could obtain a special license allowing them to throw rice on condition that they undertook to sweep it up afterwards and take it away. That this would divert the time and effort of local authority staff from more pressing duties would not be the concern of the court.\(^\text{149}\)

Barry goes on to discuss *State v. Hershberger*.\(^\text{150}\) That case involved an Amish person’s refusal to pay a fine for failing to display the red and orange reflective triangle that was required by law to be fixed to the backs of slow moving vehicles (SMVs). Gerald Hershberger was one of those who refused to pay the fines for violating the law and ‘was sentenced to jail for seven days’. Overruling the lower courts, the Minnesota Supreme Court held that the SMV requirement ‘infringe[d] on rights guaranteed by the free exercise clause of the First Amendment to the United States Constitution.\(^\text{151}\)

Following the U.S. Supreme Court’s decision in *Smith* Barry states that

[t]he Minnesota Supreme Court reconsidered the case, and held…that the ‘compelling interest/least restrictive alternative’ test could be resuscitated on the


\(^{149}\) Id. at 182-83.

\(^{150}\) 462 N.W. 2d 393 (Minn. 1990).

\(^{151}\) BARRY, CULTURE & SOCIETY, supra note ___, at 186, citing State v. Hershberger (Hershberger I), 444 N.W. 2d 282 (Minn. 1989)/
basis of the Minnesota Constitution. While it is true that this document contains some wording about ‘freedom of conscience’ that does not appear in the US Bill of Rights, it is clear that the logic of Smith (and the actual text in place of Scalia’s opinion) would lead to the conclusion that freedom of conscience does not underwrite the violation of generally applicable laws. Shifting to the Minnesota Constitution was, in effect, a device for refusing to accept the validity of Smith.152

“The upshot” of the case, according to Barry, “is that in Minnesota, anybody with a sincere belief can have any law specially tailored to fit, unless the state can satisfy the ‘compelling interest/least restrictive alternative’ test. But that, judging by the Minnesota’s Supreme Court’s performance in Hershberger cases, is going to be virtually impossible to meet.”153 Barry agrees with “Justice Scalia’s argument in Smith that courts are not equipped to discern the occasions for exemptions to general laws could scarcely be better supported than by the saga of judicial tomfoolery in Minnesota.”154

Still, notwithstanding Brian Barry’s view or the Court’s opinion in Smith, one must not give into the temptation too easily to dismiss the claim of the religious objector. For her sincere belief, especially if coupled with an obligation of obedience, can very well place her in the position, as another philosopher, Bernard Williams, reminds us, of fearing she has to compromise her personal integrity.155 While I do not believe Barry arguments in support of Justice Scalia’s position in Smith is meant to do that and, even less, to afford approval of a simple utilitarian calculation of affording the greater utility, it is important to see how the religious objector’s claim might be reconciled with those who sincerely believe a very important common good is not being provided.

152 Id. at 186 citing State v. Hershberger, 462 N.W. 2d 393 (Hershberger II) (Minn. 1990).
153 Id.
154 Id. at 187.
155 See Bernard Williams, Against Utilitarianism (1973).
What Barry might be seen as implying here, given what he has said elsewhere, is that people living in society must often wear different hats: one hat might be their membership in a particular religious sect, another might be their role in a family, still another might be their role as member of some civic group.\textsuperscript{156}

One of the capacities in which everyone finds himself is that of ‘a member of the public’. Some issues allow a policy to be produced which will affect everyone in his capacity as ‘a member of the public’. This is the pure ‘Rousseau’ situation [where a general will can be expressed]. Then there are other issues which lack this simplicity but still do not raise any problems because those who are affected in a capacity other than that of ‘a member of the public’ are either affected in that capacity in the same direction as they are in their other capacity of ’member of the public’ or at least not affected so strongly in the contrary direction as to tip the overall balance of their interest (which I shall call their ‘net interest’) that way.\textsuperscript{157}

In her capacity as ‘member of the public’, it can be argued that a person takes on mutual obligations with everyone else, to stand in each other’s shoes, and to serve the common good. This is the contract each person makes with every other person that might be discerned from ‘operating in their capacity as ‘member of the public’.\textsuperscript{158} And certainly operating in that capacity allows for judgments to be made that encourage individual freedom of conscience while, at the same time, supporting the well being of the society. Only when a person’s “net interest” requires them to adopt a position contrary to her role as “a member of the public”, then are the obligations attached to that

\textsuperscript{156} Elsewhere, Brian Barry adopts a modified Rousseau-like description of the public interest by noting that “[i]nstead of simply saying that some measure is ‘in his interest’ a man will often specify some role or capacity in which it is favorable to him: ‘as a parent’, ‘as a businessman’, ‘as a house owner’, and so on. Brian Barry, “The Public Interest,” 38 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 1 (Supp. 1964).

\textsuperscript{157} Id.

\textsuperscript{158} Here I follow in line with such the classical social contract theorists as Thomas Hobbes, John Locke, and Jean-Jacques Rousseau.
role broken and might there exist a possibly incommensurable conflict of values that may even prove ultimately destructive of the society itself.159

VII. Reading *Hobby Lobby* Narrowly Preserves the Legitimacy of the Court and Its Role as Protector of Human Rights

In this section, I will argue for a narrow reading of *Hobby Lobby* along lines suggested by Justice Kennedy’s concurring opinion on the ground that such a narrow reading is necessary to preserve the legitimacy of the Court as a protector of human rights. Following the work of the philosopher John Rawls, I begin by noting that while incommensurable conflicts of values will certainly arise in modern democratic societies made up of many different groups who don’t necessarily share all the same values, members of these societies may nevertheless share an overlapping consensus that allows keeping their conflicts in check. The rationale for this view is Rawls idea of the role of public reason, especially in context to democratic societies whose members might reasonably share overlapping consensus at least, as to how decisions get made.

Another argument I will adopt follows the philosopher Alan Gewirth’s idea of reason as the ultimate arbitrator between particularist and universal morality. It is my clam that these two frameworks provide intuitive 160 and actual reasonableness

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159 I would note that the incommensurable conflict of values is possible but not certain. For democratic societies with more complex sets of norms may provide that conflicts under the guise of ‘civil disobedience’ will be tolerated provided they are limited in scope, their purposes are made known to the public, and they are nonviolent. See, e.g., Martin Luther King, *Letter from Birmingham Jail* (19630, reprinted in JOEL FEINBERG ET AL., PHILOSOPHY OF LAW 9th ed 259, 263 (2014).

160 WEBSTER’S NEW WORLD COLLEGE DICTIONARY (3rd ed. 1997) defines ‘intuitive’ as “2. having, or perceiving, by intuition.” And it defines ‘Intuition’ as “1. The direct knowing or learning of something without the conscious use of reason; immediate
respectively for protecting religious freedom while at the same time limiting its encroachment into political decision-making affecting the common good. Under either framework it should be possible to describe what conditions must be met for the state first to established that its action serves a compelling state interest as a first step to limiting the free exercise of religion. Following that further guidelines in support of limiting objective harm provide the least restrictive means for the government’s incursion into the claimed area of religious freedom.

A. How Legitimacy Comes into Play

I begin with an idea of the role of public reason that in 1993 John Rawls drew importantly upon, in his book, Political Liberalism, to serve “as part of a political conception of justice that is broadly speaking liberal.”

Rawls asks the question: “[H]ow is it possible that there can be a stable and just society whose free and equal citizens are deeply divided by conflicting and even incommensurable religious, philosophical, and moral doctrines?” Rawls answer is to view society as organized not along basic moral beliefs—the content and priority of which may itself be subject to strong disagreement, but rather “as deriving from an overlapping consensus on a

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understanding.” In American legal thought intuition is most obviously exhibited in Thomas Jefferson’s famous phrase in The Declaration of Independence para. 2 (U.S. 1776), “We hold these truths to be self evident that all men are created equal and that they are endowed by their creator with certain unalienable rights that amongst which is life, liberty, and the pursuit of happiness.”

161 JOHN RAWLS, POLITICAL LIBERALISM (1993). Interestingly, Political Liberalism was published the same year RFRA was enacted into law.

162 Id. at 133.

163 See id. at 201.
political conception of justice suitable for a constitutional regime.” Rawls notes that “as reasonable we must assess the strength of peoples’ claims, not only against our own claims, but against one another, or on our common practices and intuitions...” Here we need take account of “[t]he evidence—empirical and scientific—barring on the case,” our differences in view concerning the weight of “the kinds of considerations that are relevant,” including whether an interpretation of relevant but possibly vague concepts may be called for. We also consider “the way we assess evidence and weigh moral and political values [as] shaped by our total [life] experience,” and what “different kinds of normative considerations of different force” may be relevant. Lastly, we recognize that “any system of social institutions is limited in the values it can admit so that some selection must be made from the full range of moral and political values that might be realized.”

Rawls does not deny that people have and will continue to hold very different comprehensive doctrines that derive from religious and other deeply held views. What he believes is that reasonable persons will adopt doctrines that “can be justified to others”, which leads to toleration and supports the idea of public reason.” This is found when the doctrines proposed: first, cover “the major religious, philosophical, and moral aspects of human life;” second, assign to “certain values a particular primacy and weight” to afford balance when they conflict; and third, “belong to or draw upon a tradition of

164 Id.
165 Id. at 56.
166 Id.
167 Id. at 56-57.
168 Id. at 57.
169 Id. at 59.
thought and doctrine” that itself “tends to evolve slowly in light of what, from its point of view, it sees as good and sufficient reasons.”\textsuperscript{170}

As a consequence, “reasonable persons see that the burdens of judgment set limits on what can be reasonably justified to others, and so they endorse some form of liberty of conscience and freedom of thought. It is unreasonable for us to use political power, should we possess it or share it with others, to repress comprehensive views that are not unreasonable.”\textsuperscript{171} Rawls claims that his idea of “being reasonable is not an epistemological idea (though it has epistemological elements). Rather, it is part of the political idea of democratic citizenship that includes the idea of public reason.”\textsuperscript{172}

For purposes of this essay, we may assume without further justification that reasonable people would “desire for its own sake a social world in which they, as free and equal, can cooperate with others on terms all can accept.”\textsuperscript{173} They would affirm a political state that afforded, as part of an overlapping consensus, basic rights, including a right to the free exercise of religion.\textsuperscript{174} They would also support as part of basic justice the right of all persons to access society’s benefits free from arbitrary discrimination.\textsuperscript{175} And they would allow for a system of courts, especially a supreme court, to arbitrate by public reasons between these two values when and if they conflict.\textsuperscript{176} This latter understanding means that courts will be “antimajoritarian with respect to ordinary law, for a court with judicial review can hold such law unconstitutional. The court is not

\begin{flushright}
\textsuperscript{170} Id. at 59.  \\
\textsuperscript{171} Id. at 61.  \\
\textsuperscript{172} Id. at 62. “A constitutional regime does not require an agreement on a comprehensive doctrine: the basis of its social utility lies elsewhere.” Id. at 63.  \\
\textsuperscript{173} Id. at 50.  \\
\textsuperscript{174} See id. at 187.  \\
\textsuperscript{175} See id.  \\
\textsuperscript{176} Id. at 235.
\end{flushright}
antimajoritarian with respect to higher law when its decisions reasonably accord with the
classification itself and with its amendments and politically mandated interpretations.”¹⁷⁷

Here it is important to note that the content of such reason would be first, to
identify the “substantial principles of justice for the basic structure” of the society and
second, to provide “guidelines of inquiry: principles of reasoning and rules of evidence in
light of which citizens are to decide whether substantive principles properly apply and
policies that best satisfy them.”¹⁷⁸ In the case of the courts, public reason is especially
limiting.

Citizens and legislators may properly vote their more comprehensive
views when constitutional essentials and basic justice are not at stake; they need
not justify by public reason why they vote as they do or make their grounds
consistent and fit them into a coherent constitutional view over the whole range
of their decisions. The role of justices is to do precisely that and in doing it they
have no other reason and no other values than the political. …. In doing this, it is
expected that the justices will and do appeal to the political values of the public
conception whenever the constitution itself expressly or implicitly invokes those
values, as it does, for example, in a bill of rights guaranteeing the free exercise
of religion or the equal protection of the laws.¹⁷⁹

In *Hobby Lobby* the Court sees in Congress’s enactment of RFRA a higher law
criticism for its departure in *Smith* from its prior precedent of requiring a compelling
interest before allowing a statute to intrude on religious free exercise. But it also runs the
danger when its logic is presented too broadly of possibly unsettling other areas of law,
including antidiscrimination laws, because some may find them limiting of their religious
free exercise. In the case of *Hobby Lobby*, it was important for the Court to state and not

¹⁷⁷ Id. at 234. Here Rawls takes note of a point that Bruce Ackerman makes in *WE THE
PEOPLE: FOUNDATIONS* chs. 3-6 passim (1991) in which Ackerman distinguishes the
higher power of the people from legislative power. *POLITICAL LIBERALISM*, supra note --
-, at 133 (citing ACKERMAN, *WE THE PEOPLE* 6-10).
¹⁷⁸ Id. at 224.
¹⁷⁹ Id. at 235-36.
just assume, as the dissent correctly points out, what governmental interests were at state in the ACA’s contraceptive mandate for women.\textsuperscript{180} It was also important to not make it appear that the Court had merely sifted in the political winds from being too narrow in its protection of religious freedom to now being overly protective, especially when other compelling interests may be involved.

This would be the case, even acknowledging, as the majority does, the compelling interest of the state to avoid in other areas discrimination based on race. But even that acknowledgement falls a bit flat when in its very next move regarding the ACA mandate the Court appears to bypass how the state’s compelling interest to protect women’s health can actually be secured by too narrowly drawing the mandate so as to effectively provide for-profit corporations a pass, at least when closely held, regardless of their actual size or

\textsuperscript{180} An interpretation based on public reason might consider the right to the free exercise of religion as part of a more general concern to protect individual autonomy that arguably has been an evolving part of Western democratic thought for some time, although perhaps originally under the guise of privacy. Moreover, locating religious freedom as part of a more general understanding of autonomy could then be balanced against the ACA’s mandate of providing contraceptive health services to women, which would also be in service to their autonomy. In that instance, the common denominator of autonomy would be the basis for determining whether there existed a compelling state interest in the protection of women’s health that could not otherwise be met (or met significantly) without the kind of incursion on religious freedom the \textit{Hobby Lobby} case represents. And even if no such incursion in the contraceptive case could, in the final analysis, survive constitutional muster (perhaps because there was a less intrusive alternative available as shown in the way HHS had previously resolved a similar conflict involving nonprofits), a similar analysis would likely fail to permit overriding general antidiscrimination laws where it would be too hard for government to protect individuals against the kinds of harms resulting from loss of (or not even being considered for) employment, housing, and public accommodations in the private sector, except by way of a general prohibition.. Because in these instances the law would be likely supported by a compelling state interest for which there was no less restrictive alternative, it would, as Justice Kennedy suggests and possibly the majority’s opinion also, survive a constitutional or RFRA challenge. For a further elaboration of this approach in context to the right to privacy see generally \textsc{Vincent J. Samar, The Right to Privacy: Gays, Lesbians and The Constitution} 67-68, 86-90, 112-17 (1991).
number of employees. If the Court is really to be understood here as providing only a very narrow decision which its own logic would seem to negate, though it is clearly what is suggested by Justice Kennedy’s concurring opinion, then its public reason of merely following the precedent that HHS had previously set for nonprofits must be taken very seriously. That is to say, in situations where no prior exception was already allowed for and where it would appear to adopt such an exception would undermine the compelling interest itself, a court should be loath to circumvent well recognized means that are already in place to satisfy the state’s compelling interest.

This is important if the concerns expressed by civil rights groups following *Hobby Lobby* are to be addressed. Surely one important concern here will be how in light of the *Hobby Lobby* decision lower courts will decide particular instances of private sector discrimination against, for example, same-sex couples or transgendered people among others. Obviously, the total set of involvements with the private sector—from employment, to housing, to public accommodations—that are implicated by these peoples lives will be substantially underserved and under-protected if the antidiscrimination laws that states have already passed and the federal government might soon enact are very much undermined by a too broad interpretation of the least restrictive incursion on religious freedom. If the courts are to do right by their responsibility to provide public reasons that justify their decisions to the broader society, they will be obligated to take into account the total set of relevant objective facts of peoples lives implicated by antidiscrimination laws and how those lives are likely to be changed if the laws are weakened. This is especially true when that free exercise of religion is safeguarded not against some immediate threat, but even against a distant process of
engagement in the public arena, as in the *Wheaton* case. Both businesses and private persons benefit most when such laws operate primarily to minimize the occasions for real objective harm and are harmed when nonobjective harms are allowed to offset objective harms, especially if empirically based.\footnote{Fundamentalist religious doctrines about how people should live, whether it be those adopted by fundamentalist Christians, orthodox Jews, conservative Catholics, or conservative Moslems, operate on their power to organize, direct, and stabilize a person’s world, often providing comfort in times of great turmoil. But they do so at great cost, oftentimes excluding all who don’t fit within their framework. That cost arises not because of some objective harm to real persons actually taking place, but because of the framework’s inability to reevaluate its own dogmas to comport to deeper understandings of human psychology, sociology, and morality. Still, notwithstanding the internal dilemmas religion sets for people living in pluralistic societies, it is still possible to provide a conceptual space for accommodating particularistic views without, at the same time, threatening the whole of the society. This occurs when the members of the society acknowledge their need to live in a world made up of many diverse views and opinions, not all of which can be made consistent but much of which can still be made to coincide if set in their proper space. See ALAN GEWIRTH, *SELF-FULFILLMENT* 176-77(1998).}

Indeed, at the point where objective harms, such as loss of job, inability to get housing, or inability to receive needed public accommodations for specified groups of people can be articulated and reasonably well described, courts need not evaluate the particular incidents of those harms when justifying application of an antidiscrimination law for instance in every case that comes along. So long as the law can be grounded in public reasons simple utility of the convenience of the docket makes it unnecessary for courts to further investigate the case unless the facts are such as to raise a more across-the-board doubt about the scope of application of the very law in question. So long as all these conditions are met and met responsibly—that is to say, provided courts take seriously the nature of the state’s compelling interest in passing, for example, civil rights or health care legislation—civil rights groups need not be too seriously concerned that weakening of the civil rights laws will be at the behest of the courts.
B. Protecting Human Rights

Alan Gewirth has argued that basic human rights to freedom and well-being can be dialectically established from the fact of voluntary purposive human action.\(^{182}\) That is to say, each person, from their own point of view, impliedly claims rights to freedom and well-being by their voluntary purposive human agents.\(^{183}\) Indeed, for any person to deny these rights claims while still acting voluntarily and purposively would force them into an internal contradiction with their own actions.\(^{184}\) More importantly, because all human agents\(^{185}\) could make these same claims, a contradiction also arises when one agent denies to her fellow agent rights to the same basic freedoms and well-being she claims for himself.\(^{186}\) This leads to the conclusion that each agent must respect the basic human rights to freedom and well-being of her recipients as well as herself.\(^{187}\)

What is important to see from Gewirth’s analysis is how he connects these human rights, which he takes to ground human autonomy to a kind of self aspiration-fulfillment.

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\(^{183}\) *Id.* at 81-82. By an agent, Gewirth means a voluntary purposive rational actor. Consequently, young children and purposes at the end of life may not be full-fledged agents if they are unable to act voluntarily for their own purposes with knowledge of relevant circumstances. *See id.* at 61, 79.

\(^{184}\) *See id.* at 83-84.

\(^{185}\) *Id.* at 82.

\(^{186}\) *See id.* at 84. Gewirth labels this principle as the “Principle of Generic Consistency”. *Id.* For Gewirth, it is the supreme principle of morality. The principle directs each agent to “Act in accord with the generic rights [the rights to freedom and well-being] of your recipients as well as yourself.” *Id.*

\(^{187}\) *Id.* at 85-86.
He begins by distinguishing “desire-autonomy” from “behavior-autonomy”. The former “involves that one controls the process” by which one is able to set rules for the self “in a self-critical way.” It also “enables you to control your aspirations rather than having them shaped either from without or from unconscious forces within the self.” Since “[o]ne wants to be in control of one’s formation of aspirations not only because this will help one to achieve other objects but also because one identifies oneself with one’s aspirations[…autonomy is itself regarded as a good worthy of being sought after and attained.” Desire-autonomy is distinguished from behavior-autonomy, which goes beyond how desires are set as it “bears on one’s actions following upon one’s desires and choices.”

The connection one finds between desire-autonomy and the human right to the free exercise of religion is in the opportunities it presents for the creation and development of aspirations important to one’s personal identity. Were religion not to operate at this plane I would venture to doubt that it would be afforded the central role it is afforded by so many people. That said, for religion to operate in this way must presuppose the persons who use it to also have the capacity to ask: “How can I make the best of myself?” Viewed in this way, “capacity-fulfillment consists simply in the activation or playing out of certain internal forces of the self; it is the actualization of...

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188 Id. at 34-35.
189 Id.
190 Id.
191 Id. at 35.
192 Id. at 36.
193 Id. at 59. Under “capacity ”Gewirth lists, contra Aristotle, “”emotions, powers or capacities, and states of character in terms of their different relations to virtues or vices.” Id. at 63 citing ARISTOTLE, NICOMACHEAN ETHICS 2.5.
inherent potentialities.”\footnote{Id.} It is here that Gewirth believes the two forms of self-fulfillment might come together because the greatest capacity a person can develop is the ability to reason as “the best human capacity for ascertaining and preserving truth” including “to ascertain what is best in human beings”.\footnote{Id. at 76.}

It is also here that a potential conflict emerges if a noncritical exercise of religion freedom is allowed to conflict with reasonable state policies designed to afford other basic human rights, including the basic right of women to access the means necessary to protect their health, and LGBT people the means to avoid overt discrimination in employment, housing, and various public accommodations, what Gewirth calls a “nonsubtractive right”.\footnote{Id. at 80.} In such circumstances, the human right to well-being provides in the first instance a right to be free from harms that directly threaten a person’s ability to be an agent; this Gewirth calls “basic well-being”; in the second, the human right prevents having one’s capacities of agency seriously diminished.\footnote{Gewirth, Self-Fulfillment supra note ---, at 80.} Because in both cases the rights are central to the possibility of being a prospective purposive agent, let alone an actual agent, the state’s interest in securing both kinds of protection ought to be viewed as compelling.\footnote{By a prospective purposive agent is meant “one who has the proximate abilities of the generic features of action [voluntariness and purposiveness]even if he is not currently acting [actual agent].”…. Children[, for example,] are potential agents, they have rights that are preparatory for their taking on the generic rights [to freedom and well being] pertaining to full-fledged agency.” Alan Gewirth, Reason and Morality 141 (1978). So, a parent doesn’t violate a child’s right to freedom by insisting the child hold the...}
But what should happen when one’s free exercise of religion would prevent accessing a basic right. In such a circumstance, provided the person’s choice is rational and set upon knowledge of relevant circumstances, Gewirth would recognize a place for religious free exercise in a realm of personal or particularist morality (the latter involving group rights). 199 But even here the right to religious freedom must not overstep universal morality by threatening the basic or nonsubtractive well-being of those outside the group or those who may, because of lack of knowledge or cultural pressure, have had little ability to critically evaluate the values of the religion. 200 Gewirth’s view here adds a further dimension of normativity to the dissent’s argument in Hobby Lobby that nonprofits organized to serve particular religious purposes, for example, might be provided an opt out from antidiscrimination protections insofar as the nonprofit’s stated purpose could not be separated from a particular religious belief, and all participating in the nonprofit had notice of that belief; the same might possibly be said for a religiously concerned for-profit company, provided it is sufficiently small that it would not be unreasonable to assume the owners and workers shared the same religious purposes. But parents’ hand in crossing the street if the child does not yet fully appreciate the dangers associated with crossing a street.

199 Gewirth, Self-Fulfillment supra note ---, at 52-54.

200 For example, Gewirth cites “the Hindu practice of suttee, where a woman was required to throw herself on her husband’s funeral pyre. Concerning this practice it has been written ‘… A shared cremation absolves sins and guarantees eternal unity between husband and wife, linked together as god and goddess through the cycle of future rebirths.’ [Gewirth asks] [e]ven if given the most benign interpretation of the widow’s willingness to commit suicide with this justification, there remains the question of whether her conduct is free and voluntary in the sense that she not only controls her behavior by her unforced choice but has knowledge of relevant circumstances, and is to this extent rational. If one views the religious beliefs in question as having been instilled through a long process of enculturation, with no opportunity provided for their critical (including empirical) assessment, then suttee and similar practices are egregious violations of the human rights to freedom and well-being.” Id. at 203-204, citing Richard A. Shweder, Thinking Through Cultures 16 (1991).
even here similarity of purposes between owners and workers becomes attenuated unless
the religious purpose is clearly spelled out as part of the profit-making venture itself, as
one might expect with a health care clinic that purports to follow Christian Science
principles.

This same argument clearly fails to be persuasive for large, for-profits companies,
where the purposes of the owners are not likely to coincide even among themselves, let
alone with those of the workers, except in promoting the particular service or goods for
which the company was established and which the employee’s job is to support. And
although there may be some uncertainty exactly where to set the cutoff point on size, still
it must be set, and probably at the place where likely differences in employ culture,
geography, gender, sexual orientation, ethnicity or religion would not be likely to
coincide except by forced discrimination. For it is unlikely there would be across the
board continuity of purposes for any goals or values outside the specific business
purposes of the company for any company of significant size even if closely held. Thus,
no continuity of purposes beyond the immediate business purpose of the company should
be assumed for large companies employing hundreds of workers especially across several
states or countries as was allowed in the *Hobby Lobby* case.

Indeed, unless there be a clearly less restrictive intrusion on free exercise of
religion that could be easily managed notwithstanding these circumstances, large for-
profit companies should certainly not be provided an opt-out of important civil rights /
antidiscrimination protections for that will certainly burden most the individuals
discriminated against. If it were reasonable to allow *Hobby Lobby* such an opt-out, it was
only because the contraceptive service to be provided was confined to three drugs and
one device, and because HHS’s had already established as a kind of precedent having an agreement with insurers for handling a similar situation involving nonprofits. It seem doubtful that insurers would agree to a the kind of expansion such an agreement would require to encompass all for-profit companies, or that taxpayers would support what is normally viewed as a perk of employment. In any case, where the issue involves discrimination and not provision of a benefit, it is difficult to imagine what kinds of across the board alternatives would even exist, let alone that alternatives that would be substantially effective.

VIII. Conclusion
The Supreme Court’s five to four statutory construction of the Religious Freedom Restoration Act of 1993 (RFRA) has set up a great fear among various civil rights groups, especially in the LGBT community, over what the Court might do next regarding rights of same-sex and transgendered couples seeking legal protections in employment, housing, and public accommodations. Indeed, if Justice Alito’s majority position is taken for all that its logic implies, then it should be true, as Justice Ginsburg’s dissent warns, that there is indeed much for civil rights community to be concerned about. However, I show in this article that there are good reasons for not treating the Hobby Lobby case this broadly. First, Justice Kennedy’s concurring opinion suggests that he was moved to join the Alito opinion by a much narrower view of what the Court’s opinion held. Second, a narrower interpretation of the opinion would seem to be a better fit with RFRA’s legislative history. Third, a narrow interpretation is shown by public reasons to be more in keeping with the Court’s seeming recognition of health care and equality as
compelling concerns of many federal and state laws along side protection of religious freedom. It also better resolves the conflict of rights lying in the background between the human right to freedom of conscience and the even more important human right to well-being. This it does by insuring that no one suffers objective harm from either denial of preventative health care or loss of civil rights protections when a compelling state interest is present or the harm to conscience is less than substantial. At least this is my hope.