# FREE EXERCISE AND THIRD-PARTY HARMS: WHY SCHOLARS ARE WRONG AND RFRA IS RIGHT

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## INTRODUCTION

In the aftermath of *Hobby Lobby*, one of the most salient criticisms by constitutional scholars has been that the ruling did not adequately consider the harm that would befall Hobby Lobby's female employees when it ruled that Hobby Lobby should be exempted from the mandate requiring all employers' insurance plans to cover certain type of contraceptives.[1] Such a reaction is based on the premise, accepted by these scholars, that religious free exercise should only be permitted to the point where it "harms" a third party. Additionally, some scholars have suggested that courts should not only consider material harms, i.e. physical or financial, but also dignitary or psychological harms to third parties, when determining what religious exemptions should be allowed.[2]

While the Religious Freedom Restoration Act (RFRA)[3] and the Religious Land Use and Institutionalized Persons Act (RLUIPA)[4] were Congress' answer to the question of competing rights when government action is involved, such as in *Hobby Lobby*, some recent scholars either oppose the test outlined in RFRA or assert that any harm experienced by third-parties, even

[1] *See, e.g.*, Leslie C. Griffin, *Hobby Lobby: The Crafty Case That Threatens Women's Rights and Religious Freedom*, 42 Hastings Const. L.Q. 641, 641-42 (claiming that religious freedom does not allow citizens to "impose" their faith on others."); Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 Harv. J. L. & Gender 35, 77 (Winter 2015) ("[W]e believed then, and still believe, that the Establishment Clause requires a construction of RFRA that does not permit the imposition of significant harms on third parties – in this case, female employees and female dependents of all employees.)

[2] *See, e.g.*, Douglas Nejaime & Reva B. Siegal, Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics, 124 Yale L.J. 2516, 2575 (2015) (claiming that complicity exemptions cause dignitary harm third-parties).

[3] 42 U.S.C. § 2000bb-bb4

[4] 42 U.S.C. § 2000cc, et seq.

broadly defined, should be understood to create a compelling government interest of sufficient magnitude that it always justifies the government's action.[5]

The newly energized scholarship in this area is of course not entirely one-sided,[6] but some of the country's most notable constitutional scholars seem to hold the view stated above (referred to as the "No-Harm View" going forward).[7] A review of the arguments that premise the No-Harm View finds some important shortfalls.[8] The No-Harm View, for instance, fails to adequately respect the Free Exercise Clause, ignores any harm experienced by religious actors when they are forced to adhere to regulations that violate their beliefs, and defines "harm" so broadly as to eliminate any meaningful protection of religious behavior. It also has potentially greater consequences to Free Speech and the interpretation of the First Amendment.

The purpose of this article is to call for nuance in this debate by examining some of the basic premises and assertions made by scholars who promote the No-Harm View. This article proceeds in Section I by providing a foundation for the discussion by presenting beliefs held by the country's Founders that premised the First Amendment. Then, the section outlines a history of cases and major laws that have contemplated the impact of religious free exercise on third parties. In Section II, the essay provides a thorough summary of two representative articles

[5] *See infra* section II.
[6] For views that support an approach that attempts to protect or balance the rights of all involved, *see* Tom Berg, *Progressive Arguments for Religious Organization Freedom: Reflections on the HHS Mandate*, 21 J. Contemp. Legal Issues 279, 286 (2013) (asserting that protecting religious rights preserves rights of progressives); Douglas Laycock & Thomas C. Berg, *Protecting Same-Sex Marriage and Religious Liberty*, 99 VA. L. Rev. in brief 1 (April 2013); Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. Rev. 1417, 1445-46 (2012) (arguing that religious exemptions assist rather than impede the progression of other goals); Alan Brownstein, *Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodation of Religious Liberty and the Right of Same-Sex Couples to Marry*, 45 U.S. F. L. Rev. 389 (2011); Douglas Laycock, "Sex, Atheism, and the Free Exercise of Religion, 88 U. Det. Mercy L. Rev. 407, 431 (2011) (calling for both same-sex marriage rights and religious protections).
[7] *See infra* section II.
[8] *See* discussion in section IV *infra*.

promoting the No-Harm View. Section III analyzes the thematic underpinnings of the No-Harm View and offers considerations that are missing or incomplete in the articles described in Section II. Section IV describes why RFRA and RLUIPA already provide a blueprint to resolve most of these issues by starting with the substantial burden inquiry and then requiring the government to pass strict scrutiny analysis. The article concludes by finding that protecting religious free exercise will sometimes impact third parties just as the rights held by third parties will sometimes limit religious exercise. Neither the Constitution nor prior court cases provides a clear blueprint for resolving these issues. In the end, the No-Harm View is clearly not the answer. The balancing test established in RFRA is the best method so far to resolve most of these disputes.

## I. FREE EXERCISE – FOUNDERS' BELIEFS, COURT CASES AND RECENT LEGISLATION – AN OVERVIEW

Courts have been grappling with the meaning of the Free Exercise Clause and its impact to third parties since nearly the beginning of the Republic. Many of the conflicts stem from religious actors who claim "conscientious objector" status to generally applicable laws.[9] More recently, conscientious objectors have also opposed laws that require religious actors to provide services – e.g. health insurance covering abortion and wedding supplies -- that they believe make them complicit in the behavior of others in a way that violates their religion.[10] Section A presents a foundational overview of the Founders' beliefs in religion, an inquiry relevant to any current-day inquirer seeking to understand what the Founders were attempting to protect. Section B presents major areas of conflict topically. Section C introduces the landmark religious freedom laws, RFRA and RLUIPA, and describes the specific test the statutes require courts to adhere to in order to balance religious and other freedoms.

[9] Such as laws to serve in the military or pay taxes. *See* discussion in subsection A *infra*.
[10] Such as selling pharmaceuticals that end pregnancy, providing contraception in insurance plans, or making sheet metal for gun turrets. *See* discussion in subsection A *infra*.

*A. The Founders Beliefs*

The Founders, themselves believers in God, fiercely sought to protect government intrusion into religious exercise.[11] Constitutional scholar, Professor Michael McConnell, has written about the Founder's theological views which fueled their forceful efforts to keep religious and government exercise separate.[12] He describes in his article *Why is Religious Liberty the First Freedom?* that one of the primary theological views at the time was the "two-kingdoms" view.[13] McConnell quotes an early Baptist leader and religious-freedom advocate at the Founding, "God has appointed two kinds of governments in the world" which are "distinct in their nature, and ought never to be confounded together."[14] As McConnell expounds, religious freedom "was a result of the jurisdictional separation between these two sets of authorities."[15] James Madison expressed the "two-kingdom" view in his famous *Memorial and Remonstrance Against Religious Assessments*, "Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe. And if a member of Civil Society, who enters into any subordinate Association, must also do it with a reservation of his duty to the general authority much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign."[16]

Another theological view supported at the Founding was "primacy of conscience" which requires individuals to have free choice to determine their own faith and freedom to practice it.[17] As Elisha Williams, a congregational minister and rector of Yale, stated, "[i]t is

[11] Michael W. McConnell, *Why is Religious Liberty the First Freedom*, 21 CARDOZO L. REV. 1243 (2000).
[12] *See id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* at 1245.
[16] *Id.* at 1246.
[17] *Id.* at 1250.

blasphemous…for an outside party, the government for example, to presume to supplant the free act of God."[18] This theory was expressed by Thomas Jefferson[19] in his introduction to the Virginia Statute of Religious Liberty, "Whereas Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religions, who being Lord both of body and mind, yet chose not to propagate it by coercions on either."[20]

While a comprehensive inquiry into the Founders' beliefs is unrealistic here, both of these theological theories represent insight into their conviction that religion was to be exercised freely without coercion or punishment by the state. The theory of free conscience was the basis for the Declaration of Independence and its assertion that an "unalienable right" given to all by the Creator is the "pursuit of happiness."[21] While the Founders' conscientious effort to protect religious behavior with the First Amendment does not clearly define for future courts how competing rights are to be adjudicated, it does justify a cautious approach to any future court or lawmaker who seeks to limit religious exercise.

[18] *Id.*
[19] Jefferson is also the Founder known for the phrase "Separation of Church and State." Historians have studied Jefferson's wrestle with conflict between government and church. At times his concern was primarily to keep church affairs away from government, and at other times his writings express the opposite concern. Further, Jefferson's writings were sometimes contradictory on the matter, something that likely comes from a lifetime of pondering on an issue. *See* David Barton, *The Image and the Reality: Thomas Jefferson and the First Amendment*, 17 NOTRE DAME J.L. ETHICS & PUB. Pol'y 399 (2003); Davis Reiss, *Jefferson and Madison as Icons in Judicial History*, a Study of Religion Clause Jurisprudence. 61 Md. L. Rev. 94 (2001).
[20] *McConnell, supra* FN 183, at 1251.
[21] *Id.*

*B. Case History*

The First Amendment states: Congress shall make no law respecting an establishment of religion, or prohibiting the exercise thereof.[22] While much has been written about the various interpretations of the Free Exercise Clause-an inquiry that is too involved to reproduce here-it can be fairly stated that courts and lawmakers have applied inconsistent interpretations over the hundreds of years since it was penned.[23] The focus here concerns interpretations shedding light upon the identity and analytical significance of claimed "harms to third parties" resulting from believers' free exercise of religion.

*1. An Early Case*

One early case, *People v. Phillips*,[24] displayed the judiciary's early deference to religious exercise on the grounds of its general social benefits even while allowing religious exercise to frustrate law enforcement's efforts. This New York court exempted a priest from testifying in court and providing law enforcement with the identity of an individual after one of the priest's parishioners admitted to a crime during a confessional.[25] The court acknowledged the priest's dilemma in being forced to choose between his church obligations and the law.[26] It also recognized that religious practices benefited society generally, even while allowing this priest to remain silent about the identity of a criminal appeared to be a specific social harm.

[22] US CONST. amend. I. For a thorough description of how the religious clauses were drafted and originally interpreted, *see* Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 Ohio St. L.J. 409, 410-16 (1986).
[23] For an excellent discussion of the Court's inconsistencies, see Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992).
[24] *People v. Phillips* (N.Y. Ct. Gen. Sess. 1813), reported in William Sampson, *The Catholic Question in America: Whether a Roman Catholic Clergyman Can Be in Any Case Compellable to Disclose the Secrets of Auricular Confession* (New York, Edward Gillespy1813).
[25] *Id.*
[26] *Id.*

*2. Religious Exercise and Parental Rights*

An ongoing area of debate is the extent to which parents can make decisions based on religious beliefs that some argue may harm third parties – their children. The areas of dispute have generally centered around either children's education and children's healthcare. This category combines two types of rights that generally are protected by the courts – religious exercise and parental rights.

Parents generally receive deference to make faith-based decisions in probably the most controversial category of potential third-party harm to children –medical care. Some religions do not believe in medical intervention and instead utilize "faith-based healing" measures such as prayer when a child is sick, even if the illness is treatable.[27] Children who would otherwise live are denied medical treatment based on the religious beliefs of their parents. Those who oppose allowing this practice emphasize children's' rights and assert that they are too young to protect themselves.[28] Opponents believe this is a classic situation where religious freedom is taken too far due its resulting harm on a third-party, the child, who, they assert, must be protected by the state.[29]

During the first part of the twentieth century, courts were unwilling to intervene in parents' medical choices.[30] For instance, the Washington State Supreme Court in *In re Hudson* chose not to order surgery for a young girl who had a congenital defect causing a growth on her entire left arm, even though the defect rendered her entire left arm unusable.[31] However, as the

[27] *See* Kei Robert Harasawa, Student Note, *Are Parents Acting in the Best Interests of the Child When They Make Medical Decisions Based on Their Religious Beliefs?* 44 Fam. Ct. Rev. 316, 317 (2006).
[28] *Id.* at 317.
[29] *See id.*
[30] *Id.* at 317.
[31] 13 Wash 2d 673, 675 (1942).

century continued, courts chose to intervene more frequently.[32] For instance, in *Wallace v. Labrenz,*[33] the Illinois Supreme Court ordered a blood transfusion because it determined that without it, the child would die.

In 1974, the federal government's Child Abuse Protection and Treatment Act required that each state include a "prayer-treatment exemption" for child abuse cases in order for states to receive federal funds.[34] Most states adopted the exemption though later the government removed its requirement for a religious exemption.[35] However, many states still offer this and other religious exemptions for parents, which generally protect parents from criminal liability when they choose to provide faith-based healing for their children in place of medical care, even if the child eventually dies due to lack of medical treatment.[36] Some states, though, have limited the exemptions to nonfatal cases or have gone so far as to charge parents with manslaughter or felony endangerment, choosing an after-the-fact remedy to encourage medical treatment.[37] Some courts have allowed the state to take children into custody if medical treatment is required.[38]

The debate of parental decision-making for their children's healthcare has been reinvigorated with the issue of vaccinations. Some parents choose not to vaccinate their children for religious and other reasons.[39] Those who oppose allowing parents to opt their children out of vaccinations point to not only the potential harm to the child of contracting a disease, but also the

[32] Harasawa, *supra* note 30, at 318.
[33] 104 N.E. 2d 769 (Ill. 1952); see also In re Eric B., 235 Cal. Rptr. 22 (Cal Ct. App. 1987) (ruling that a child participate in a follow-up treatment for his eye cancer).
[34] Harasawa, *supra* note 30, at 318.
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] Christine Kiracofe & Nicholas Atwood, *Giving Kids A [Required] Shot: Mandatory Vaccination Laws and Exception for Public K-12 Students in the United States.* 324 Ed. Law Rep. 611, 612 (2016).

harm that would be felt by other members of the population as the disease spread.[40] Even with these concerns, though, states generally allow exceptions to vaccination laws and allow the parent to decide whether to vaccinate the child.[41]

Parents also enjoy deference, though not unlimited, for religious-based decisions regarding children's education. While, all states have mandatory education statutes that require children to attend school, parents generally have discretion to choose how that education is received, whether at home or in a religious-private school, and if that education is supplemented with other religious education.[42]

The landmark case of *Wisconsin v. Yoder*[43] addressed the intertwined topic of state educational laws, parental rights, religion and potential "harm" to children. The Court ruled that a state law requiring all children to attend school until they are sixteen was unconstitutional as applied to Amish children.[44] The state believed that it was protecting children with the educational mandate and any exemptions would bring harm to the children.[45] The Court, however, stated that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to free exercise of religion."[46] The Court noted that the Amish way of life, sustainable for hundreds of years, and the religious connection between belief and "daily living" provided ample evidence that Amish children are not harmed by choosing not to follow the state's mandatory attendance requirement.[47]

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[40] *See id.* at 611.
[41] *Id.* at 612.
[42] Jack Macmullan, *The Constitutionality of State Home Schooling Statutes*, 39 VILL. L. REV. 1309, 1337 (1994).
[43] Wisconsin v. Yoder, 92 S.Ct. 1526 (1972).
[44] *Id.* at 1543.
[45] *Id.*
[46] *Id.* at 1533
[47] *Id.* at 1533-34.

However, in a different setting, *Prince v. Commonwealth of Massachusetts*[48] provides an example where the judiciary did not concede to parental authority when religious exercise was before the court. Here, Mrs. Prince had custody of her niece, a nine-year-old girl, who accompanied her to outdoor preaching.[49] Mrs. Prince was convicted of breaking child-labor laws, even though she claimed that her niece was just exercising her religion and that Mrs. Prince, as the child's custodian, had parental rights to direct her niece's activities.[50] The Supreme Court found that the state child-labor laws were within the state's police power to prevent harm, stating "[p]arents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."[51]

In sum, parents maintain broad discretion to raise their children according to their religious beliefs even in some cases where doing so arguably "harms" the child (such as in medical care decisions, alternative schooling, opting out of vaccinations, and so on). However, the court has found, at least when up against child labor laws and in some state laws regarding medical care, that the parents' defense of Free Exercise is not a foolproof method for receiving exemptions from all laws.

*3. Religious Exercise and Taxation*

Allowing tax exemptions for religious bodies is a practice dating back thousands of years and has been allowed in the United States for most of our history even though an argument can

[48] Prince v. Commonwealth of Massachusetts, 64 S.Ct. 438 (1943).
[49] *Id.* at 162.
[50] *Id.* at 163-64.
[51] *Id.* 169-70.

be made that tax exemptions for churches increases the tax burden for non-religious entities.[52] Churches are allowed exemption from taxes under the umbrella of laws that allow non-profit organizations to be exempt from taxes.[53] This practice was reaffirmed by the Supreme Court in *Walz v. Tax Commission of the City of New York*,[54] where a citizen and real estate owner in New York sought an injunction to prevent the city from allowing tax exemptions for religious organizations.[55] He asserted that by allowing tax exemptions for church property, the city was essentially requiring him to contribute to the religious body which, in his view, violated the Establishment Clause.[56] The court rejected his assertion that religious tax exemptions infringe on his rights by pointing to the long-standing historical practice of tax exemptions for religious bodies and the neutrality inherent with allowing exemptions to all religion.[57] However, sales tax is viewed differently as demonstrated in *Texas Monthly*[58] where the Court found that a state statute that exempted religious publications from sales and use taxes was unconstitutional.[59] Among the justifications for the ruling, the court stated that by exempting only religious writing from taxation, the state was offering a "subsidy" to the religious organization that forced others to become "indirect and vicarious 'donors.'"[60]

So, while there are exceptions for sales taxes, the vast majority of religious organizations in this country receive broad exemptions from taxation based on their status as religious organizations despite any impact such exemptions may have on third parties.

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[52] John W. Whitehead, *Tax Exemption and Churches: A Historical and Constitutional Analysis*, 22 CUMB. L. REV. 521, 521 (1991-1992).
[53] *See Exemption Requirements – 501(c)(3) Organizations*, https://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/Exemption-Requirements-Section-501(c)(3)-Organizations; *Id.* at 542.
[54] Walz v. Tax Commission of the City of New York, 90 S.Ct. 1409 (1970).
[55] *Id.* at 665.
[56] *Id.* at 667.
[57] *Id.* at 668.
[58] Texas Monthly, Inc. v. Bullock, 109 S.Ct. 890 (1989).
[59] *Id.* at 892.
[60] *Id.* at 899, quoting *Bob Jones University v. United States*, 461 U.S. 574, 591 (1983).

*4. Free Exercise and Church Autonomy*

Courts have recognized broad autonomy for churches to run their own affairs. This deference has resulted in allowing churches to make decisions regarding employment which directly conflict with laws aimed at protecting third parties affected - workers. In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos,*[61] the court upheld a decision by a church's non-profit organization to terminate an employee who was unable to satisfy a worthiness component the church required of all of its employees.[62] The former employee filed charges alleging religious discrimination forbidden in Title VII of the Civil Rights Act of 1964.[63] However, the Court upheld the termination finding that the religious exemption in Title VII was not a government tool used by the government to advance religion.[64] The court further dismissed the claim that this decision benefits religious employers above non-religious employers by reasoning that the exemption to Title VII was a rational law passed by Congress for the purpose of avoiding entanglement, a sufficient reason for upholding the exemption.[65]

The Court again defended Church autonomy in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC,*[66] when it confirmed the rights of churches to appoint its own ministers and render them free from scrutiny under employment nondiscrimination laws designed to protect third parties.[67] The Court ruled unanimously that the Free Exercise and Establishment Clauses disallow suits against churches by ministers who claim they were unfairly

[61] Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987).
[62] *Id.* at 327.
[63] *Id.*
[64] *Id.* at 327-28.
[65] *Id.*
[66] *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012).
[67] *Id.* at 75.

terminated.[68] This case involved a teacher who was fired after she had taken disability leave.[69] She claimed that her termination violated the American with Disabilities Act (ADA).[70] The court was unpersuaded, however, and found that by requiring reinstatement, it would be intruding on "more than a mere employment decision. Such action [would interfere] with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs."[71]

When it comes to church autonomy, the Supreme Court has interpreted the Free Exercise and Establishment Clauses to allow broad deference to church decisions even if third-parties are arguably harmed.

*5. Free Exercise and Private Business Ownership*

The extent of religious behavior one can exercise as a business owner represents one of the most active areas of recent debate regarding claimed third-party harms as a result of free exercise. An area that has received much attention in the courts involves cases where landlords wish to decline renting to unmarried individuals. The Supreme Court has not yet heard a case resolving this type of landlord/tenant question, but other courts have grappled with this question. In *Thomas v. Anchorage Equal Rights Commission*,[72] the Ninth Circuit found that requiring the landlords to rent to unmarried individuals violated their religious freedom, based on RFRA analysis.[73] The landlords had violated the fair housing statutes of both Alaska and the City of

[68] *Id.* at 710.
[69] *Id.* at 700.
[70] *Id.* at 701.
[71] *Id.* at 706.
[72] Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692 (9th Cir 1999). Reversed for lack of ripeness at 220 F.3d 1134 (9th Cir. 2000) (en banc).
[73] *Id.* at 714.

Anchorage by turning away unmarried couples.[74] However, the court found that by requiring the landlords to rent to an unmarried couple, the landlords faced a "Hobson's Choice of sorts" between renting to the unmarried couple and suffering the punishment or "forsaking their livelihoods as apartment owners altogether."[75]

Other cases have dealt with business owners' objections to abortion. In *Rasmussen v. Glass*,[76] a deli owner refused to deliver to an abortion clinic.[77] He stated that he would serve anyone in his deli, even those who oppose abortion, but he would not deliver to a facility that actually performed abortion, which he believed to be murder.[78] The state appeals court ruled for the deli owner finding that requiring him to deliver to a facility that performs abortions violated his religious rights as protected in the Minnesota Constitution.[79]

One of the first cases where the service industry came into conflict with same-sex marriage was *Elaine Photography, LLC v. Willock*,[80] where a same-sex couple claimed dignitary and discriminatory harm when a small New Mexico photography company refused to take pictures for a same-sex wedding because of the owner's religious beliefs. The state court ruled the owner's actions violated the state non-discrimination statute.[81]

Another facet of free exercise and claimed harm to third parties played out in the *Hobby Lobby* case.[82] In *Burwell v. Hobby Lobby Stores*, the Court ruled that a federal regulation requiring companies to include certain contraceptives as a part of their insurance plan violated

[74] *Id.* at 697.
[75] *Id.* at 712-14.
[76] 498 N.W.2d 508 (Minn. Ct. App. 1993).
[77] *Id.* at 509.
[78] *Id.*
[79] *Id.*at 516.
[80] Elaine Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013).
[81] *Id.* at 72.
[82] 134 S.Ct 2751, 2759 (2014).

RFRA for a company whose owners oppose abortions.[83] The plaintiffs, two closely-held family businesses, asserted that the government's requirement that their insurance covers certain contraception created a substantial burden on their religious beliefs because it required the owners to facilitate what they believe to be an immoral act.[84] The government claimed that women not receiving free contraception would experience substantial harm since the purpose behind the mandate was to remove any barrier to contraception and exempting certain companies from providing these contraceptives would undermine that purpose.[85] The Court applied RFRA's substantial burden test, described in more detail below,[86] and found that the heavy fines the parties faced - $100 per day for each employee leading to $475 million per year for Hobby Lobby and $15 million per year for the other company in the suit – clearly demonstrated a substantial burden.[87] The Court also determined that the government had not met RFRA's strict scrutiny requirement of using the least restrictive means to accomplish its compelling state interest, because other organizations had been offered different options which these businesses had not been offered.[88] Justice Alito refuted the dissent's assertion that the ruling harmed women employees by stating that since the government can provide another way for these women to attain insured contraceptives, the effect would be "precisely zero."[89]

The recently-argued case of *Zubik v. Burwell* involves several non-profit organizations who objected to the process created by Health and Human Services ("HHS") to gain an exemption from the contraceptive mandate which the government argued would create an

[83] *Id.* 134 S.Ct. at 2762-63.
[84] *Id.*at 2764-66.
[85] Brief for Petitioner at 46-49, Burwell v. Hobby Lobby, 134 S.Ct. 2751 (2014) (No. 13-354).
[86] *See* subsection B, *infra*.
[87] *Id.* at 2762, 2775-76.
[88] *Id.*
[89] *Id*. at 2759

unworkable exception that would result in lower access to contraceptives.[90] The non-profit organizations asserted that the process itself requires complicity in the use of contraception, which they oppose on religious grounds.[91] The government argued that any other solution would harm women.[92] Indeed, the government even argued that requiring women to attain contraceptives through a separate contraceptives-only insurance plan would result in the lower usage of contraceptives since it would create more administrative hassle for women.[93] The Supreme Court, in a highly unusual response, first requested further comment from the parties to theorize on a solution that would satisfy both sides.[94] After receiving confirmation from both parties that such a compromise was possible to design, the Court remanded the case to allow the parties to come to an agreement.[95]

While such cases are likely to continue to play out in the courts, the Supreme Court has not been afraid to tell the government to alter its plans to accommodate religious freedom even if third-parties are impacted to some extent. Likely this is based on a perception that the government can find a workaround that reduces the impact to third-parties.

*6. Free Exercise and Accommodating Employees*

Employees' rights to be accommodated in their religious behavior have been predictably difficult to balance with employers' rights to run their own companies and not burden non-religious employees. Title VII, a landmark law passed in 1964, prohibits employers from

[90] *See* Petition for Writ of Certiorari, Zubik v. Burwell, available at: http://www.scotusblog.com/wp-content/uploads/2015/11/Zubik-v.-Burwell-Cert-Petition.pdf.
[91] *Id.*
[92] Transcript of Oral Argument at 50-53, Zubik v. Burwell, 578 U.S. __ (2016).
[93] *Id.*
[94] Order of the Court, March 29, 2016. Can be accessed here: http://www.supremecourt.gov/orders/courtorders/032916zr_3d9g.pdf
[95] Zubik v. Burwell, 578 U.S. __ (2016).

discriminating against employees based on, among other things, religion.[96] The scope of Title VII has been challenged in court and in 1977, the Supreme Court considered *Trans World Airlines, Inc. v. Hardison* (TWA).[97] In *Hardison*, an employee sued after being fired for refusing to work on his Sabbath, Saturday, after the employee moved to a new department where he did not have the seniority to bid for his more desirable shift.[98] The Court ruled that TWA had made reasonable efforts to accommodate the employee and did not violate Title VII.[99] The Court stated that "[t]o require TWA to bear more than a de minimis cost in order to give respondent Saturdays off would be an undue hardship."[100]

Other employee exemption cases and laws have arisen from situations where employees' job responsibilities are objectionable based on their religious beliefs, such as nurses who oppose abortion. Some argue that allowing such exemptions cause third-party harm by compromising service for patients by resulting in fewer healthcare providers in areas where medical personnel are more limited.[101] Most states allow exemptions for nurses and other health care professionals from participating in procedures they are morally opposed to.[102] Conscience clauses were federally mandated in 1973 by the Church Amendment, enacted in response to *Roe v. Wade*, to prohibit requiring health personnel to violate their religious beliefs.[103] Today, virtually all states have broad "refusal" clauses which protect individuals (and institutions) from providing medical care they are religiously opposed to.[104]

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[96] http://www.eeoc.gov/laws/types/religion.cfm
[97] 432 U.S. 63 (1977).
[98] *Id.* at 63-64.
[99] *Id.*
[100] *Id.* at 65.
[101] See section IIB *infra* discussion about abortion
[102] Martha S. Swartz, *"Conscience Clauses" or "Unconscionable Clauses": Personal Beliefs v. Professional Responsibility*. Yale Journal of the Health Policy, Law & Ethics 269, 279-80 (2006).
[103] *Id.* at 280.
[104] *Id.* at 284.

*7. Other cases*

*Snyder v. Phelps*[105] is a case where the First Amendment rights of the church members were protected despite obvious emotional harm their speech caused a third-party: in this case, the family of a dead soldier. The Westboro Baptist Church picketed the funeral of a soldier, approximately 1,000 feet away from the church that hosted the funeral.[106] Westboro's picketing was motivated by a number of factors based on the contents on the picketing signs: opposition to the military's acceptance of homosexual soldiers, condemnation of the Catholic Church for clergy scandals, and so on.[107] The deceased service member's father filed a tort action against the leader of the Westboro Church for "intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy."[108] The Court ruled that the First Amendment, specifically the Free Speech Clause, shielded Westboro from tort liability reasoning that the speech was of "public concern" and not primarily directed at the decedent or his family, even though the jury in the lower court found the behavior "outrageous."[109]

The Court has allowed for exemptions from mandatory military service based on both religious and conscience objections despite concerns that one citizen's refusal to serve would impact another citizen who might be drafted. *The Selective Draft Law Cases* upheld exemptions from military drafts for clergy, seminarians, and pacifists.[110] In *Gilette*, the Court upheld religious exemptions from military drafts.[111]

[105] 131 S.Ct. 1207, 2011
[106] *Id.* at 448-50.
[107] *Id.*
[108] *Id.*
[109] *Id.* at 458-59.
[110] 245 U.S. 366 (1918).
[111] Gillette v United States, 401 U.S. 437 (1971). Harm described by one expert: If ten thousand conscientious objectors are exempt from the military draft, ten thousand others must serve in their place. Some of the substitutes may be killed. In a sense, these other workers and other draftees are discriminated against because of their religion.

The cases above demonstrate how courts and lawmakers have had to interpret the Free Exercise Clause when it impacts other parties. In some instances, courts have valued religious exercise over third-party interests, such as in *Amos*, *Hosanna-Tabor*, and *Cantwell*. In other cases, courts have valued the interests of third-parties over the religious exercise, such as in *Texas Monthly* and *Prince*.

### *C. The Religious Freedom Restoration Act*

Congress took a strong step to protect free exercise of religion after the Supreme Court's decision in *Employment Division v. Smith*.[112] In *Smith*, two employees were fired after ingesting peyote, a hallucinogenic and illegal drug, while attending a religious ceremony for the Native American Church.[113] Both employees were drug counselors who were required to abstain from alcohol or drugs as a condition of employment.[114] Both were denied unemployment compensation, and appealed asserting that they were exercising their religion.[115] The Court found that since the law governing the denial of unemployment benefits was "neutral" and "generally applicable" and since the right asserted is not connected with any other right (such as parental rights or free exercise), it did not prohibit free exercise because, the court asserted, the effect on religion was merely incidental.[116]

Congress passed RFRA to overturn *Smith* and reinstate the strict scrutiny standard the Court had established in prior cases where religious actors claimed a law created a substantial

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If only they would adopt religious beliefs that made them conscientious objectors, they too would be exempt from the draft and from working on Saturday. Laycock, *supra* note 13 at 432.

[112] 110 S.Ct. 1595 (1990).

[113] *Id.* at 1597-99.

[114] *Id.*

[115] *Id.* at 1597-1600.

[116] *Id.* at 1599-1600.

burden on religion.[117] RFRA (for federal laws) and RLUIPA (for prisons and land-use issues in the states)[118] offer a course of action for religious actors who believe their free exercise rights have been burdened as a result of government action. The laws first require the religious actor to establish that the government action or regulation has created a substantial burden on his or her deeply-held religious beliefs.[119] Congress did not provide a definition of substantial burden in the laws themselves because it wanted the courts to use the same definition from prior cases.[120] An oft-quoted definition of substantial burden comes from *Thomas*, another religious unemployment case which held that when a state "conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of the conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists."[121]

If the religious plaintiff establishes a substantial burden has been created, the government must then demonstrate that the burden is the least restrictive means to achieve a compelling government interest.[122] If, for instance, another method is easily identifiable for the government to accomplish its goal or if a less-restrictive exception has already been offered to others, the government will probably not pass the "least restrictive means" test.[123] In *Hobby Lobby*,

[117] *See* Sherbert v. Verner, 374 U.S. 398, 404 (1963) (ruling that a substantial burden exists when the religious actors is forced to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.)
[118] RFRA's constitutionality was challenged in *Boerne* and the Court ruled that because it was not tailored to correct a specific problem, its overinclusiveness deemed it unconstitutional as applied to states. Congress then followed up with RLUIPA which essentially applied RFRA to prisons and local land-use decisions, after extensive Congressional testimony demonstrated religious freedom abuses in both settings. *See* City of Boerne v. Flores, 117 S.Ct. 2157 (1997); Congressional History of RLUIPA: https://www.justice.gov/jmd/religious-land-use-and-institutionalized-persons-act-2000-pl-106-274.
[119] 42 U.S.C. § 2000bb-bb4.
[120] *See* 146 Cong. Rec. S7774 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).
[121] *Thomas*, 450 U.S. at 717-18.
[122] 42 U.S.C. § 2000bb-bb4.
[123] *See Singh v. McHugh*, 109 F. Supp. 3d 72, 90 (D.D.C. 2015) (quoting *Burwell v. Hobby Lobby Stores, Inc*., 134 S. Ct. 2751, 2780-82 (2014) (internal citations omitted) ("the very existence of a government-sanctioned exception

described above, the Court found for Hobby Lobby because the government had already created a less onerous method for other entities to opt out of the contraceptive mandate, but had not offered that option to Hobby Lobby.[124]

Since RFRA does not apply to the states, many states have passed their own versions,[125] some with much controversy.[126] Also, many states' own Constitutions provide broad protections for religious freedom. However, since RFRA does not apply to the states, *Smith* still does, and the result is that while the federal government uniformly must adhere to the substantial burden and strict scrutiny tests established in RFRA, the states are inconsistent in their protections of religious free exercise.

## II. REPRESENTATIVE ARTICLES OF RECENT SCHOLARSHIP SUPPORTING THE NO-HARM VIEW

As stated in the Introduction, the *Hobby Lobby* decision as well as the *Obergefell* decision, which required states to recognize same-sex marriages, have led to much scholarship by constitutional and religious scholars, professors, and advocates, much of which,[127] supports the idea that free exercise should be limited in light of harms to third parties caused by failure to recognize or extend newly-recognized rights or newly-offered government benefits. The theory generally is based on the assertion that if the government makes exceptions for religious objectors, third-parties are harmed. The articles below represent this "No-Harm View." Section A provides a detailed summary of a recent article by two Constitutional and religious scholars,

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to a regulatory scheme that is purported to be the least restrictive means can, in fact, demonstrate that other, less-restrictive alternatives could exist.")

[124] *See Hobby Lobby*, 134 S. Ct. 2751 (2014).

[125] For a map of states that have adopted their own individual RFRA laws, *see* http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.

[126] Some view state RFRA laws as anti-gay laws. *See, e.g.*, http://www.douglascountysentinel.com/opinion/columnists/georgia-s-religious-freedom-restoration-act-polarizes-state/article_75f8c9af-2f98-5d64-9307-e95e4038be9f.html.

[127] *See supra*, note 6.

Professors Erwin Chemerinsky and Michele Goodwin, whose article ("Chemerinsky & Goodwin article") was chosen to represent the "No-Harm View" because its authors are respected scholars and because the article presents the No-Harm View clearly in a manner generally congruent with other scholars' assertions as well.[128] Section B summarizes another article which offers a discussion of the types of harms that many proponents of the No-Harm View assert are relevant in this debate. Section C briefly summarizes the primary assertions of the two articles.

*A. Chemerinsky & Goodwin article*

In *Religion Is Not a Basis For Harming Others*, Chemerinsky and Goodwin, two prominent Constitutional professors,[129] make the case that "free exercise of religion – whether pursuant to the Constitution or a statute – does not provide a right to inflict injuries on others."[130] They began their article by summarizing a new book by Dr. Paul A. Offit, a medical doctor. Dr. Offit's book, titled Bad Faith: When Religious Belief Undermines Modern Medicine, criticizes parents who refuse to attain medical assistance for their children when those children are ill and instead seek religious remedies such as prayer.[131] Dr. Offit shares stories of religious parents whose sick children died while parents chose not to avail their child to medical care, a practice

[128] Other examples include: *Hobby Lobby: The Crafty Case That Threatens Women's Rights and Religious Freedom*, Leslie Griffin advocates a theory she calls the "non-imposition model" which asserts that "legal and political problems must be decided by legal and political principles" and not by a "values model" where decisions are made based on people's values and which has the effect of imposing values on third-parties. The non-imposition model requires decision-makers to begin at the same place – such as the text of the Constitution or applicable statute – and work from there. The values model allows people to consult their personal or religious views and then include those views into the decision-making process. The author's version of harm is the fact that values not held by all are "imposed" on others. She also claims that the *Hobby Lobby* decision will result in everyone becoming a "law unto himself" as articulated in *Reynold's;* Griffin, Leslie C., "Hobby Lobby: The Crafty Case that Threatens Women's Rights and Religious Freedom" (2015).Scholarly Works. Paper 945. http://scholars.law.unlv.edu/facpub/945.
[129] Professor Erwin Chemerinsky is the Dean of the School of Law at University of California, Irvine. Professor Michele Bratcher Goodwin is a Chancellor's Professor of Law at the University of California, Irvine.
[130] Erwin Chemerinsky & Michele Goodwin, *Religious Is Not A Basis For Harming Others*, Legal Studies Research Paper Series No. 2015-78 at 22. Forthcoming, Georgetown Law Journal, 2015/16. Draft available here: http://ssrn.com/abstract=2654487.
[131] *Id*. at 4.

which Dr. Offit renounces, calling the religions "cults" and suggesting that laws exempting parents from civil and criminal penalties in these situations should be repealed.[132]

Chemerinsky & Goodwin spend a great deal of time in their article recounting stories from Dr. Offit's book and agree with Offit's conclusions that parents should be penalized if they choose not to attain medical care for their children. They then turn to the question of "whether free exercise of religion protects the right of parents to make these choices."[133] They state that the "Constitution provides no basis for a religious right to refuse medical care or for inflicting injuries on others in the name of religious beliefs" but that statutes, both federal and state, are used to justify this.[134] The authors recount the history of free exercise cases, emphasizing the result in *Reynold's*[135] that the government cannot regulate beliefs but can regulate action.[136] The authors explicitly disagree with the court's holding in *Yoder*, asserting that "we do not believe that parents should be able to deny this fundamental education benefit to their own children."[137]

The authors then present cases where free exercise claims were rejected such as in *Braunfeld*[138] and the watershed case of *Smith*.[139] Noting that in *Smith*, laws that are generally applicable must only pass the rational basis test regardless of their burden on religion, and that even prior to *Smith*, the Supreme Court rejected "all free exercise claims since 1960 except for

[132] *Id.* at 7.
[133] *Id.*
[134] *Id*.
[135] In *Reynold's v..United States*, 96 U.S. 145 (1878) the Supreme Court affirmed the conviction of a Mormon polygamist who challenged the anti-polygamy laws based on the First Amendment. The Court stated in its ruling that Congress cannot control religious belief, but it can regulate religious practice. *Id.* at 166.
[136] *Id.* at 8.
[137] *Id.* at 20.
[138] In *Braunfeld v. Brown*, 366 U.S. 599 (1961), the Supreme Court upheld a state law requiring businesses to close on Sunday. The case was challenged by Orthodox Jews who were also merchants and who, due to their religion, closed on Saturday as well. The challengers did not wish to lose two days of business each week due to the law. However, the court upheld the law reasoning that the law had a legitimate state purpose of providing for the general welfare of the state's citizens.
[139] *See supra* FN 112-116 and related text.

the employment benefit cases and *Yoder*," the authors declare that "the free exercise claim of the First Amendment thus does not provide a basis for challenging laws that prevent harms to others – whether in the area of discrimination, provision of reproductive health care services, or ensuring needed medical treatment."[140]

Moving on to statutes, the authors summarize the history of RFRA and RLUIPA and subsequent cases which have applied these laws.[141] Regarding *Hobby Lobby*, the authors state that "[p]roblematically, the denial of medical care based on religious beliefs can be arbitrarily applied and enforced – even within the contexts of contraception-as in this case the medications denied by the employees were used by women even while the companies covered vasectomy treatments for their male employees."[142] The authors then restate their point that "free exercise of religion provides no basis for exemption from laws that require medical care, including reproductive medical care, be provided."[143] "Freedom of one person ends when it inflicts injury to another."[144]

Regarding children in medical need, the authors assert that any state could require parents to seek medical care for children who need it and such a law would always pass any state RFRA because the child's need would always pass strict scrutiny analysis.[145] Moving to more broad instances of medical care, the authors then apply the same principle to other scenarios such as *Hobby Lobby* when they declare that their analysis leads them to conclude that "the religious beliefs of some *never* provide them a right to deny medical care to others."[146] In *Hobby Lobby*,

[140] *Id.* at 14-15.
[141] *Id.* at 16-20.
[142] *Id.* at 18.
[143] *Id.* at 22.
[144] *Id.*
[145] *Id.* at 24.
[146] *Id.* at 28.

the authors express concerns for the "potential reach" of the decision, noting that Hobby Lobby is a large company and the majority of corporations in the United States are "closely held" businesses.[147] The authors also express concern that Hobby Lobby was allowed an exemption based on their employees' potential behavior when all it had to do is provide insurance.[148] The authors describe slippery-slope scenarios where other challenges may arise, such as Christian Scientists claiming they do not have to provide any insurance.[149] The authors even ask, "In fact, why can't an employer, at least a family owned business, even require as a condition of employment that no money paid as salary be used to purchase contraceptives (or other things that violate the employer's religious beliefs?)"[150] The authors assert that women will be "seriously hurt[151] in being denied insurance coverage for their contraceptives"[152]

B. NeJaime & Siegal Article

In *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, objections to "being made complicit in the assuredly sinful conduct of others" – differ from other

[147] *Id.* at 29.
[148] Chemerinsky & Goodwin FN130, *supra* at 30.
[149] *Id.*
[150] *Id.* This question is, of course, not a logical result of allowing Hobby Lobby an exemption from a mandate. Hobby Lobby's opposition to the contraceptive mandate was that it was required to take action – provide medical insurance – for a specific type of coverage, the use of which violates Hobby Lobby's deeply held beliefs. Providing salary to employees for their work does not require Hobby Lobby to take any action that specifically facilitates the use of contraception. Money, once given to employees, becomes the employees' personal property to do with as they wish. This is different than a health insurance plan, sponsored by the company itself, being forced to include a religiously-offensive provision.
[151] On SCOTUSBLOG, religious scholars Ira Lupu and Robert Tuttle authored a post prior to the Hobby Lobby decision where they proposed that RFRA be construed similarly to *Hardison* where any third-party "accommodation cost" should not exceed de minimus.[151] They asserted that the harm to women was significant at Hobby Lobby after the exemption, especially women who require the particular types of contraception after "coerced sex."[151] The authors then lament that if Hobby Lobby's exemption is given, other claims would follow including exceptions for other "medical services, collective bargaining, family leave, or invidious discrimination."[151] The Court, they assert, should find a compelling interest in "limiting employers to exemptions that impose no more than de minimus harm on employees."[151] They finish by stating, "Employers acting under RFRA, in symmetry with employees asserting rights under Title VII, should not be legally empowered
[152] Chemerinsky & Goodwin FN130, *supra* at 30.

free exercise claims protected by RFRA and Free Exercise jurisprudence.[153] They argue that the distinction is important because these claims potentially inflict "material and dignitary harms on other citizens." Looking backward, the authors assert that "when accommodation has threatened to impose significant burdens on other citizens, courts have repeatedly rejected the exemption claims."[154] The authors assert that the Court emphasized third-party interests when deciding *Hobby Lobby* since it found that the government had other means to provide women contraception.[155] However, the authors claim that the Justices did not examine the different kind of harm that is inflicted by complicity exemptions.

The authors then provide a background of healthcare refusal laws, which have grown over time to provide wide exemptions to professionals who object to participating in abortion and sterilization procedures.[156] Such exceptions, they claim, grew from originally protecting actors directly involved in medical procedures to protecting actors not directly engaged, leading to the creation of complicity exemption requests such as seen in *Hobby Lobby*. However, these complicity exceptions, they claim, are fundamentally different than the ones Congress considered when it passed RFRA, which dealt with minority faiths that were not considered by lawmakers when the offending laws were passed. The authors state that by accommodating these minority faiths,[157] the harm to others is "minimal and widely shared."[158] Complicity claims, they

[153] Douglas NeJaime & Reva B. Siegal, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*. 2518, Yale L. J. (2015).
[154] *Id.* at 2528.
[155] *Id.* at 2519.
[156] *Id.* at 2535-38.
[157] RFRA does not limit itself to minority faiths on its face.
[158] Douglas NeJaime & Reva B. Siegal, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*. 2518, 2520 Yale L. J. (2015).

assert, will harm third-parties more directly and in different ways by having "social meaning and material consequences for law-abiding persons who the claimants say are sinning."[159]

The authors proclaim first that "accommodation of complicity-based conscience claims may impose material burdens on third parties by deterring or obstructing access to goods and services."[160] As an example, the authors point to the healthcare workers refusal laws which they say do not always provide for a suitable alternative for the patient if the healthcare provider is unwilling to perform the procedure.[161] Second, religious exemptions inflict dignitary harms, which they assert are analogous to the type of harms Congress was trying vindicate when it passed the Title II of the Civil Rights Act, which prohibited discrimination in public accommodation.[162] The authors claim that the same sort of insult to dignity occurs when Congress allows accommodation of religious exemptions, by allowing religious adherents to stigmatize others' behavior.[163] The authors provide examples of clashes between same-sex couples and service providers and even the "condemnation" made by Hobby Lobby owners which, they say present the actions of third parties "as sinners in ways that can stigmatize and demean."[164] The authors do no provide concrete evidence of stigma, though, or how it should be measured.[165]

[159] *Id.*
[160] *Id.*
[161] *Id.* at 2567.
[162] *Id.* at 2575.
[163] *Id.* at 2576-77.
[164] *Id.* at 2576.
[165] The authors also make the argument that exemptions should not be allowed that "would produce effects and meanings that undermine the government's society-wide objectives." *Id.* at 2580. the authors invoke a discussion of pluralism claiming that by allowing religious exemptions in situations where the "mobilized groups and individuals…seek to enforce traditional norms against those who do not share their beliefs," pluralism is not advanced and instead is undermined. *Id.* at 2586. This argument is discussed in more detail in Section III *infra*.

### *C. Summary of the No-Harm View*

While it is false to claim that all of the authors mentioned above – or others who support the No-Harm View – hold identical views; generally, the articles seem to articulate a few propositions held my many: First, the outer boundary of the Free Exercise Clause is defined as whenever the religious exercise "injures" or "harms" a third party. Harm is defined broadly to include not only physical or financial harms, but also such inconveniences as reduced convenience to anything denominated a government benefit. And, at least some proponents of the No-Harm View suggest emotional or so-called dignitary harms should be included as harms that limit Free Exercise.

This article does not assert that any of the ideas presented above are wholly incorrect, just that the analysis fails to consider important elements and leads to broad, unsubstantiated conclusions. The next section attempts to fill in these gaps.

## III. TOWARD A MORE RIGOROUS AND NUANCED DEBATE

As stated in the Introduction, the purpose of this essay is to suggest that one's free exercise rights do not end simply because that behavior impacts a third-party. This section presents some theoretical concerns with the No-Harm View as well as concrete rebuttals to some of the premises on which the No-Harm View is built.

### *A. The No-Harm View Ignores the Presence of the Free Exercise Clause and Disregards Harms Felt by Religious Actors When Religious Exercise is Limited*

Absent from the articles in section II is discussion or even acknowledgement that the Free Exercise Clause exists. By asserting that the presence of any injury to a third party – a very low threshold – should place an absolute bar on religious exercise, proponents of the No-Harm View seem to assert that whatever Constitutional importance is allocated to religious exercise, any

other behavior exceeds that importance and religious exercise is thus secondary by comparison. And yet, such a view cannot be consistent with the Founders' view. Indeed, fair minds differ regarding the original intent and extent of the Free Exercise Clause, and as Section I demonstrates, courts and lawmakers have grappled with this since the Founding. However, any sophisticated theory that seeks to limit Free Exercise must at least acknowledge that it means *something* and provide a theory for what it was meant to protect.

Perhaps as a result of ignoring the presence of the Free Exercise Clause in the Constitution, the No-Harm View fails to acknowledge the impact that limiting Free Exercise has on religious actors. The authors express considerable concern for harm that religious exercise may cause a third-party, even broadly-conceived emotional or psychological harm.[166] However, by contrast, the authors are silent regarding harms that religious adherents experience when religious exercise is limited. Yet, much of the same logic about harm or injury the authors believe may befall a third party who is impacted by someone else's religious exercise can just as convincingly apply to the religious actor as well.[167] Such harm may be physical or emotional harms, or even spiritual harms. Indeed, the entire inquiry into dignitary harms is particularly relevant to religious individuals who are mandated to support laws that directly violate their faith. Certainly the stigma felt by religious actors who are forced to adhere to a law that violates their deeply-held religious beliefs is at least as great as the stigma associated with non-religious actors whose behavior is opposed by religious actors, but whose behavior is not limited in any way.

[166] *See* section III *infra*.
[167] Compare the harm a religious person experiences for being forced to participate in abortion which she believes to be murder to the harm attributed to the employee who must attain alternate insurance to attain contraceptives.

One can better understand what is lost by religious actors whose religious freedom is restricted by remembering what the Founders were attempting to protect when they penned the Religious Clauses. As explained in Section I, the Founders themselves believed in God and vigorously sought to protect government intrusion into religious exercise.[168] Their desire to protect religious freedom did not stem from a theoretical or merely intellectual belief that such protection is just. Instead, it stemmed from their personal experience with God. They knew that the very ability to understand one's existence, experience the blessings that God offers to His followers, and pursue His version of happiness are at stake when religious believers are unable to exercise their religion freely.[169] Proponents of the No-Harm View fail to consider, as one scholar put it, "[t]hose seeking exemption believe that they are being asked to defy God's will, disrupting the most important relationship in their lives, a relationship with an omnipotent being who controls their fates….We cannot properly balance the religious-liberty claims in these cases unless we take the religious claims seriously."[170]

Proponents of the No-Harm View have not offered a theory for limiting religious exercise that acknowledges the very real beliefs of those who assert Free Exercise claims.[171] Protecting religious exercise does not assume that it trumps any other consideration, but does require that any articulated limits to religious behavior respect the purpose of the Free Exercise Clause.

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[168] *See* Michael W. McConnell, *Why is Religious Liberty the First Freedom*, 21 CARDOZO L. REV. 1243 (2000).
[169] *See id.* at 1251-52.
[170] Douglas Laycock, Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Siegel, 125 YALE L.J. F. 369 (2016), http://www.yalelawjournal.org/forum/religious-liberty-for-politically-active-minority-groups.
[171] *See id.* ("But like many others on the anti-exemption side of these issues, NeJaime and Siegel have trouble taking the conscientious objectors' claims seriously. They do not appear to genuinely comprehend that the Greens believed they were required to pay to kill people. Revealingly, NeJaime and Siegel repeatedly italicize the fact that some people object to referring for abortion; they seem to think this claim is so extreme as to be more-or-less self-refuting.")

### *B. The No-Harm View Assumes a Broad Definition of Harm with No Articulable Limits*

Proponents of the No-Harm View define harm broadly. The Chemerinsky & Goodwin article states "freedom of one person ends when it inflicts injury to another."[172] This implies that even the most serious religious exercise must end once it even lightly impacts a third party if that impact can be construed as injury. This definition of harm creates multiple concerns. First, it allows any articulable definition of harm to limit religious exercise without considering the nature of the alleged harm. Second, it ignores the government's role in many of these conflicts and gives the government extraordinary authority to authorize any limitation to religious behavior under the guise of being generally-applicable law. Each of these concerns will be discussed in turn below.

#### *1. The No-Harm View allows any articulable definition of harm to limit Free Exercise*

The No-Harm View defines harm so broadly that any conceivable definition of harm can limit free exercise. The literal application of this assertion would lead to absurd results. For instance, this rule would imply that church congregations should not be able to gather on Sundays because the resulting traffic "injures" other drivers by delaying arrival to their desired destinations. Such a result is obviously illogical and, hopefully, not the type of conclusion the authors intended with their statement.

However, if traffic is not an injury that can limit free exercise, the NeJaime & Siegal article suggests equally irrational types of harms that they claim should limit free exercise. First, NeJaime & Siegal suggest that courts should protect third-parties from experiencing "dignitary

[172] Erwin Chemerinsky & Michele Goodwin, *Religious Is Not A Basis For Harming Others*, Legal Studies Research Paper Series No. 2015-78 at 22. Forthcoming, Georgetown Law Journal, 2015/16. Draft available here: http://ssrn.com/abstract=2654487.

harms" as a compelling government interest. They assert that in *Hobby Lobby*, for instance, providing an exemption for contraceptives has the effect of treating the women who would use them as sinners which has the effect of stigmatizing and demeaning them.[173] However, as Professor Douglas Laycock has written, "preventing these harms cannot be a compelling interest that justifies suppressing someone else's individual rights."[174] "These are expressive harms," Dr. Laycock continues, "based on the 'communicative impact' of the religious practice – a justification that is generally fatal to regulation of expressive conduct. … That your religion offends me is not a sufficient reason to suppress it."[175] As discussed above, not granting an exemption also sends a message that arguably stigmatizes religious actors. But, religious rights cannot depend on a showing of whose feelings were hurt most. Further, the Supreme Court has made clear that First Amendment rights – speech, association, religion - are not restricted because their expression offends others.[176]

Official recognition of such harms would not only usurp the Supreme Court's history of not recognizing emotional harms as a bar to Constitutional rights, but it would have the effect of incentivizing future litigation where other "harms" are asserted. With no boundaries on what type of injury can limit religious exercise, the potential for litigation is endless. NeJaime & Siegal provide an example justifying this concern in their article by offering an even more irrational definition of harm. They assert that harm is created when religious exemptions are

[173] Douglas NeJaime & Reva B. Siegal, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*. 2518, 2576, Yale L. J. (2015).
[174] Douglas Laycock, Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Siegel, 125 YALE L.J. F. 369 (2016), http://www.yalelawjournal.org/forum/religious-liberty-for-politically-active-minority-groups. ("Mutual moral disapproval is inherent in a morally pluralistic society. Religious conservatives think that same-sex couples, and women seeking abortions, are engaged in deeply immoral conduct. Much of the gay-rights and pro-choice movements think that religious conservatives are hate-filled bigots and extremist zealots. Both sides are well aware of the other's disapproval…").
[175] *Id.*
[176] *See Snyder*, text associated with FN 110-14, *supra*; Boy Scouts of America v. Dale, 530 U.S. 640 (2000) (finding that the Boy Scouts may exclude a person from membership based on the constitutional right of freedom of association).

given to religious actors because the exemptions may have the impact of strengthening religious social movements.[177] NeJaime & Siegal suggest that government programs are undermined when the government allows for religious exemptions that align with religious actors' efforts in the political sphere.[178] The exemptions have the impact of strengthening religious political efforts.[179] Therefore, they suggest, such exemptions should not be awarded to religious actors if it may cause the "harm" of strengthening a related political goal.[180] Dr. Laycock, specifically responding to this argument, called it "indefensible."[181] "The exercise of one right cannot be conditioned on the forfeiture of another."[182] While it is inappropriate to claim that other adherents to the No-Harm View share this particular view of "harm" with NeJaime & Siegal, these authors' "indefensible" conception of harm demonstrates the sort of race to the bottom that comes with allowing it to be defined so broadly.[183] Once one broad definition is accepted, it is even easier for lawyers to expand the definition as new clients present themselves. Allowing such inventions of harm to limit religious exercise proves the point that the No-Harm View's definition of harm shows no limits. Indeed, if any creative or clever assertion of injury can limit religious exercise, then there is no meaningful or tangible right to Free Exercise.

[177] Douglas NeJaime & Reva B. Siegal, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics.* 2518, Yale L. J. (2015).
[178] *Id.* at 2580-86.
[179] *Id.*
[180] *Id.*
[181] Douglas Laycock, Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Siegel, 125 YALE L.J. F. 369 (2016), http://www.yalelawjournal.org/forum/religious-liberty-for-politically-active-minority-groups.
[182] *Id.*
[183] *Id.* ("Conditioning the right to political speech on surrender of the right to conscientious objection-or vice versa-is well within the core [of unconstitutional conditions]. Religious conservatives do no forfeit their right to conscientious objection by making political arguments about the laws they object to, and they do no forfit their rights to make political arguments by invoking their right to conscientious objection. Religious conscience is widely protected in American law, and political speech is protected everything in American law.")

*2. The No-Harm View fails to consider the role the government plays in many of these disputes and provides the government with too much leeway to limit religious freedom*

For conflicts between religious exercise and third-parties, the No-Harm View conceives the religious actor as the cause and "harm" to the third-party as the effect. Based on this paradigm, the No-Harm View can only imagine one solution: End the religious actor's behavior, the cause, and the resultant harm, the effect, will disappear as well. However, this paradigm ignores the reality that in many of these disputes, it is the government who created the law or regulation that imposes on religious actors in the first place, even with good intentions. Acknowledging the government's role creates a new "cause and effect" paradigm which places responsibility directly on the government to create regulations and laws that do not substantially burden religious actors or put them in a position where their objection to a law will be viewed as harming others. As the petitioners in the *Zubik* case asserted, "[t]here is a sharp difference between preventing a religious group from inflicting harm and coercing it to provide benefits."[184] The new paradigm more accurately describes the government's role, and can lead to more creative solutions. The government may be able, for instance, to find another way to accomplish its goals without burdening religious actors.

By ignoring the government's role, the No-Harm View's definition of harm also has the effect of allowing any government agency to set limits to religious freedom with any regulation.[185] This logic allows the government to implement policies that offend religious actors without any recourse, as long as the laws are "generally applicable." With no responsibility assigned to lawmakers to consider the impact to religious actors, the government has jurisdiction

[184] Brief for Petitioners in Nos. 14-1418, 1453 & 14-505, at 53, *Zubik* (U.S. Jan 4, 2016).
[185] In this case, it was an Administrative regulation and not Congress that designed the mandate.

over any aspect of life or business. Religious actors have no choice but to adhere to these laws, because not adhering to them may cause "harm" to non-religious actors if such a harm can be articulated, which it probably can be. Indeed, this is the logical conclusion to Chemerinsky & Goodwin's argument that *any* harm or injury, no matter how it is conceived, should limit religious behavior. Certainly the Founders did not intend to vest either Congress or administrative lawmakers with absolute authority to determine the outer contours of the Free Exercise Clause.[186]

Any discussion of responsibility for third-party "harms" should be premised on the more accurate view that the government is an actor whose decisions have often created the conundrum, and who often has the power to solve the conflict in a way that protects religious freedom.

*C. The No-Harm View is irrationally concerned with the slippery slope that would come with allowing religious exemptions*

Ever since the Supreme Court in *Reynold's* stated that offering religious exemptions to a generally applicable law would cause every man to be a law unto himself,[187] arguments have been made attempting to limit exemptions for this very reason.[188] However, after several years of RFRA and RLUIPA with hundreds of court cases, and the time to observe the actual behavior of religious citizens, such concerns hopefully have subsided. Courts have ruled for religious actors in some cases and the government in other cases, each of which is fact specific. Indeed, the

[186] *See* section III.A *supra*.
[187] *Reynolds*, 98 U.S. at 166.
[188] Scalia also asserted this into his *Smith* majority. 494 U.S. 872, 885 (1990).

Supreme Court itself asserted that courts are capable of "case-by-case consideration of religious exemptions to generally applicable rules."[189]

A more important rebuttal to the assertion that offering one exemption would only lead to more, however, is that this argument elevates concern for administrative complexity over First Amendment rights. That any one person's rights should be limited because someone else might in the future claim a trivial exception is not fair to the individual whose rights are under consideration in the here and now. Limiting religious exercise based on a fear that other, even trivial, exemptions may present themselves in the future throws the proverbial baby out with the bathwater. The argument is really saying that Constitutional rights are not worth protecting if by doing so, continuing to protect them will grow more difficult. Such a view obliterates the force of Constitutional rights and undermines their purpose.

*D. Nothing in Prior Case Law Supports the No-Harm View*

No-Harm View proponents seem very confident in their assertion that case law, especially before *Hobby Lobby* which they criticize, supports their conclusions. However, in reality, case law, while being sensitive to third-party harms, has not provided such a clear-cut rule. For instance, in *Amos*, the Court upheld the religious exemption in Title VII of the Civil Rights Act and found that it does not violate the Establishment Clause.[190] In that case, an employee was fired from a religious non-profit for not meeting the religious requirements of the church and despite the clear harm that was felt by the former employee, the action was upheld.[191] In *The Selective Draft Law Cases* and *Gilette*, the Court upheld religious exemptions from military drafts for those who oppose war despite the impact that such an exemption may have on

[189] Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 436 (2006).
[190] Corp. of the Presiding Bishop v. Amos, 483 U.S. 387 (1987).
[191] *Id.*

others who must serve in their place.[192] *Walz* upheld property tax exemptions despite these exemption's impact on other parties who arguably must pay more – even if only slightly- to fund government initiatives.[193] The Court in *Yoder* allowed Amish parents to restrict their children from attending state mandated education despite state assertions that such exemptions would harm students.[194] The Court recently considered *Hosanna Tabor*, where it ruled that a fired teacher had no recourse under the Americans with Disabilities Act because "the Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."[195] The teacher was included under the broad definition of minister, and therefore was unable to sue her former employer.

Lawmakers have also protected religious actors at the inconvenience or injury to third parties. Title VII's religious exemptions are one example. Exemptions offered to health care providers who oppose participating in certain procedures, such as abortion, are another example.[196] Laws that exempt parents from criminal statutes when they choose, for religious reasons, not to seek medical care for their children are yet another example.[197]

These laws and cases demonstrate instances where courts and lawmakers have upheld religious practice (or exempted religious actors from generally-applicable laws) despite resulting cognizable harm inflicted on third-parties. This history supports the idea that there is no absolute bar to religious practice simply because third-parties are harmed.

[192] Gillette v United States, 401 U.S. 437 (1971); 245 U.S. 366 (1918).
[193] Walz v. Tax Comm'n, 397 U.S. 664, 664 (1970).
[194] Wisconsin v. Yoder, 92 S.Ct. 1526 (1972).
[195] *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012).
[196] *See* section I *supra*.
[197] *Id.*

Even more compelling is that courts and lawmakers not only protect *religious behavior* at the expense of others when deemed necessary, but also *non-religious behavior*. Other Constitutional rights are sometimes protected even at the risk of harm to others. For instance, the *Boy Scouts* case protected association rights at the expense of those who are excluded from membership despite the humiliation that likely comes from getting turned away.[198] Indeed, even non-Constitutional benefits are sometimes protected at the inconvenience of others. Consider the Family Medical Leave Act (FMLA) which allows employees to take a leave of absence for medical and family care and receive job protection.[199] Those who take advantage of this benefit do so at the inconvenience of employers and co-workers, and yet Congress chose to provide this benefit to employees who have family needs that require attention. For the impacted employees and employers, the benefit can certainly create more than a de minimis impact, depending on the situation. However, Congress determined that the needs of the employee in some cases outweigh the harm inflicted on the employee's coworkers or employer. Such lawmaker-invented benefits should not be protected above Constitutionally-mandated rights such as free exercise. As one scholar put it, "[m]ost exercise of constitutional rights inflict cost on others; there is no reason to require that religious liberty alone be entirely cost free."[200]

If Congress can exercise its power to create benefits that are not constitutionally mandated at the expense of other parties, then certainly religious exercise that impacts third parties should not be categorially disallowed. Again, this paper's goal is not to advocate for

[198] Boy Scouts of America v. Dale, 530 U.S. 640 (2000) (finding that the Boy Scouts may exclude a person from membership based on the constitutional right of freedom of association).
[199] *See* http://www.dol.gov/whd/fmla/.
[200] Douglas Laycock, Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Siegel, 125 YALE L.J. F. 369 (2016), http://www.yalelawjournal.org/forum/religious-liberty-for-politically-active-minority-groups.

harming third parties, just to refute the No-Harm View that *any* impact to third-parties automatically justifies limiting religious exercise.

### *IV. RFRA AND RLUIPA PROVIDE A PRAGMATIC, WORKABLE ANALYSIS FOR RELIGIOUS EXERCISE AND THIRD PARTIES.*

Ironic in much of this debate is that a workable solution has already been passed into law with RFRA and RLUIPA.[201] These laws already offer a mechanism for courts to consider scenarios where third-party harm may result from religious exemptions to generally-applicable laws. These laws begin with the appropriate test – the substantial burden test – which asks whether the government action or law has burdened a sincerely held religious belief.[202] That the law requires judges to begin with this inquiry is evidence of the due respect owed to the Free Exercise Clause as a Constitutional guarantee. If a substantial burden is found, the government rule in question must pass strict scrutiny analysis. The strict scrutiny test incentivizes the government to consider a law's impact to religious actors *before* regulations are passed. This requirement renders proponents of the No-Harm View mistaken in their assertion that in *Hobby Lobby*, for instance, providing an exemption necessarily creates cognizable harm to third-parties. RFRA does not mandate that Hobby Lobby's employees never have access to insured contraceptives; RFRA simply requires that the government find a different way to provide it.[203]

These laws do not solve every scenario, however, because they only protect religious actors from Federal and some state laws, and since not every state has adopted a RFRA, some

[201] *See* description in section I *supra*.
[202] *See* U.S.C. § 2000bb-(1)-(4).
[203] *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

state's laws are outside of the scope of protection.[204] Further, only some states have included private party protection in RFRA laws.[205]

However, while state and federal RFRAs and RLUIPA may not resolve every conflict, they do offer a workable solution to many scenarios where religious practice may impact third-party harm, since often it is the existence of a law or regulation that creates the tension in the first place.

## CONCLUSION

With a growing administrative state and changing social norms, religious actors and non-religious actors will increasingly find themselves at odds for control of policy, interpretation of rights, and so on. As one scholar explained "[i]t should be remembered that when the First Amendment was proposed and ratified, the government had little or no involvement in education, social welfare, or the formation and transmission of culture. These functions were predominantly left to the private sphere, and within the private sphere religious institutions played a leading role."[206] As our culture moves away from this norm, democratic processes play an important role in sorting out the resulting conflicts. However, there will be times when the Court will need to exercise its counter-majoritarian role and protect those whose rights are infringed on by the majority. "The Free Exercise Clause exists precisely because religious

[204] For a map of states that have adopted their own individual RFRA laws, *see* http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.

[205] One loophole is when states have RFRA laws and anti-discrimination laws, but RFRA does not particularly include protections for religious actors from having to obey anti-discrimination laws. Since the existence of the anti-discrimination law does not invoke RFRA (because the case is between two private parties and there is no government action involved), the religious actor is not protected. *See Elaine Photography* Elaine Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013) where the state found that the state RFRA did not apply because both parties were private, even though it was a state law mandating the religious actor's behavior. State RFRAs therefore should specifically protect religious actors in these scenarios. However, laws that have attempted to do so have been controversial and considered "anti-gay."

[206] Michael W. McConnell, *Why is Religious Liberty the "First Freedom"?* 21 Cardozo L. Rev. 1243, 1261(2000).

minorities often do not have the clout to protect their liberty politically.[207] At times, protecting those Constitutional rights may impact third-parties. At other times, religious actors may not get to practice their religion exactly as they wish due to its effect on others. However, one thing is certain; the No-Harm View is not the answer to conflicts that may arise in our increasingly pluralistic society. It offers a unidimensional answer to a multi-dimensional problem and does so in a manner that renders the Free Exercise Clause meaningless.

Meanwhile, RFRA and RLUIPA offer a balanced approach and provide judges with a thoughtful method to work through conflicts when the government has played a hand in creating them. These laws' primary strengths are that they demand respect for the substantial burden that modern laws sometimes place on religious practice. They also respect third-party rights with their inquiry into the compelling state interest test. Given the workability of RFRA and RLUIPA to deal with both religious burdens and third-party harms, there is no reason to abandon these laws for the No-Harm View which obliterates meaningful free exercise.

[207] Douglas Laycock, Religious Liberty and the Culture Wars, 2014 U. Ill. L. Rev. 839, 878 (2014).