

Hobby Lobby: The Crafty Case That Threatens Women’s Rights and Religious Freedom

by LESLIE C. GRIFFIN*

Introduction

In the name of religious freedom, the Supreme Court authorized the Green family, the Christian owners of the Hobby Lobby corporation, to impose their religious faith upon their female employees through force of law.¹ The Greens openly oppose abortion for religious reasons and believe that four of the twenty contraceptives, for which the Affordable Care Act (“ACA”)² requires insurance coverage, cause abortion. They asked the Court for an exemption from the ACA. The Court held that employers did not have to prove that the contraceptives were actually abortifacient drugs. Rather, the Court ruled, the Greens only had to assert their belief sincerely in order to become exempt from the law’s requirements to protect women’s health and equality. The Court’s decision thus “impose[d] the employer’s religious faith on the employees”³ in the name of religious liberty without regard for medical evidence or women’s rights.

Despite the pro-religion rhetoric surrounding it, *Hobby Lobby* marks a loss of religious freedom. Missing from the majority’s opinion is the core concept that religious freedom is necessary to

* William S. Boyd Professor of Law, UNLV Boyd School of Law, leslie.griffin@unlv.edu; B.A., University of Notre Dame; Ph.D., Religious Studies, Yale University; J.D., Stanford Law School. My thanks are due to Professors Marci Hamilton, Mark Tushnet, Thomas Main, Anita Bernstein, and Blake Johnson for help with this Article, and to the late John Rawls for setting me on the pathway toward constitutional reasoning.

1. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).
2. Patient Protection and Affordable Care Act, § 1001(a)(5), 42 U.S.C.A. § 300gg-13(a).
3. *United States v. Lee*, 455 U.S. 252, 261 (1982).

protect the rights of all Americans, and that a religious belief must not be imposed on citizens through the force of law. Any interpretation of the First Amendment or the Religious Freedom Restoration Act (“RFRA”)⁴ that imposes one citizen’s religious faith upon another must be rejected.

This Article defends this non-imposition model of religious freedom and describes why and how *Hobby Lobby* incorrectly departed from it. Part I explains that *Hobby Lobby* is part of a twenty-year trend that imposes religious values through the force of law. Part I.A describes the broad acceptance of the imposition model within the most popular theories of constitutional interpretation. Part I.B. traces the similarly far-reaching application of the imposition model by politicians, legislators and judges that culminated in *Hobby Lobby*. Part II demonstrates the value of the non-imposition model by tracing its success in the same-sex marriage equality movement. A review of state and federal same-sex marriage cases establishes that same-sex plaintiffs won whenever courts ruled that religious opinion could not be imposed through law (Part II.A) and lost wherever religious values won (Part II.B). Part III argues that civil rights are always endangered by the law’s imposition of religious values. *Hobby Lobby* demonstrates that religion-based law undermines women’s right to equality. The next step will be the loss of gay and lesbian rights, as believers claiming exemption from laws protecting gays and lesbians threaten the advances of marriage equality. I conclude that religious freedom is best protected when the Constitution and laws are interpreted to advance a shared political and legal system based on common values rather than religious ones.

I. The Trend Toward *Hobby Lobby*

My non-imposition model of government is straightforward. It holds that legal and political problems must be decided by legal and political principles. When resolving questions of public policy, everyone—citizens, judges, presidents, legislators—must begin at the same starting point. If reproductive health care or marriage equality is the contested issue, for example, then the discussion opens with the constitutional principles of equal protection and due process. That leaves citizens with plenty to debate, as many constitutional and legal provisions are indeterminate.

4. 42 U.S.C. § 2000bb *et seq.* (2006).

In contrast, in the values model associated with *Hobby Lobby*, individuals first consult their personal religions and philosophies (what the late philosopher John Rawls called “comprehensive doctrines”),⁵ find their preferred answers therein, and then transform those beliefs into law, *even if their fellow citizens do not share those beliefs and even if those beliefs restrict others’ freedoms*. Thus they impose their comprehensive doctrines on one another through the force of law.

Religious freedom cannot flourish in such a values-imposed environment because individuals are forced to live by norms and principles they do not share. Article VI and the First Amendment of the Constitution should protect individuals from such tyranny. Yet over the last sixty years too many interpretations of the Constitution have been rooted in comprehensive doctrines instead of in law. Today, the dominant account of judges, presidents, legislators, and citizens is that they frequently apply or translate their personal beliefs into public policy. The outcome of *Hobby Lobby* continues this alarming trend, and demonstrates that civil rights are restricted whenever comprehensive doctrines govern.

A. Interpreting the Constitution to Impose Personal Values

Imagine a room full of philosophers, political scientists, economists, theologians, and historians trying to persuade you that their discipline is superior and that it should make the laws for everyone else. The battle over constitutional interpretation has been similar to that scenario. Different comprehensive doctrines vied to set the constitutional standard for everyone else by turning their doctrines into law.

The Supreme Court’s controversial decisions about school desegregation, contraception, and abortion ramped up the debate about constitutional values, and shifted the nation’s attention toward what was the best way to interpret the Constitution. In *Brown v. Board of Education*, the Court ordered the desegregation of the public schools.⁶ In *Griswold v. Connecticut*, the Court identified a privacy right of married couples to use contraceptives.⁷ In *Roe v. Wade*, the Court recognized a woman’s right to decide whether to bear a child.⁸

5. JOHN RAWLS, *POLITICAL LIBERALISM* 247 (1993).

6. 347 U.S. 483, 495 (1954).

7. 381 U.S. 479, 498–99 (1965).

8. 410 U.S. 113, 166 (1973).

Critics of those rulings argued that the Court had pushed the constitutional text beyond its given meaning.⁹ These critics argued that if the Framers of the Fourteenth Amendment accepted racial segregation then it must be constitutional.¹⁰ Although a law forbidding the use of contraceptives might be “unwise, or even asinine,” they concluded, nothing in the Constitution prohibits it.¹¹ Similarly, they asserted that the right to abortion finds no support in any constitutional text.¹² Their argument developed that if constitutional values do not support desegregation, contraception, or abortion rights then the Justices had wrongly imposed their personal values on the country in an undemocratic act of judicial activism.¹³

After Supreme Court Justices, especially members of the Warren Court (1953-1969), were accused of imposing their own values on the Constitution, a lengthy debate about the possibility of finding values *within* the Constitution ensued.¹⁴ The discussion focused on whether “judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution . . . [or] should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document.”¹⁵ In awkward and confusing academic terminology, the group that followed the first strategy was labeled “interpretivist” and the second “noninterpretivist,” sometimes called “textualists” and “supplementers.”¹⁶ To put it in more direct language, they were debating whether to find values in the Constitution or to impose them on the Constitution from another source.

Both sides were critical of each other. Critics of noninterpretivism pejoratively labeled it “constitutional policymaking”¹⁷ or “judicial activism.”¹⁸ The noninterpretivists,

9. Edwin Meese III, *A Return to Constitutional Interpretation from Judicial Law-Making*, 40 N.Y.L. SCH. L. REV. 925, 927 (1996).

10. RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 166–92 (1977).

11. *Griswold*, 381 U.S. at 527 (Stewart, J., dissenting).

12. Critics from the left and right made this point. See, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

13. *Id.*

14. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (2002).

15. *Id.* at 1.

16. Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 1–5 (1984).

17. MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 2 (1982) (“[A] species of policymaking, in which the Court decides, ultimately without

however, insisted that the Constitution's text cannot answer all the questions posed to it.¹⁹ Some textual language—equal protection or due process, for example—is so broad that its interpretation is not self-evident.²⁰ Therefore, the answers must be sought elsewhere to decide cases.

The location of the elsewhere was contested. Where can one find a theory of values that clarifies the text of the Constitution? Predictably, comprehensive doctrines were offered as a solution, and, over time, constitutional theory became the battleground between the comprehensive doctrines. Philosophy, political science, economics, theology, and history all competed as candidates for the best hermeneutic tool to discover—or create—constitutional values.

Constitutional theorists usually focused on the judge's role, asking how judicial judgment could be enhanced by appealing to external disciplines.²¹ The philosopher judge, the political scientist judge, the economist judge, the theologian judge, and the historian judge all vied for primacy.

Unsurprisingly, as the idea of judges appealing to comprehensive doctrines became more acceptable, it transferred to presidents, legislators, and citizens. Today, the dominant account of judges, presidents, legislators, and citizens is that they frequently apply their personal beliefs to legal and political questions. Now, citizens regularly impose their religious and philosophical beliefs on one another without regard for each other's rights.

Envisioning the judge as a philosopher, political scientist, economist, theologian, or historian exposes the intellectual roots of the imposition model of governance, where citizens impose their fundamental values on each other instead of finding common ground in the Constitution. In the following sections, I introduce you to the philosopher judge, the political scientist judge, the economist judge, the theologian judge, and the historian judge. The point is to remind you that in my non-imposition model of constitutional interpretation, it is best to be simply a judge.

reference to any value constitutionalized by the framers, which values among competing values shall prevail and how those values shall be implemented.”).

18. *Id.*

19. *Id.*

20. See ELY, DEMOCRACY AND DISTRUST, *supra* note 14, at 31. The Equal Protection Clause, for example, is “a provision whose general concern—equality—is clear enough but whose content beyond that cannot be derived from anything within [the Constitution's] four corners or the known intentions of its framers.” *Id.*

21. See generally *id.*

1. The Philosopher Judge: Ronald Dworkin

Hercules is the most famous philosopher judge. Ronald Dworkin created Hercules to illustrate how an ideal judge decides cases.²² Hercules can decide easy cases by the constitutional text. To resolve a hard case, however, Hercules must identify the overarching principle that best fits the constitutional text and apply it with integrity to his case.

In deciding whether the Establishment Clause allows a state to provide busing to both religious and public school students,²³ for example, Hercules confronts two possible interpretations of religious liberty: “the right not to have one’s taxes used for any purpose that helps a religion to survive” or the right “not to have one’s taxes used to benefit one religion at the expense of another.”²⁴ Because both rules are plausible, Hercules must determine “which conception is a more satisfactory elaboration of the general idea of religious liberty.”²⁵ Hercules is brilliant enough to discern the correct guiding principle. Indeed, Hercules “always [has] a right answer—and that answer is provided by the normative theory that best fit and justified the law as a whole.”²⁶

Hercules’ task in identifying the decisive principle is straightforwardly philosophical. Even if the principle he selects is only “second-best”²⁷ (because the best philosophical principle in the world might be untethered to the Constitution), his job in crafting principles depends upon good philosophy. Indeed, early in his career, Hercules’ Creator lamented the disconnect between moral philosophy and the law and recommended the “fusion of constitutional law and moral theory.”²⁸ In 1975, Dworkin recommended John Rawls’s *A Theory of Justice* as a philosophical theory that “no constitutional lawyer will be able to ignore.”²⁹ Rawls’s principle of justice as fairness—which included equal basic

22. See generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978).

23. The question is based on the famous Supreme Court case, *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947), where the Court ruled that the busing did not violate the Establishment Clause.

24. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 22, at 107.

25. *Id.*

26. Lawrence B. Solum, *The Unity of Interpretation*, 90 B.U. L. REV. 551, 554 (2010) (symposium on Justice for Hedgehogs).

27. *Id.*

28. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 22, at 149.

29. *Id.*

liberties, fair equality of opportunity, and the difference principle—was thus relevant to constitutional law.³⁰

Dworkin urged constitutional law to “take rights seriously” and make rights “part of its own agenda.”³¹ Presumably no one could be of more help in setting that agenda than Rawls, the Harvard philosopher who had revolutionized the philosophical world by expounding a theory of justice that upset the dominant utilitarian school and defended the priority of the right over the good.³² Thus, Rawlsian moral and political philosophy served Dworkin’s vision of a “moral reading of the Constitution” that could replace legal positivism’s disconnect between law and morality.³³

2. *The Political Scientist Judge: John Hart Ely*

Law professor John Hart Ely quickly debunked Dworkin’s philosophical reading of the Constitution by wryly imagining its effect on a Supreme Court decision: “We like Rawls, you like Nozick. We win, 6-3. Statute invalidated.”³⁴ Like Rawls, Robert Nozick was a Harvard philosopher. Nozick, however, attacked Rawls’s ideas and defended a more libertarian reading of the state and private property in *Anarchy, State, and Utopia*.³⁵ As Ely shrewdly noted, the two philosophers “reach very different conclusions. There simply does not exist a method of moral philosophy. . . . The Constitution may follow the flag, but is it really supposed to keep up with the *New York Review of Books*?”³⁶

Ely’s gibe identified a salient criticism of philosophical judges. A philosophical basis for the Constitution ends in a choice among philosophers. One could choose John Locke, Jeremy Bentham, John Stuart Mill, John Rawls or Ronald Dworkin.³⁷ Critics of Rawls and

30. *Id.*

31. *Id.*

32. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

33. RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE CONSTITUTION* (1997).

34. ELY, *DEMOCRACY AND DISTRUST*, *supra* note 14, at 58.

35. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

36. *Id.*

37. *See, e.g.*, DAVID A. J. RICHARDS, *TOLERATION AND THE CONSTITUTION* (1986); DAVID A. J. RICHARDS, *FOUNDATIONS OF AMERICAN CONSTITUTIONALISM* (1989) (political philosophy of the Founders was clearly Lockean); David A. J. Richards, *Constitutional Privacy, The Right to Die and the Meaning of Life: A Moral Analysis*, 22 WM. & MARY L. REV. 327 (1981) (applying moral theory to right to die and privacy cases).

Dworkin reasserted the utilitarianism of Jeremy Bentham and John Stuart Mill. Dworkin defended himself against the charge of imposing his philosophy on the Constitution, arguing, for example, that although his political views favored some redistribution of wealth, the Constitution could not be read to support economic justice.³⁸ Ely opposed all such attempts to impose philosophy on the Constitution.

Ely opposed attempts to read substantive values into the Constitution, favoring process over substance. In *Democracy and Distrust*, Ely argued it is undemocratic for judges to impose their own substantive values on the Constitution. Instead, they should do what judges do best, namely keep the processes of democracy working while the people and their representatives appropriately make their own decisions about values.

Unlike rights theorists like Dworkin, Ely “ask[ed] us to focus not on whether this or that substantive value is unusually important or fundamental, but rather on whether the opportunity to participate either in the political processes by which values are appropriately identified and accommodated, or in the accommodations those processes have reached, has been unduly constricted.”³⁹

Ely’s process theory, which was based on a famous footnote in a Supreme Court decision, authorized the courts to protect democratic participation through “representation reinforcement.”⁴⁰ Thus, judges are referees who police the process of representation rather than players who identify substantive values. In other words, each judge is a mere mortal, not Hercules; judges are not philosophers, but simply judges. Specifically, Ely’s judge monitors situations in which:

- (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or
- (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced

38. See ELY, *DEMOCRACY AND DISTRUST*, *supra* note 14, at 36; see also Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 *YALE J.L. & HUMAN.* 155, 181 (2006) (“By the mid-1990s, Dworkin himself argued that not even Hercules—Dworkin’s name for his ‘ideal’ judge—could legitimately find Michelman’s theory of rights for the poor in the United States Constitution even though it was what liberal political theory required.”).

39. ELY, *DEMOCRACY AND DISTRUST*, *supra* note 14, at 77.

40. See generally *id.*

refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.⁴¹

The philosophers immediately struck back, labeling Ely a political scientist or, even worse, a utilitarian philosopher.⁴² They insisted that Ely had snuck his own substantive theory into the Constitution by privileging participation and democracy over other values like human rights.⁴³ Ely's judge was secretly a political scientist, not a neutral referee, because he had to figure out how democracy works. Because the Constitution does not define democracy, Ely's judge had to "appeal to critical political theory" to give the word meaning.⁴⁴ Moreover, only a political scientist could "determine when the channels of political change are blocked or a group is the victim of improper stereotyping."⁴⁵

Critics then charged that Ely, a constitutional lawyer, was a poor political scientist.⁴⁶ Judge Richard Posner, who led the movement to incorporate economic analysis into law, argued that the flaws in *Democracy and Distrust* were "also weaknesses at the level of political and social theory."⁴⁷ Critics lamented that Ely did not even bother to cite political science, economics, or public choice theory.⁴⁸ According to Posner, only social science can teach judges about the "design of political institutions" or the "effects of apportionment, the political dynamics of affirmative action, the conditions for effective minority politics, the significance of conflicting interests within a group (housewives and working women, for example, have sharply different economic interests), the force of inertia in the political

41. *Id.* at 103.

42. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM, *supra* note 37, at 252.

43. *Id.*

44. *Id.*

45. David A. Strauss, *Modernization and Representation Reinforcement: An Essay in Memory of John Hart Ely*, 57 STAN. L. REV. 761, 777 (2004); RONALD DWORKIN, A MATTER OF PRINCIPLE 34 (1985).

46. Richard A. Posner, *Democracy and Distrust Revisited*, 77 VA. L. REV. 641, 648 (1991).

47. *Id.*

48. *See id.* at 649 (Once Ely picked a constitutional text, he was "off and running . . . [b]ut to run well, you need more social science than Ely deploys in *Democracy and Distrust*.").

process.”⁴⁹ Without scientific data, Ely was merely another philosopher like Dworkin, imposing his own comprehensive doctrine on the Constitution without even understanding his comprehensive doctrine very well.

Other critics insisted that Ely’s principle of representation reinforcement was philosophically utilitarian because it weighed and balanced political interests.⁵⁰ In determining whether the political process was fair, Professor David A. J. Richards insisted Ely’s judge would “maximize the aggregate of satisfaction over frustration of interests, and judicial review assures that the interests are given their proper utilitarian weight.”⁵¹ As rights philosophers, Dworkin and Rawls had, of course, long opposed utilitarian philosophy. They had established their reputations by attacking utilitarianism’s dominance in moral and political philosophy and constitutional law. To them, Ely was just another utilitarian philosopher, balancing interests under a scheme to maximize pleasure, satisfaction, or happiness, and therefore imposing his (misguided) utilitarian values on the Constitution.

3. *The Economist Judge: Richard Posner*

Posner, the economist judge, rejected both utilitarianism and fundamental rights in favor of law and economics. Economists, Posner complained, were frequently equated with utilitarians and then derided and dismissed.⁵² Posner, however, argued that economics and utilitarian philosophy are not alike. Economists and utilitarians employ different methods of analysis and promote different values. Economics uses empirical tools that measure costs in monetary terms; utilitarianism begins with philosophical ideas. Economics promotes welfare; utilitarianism calculates happiness aggregated across society.⁵³ Economics balances costs; utilitarianism weighs utilitarian values.

49. *Id.* at 650.

50. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM, *supra* note 37, at 254.

51. *Id.*

52. Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979); Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1647 (1998) (“[E]conomic theory deals with observable social behaviors, such as price movements, firm size, input costs, output, shortages, wages, methods of compensation of employees and other agents, capital investments, population growth, and industrial output.”).

53. *Id.*

To clarify the point that economic welfare is different from utilitarian happiness, Posner defined the value behind economics as “wealth maximization” and argued that wealth maximization “provides a . . . basis for a normative theory of law.”⁵⁴ Economics, therefore, provides a better theory of judging than utilitarian or Kantian philosophy.⁵⁵ Unlike the utilitarian philosopher judge who weighed and balanced different interests against one another, or the Kantian judge who defended the dignity of the human person, the economist judge was a “rational, self-interested utility maximizer”⁵⁶ who enhanced wealth.⁵⁷

Posner was especially harsh in his criticism of “academic moralists,”⁵⁸ and denounced “Dworkin and his allies [as] the Taliban of Western legal thought”⁵⁹ for merging their own moral theories with law. Academic moralists inappropriately impose their own moral ends on the Constitution, he argued, while economists provide the appropriate means to the goals set by law.⁶⁰ To “advise a person (or, for that matter, an entire society) about the consequences of alternative paths to the goal that the person or society has chosen is not to commit oneself to a moral view.”⁶¹

The pragmatic Posner (a sitting federal judge) questioned the effectiveness of the philosophers’ and political scientists’ comprehensive theories in the world of real judging: “few judges (few anybody) are equipped to create or even evaluate comprehensive political theories.”⁶² Nonetheless, *some* room for personal values in judging remains as long as they are “yoked to empirical data.”⁶³ According to Posner, “most judges can handle facts better than they can handle theories.”⁶⁴ On that ground, empirical economics was superior to other disciplines that theorized without practical result.

54. Posner, *Utilitarianism, Economics, and Legal Theory*, *supra* note 52, at 103.

55. *Id.* at 119.

56. RICHARD A. POSNER, HOW JUDGES THINK 35 (2008).

57. For Posner’s criticism of Ely, see Posner, *Democracy and Distrust Revisited*, *supra* note 46, at 643.

58. Posner, *The Problematics of Moral and Legal Theory*, *supra* note 52, at 1638.

59. *Id.* at 1695.

60. *Id.*

61. *Id.* at 1669.

62. Richard A. Posner, *Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U. CHI. L. REV. 433, 449 (1992).

63. *Id.*

64. *Id.*

Philosophers pushed back, arguing that economic analysis cannot protect fundamental rights or defend against utilitarian values, the original goal of Dworkin and Hercules.

4. *The Theologian Judge: Stephen Carter*

With philosopher, political scientist, and economist judges hard at work, it was inevitable for theologian judges to demand their turn in the spotlight. The theologians' dominant argument was about *fairness*: if philosophers, political scientists and economists could impose *their* personal values on the Constitution, then theologians must be allowed to do so as well. This theological demand for fairness was crucial in inspiring the religious revival that led to *Hobby Lobby*.

The new theologians challenged the traditional separationist account of judges, which was rooted in the Establishment Clause of the First Amendment and required judges to separate their faith from their legal work.⁶⁵ Over many years of Senate confirmation hearings, Catholic Supreme Court nominees as liberal as William Brennan, moderate as Anthony Kennedy, and conservative as Antonin Scalia had all pledged to follow the Constitution over Catholicism and to resign if the two conflicted. Thus, they renounced their comprehensive doctrines in favor of the Constitution.

Yale Law professor Stephen Carter disputed the unofficial requirement that the "religiously devout judge" must promise separation.⁶⁶ If many judges relied on *other* personal values in deciding cases, and if Hercules could rely on philosophy, then religious values should not be banned under a proper reading of the Establishment Clause. Separation, Carter argued, "carries an implicit trivialization of religious faith, and a denigration of religion as against

65. Sanford Levinson, *Is It Possible to Have a Serious Discussion About Religious Commitment and Judicial Responsibilities?*, 4 U. ST. THOMAS L.J. 280, 283 (2006) (describing Scalia saying he would resign if faith conflicted with law and fortunately church's teaching on death penalty is not binding); *id.* at 287 (religion played almost no role in Alito and Roberts confirmations); Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047 (1990) (general background to confirmation hearings); *id.* at 1063 (Brennan oath to support the Constitution); *id.* at 1064 (Scalia); *id.* at 1065 (Kennedy). *But see* Scott C. Idleman, *Private Conscience, Public Duties: The Unavoidable Conflicts Facing a Catholic Justice*, 4 U. ST. THOMAS L.J. 312 (2006) (identifying that there are real conflicts for Catholic justices).

66. *See, e.g.*, Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932, 943 (1989); *see also* Robert F. Cochran, Jr., *Catholic and Evangelical Supreme Court Justices: A Theological Analysis*, 4 U. ST. THOMAS L.J. 296, 309 (2006).

other ways of knowing.”⁶⁷ Fairness required that religion be treated equally.

Carter contrasted the traditionally separatist objective, neutral judge with the reality of the “morally sensitive judge.”⁶⁸ Carter agreed with Dworkin that the traditional separatist judge, who ignored moral values, was unable to protect fundamental rights. Like Hercules, Carter’s morally sensitive judge brought moral values—religious or nonreligious, without discrimination—to bear on hard cases. “The idea, in short, is to treat all moral knowledge as one and once we decide to allow judges to rely on it, not to be fussy about its source.”⁶⁹ Every judge is treated alike. Christianity is as good as Kantianism in resolving hard questions of law.

Some judges decided cases on religious grounds.⁷⁰ Just as Hercules found guidance in moral philosophy, some theologian judges pursued Christian values in opposing contraception, abortion, and women’s equality.⁷¹ Most theologians agreed that religion was necessary only for the hard cases because law resolved the easy ones. They disagreed, however, about how explicit the appeal to religion should be.

Columbia law professor Kent Greenawalt, for example, argued that a judge might base her ruling on religious beliefs when the law is indeterminate.⁷² If interpretation of an environmental statute depends on the abstract issue of what duties we owe to nature, religion may resolve the controversy. However, Greenawalt was

67. Carter, *supra* note 66, at 933; *see also* Kent Greenawalt, *The Use of Religious Convictions by Legislators and Judges*, 36 J. CHURCH & STATE 541, 545 (1994) (“[F]or reasons of fairness, and because a religious person can hardly ask what are her personal moral convictions apart from her religion, judges will sometimes appropriately take their own religious convictions into account.”); Kent Greenawalt, *Some Problems With Public Reason in John Rawls’s Political Liberalism*, 28 LOY. L.A. L. REV. 1303 (1995).

68. Carter, *supra* note 66, at 933.

69. *Id.* at 943.

70. William H. Pryor, Jr., *The Religious Faith and Judicial Duty of an American Catholic Judge*, 24 YALE L. & POL’Y REV. 347, 355–56 (2006) (the actual Catholic judge here says he subscribes to Carter’s model of the objective judge and not to the morally sensitive one).

71. Raul A. Gonzalez, *Climbing the Ladder of Success—My Spiritual Journey*, 27 TEX. TECH L. REV. 1139 (1996) (identifying nine actual cases where his religion affected him); Wendell L. Griffen, *The Case for Religious Values in Judicial Decision-Making*, 81 MARQ. L. REV. 513, 515 (1998) (“[J]udges are Value-Sensitive People in a Value-Ridden Process”); *id.* at 516 (“it is unrealistic to demand that a person who is sincere in her religious conviction disown or discount that conviction when she assumes judicial office”).

72. Greenawalt, *The Use of Religious Convictions by Legislators and Judges*, *supra* note 67, at 545.

“extremely wary” about allowing judges to rely on religious premises, so he insisted that the judge’s written decision stand on public reasons and not on religious grounds.⁷³ Thus, religion could authentically provide a judicial answer but not provide the written grounds for justification.⁷⁴ Michael Perry objected, arguing that Greenawalt’s solution violated the rule of law: “That *judges* conceal that they have relied on a controversial premise, including a religious premise, is deeply problematic, as is the proposition that they *should* do so.”⁷⁵

Behind Greenawalt’s and Perry’s dispute lay a much broader potential controversy among theologian judges. Did Greenawalt unintentionally favor religions that could or would translate faith into public reason? Would Perry’s approach allow court opinions to be full of particular religious references, perhaps religions unshared by the parties to the case?⁷⁶ Would only certain types of religious argument be acceptable? Favoritism among religions is always problematic under the Establishment Clause. Once the courtroom door opens to one theologian judge, the rest must follow no matter what type of arguments they offer.

Theologians successfully convinced Americans that principles of fairness allow religious groups to impose their comprehensive doctrines, even in judicial opinions. Their success was a direct precursor to *Hobby Lobby*.

5. *The Historian Judge: Antonin Scalia*

Devout Roman Catholic Supreme Court Justice Antonin Scalia rejected the theological model of judges. Unlike the theologian judges, Scalia famously pledged to resign if his faith conflicted with

73. KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 239–41 (1988); see also Greenawalt, *The Use of Religious Convictions by Legislators and Judges*, *supra* note 67, at 545 (“[J]udges may sometimes appropriately rely on personal moral convictions even though their opinions make it seem as if they are relying only on sources available in the same way to all judges.”); *id.* at 549 (“[S]hared premises and forms of reasoning have priority; these will get judges all of the way in some cases but not in others. Thus, even though my category of personal moral convictions is narrower than Carter’s, I agree with him that sometimes judges will have to rely on personal moral convictions.”).

74. KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS 150 (1995).

75. MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES 104 (1997).

76. In his general theory described in *Religion in Politics*, Perry had required ecumenical political dialogue that put some limits on religious argument in terms of making it accessible to everyone. *Id.* at 78–79.

his oath of office.⁷⁷ Scalia is an originalist judge who prefers the objective, neutral model of judging to the morally sensitive judge or Hercules.⁷⁸ He led the Originalism movement that contested the personal values claims of the philosophers, political scientists, economists, and theologians by claiming to find a personal-value-free source in history. I call him a historian judge for reasons that follow.

Originalists sought to expel personal values from constitutional interpretation by focusing on the original Constitution. Originalism has survived many stages. The first wave (Old Originalism) focused on *original intent*, arguing that judges should learn the intent of the Framers at the time they drafted the Constitution and use it to interpret the Constitution today.⁷⁹ The Framers' intent would therefore replace the judge's personal values as a source of law.

Original Intent Originalism was "a negative and reactive theory"⁸⁰ whose main political goal was to criticize the liberal decisions of the Warren Court. Its theoretical flaws were quickly spotted. *Which* Framers' intents would be studied, and *how* would they be discovered? Even the best historical scholarship was inconclusive about such questions. Moreover, the *Ratifiers'* intent, critics insisted, was more legally binding than the *Framers'*, and yet more elusive for historical recovery.⁸¹ Even the brightest historian judge could not reconstruct James Madison's intentions, or George Mason's, or William Pierce's, or those of the Members of the Massachusetts Ratifying Convention, or Theophilus Parsons, or Virginians, or New Yorkers, etc.

The New Originalists replaced the Framers' and Ratifiers' *intent* with Public Meaning Originalism, which examines the "*objective* textual meaning measured by the hypothetical understanding of a reasonable person at the time of the framing."⁸² As Georgetown Professor Lawrence Solum explains, New Originalism combines the

77. Levinson, *The Confrontation of Religious Faith and Civil Religion*, *supra* note 65, at 1076 (Scalia is "especially dramatic insofar as it appears to be an unusually broad abnegation of the role of moral analysis in constitutional decisionmaking").

78. *Id.*

79. See, e.g., Larry Kramer, *Two (More) Problems with Originalism*, 31 HARV. J.L. & PUB. POL'Y 907, 909 (2008); see generally Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204 (1980).

80. Peter J. Smith, *How Different Are Originalism and Non-Originalism?*, 62 HASTINGS L.J. 707, 712 (2011).

81. See Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239 (2009).

82. Smith, *supra* note 80, at 713.

“fixation thesis” with the “constraint principle”; because “the [original] meaning of each constitutional provision is determined [i.e., fixed] at the time the text was written and adopted,” the judge is constrained to adopt it.⁸³ Justice Scalia allegedly initiated the movement from the Doctrine of Original Intent to the Doctrine of Original Meaning.⁸⁴

Scalia acknowledged that the original meaning judge must examine “an enormous mass of material,” including the constitutional text and structure, old dictionaries, state debates about ratification, and constitutions, contemporaneous understanding (especially of the Framers and the First Congress) as well as the “political and intellectual atmosphere of the time.”⁸⁵ Although Scalia conceded that this task is “sometimes better suited to the historian than the lawyer,”⁸⁶ he nonetheless favored this approach to judging because it replaces the personal preferences of the judge with the objective meaning of the Constitution. An originalist judge is not a philosopher judge. Scalia’s explanation of the Eighth Amendment clarifies the difference:

[T]he principle underlying the Eighth Amendment “is not a moral principle of ‘cruelty’ that philosophers can play with in the future, but rather the existing society’s assessment of what is cruel. It means not . . . ‘whatever may be considered cruel from one generation to the next,’ but ‘what we consider cruel today [i.e., in 1791]’; otherwise it would be no protection against the moral perceptions of a future, more brutal generation. It is, in other words, rooted in *the moral perceptions of the time.*”⁸⁷

83. Lawrence B. Solum, *Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption*, 91 TEX. L. REV. 147, 154 (2012).

84. Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 933 (2009).

85. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852, 856 (1988).

86. *Id.* at 857.

87. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 296 (2007) (quoting Antonin Scalia, *Response*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 129, 140 (Amy Guttmann ed., 1997)); *see also* Solum, *District of Columbia v. Heller and Originalism*, *supra* note 84, at 952 (In order to figure out that original meaning, the judge asks “How would the Constitution of 1789 have been understood by a competent speaker of American English at the time it was adopted?”); *see* Bret Boyce, *Heller, McDonald and Originalism*, 2010 CARDOZO L. REV. DE NOVO 2, 4

Thus, constitutional interpretation is rooted in history, not philosophy; in fixed meaning, not living text.

The philosophers, political scientists, economists, and some authentic historians resisted Originalism. The Original Public Meaning approach suggests that linguistic history is determinate. As with Original Intent Originalism, however, history is not up to the task of Original Public Meaning. If varying definitions of constitutional text existed at the time of drafting, then the judge might not be able to discover just *one* “fixed” meaning.⁸⁸ He might have to choose arbitrarily between two concurrent interpretations. In doing so, he would be considering individuals’ *conceptions* of words, which is no different from searching for original intent.⁸⁹ Even more strangely, he might prefer “a hypothetical author’s intended meaning (the meaning the hypothetical member of the public would erroneously assume was intended by the actual authors) over the actual authors’ intended meaning.”⁹⁰

Despite the high hopes of the Originalists, “linguistic facts” are not so clear that they can be interpreted without some sense of the hypothetical or historical interpreter. Thus, the historian judge inevitably creates a fictional interpreter, a creature of his imagination, a historical Hercules. Given that the “natural tendency for any interpreter [is] to think that the founding generations were composed

(2010) (“The theoreticians of public meaning originalism avoid the messy historical inquiry into how the adopters *actually* understood a given provision, and instead focus on how a *fictional* competent speaker *would have* understood the provision as determined by ‘conventional semantic meaning,’ the ‘rules of syntax,’ and other evidence of contemporary usage.”).

88. Kramer, *supra* note 79, at 912 (“You are deciding what principles should have been used in the eighteenth century to determine public meaning, because those principles were never settled.”).

89. See Tara Smith, *Originalism’s Misplaced Fidelity: “Original” Meaning is Not Objective*, 26 CONST. COMMENT. 1, 55 (2009) (Original meaning “interprets law’s language to reflect only the actual, inevitably limited conceptions of words’ meanings held by the public at a particular date. If we take the meaning of law’s words to be merely what certain people’s words meant *to them*—those individuals’ *conceptions*, no more and no less—we revert to the mind-reading games and variability that sank the Original Intent school.”); *id.* at 5 n.20 (“collapses into subjectivism”); *id.* at 56 (“What all Originalists fail to appreciate is that the popular understanding of certain words, however accurately we come to understand what that understanding actually was at a given date, remains a fact fundamentally about consciousnesses, rather than about reality. Consequently, it cannot sustain the objective rule of law.”).

90. Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, the Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 582–83 (2011) (quoting Larry Alexander).

of smart, sensible people like—well, the interpreter himself,”⁹¹ many of Justice Scalia’s decisions in fact reflect his personal values while claiming basis only in the text of the Constitution.⁹²

Judge Posner also questioned the Originalists for applying their theories to the Constitution. Posner observed that although Robert Bork—one of the first Originalists, who was rejected by the Senate after President Reagan nominated him to the Supreme Court—always opposed the use of moral philosophy in law, he was clearly “under the sway of a moral philosopher,” namely Thomas Hobbes.⁹³ The historian judge thus imposes a different era’s comprehensive doctrine on his colleagues, but that comprehensive doctrine is no less comprehensive than the philosophical, political, economic and theological accounts.

Even if a modern judge could work the Originalist method to find the accurate historical interpretation of the Constitution, he still faces the “dead hand” objection, which asks why Americans in 2015 should be governed only by the ideas of eighteenth-century men.⁹⁴ Indeed, the absence of women and slaves from most reports of the original Constitution represents a dead hand plus problem, leaving today’s diverse society to be ruled by the religions and philosophies of a small group of men, the “earlier men.”⁹⁵

From my perspective, Originalism became another instance, like philosophy, political science, economics, and theology, in which a comprehensive doctrine—belonging to an actual Framer or Ratifier, a hypothetical reader, or the judge himself—is applied to the Constitution.

Envisioning the judge as a philosopher, political scientist, economist, theologian, or historian exposes the intellectual roots of the imposition model of governance, where citizens impose their fundamental values on each other instead of finding common ground in the Constitution. In contrast, my non-imposition model speaks simply of the judge.

91. David A. Strauss, *Originalism, Conservatism and Judicial Restraint*, 34 HARV. J.L. & PUB. POL’Y 137, 143 (2011); see also Rakove, *supra* note 90, at 586 (“[T]he imaginary disinterested original reader of the Constitution remains nothing more nor less than a creature of the modern originalist jurist’s imagination.”).

92. See generally BRUCE MURPHY, *SCALIA: A COURT OF ONE* (2014).

93. Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1372 (1990).

94. Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 357 (1985).

95. Smith, *Originalism’s Misplaced Fidelity*, *supra* note 89, at 55.

6. *The Judge: John Rawls*

As noted above, during the 1970s and 1980s Harvard philosopher John Rawls's *A Theory of Justice* was widely recommended by philosopher judges as a valuable source of insight about fundamental rights and the United States Constitution.⁹⁶ The same philosophers and theologians later rejected Rawls's warning that comprehensive doctrines do not provide the basis for constitutional law and politics.⁹⁷ Rawls's 1993 book, *Political Liberalism*, challenged the dominant account of constitutional theory that judges appropriately apply their personal comprehensive doctrines to legal and political questions.⁹⁸ The widespread rejection of Rawls's argument confirmed that applying personal moral values to the Constitution was taken for granted as a matter of fairness and common sense, and that the non-imposition model of constitutional values had dropped from view by the 1990s.⁹⁹

Rawls argued that law and policy should be based on "public reason," not comprehensive doctrines, and that everyone, including judges, politicians, legislators, and citizens, should rely on public reason in deciding constitutional essentials and matters of basic justice.¹⁰⁰ Public reason is quite demanding, especially for adherents of strong comprehensive doctrines. In discussing constitutional essentials and matters of basic justice, public reason says "we are not to appeal to comprehensive religious and philosophical doctrines—to what we as individuals or members of associations see as the whole truth."¹⁰¹ Instead, citizens should be guided by "what principles and guidelines we think other citizens (who are also free and equal) may reasonably be expected to endorse along with us."¹⁰²

96. RAWLS, *A THEORY OF JUSTICE*, *supra* note 32.

97. Leslie C. Griffin, *Good Catholics Should Be Rawlsian Liberals*, 5 S. CAL. INTERDISC. L.J. 297, n.24–54 and accompanying text (1997).

98. RAWLS, *POLITICAL LIBERALISM*, *supra* note 5.

99. For critical treatment of this concept, see generally Kent Greenawalt, *On Public Reason*, 69 CHI.-KENT L. REV. 669 (1994); Lawrence B. Solum, *Constructing An Ideal of Public Reason*, 30 SAN DIEGO L. REV. 729 (1993); Peter de Marneffe, *Rawls's Idea of Public Reason*, 75 PAC. PHIL. Q. 232 (1994); Lawrence B. Solum, *Inclusive Public Reason*, 75 PAC. PHIL. Q. 217 (1994); Kent Greenawalt, *Some Problems With Public Reason in John Rawls's Political Liberalism*, 28 LOY. L.A. L. REV. 1303 (1995); Elizabeth H. Wolgast, *The Demands of Public Reason*, 94 COLUM. L. REV. 1936 (1994).

100. RAWLS, *POLITICAL LIBERALISM*, *supra* note 5, at 224–26 (1993).

101. *Id.* at 224–25.

102. *Id.*; see also JOHN RAWLS, *POLITICAL LIBERALISM* 1 (Paper Ed.) ("This ideal is that citizens are to conduct their public political discussions of constitutional essentials and matters of basic justice within the framework of what each sincerely regards as a

Endorse is the key word; I may *understand* that President Obama governs from Christian principles because he is a committed Christian, but I cannot be expected to *endorse* Christian government if I am not Christian. I may *understand* that Hercules is a committed Kantian, but cannot *endorse* government based on Kantian principles, especially if I am a utilitarian or an economist. Whenever citizens vote their Christianity or Kantianism into law, Rawls argued, they coerce their fellow citizens to obey those beliefs and thus use “unreasonable force” against them.¹⁰³ Rawls thus captured the non-imposition model of the Constitution in the philosophical language of public reason.

Rawls identified Supreme Court Justices as exemplars of public reason and argued that public reasons were obligatory in judicial opinions as well as in legislation and voting.¹⁰⁴ In contrast to Greenawalt, who allowed judges to reason from religious premises, or Perry, who encouraged judges to include whatever reasoning they used, Rawls insisted that “public reasons should guide decision as well as debate and opinion writing.”¹⁰⁵

The criticisms of Rawlsian public reason were extensive. Professors Perry, Dworkin, Greenawalt, and Carter were among the harshest detractors. Three recurring complaints were that public reason was unfair, impractical, and impossible. Public reason was unfair because religion was shut out of the marketplace of ideas, impractical because politics depends upon appeals to comprehensive doctrines, and impossible because individuals cannot put aside their personal beliefs.¹⁰⁶ Dworkin, in particular, argued “liberals will not

reasonable political conception of justice, a conception that expresses political values that others as free and equal also might reasonably be expected reasonably [sic] to endorse.”).

103. RAWLS, *POLITICAL LIBERALISM*, *supra* note 5, at 247. *But see* Miriam Galston, *Rawlsian Dualism and the Autonomy of Political Thought*, 94 COLUM. L. REV. 1842 (1994) (arguing against Rawls’s assumptions that comprehensive doctrines that dictate political outcomes are unreasonable).

104. RAWLS, *POLITICAL LIBERALISM*, *supra* note 5, at 216. *See generally* Samuel Freeman, *Political Liberalism and the Possibility of a Just Democratic Constitution*, 69 CHI.-KENT L. REV. 619, 656 (1994) (noting that public reason is hypocritical if it allows individuals to “vote their personal preferences and comprehensive views with impunity,” and suggesting that Greenawalt must allow for this).

105. Greenawalt, *On Public Reason*, *supra* note 99, at 677–79.

106. For the point that public reason is restrictive, see Galston, *supra* note 103, at 1844 (noting “how exclusionary his political theory in fact is in its characterization of certain comprehensive views [both religious and non-religious] as unreasonable”); Michael J. Sandel, *Political Liberalism*, 107 HARV. L. REV. 1765, 1776 (1994) (“[Public reason] is an unduly severe restriction that would impoverish political discourse and rule out important dimensions of public deliberation”); *id.* at 1790, 1791 (“restrictive character of liberal

succeed if they ask people of faith to set aside their religious convictions when they take up the role of citizens.”¹⁰⁷ Greenawalt was even more direct, arguing that “ordinary people” cannot leave aside their comprehensive doctrines absent “exceptional discipline,”¹⁰⁸ which is not an every day occurrence.

Rejecting public reason, the comprehensive theorists (unsurprisingly) argued that political debate should take place according to the arguments of comprehensive doctrines. Liberals, Dworkin recommended, “must try to show religious conservatives that their ambition to fuse religion and politics in the way they now propose is an error because it contradicts very basic principles that are also part of their faith. Conservatives must try to show liberals that they are wrong in that judgment.”¹⁰⁹ In other words, citizens should battle over faith.

public reason”); Wolgast, *supra* note 99, at 1943 (arguing that in the context of the passage of a law on inoculation for children opposed by a Christian Science congressman, Rawls’s approach deprives individuals of the “considerable power” and “passion” of religious argument. “Framed in this cooler, more legalistic way, some of its power has certainly been lost.”). See generally Gary C. Leedes, *Rawls’ Excessively Secular Political Conception*, 27 U. RICH. L. REV. 1083, 1104 (1993) (book review) (“This kind of discriminatory treatment is unlikely to end the culture wars between many Americans and their adversaries including Christian fundamentalists, Islamic fundamentalists, conservative Catholics, and Orthodox Jews. Rawls is in cloud-cuckoo land if he thinks that religious disagreements will be reduced in number by a political theory that stigmatizes devout persons whose political opinions are consistently aligned with their religious orientation.”).

107. RONALD DWORKIN, *IS DEMOCRACY POSSIBLE HERE?: PRINCIPLES FOR A NEW POLITICAL DEBATE* 65 (2006).

108. KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS*, *supra* note 74, at 138 (arguing that the rare person who managed to separate perspectives would inevitably question whether her political opponent was doing the same in good faith, and eventually become skeptical about “neutral” accounts of political debate because of growing mistrust of her interlocutors); *id.* at 138 (“If someone is conscientiously trying to purge his own position of religious or comprehensive views, but finds (surprisingly) that his position ends up being the one that fits best with those overall views, how far is he going to believe that his opponents have managed to discount their comprehensive views?”); *id.* (“people are likely to feel that if they try too hard, they will be unfairly disadvantaging the comprehensive views from which they begin.”); *id.* at 138–39 (“It is demanding a great deal to ask people strenuously to aim to distance themselves from their comprehensive views when they will inevitably suspect that their political opponents are failing to do so.”); see also Kent Greenawalt, *Religion and Public Reasons: Making Laws and Evaluating Candidates*, 27 J.L. & POL. 387, 392 (2012) (Repeating the earlier point that it applies to public justification, not actual reasoning: “If most people are not really capable of excising all their religious understandings from their political positions, it would be unwise to insist that they do so.”).

109. DWORKIN, *IS DEMOCRACY POSSIBLE HERE?*, *supra* note 107, at 65.

The politicians agreed. Thus, we suffer from the current political environment, where politicians express their religious views openly, or translate them into more public language, and then expect their comprehensive doctrines to provide common ground for the 260 million people of the United States, who subscribe to 350,000 religious congregations, and the 50 million who affiliate with no religion at all.¹¹⁰

While comprehensive constitutional theory encouraged comprehensive doctrine-based judging, it was the politicians who grabbed the values theories and ran with them, thereby creating the faith-based politics that led to *Hobby Lobby*.

B. Faith-Based Politics

Ironically, our contemporary faith-based politics arose in response to President Jimmy Carter, a devout Christian who by Southern Baptist faith believed in “absolute and total separation of church and state.”¹¹¹ Carter modeled his early political career after President John F. Kennedy, the nation’s first and only Roman Catholic president, who won non-Catholic voters’ confidence in a famous 1960 campaign speech when he pledged to obey the Constitution, not the pope, and to resign if his faith conflicted with his oath of office.¹¹² Carter took the Kennedy separationist pledge when he ran for president in 1976.

1. The Rise of Faith-Based Politics from Presidents Jimmy Carter to Barack Obama

Carter placed Christianity at the heart of his political identity and at the core of his presidency in a more open manner than previous presidents, especially by repeatedly describing what it meant to be a born-again Christian.¹¹³ In 1976, in a close victory over President

110. Greenawalt, *Religion and Public Reasons*, *supra* note 108, at 393 (Consistent with his position on judging, Greenawalt was less certain about open religious advocacy, thinking that everyone could rely on religious premises without stating them publicly: “This does involve some sacrifice in candor, but I believe that is a relatively minor concern about the candor of public officials, and an acceptable cost.”).

111. Interview by Ralph Blodgett with Jimmy Carter, in *The Church and the State*, LIBERTY, Sept./Oct. 1976, reprinted in JIMMY CARTER, 1 THE PRESIDENTIAL CAMPAIGN 1976 974–76 (1976); *Carter Reassures Jews*, Facts on File World News Digest, 1976 DIGEST, at 410 n.3.

112. *Transcript: JFK’s Speech on His Religion*, NPR (Dec. 5, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=16920600>.

113. See, e.g., Jimmy Carter, *Judge Not*, ATLANTA JOURNAL-CONSTITUTION, Feb. 27, 1996, at A17; John Rivera, *Jimmy Carter’s Mission in Life: Religion: Former President*

Gerald Ford, Carter became the first Democrat since Harry Truman to carry the Southern Baptist vote and won over a significant number of Protestant evangelical voters who traditionally voted Republican.¹¹⁴

The Evangelicals, however, quickly became disaffected with Carter's policies. Evangelicals did not support eliminating tax exemptions for religious schools that discriminated on the basis of race, restricting government funding of religious schools, opposing prayer in public schools, and enforcing the constitutional right to abortion. In other words, the Evangelicals were disappointed that the Christian Carter's policies were not pro-Christian and Christian-based.¹¹⁵ In protest, they formed the organizations of the new Christian Right and sought candidates whose views were in line with their own.¹¹⁶ As a result of their dissatisfaction with Jimmy Carter's presidential choices, Ronald Reagan gained the religious and evangelical vote in the 1980 election.¹¹⁷

The Christian Right targeted abortion rights. Religious battles over abortion heated up in the late 1970s due to a vigorous anti-*Roe* campaign by the nation's Catholic bishops, who wanted their reproductive values, not the Supreme Court's, to govern the nation.¹¹⁸ In 1980, when Reagan defeated Carter, the Republican Party's platform pledged for the first time to appoint judges "who respect traditional family values and the sanctity of innocent human life."¹¹⁹ Sanctity, of course, is a religious word invoking the sacred, holy or saintly. The platform's goal was for judges to start with their vision of sanctity and apply it to the law as the bishops and other Christians wanted. Since 1980, the nomination of federal judges has become

Brings His "Living Faith," Decades of Lessons from His Sunday School Lectures, to Baltimore, BALTIMORE SUN, Nov. 21, 1997, at 1E.

114. TIMOTHY A. BYRNES, CATHOLIC BISHOPS IN AMERICAN POLITICS 84 (1993); Leo P. Ribuffo, *God and Jimmy Carter*, in TRANSFORMING FAITH: THE SACRED AND SECULAR IN MODERN AMERICAN HISTORY 146 (M. L. Bradbury & James B. Gilbert, eds., 1989).

115. See generally MATTHEW C. MOEN, THE TRANSFORMATION OF THE CHRISTIAN RIGHT IN THE 1980S (2008).

116. *Id.*

117. Albert J. Menendez, *Religion at the Polls, 1980*, 33 CHURCH & STATE 15 (1980) (Carter received only 40% of the Catholic and Baptist vote); ROBERT BOOTH FOWLER & ALAN D. HERTZKE, RELIGION AND POLITICS IN AMERICA: FAITH, CULTURE, AND STRATEGIC CHOICES 103 (4th ed. 2009) (Carter received 64% of the Jewish vote).

118. See generally PATRICIA MILLER, GOOD CATHOLICS: THE BATTLE OVER ABORTION IN THE CATHOLIC CHURCH (2014).

119. Republican Nat'l Comm., *The Republican Party Platform*, reprinted in 2 NATIONAL PARTY PLATFORMS 965, 974 (Donald Bruce Johnson ed., 1978).

increasingly ideological as partisans seek judges who interpret the law in light of their comprehensive doctrines instead of starting with the Constitution.

After 1980, gradually the Christian Right emerged as a new force in American politics,¹²⁰ its power culminating in the 2000 election of George W. Bush.

The younger Bush had realized “My God, you could win the White House with nothing but evangelicals,”¹²¹ during his father’s 1988 campaign, when he served as liaison to evangelical voters. The Christian Right recognized that the younger, but not the elder, Bush was one of the faithful. In 2000, the Christian Right attained their goal of bringing *its* religious values to the White House. Bush pursued the groups’ agenda during his first term by funding faith-based organizations without regard to the antidiscrimination laws.¹²² He was reelected in 2004 largely due to a nationwide religious campaign to ban same-sex marriage. He then appointed two of the Catholic Justices (Roberts and Alito) who formed the majority in *Hobby Lobby*, fulfilling campaign promises to appoint “strict constructionists” to the Court.¹²³

President Barack Obama continued the religious emphasis of his predecessor. Early in his political career, Obama famously criticized fellow Democrats for adhering too rigidly to Kennedy’s separationism.¹²⁴ The Kennedy approach not only unfairly excluded people of faith from the public square, Obama argued, but also foolishly conceded religious voters to Republicans and therefore lost

120. RICHARD A. VIGUERIE, *THE NEW RIGHT: WE’RE READY TO LEAD* 27–30 (1981); RICHARD V. PIERARD & ROBERT DEAN LINDER, *CIVIL RELIGION & THE PRESIDENCY* 231, 263 (1988).

121. Sam Allis, *A Timely Look at How Faith Informs Bush Presidency*, *BOSTON GLOBE*, Apr. 29, 2004, at D1.

122. Executive Order 13279, Dec. 12, 2002, *Equal Protection of the Laws for Faith-Based and Community Organizations*, 67 Fed. Reg. 77141 (Dec. 16, 2002).

123. Jeffrey Rosen, *Can Bush Deliver a Conservative Court?*, *N.Y. TIMES* (Nov. 14, 2004), available at <http://www.nytimes.com/2004/11/14/weekinreview/14jeff.html?pagewanted=1#>.

124. See Senator Barack Obama, Keynote Address at the Sojourners/Call to Renewal “Building a Covenant for New America” Conference: Faith and Politics (June 28, 2006), *TRANSCRIPT: Obama’s 2006 Sojourners/Call to Renewal Address on Faith and Politics*, SOJOURNERS: GOD’S POLITICS BLOG (Feb. 21, 2012, 3:36 PM), available at <http://sojo.net/blogs/2012/02/21/transcript-obamas-2006-sojournerscall-renewal-address-faith-and-politics>.

elections.¹²⁵ After Obama won elections, religious politics seemed a good idea to Democrats and Republicans alike.

In contrast to Kennedy's separation model, Obama developed a "translation" approach to religion and politics. He argued that because of American pluralism, politicians should "translate their concerns into universal, rather than religion-specific, values."¹²⁶ Obama's original opposition to same-sex marriage, for example, was based upon his interpretation of the Bible.¹²⁷ Because the Bible (in Obama's view) forbade gay marriage, so would he. In this Obama, like Bush, was just like the comprehensive doctrine theorists described in Part I; he started with his personal beliefs and applied them to the Constitution. In my language, this is the pro-imposition, values-based model of governance; the translation might hide the imposition, but does not change its nature. It is now equally accepted by Republican and Democratic politicians alike.

2. *The Pro-Faith Legacy of President Clinton*

Ironically, it was another Democratic Southern Baptist president—William Jefferson Clinton—who most successfully implemented the Christian values agenda that culminated in *Hobby Lobby*. Clinton enthusiastically praised the "theologian judge" Stephen Carter's 1993 book, *The Culture of Disbelief*, for accurately capturing his experience that the public culture was hostile to religion and unfairly excluded religious voices from debate.¹²⁸ Clinton's respect for Stephen Carter motivated him to pursue "a two-step plan for integration of religion into the public square. First, he implore[d] religions to work together. Second, he advocate[d] bringing them closer to the government."¹²⁹ In other words, he encouraged citizens to impose their comprehensive doctrines upon one another; indeed, he even helped popular comprehensive doctrines set the political and legal agenda for his administration.

Clinton ran with Carter's theologian judge model and implemented it extensively in the political arena to support numerous

125. *Id.*

126. BARACK OBAMA, THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM 219 (2008).

127. *Id.* at 222–24.

128. STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993).

129. Marci A. Hamilton, *Religion and the Law in the Clinton Era: An Anti-Madisonian Legacy*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 359, 364–65.

policies favoring comprehensive doctrines.¹³⁰ Two major religion-based laws concern us here, namely, the Defense of Marriage Act (“DOMA”) of 1996 and the Religious Freedom Restoration Act (“RFRA”) of 1993.¹³¹ Both statutes were misnamed. DOMA restricted the right to same-sex marriage instead of defending it. RFRA did not restore anything, but instead created special rights for religious groups and individuals that they had never enjoyed before. *Hobby Lobby*, of course, is the result of RFRA.

The fate of the two statutes confirms the dangers of comprehensive doctrine imposition and the wisdom of my non-imposition model of government. In 2013, the Court honored constitutional principles over religion principles by invalidating sections of DOMA in *United States v. Windsor*.¹³² In 2014, the Court honored religious principles instead of constitutional principles by adopting a broad interpretation of RFRA and imposing religious doctrine on women employees in *Burwell v. Hobby Lobby*.¹³³ Unfortunately, in the long run, *Hobby Lobby* is likely to undermine *Windsor* and the right to same-sex marriage, as I explain later in Part II.

a. Defense of Marriage Act

The Hawaii Supreme Court started the same-sex marriage ball rolling in 1993 when it ruled in *Baehr v. Lewin* that a ban on same-sex marriage was a form of sex discrimination that must be subjected to heightened scrutiny.¹³⁴ Although Hawaii voters immediately rejected same-sex marriage at the ballot box, fear of same-sex marriage gripped the nation as other states worried that they might have to recognize gay and lesbian marriages performed in Hawaii or other states.¹³⁵

In a forceful response to *Baehr*, Congress passed and President Clinton signed DOMA in 1996, which restricted marriage in two ways. First, for purposes of federal benefits, DOMA defined

130. *Id.*

131. See 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006) (DOMA); 42 U.S.C. § 2000bb *et seq.* (2006) (RFRA).

132. 133 S. Ct. 2675 (2013).

133. 134 S. Ct. 2751 (2014).

134. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

135. For a description of the amendment process, see David Orgon Coolidge, *The Hawai'i Marriage Amendment: Its Origins, Meaning and Fate*, 22 U. HAW. L. REV. 19, 32–38 (2000).

marriage as between a man and a woman only.¹³⁶ Second—in contradiction to the usual rule of the Full Faith and Credit Clause, which requires states to respect the legal rulings of other states—DOMA authorized the states to refuse recognition to same-sex marriages.¹³⁷ If marriage became legal in Hawaii, Texas would not have to recognize it.

The justifications for DOMA were traditional Christian arguments. The House Report explained the government's interests in DOMA by citing testimony from Professor Hadley Arkes, who was well-known for arguing that *a priori* moral principles should be applied to the Constitution.¹³⁸ Rejecting the idea that marriage should publicly recognize “love between persons,” Arkes argued, “at its core, it is hard to detach marriage from what may be called the ‘natural teleology of the body’: namely, the inescapable fact that only two people, not three, only a man and a woman, can beget a child.”¹³⁹ Furthermore, the House reported that DOMA appropriately protected “traditional notions of morality” and that civil marriage law is justifiably based upon “a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.”¹⁴⁰

All those references to tradition were in fact invoking a traditional *Christian* account of marriage that is much older than the Constitution and American law. Its lineage links to St. Augustine, the prominent Christian Bishop of Hippo who wrote *On the Good of Marriage* around the year 401 C.E. Augustine established the essential definition of marriage that dominated centuries of Christian history and later influenced American marital law, including DOMA.¹⁴¹ According to the Bishop of Hippo, marriage has three goods: procreation, fidelity, and indissolubility.¹⁴²

St. Augustine was troubled by the sinfulness of sexual desire, which he viewed “as in itself an evil passion (that is, distorted by

136. 1 U.S.C. § 7 (2006).

137. 28 U.S.C. § 1738C (2006).

138. H.R. REP. NO. 104-664, at 13 (1996) (footnote omitted), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2917.

139. H.R. REP. NO. 104-664, at 13 (1996) (footnote omitted), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2917.

140. *Id.* at 16 (emphasis added).

141. See generally Charles J. Reid, Jr., *The Augustinian Goods of Marriage: The Disappearing Cornerstone of the American Law of Marriage*, 18 *BYU J. PUB. L.* 449 (2004).

142. *Id.*

original sin).”¹⁴³ Instead of insisting that Christians renounce all sex, however, he identified a moral rationale that justified some sexual activity, namely procreative heterosexual marriage. His theory of marriage channeled sexual desire into its proper procreative purpose within heterosexual marriage. Such limited sexual activity was moral because it served the goal of procreation, thus avoiding unruly passion and sin.

For St. Augustine, marriage was more than procreative because the marital relationship fostered a personal loyalty between spouses.¹⁴⁴ Hence the first two goods of marriage provided a procreative as well as an interpersonal relationship that set appropriate limits on human sexuality.

As for the third good of marriage, “[e]ven where the spouses are unable to procreate, even where one spouse has abandoned the other, Augustine asserted, they remain *symbolically bound* to one another.”¹⁴⁵ That bond cannot be broken and provides the basis for the argument that Christians may not divorce.

With DOMA, President Clinton and Congress inscribed the Augustinian notion of marriage into the United States Code. In Part II below I explain that judges who subscribe to the Augustinian ideal have consistently ruled against marriage equality while those interpreting the Constitution have supported it.

In retrospect, it seems puzzling that a Democratic president like Bill Clinton, an early supporter of gay and lesbian rights, did not veto DOMA. Recent commentary suggests that “[i]nside the White House, there was a genuine belief that if the President vetoed [DOMA], his reelection could be in jeopardy.”¹⁴⁶ Clinton’s support of DOMA for electoral reasons, thus, confirms the political clout of religious groups.

In 1993, Clinton joined with those groups to champion RFRA’s passage. Unfortunately, RFRA threatens gay and lesbian rights but

143. MARGARET A. FARLEY, *JUST LOVE: A FRAMEWORK FOR CHRISTIAN SEXUAL ETHICS* 40 (2006).

144. *Id.* This understanding of the first two goods of marriage explains the moral opposition to contraception in modern Roman Catholic thought that persists today in the contraceptive mandate cases. Having sex without procreative intent treats the partner as a “fornicator” and undermines the essential procreative purpose of marriage, which is always present even when procreation cannot or does not occur. See Reid, Jr., *supra* note 141, at 454.

145. *Id.* at 453 (emphasis added).

146. Richard Socarides, *Why Bill Clinton Signed the Defense of Marriage Act*, THE NEW YORKER (Mar. 8, 2013), available at <http://www.newyorker.com/online/blogs/newsdesk/2013/03/why-clinton-signed-the-defense-of-marriage-act.html>.

everyone else's rights as well. The statute marked the triumph of values-based, imposition-heavy government over civil rights.

b. Religious Freedom Restoration Act

The sad story of RFRA's passage has been told brilliantly by Professor Marci Hamilton, the Cardozo Law professor who successfully persuaded the Supreme Court in *City of Boerne v. Flores* that RFRA was unconstitutional as applied to the state governments.¹⁴⁷ I summarize the highlights of RFRA's history here as they relate to values imposition and *Hobby Lobby*.

In 1990, before Clinton was elected president, the Supreme Court decided *Employment Division v. Smith*.¹⁴⁸ The case involved two Native American drug counselors from Oregon who used peyote in a religious ritual. Because peyote use was illegal under state law, the two men were denied unemployment compensation benefits after their employer fired them for drug use.

Justice Antonin Scalia wrote the opinion denying the men's First Amendment Free Exercise Clause claim that they were entitled to the benefits because they were fired for practicing their religion. Justice Scalia wrote that the criminal drug laws were "neutral laws of general applicability" that the men must obey; the First Amendment did not entitle them to any exemption.¹⁴⁹ He concluded an exemption-based interpretation of the First Amendment would improperly allow every citizen to become "a law unto himself" and thus undermine the rule of law.¹⁵⁰

Although there was a long, pre-*Smith* history of Court cases that applied *Smith's* rule—including the Court's first free exercise opinion¹⁵¹—many religious groups and individuals pushed back against the Court's decision. After 1992, the *Smith* opposition found a new friend in the Clinton White House. Clinton interpreted *Smith* as hostile to religious freedom instead of recognizing it as an opinion that protected civil rights by requiring all citizens to follow the law equally.

Clinton then empowered an array of religious groups, conservative and liberal, to pass RFRA for the direct purpose of

147. *City of Boerne v. Flores*, 521 U.S. 507 (1997); Marci Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 U. PA. J. CONST. LAW 1 (1998).

148. 494 U.S. 872 (1990).

149. *Id.* at 880.

150. *Id.* at 885.

151. *Reynolds v. United States*, 98 U.S. 145 (1878).

overruling *Smith*. Under RFRA, if a neutral law substantially burdens religion, the government—state or federal—has to demonstrate that it has a compelling government interest and has used the least restrictive means to further that interest.¹⁵² That test was not only the strictest form of scrutiny available in constitutional law, but had never been the law of the First Amendment pre-*Smith*. Moreover, Congress applied this demanding new standard to both the state and the federal governments. Every neutral law in America was now subject to legal challenge.

In *City of Boerne v. Flores*, Professor Hamilton persuaded the Court that RFRA was unconstitutional as applied to the states because it exceeded Congress's powers under Section 5 of the Fourteenth Amendment.¹⁵³ Central to that holding was the Court's ruling that Congress's action in passing RFRA was disproportionate and incongruent because there was insufficient evidence of religious discrimination nationwide to justify the sweeping legislation. In other words, the RFRA coalition's understanding that the nation was populated by religious discrimination was not supported by any hard evidence.

In *Boerne*, only Justice John Paul Stevens identified another aspect of RFRA's infirmity. Justice Stevens concluded that RFRA violated the Establishment Clause in preferring religion to irreligion by "provid[ing] the Church with a legal weapon that no atheist or agnostic can obtain."¹⁵⁴ Despite a number of constitutional infirmities (including separation of powers problems), federal RFRA survived *Boerne*, and religious freedom advocates went back to Congress to strengthen its language. The Clinton administration never allowed RFRA's constitutionality to be challenged and it remained on the books as a ticking time bomb for religious believers that exploded in *Hobby Lobby*.

Lost in the debate by all but a few of RFRA's critics was Justice Stevens' important warning that the statute *avored* the religious over the nonreligious and gave religious organizations "a legal weapon that no atheist or agnostic can obtain."¹⁵⁵ As we shall see, *Hobby Lobby* allowed religious employers to use that weapon against the rights of their female employees.

152. 42 U.S.C. § 2000bb *et seq.* (2006).

153. *City of Boerne*, 521 U.S. at 507.

154. *Id.* at 537 (Stevens, J., dissenting).

155. *Id.*

c. RFRA's Broad Interpretation in *Hobby Lobby**1. Background*

Hobby Lobby demonstrates the statute's danger. Under *Smith*, the government's neutral and generally applicable laws—including the contraceptive mandate—are upheld. In contrast, under RFRA, if a neutral law substantially burdens religion, the government must demonstrate that it has used the least restrictive means to further a compelling interest. In *Hobby Lobby*, that strict standard undermined a neutral law that was designed to protect women's equality and contraceptive freedom.

American women have long paid more for health care than men because the costs of reproductive care, including contraception, are frequently not covered by health insurance policies. After the Food and Drug Administration approved Viagra in 1996, for example, many insurers covered this new drug for men's sexual problems but not contraceptives for women. As a matter of gender equity, many states then passed legislation that required employers who provide prescription drug coverage to include contraception in their insurance plans. Such legislation provoked demands from religious employers to be exempt from the new laws' requirements. But, applying *Smith*, the highest courts of New York¹⁵⁶ and California,¹⁵⁷ *inter alia*, rejected constitutional challenges to those neutral insurance laws of general applicability and held that religious employers must provide contraceptive insurance coverage.

If we analogize the above state cases to *Hobby Lobby*, the Supreme Court should have reached the same result: require religious employers to provide contraceptive insurance coverage. The contraceptive mandate of the ACA focused on the same goal of women's health care equality required by many states. The ACA required employer health care plans to contain preventive care coverage, which included twenty FDA-approved contraceptive methods and sterilization procedures.¹⁵⁸ However, in contrast to *Smith* and the state cases, religious exemptions and RFRA undermined the entire legislative scheme.

The ACA originally exempted purely religious employers like houses of worship from its requirements, but otherwise applied the contraceptive regulations to both for-profit and nonprofit religious

156. Catholic Charities of the Diocese of Albany v. Serio, 859 N.E.2d 459 (N.Y. 2006).

157. Catholic Charities of Sacramento, Inc., v. Super. Ct., 85 P.3d 67 (Cal. 2004).

158. 42 U.S.C. § 300gg-13(a)(4) (2006); 77 Fed. Reg. 8725-8726 (2012).

employers.¹⁵⁹ The uproar against the Obama administration about that original rule was equally vigorous and ridiculous. The Catholic bishops and other religious employers like the University of Notre Dame accused the administration of conducting a war on religious freedom, even though, under *Smith*, there is no constitutional right that excuses religious employers from compliance with neutral and general laws. Amish employers, for example, have long been required to pay Social Security taxes¹⁶⁰ and fundamentalist Christian employers must pay men and women equally, even if such actions contradict their religious values.¹⁶¹

Unfortunately, as RFRA and DOMA demonstrated during the 1990s, it is virtually impossible for politicians to confront the political clout of organized majority religions, and the Obama administration caved in to its religious critics. In the spirit of accommodation, Obama naïvely offered a compromise that he thought would answer the religious employers' objections. Under the compromise, someone else would provide and pay for the insurance coverage. According to the new regulations, religious employers who "1) oppose coverage for contraceptive services, 2) operate as non-profit entities, 3) hold themselves out as religious organizations, and 4) self-certify that they meet the first three criteria," do not have to include contraceptive coverage in their insurance plans.¹⁶² Depending on what type of insurance coverage they offer, the religious employers give the self-certification form to either their insurance company or a third-party administrator, who then provides the coverage that the employer opposes.

Dissatisfied with *that* accommodation, the religious nonprofit employers continued to insist their religious freedom was threatened. They insisted that *signing the form* that asserted their opposition to contraception substantially burdened their exercise of religion.¹⁶³ They went back to court, arguing that the accommodation still required them to "provide, pay for, and/or facilitate access to coverage for these objectionable products and services,"¹⁶⁴ thereby substantially burdening their religion under RFRA.

159. 45 C.F.R. § 147.131(a).

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

161. *See, e.g., Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392 (4th Cir. 1990).

162. 45 C.F.R. § 147.131(b); 78 Fed. Reg. 39874 (2013).

163. *Id.*

164. *See, e.g., Univ. of Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014).

While the religious nonprofits were litigating the new accommodation, religious for-profit companies like Hobby Lobby and Conestoga Wood went to court arguing that their religion was also substantially burdened by the mandate. Unlike the Catholic cases, the Christian Hobby Lobby and Mennonite Conestoga Wood owners opposed only four of the twenty contraceptives because they believed they were abortifacients. As a matter of faith, the Green and Hahn families believe that life begins at fertilization, and therefore consider any contraceptive method that prevents implantation to be an abortion. For this reason they oppose the use of intrauterine devices (“IUDs”) as well as some hormonal contraceptives.

At the same time, several for-profit companies owned by Catholics sued in protest of all twenty contraceptives, because under the traditional Augustinian theology described above, they believe all artificial contraception is morally wrong. The non-Catholic for-profit cases got to the Supreme Court first. In *Hobby Lobby*, the Court, by a 5-4 vote, ruled for the employers and provided a broad reading of RFRA that will encourage many future lawsuits and undermine more civil liberties.¹⁶⁵

2. *The Decision*

The Court’s opinion addressed all five statutory elements of RFRA. For RFRA to be triggered, plaintiffs must establish that they are persons whose exercise of religion is substantially burdened by the government. Once a substantial burden is established, the government must demonstrate that it has a compelling government interest and used the least restrictive means to enforce it. In *Hobby Lobby*, the Court read all components of the statute—persons, who exercise religion, substantial burden, compelling government interest, and least restrictive means—in a manner favorable to plaintiffs demanding exemptions from neutral laws.¹⁶⁶

Persons. As a threshold matter, the Court recognized for-profit corporations as persons who can exercise religion under the statute. Before the case reached the Supreme Court, some circuit courts had concluded either that corporations cannot exercise religion at all because they cannot pray or worship, or that only the religious nonprofits were corporate persons protected by RFRA. The Supreme Court disagreed, ruling that certain types of corporations—

165. 134 S. Ct. 2751 (2014).

166. 42 U.S.C. § 2000bb *et seq.* (2006).

closely held ones like Conestoga Wood and Hobby Lobby, whose ownership was a small group of family members—could sue under RFRA.¹⁶⁷ Moreover, this part of the decision attracted only two dissents; Justices Kagan and Breyer did not join Justice Ginsburg’s dissent that for-profit corporations are not persons who exercise religion under RFRA.

Although the Court’s opinion appears to be limited to closely held corporations, its reasoning could support any corporation’s right to claim RFRA’s protection. Justice Samuel Alito’s opinion for the Court expressed skepticism that large corporations with many shareholders would want to file RFRA lawsuits.¹⁶⁸ But *Hobby Lobby* opens the door for corporate RFRA claims, thus expanding the possibilities for religious exemptions in corporate America.

Who Exercises Religion. The Court did not question that the exercise of religion was involved in *Hobby Lobby*. Post-*Boerne*, Congress passed another pro-religion statute, the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), which amended RFRA’s definition of the exercise of religion from “exercise of religion under the First Amendment” to “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”¹⁶⁹ Instead of explaining what is or is not the practice of religion, the Court deferred to plaintiffs to define their religious exercise. It is still not clear, for example, why providing insurance coverage involves the exercise of religion.

Substantial Burden. On the substantial burden question, the dissent, written by Justice Ginsburg, cogently argued that any burden on the Greens’ and Hahns’ religion was “too attenuated” to qualify as substantial.¹⁷⁰ The employees, not the employers, decide whether to use contraception, and “no individual decision by an employee and her physician . . . is in any meaningful sense her employer’s decision or action.”¹⁷¹ Under Ginsburg’s analysis, *Hobby Lobby* is really about the women employees’ choice, not the employers’ religion; employers are not forced to use contraception and, therefore, their religion is

167. *Hobby Lobby*, 134 S. Ct. at 2768–72.

168. *Id.* at 2774.

169. 42 U.S.C. § 2000cc-5(7)(A) (2006). The statute also should “be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.” *Id.* at § 2000-cc-3(g) (2006).

170. *Hobby Lobby*, 134 S. Ct. at 2799 (Ginsburg, J., dissenting).

171. *Id.*

not *substantially* burdened. Substantial should mean something in legal terms.

Justice Alito saw the burden analysis differently, again deferring to plaintiffs' sincerely held beliefs. He wrote that the Greens' and Hahns' belief that the four contraceptives cause abortion "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."¹⁷² It is not for the Court, he concluded, to determine whether a burden is substantial or insubstantial; the moral judgment of the plaintiffs about what is burdensome is controlling.¹⁷³ Thus the plaintiffs, not the courts, determine if their religion is substantially burdened. This factor again favors challengers of neutral laws over the government.

Compelling Interest. The government has a compelling interest in promoting women's health and equality that is rooted in the Fourteenth Amendment's Equal Protection Clause. The Court, however, only "assumed" that the government might have a compelling interest in women's equality without giving it any consideration or importance.¹⁷⁴ Justice Kennedy's concurrence tried to give more weight to the consideration of gender equity.¹⁷⁵ But the result of *Hobby Lobby* is that the Court allowed a woman's reproductive rights to be trumped by a business owner's belief that one of her contraceptives might be an abortifacient—without even considering the importance of women's rights. In the area of women's equality, the government will have a harder time establishing a compelling government interest in future cases, and plaintiffs should have an easier time winning cases.

Least Restrictive Means. In the biggest irony of the case, the Court ruled that because there was another way to provide insurance—namely the accommodation provided to the religious *nonprofits*—the government could not meet the least restrictive means test.¹⁷⁶ Thus it was foolhardy for the Obama administration to give into the rhetoric that the nonprofits' accommodation was necessary to end a war on religious liberty. The accommodation of

172. *Id.* at 2778.

173. *Id.* at 2779.

174. *Id.* at 2759.

175. *Id.* at 2785 (Kennedy, J., concurring).

176. *Hobby Lobby*, 134 S. Ct. at 2759.

the religious nonprofits led to the accommodation of the religious for-profits.

In identifying a second least restrictive means in addition to the nonprofits' accommodation, Justice Alito opined that the "most straightforward way" of providing contraceptive access would be for the government to pay and "HHS has not shown that this is not a viable alternative." Without any evidence, Alito concluded it would not cost much for the government to provide contraception, and that it should do so rather than burden the families' religious freedom.

This is incorrect. As Justice Ginsburg pointed out, an executive order mandating such payment would require a period of notice and comment, and there is *no chance* that Congress will now fund contraceptive services. The Court's broad reading of the least restrictive means test again favors plaintiffs; it leaves employers with the ability to argue that the government should always pay for something employers do not like.

Thus, because of RFRA and *Hobby Lobby*, anyone (corporate or individual) can go to court, argue (unchallenged) that his religion is substantially burdened, ignore the government's compelling interest, and, by either pointing to any other existing government program or telling the government to pay for a new program, meet the least restrictive means standard. In other words, *Hobby Lobby* allows any adherent of a comprehensive doctrine to demand an exemption to the law that fits its religious needs, even if the rights of others are restricted and the government has to create a new program just for him. As the dissent pointed out, it is now possible to extend exemptions "to employers with religiously grounded objections to blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)."¹⁷⁷

The five Justices in the Majority ridiculed the dissent for arguing that *Hobby Lobby* was an unprecedented "decision of startling breadth."¹⁷⁸ Three days later, the same five—joined by Justice Breyer—provided the first proof that the dissent was correct. In one of the religious nonprofit cases involving Wheaton College, the Court ordered the government to provide contraceptive coverage to Wheaton employees, even though Wheaton had not signed the

177. *Id.* at 2805 (Ginsburg, J., dissenting).

178. *Id.* at 2787.

exemption form for reasons of conscience.¹⁷⁹ As Justice Sotomayor explained in a blistering dissent, the very accommodation that the Court had praised in *Hobby Lobby* now became unacceptable in *Wheaton College*.¹⁸⁰ The Court's action suggests that the religious nonprofits are going to win their challenges to the contraceptive mandate, as I explain in more detail in Part III.

And that is only the first step. With the help of the Court, religious groups and individuals may now target other areas of health law. Successful on contraception, their next target is gay and lesbian rights, which have advanced in recent years only because some courts of law have rejected comprehensive doctrine-based government and instead interpreted the Constitution to protect marriage equality. As Part II explains, LGBT rights cannot be protected as long as comprehensive doctrines are imposed.

II. The Triumph of the Constitution: Marriage Equality

The comprehensive theorists and politicians of Part I argued that public policy debates should be conducted on comprehensive grounds until citizens reach agreement at the level of moral principle. The prolonged debate about same-sex marriage belies their claims and confirms that comprehensive doctrine-based public policy undermines constitutional values. The full and lengthy public debate among conflicting philosophical, historical and religious accounts of marriage did not identify a moral principle around which all sides could rally. Only a focus on the constitutional norm of equality and the experience of same-sex couples protected gay and lesbian rights against comprehensive prejudice. Same-sex marriage supporters lost the political debate as long as it was conducted according to comprehensive moral principles. Once same-sex marriage was reframed to focus on the constitutional norm of equality, however, it gained political ground.¹⁸¹

Hobby Lobby creates a dangerous opportunity to reintroduce religious views into the LGBT rights debate and to undermine the advances of marriage and social equality. *Hobby Lobby*, after all, demonstrates that rights can be reversed; contraceptive access, which was once taken for granted post-*Griswold*, is now threatened. Given

179. *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014).

180. *Id.* at 2808–15.

181. For a discussion of framing and same-sex marriage, see GENE BURNS, *THE MORAL VETO: FRAMING CONTRACEPTION, ABORTION, AND CULTURAL PLURALISM IN THE UNITED STATES* 7 (2005).

the intensity of religious opposition to same-sex marriage, LGBT rights are the next target.

Contrasting constitutional marriage with what I call comprehensive marriage, I explain below that marriage equality succeeded only after courts based their analyses on equal protection and due process instead of the traditional Augustinian account of marriage that held sway for so many centuries. As long as religious values were imposed on gays and lesbians through the force of law, they had no chance to experience the equality of citizens. RFRA now threatens the courts' achievements in protecting Constitution-based marriage equality.

A. Constitutional Marriage

Federal same-sex marriage rights were long blocked by the Supreme Court's 1986 ruling in *Bowers v. Hardwick*, which held that same-sex sodomy was not constitutionally protected and could be criminalized.¹⁸² *Bowers* relied heavily on religious reasoning in ruling against gay rights, with repeated references to traditional morality and "Judeo-Christian moral and ethical standards."¹⁸³ For that reason, the original impetus for legal same-sex marriage came from state courts interpreting their own constitutions' due process, privacy, or equal protection provisions. Marriage equality won whenever the courts relied on law instead of religion to set the legal rule.

Most state courts relied on their equal protection clauses to support same-sex marriage. Hawaii was the first to do so in 1993.¹⁸⁴ At least two options were available to state courts under equal protection: to create a same-sex relationship equivalent in benefits to marriage, or to require same-sex marriage itself. The Vermont legislature, for example, passed a civil unions bill after the Vermont Supreme Court ruled in 1999 that unequal benefits for gays and heterosexuals violated the state's Common Benefits Clause.¹⁸⁵

The Supreme Court overruled *Bowers* in 2003 in *Lawrence v. Texas* after John Geddes Lawrence was prosecuted under a Texas

182. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

183. *Id.*

184. See Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1383–84 (2010); see generally *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). A Hawaii constitutional amendment then allowed the legislature to define marriage as between a man and a woman only.

185. See *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999) (quoting VT. CONST. ch. I, art. 7. Vermont's Constitution contains a Common Benefits Clause, stating that "government is, or ought to be, instituted for the common benefit . . . of the people."). *Id.*

criminal statute penalizing same-sex sodomy. Justice Kennedy's opinion for the Court recognized a due process liberty right to sexual privacy broad enough to include same-sex relations.¹⁸⁶ Kennedy addressed the religious arguments against same-sex relations that had been vaunted in *Bowers*, concluding that citizens' religious convictions and moral codes must not be imposed on others. Moral disapproval is not an appropriate basis for the law. This is the key lesson of the LGBT rights movement: religion must not be imposed to limit constitutional rights.

Lawrence was a tremendous victory for the non-imposition model of the Constitution, and state marriage rights soon followed. Five months later, Massachusetts became the first state with same-sex marriage after its Supreme Judicial Court ruled in *Goodridge v. Department of Public Health* that the state's ban on same-sex marriage violated equal protection under the state's constitution.¹⁸⁷

Unsurprisingly, the comprehensive doctrines launched a faith-based "ferocious backlash" against *Lawrence* and *Goodridge*.¹⁸⁸ Anti-same-sex marriage initiatives developed in numerous states and localities. President George W. Bush, a devout Christian thought to oppose gay marriage for religious as well as political reasons, took the lead in sponsoring anti-marriage equality amendments around the country.¹⁸⁹ Opposition to same-sex marriage appealed to President Bush's conservative evangelical base. For eight years (2000-2008), President Bush made opposition to same-sex marriage a key aspect of his political identity and a force in his 2004 reelection.

Some commentators attribute Bush's 2004 reelection to his advocacy of a constitutional amendment banning same-sex marriage and the presence of eleven successful anti-same-sex marriage initiatives on local ballots in November 2004.¹⁹⁰ When President Bush spoke about same-sex marriage, he used religious, historical, and cultural arguments without any consideration of constitutional norms.

186. See *Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003).

187. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948-49, 970-71 (Mass. 2003).

188. See Carolyn Lochhead, *Pivotal Day for Gay Marriage in the U.S Nears/ Massachusetts Move to Legal Weddings May Intensify Backlash in Other States*, S.F. CHRONICLE, May 2, 2004, at A1; see also Adam Liptak, *Gay Vows, Repeated from State to State*, N.Y. TIMES, Apr. 12, 2009, at WK1.

189. See Elisabeth Bumiller, *Bush Says His Party is Wrong to Oppose Gay Civil Unions*, N.Y. TIMES, Oct. 26, 2004, at A21, available at <http://www.nytimes.com/2004/10/26/politics/campaign/26gay.html>.

190. See Darren Lenard Hutchinson, *Sexual Politics and Social Change*, 41 CONN. L. REV. 1523, 1532 (2009).

“The union of a man and a woman is the most enduring human institution, honored and encouraged in all cultures and by every religious faith,” he argued. “Marriage cannot be severed from its cultural, religious and natural roots without weakening the good influence of society.”¹⁹¹

From 2004 to 2009, thirty of thirty-eight anti-gay marriage initiatives and referenda were successful.¹⁹² Nonetheless, on May 15, 2008, California became the second state supreme court to rule that a ban on same-sex marriage violated equal protection. Because California law already granted gays and lesbians in domestic partnerships the same rights as married couples, the court ruled, the state could not label heterosexual and same-sex relationships differently. If the “opposite-sex couple is officially designated a ‘marriage’ whereas the union of a same-sex couple is officially designated a ‘domestic partnership,’”¹⁹³ the court explained, equal protection is violated. The Connecticut Supreme Court followed with a similar ruling for same-sex marriage on October 28, 2008.¹⁹⁴

Soon after the California court ruled for same-sex marriage, however, a coalition of religious groups placed Proposition 8 on the ballot. The initiative proposed an amendment to the California Constitution to allow marriage between a man and a woman only.¹⁹⁵ The Catholic Archbishop of San Francisco lobbied for the amendment and persuaded the Elders of the Church of Jesus Christ of Latter-day Saints to come on board. Together Catholics, evangelical Christians and Latter-day Saints worked to protect traditional marriage against the perceived assault from same-sex marriage.¹⁹⁶ Even as Barack Obama cruised to presidential victory in

191. CNN Politics, *Bush Calls for Ban on Same-Sex Marriages*, CNN.COM (Feb. 25, 2004, 5:05 AM), http://articles.cnn.com/2004-02-24/politics/elec04.prez.bush.marriage_1_single-state-or-city-marriage-rights-marriage-licenses?_s=PM:ALLPOLITICS.

192. Mathew S. Nosanchuk, *Response: No Substitutions, Please*, 100 GEO. L.J. 1989, 1999 (2012).

193. *In re Marriage Cases*, 183 P.3d 384, 398 (Cal. 2008).

194. See *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 412 (Conn. 2008).

195. See CNNPolitics.com, *Local Ballot Measures – Election Center 2008: Ballot Measures*, CNN.COM (Jan. 12, 2009, 12:00 AM), <http://www.cnn.com/ELECTION/2008/results/ballot.measures/>; Letter from the First Presidency of The Church of Jesus Christ of Latter-day Saints to Church Leaders in California, *California and Same-Sex Marriage*, MORMON NEWSROOM (June 29, 2008), available at <http://www.mormonnewsroom.org/ldsnewsroom/eng/commentary/california-and-same-sex-marriage>.

196. See Jessica Garrison, *California Churches Plan a Big Push Against Same-Sex Marriage; Organizers Hope to Get 1 Million from Various Religions to Post Lawn Signs Backing Prop. 8 in Unison Next Month*, L.A. TIMES, Aug. 24, 2008, at B1.

November 2008, the legal right to same-sex marriage was repealed by voters in the nation's most liberal state. Although Obama won 61% of California voters,¹⁹⁷ 52% of the state approved Proposition 8, and the main reason for the difference was *religious* opposition to gay marriage.¹⁹⁸

After the 2008 presidential election, more states joined Massachusetts, California, and Connecticut in legalizing it. Iowa became the first Midwestern state to join the club with its Supreme Court's ruling on April 3, 2009.¹⁹⁹ Vermont, which had been the first state court to require civil unions in 1999,²⁰⁰ passed legislation authorizing gay marriage in April 2009.²⁰¹ The Maine legislature also approved same-sex marriage²⁰² until voters repealed it in November 2009.²⁰³ In June 2009, a Catholic governor signed New Hampshire's gay marriage legislation after the legislature included significant religious exemptions in the bill.²⁰⁴ A Washington, D.C. law allowing same-sex marriage arrived in December 2009.²⁰⁵ Roman Catholic Governor Andrew Cuomo of New York received significant praise for successfully shepherding same-sex marriage through the state legislature on June 24, 2011. Washington State approved same-sex marriage through legislation on February 13, 2012,²⁰⁶ and on March 1, 2012, Maryland did the same.²⁰⁷ Finally, President Obama renounced

197. CNNPolitics.com, *Local and National Election Results – Election Center 2008: President: California*, CNN.COM (Jan. 12, 2009, 12:00 AM), <http://www.cnn.com/ELECTION/2008/results/individual/#CAP00>.

198. *Id.*

199. *See generally* Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

200. *See generally* Baker, 744 A.2d 864 (Vt. 1999).

201. David Abel, *Vermont Legalizes Same-Sex Marriage; 11th-Hour Change of Heart Ends Veto*, BOSTON GLOBE, Apr. 8, 2009, at A1.

202. Maria Sacchetti, *Backers, Foes of Same-Sex Marriage Reflect; Vow to Fight on as Maine Rejects Law*, BOSTON GLOBE, Nov. 5, 2009, at B4; Jenna Russell & Eric Moskowitz, *Maine Governor OK's Gay Marriage*, BOSTON GLOBE, May 7, 2009, at A1.

203. Sacchetti, *supra* note 202.

204. *See* Eric Moskowitz, *N.H. Ties Gay-Marriage Knot; Revised Bill Assures Religious Protections*, BOSTON GLOBE, June 4, 2009, at A1.

205. Ian Urbina, *Nation's Capital Joins 5 States in Legalizing Same-Sex Marriage*, N.Y. TIMES, Mar. 4, 2010, at A20; Tim Craig, *D.C. City Council Votes to Legalize Gay Marriage; Opponents of Bill Look to Congress, Courts to Upend It*, BOSTON GLOBE, Dec. 16, 2009, at A2.

206. Reuters, *Washington: Gay Marriage Legalized*, N.Y. TIMES, Feb. 14, 2012, at A17.

207. Governor Martin O'Malley signed the bill but "opponents—backed by many churches—were expected to petition the law to a referendum on the November [2012] ballot." *Maryland Governor Signs Bill Legalizing Gay Marriage*, USA TODAY (Mar. 1,

his long, biblically rooted opposition to same-sex marriage on May 9, 2012, and joined the marriage equality movement.

In a historic turnaround during the 2012 elections, Maryland, Maine, and Washington voters approved same-sex marriage, and an anti-marriage ballot amendment failed in Minnesota. After the election, Rhode Island (2013), Delaware (2013), and Minnesota (2013) legalized same-sex marriage. Finally, in June 2013, the United States Supreme Court invalidated the part of DOMA that denied equal benefits to same-sex couples while leaving intact the full faith and credit section.²⁰⁸ After the Court also dismissed the Proposition 8 case on standing grounds, a district court's order invalidating Proposition 8 took effect and same-sex marriage became legal again in California.²⁰⁹

The Court issued a full opinion on the merits in *Windsor*, the litigation challenging DOMA. Plaintiff Edith Windsor and Thea Spyer had been partners since 1963; they married in Toronto in 2007. Their home state of New York recognized their Canadian marriage. Nonetheless, after Spyer died, the federal government charged Windsor \$363,053 in taxes because pursuant to DOMA their marriage did not qualify for the estate tax exemption. Justice Kennedy wrote the 5-4 decision in Windsor's favor.²¹⁰

According to Justice Kennedy, under equal protection law, the "avowed purpose and practical effect of [DOMA] are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the states."²¹¹ Kennedy argued, as he had in *Lawrence*, that moral disapproval of homosexuality is not a rational basis for legislation. Kennedy, noting that DOMA affected over 1,000 federal benefits statutes, concluded "DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality."²¹² In DOMA, the federal

2012, 6:23 PM), <http://usatoday30.usatoday.com/news/nation/story/2012-03-01/maryland-gay-marriage-law/53319758/1>. Voters, however, ultimately approved a different referendum—the Civil Marriage Protection Act—which upheld the legality of same-sex marriages. *Official 2012 Presidential General Election Question Text*, MD. STATE BD. OF ELECTIONS (Nov. 28, 2012, 8:56 AM), http://www.elections.state.md.us/elections/2012/results/general/gen_qtext_2012_4_S_00_4_06_.html.

208. *United States v. Windsor*, 133 S. Ct. 2675, 2682–83 (2014).

209. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

210. *Windsor*, 133 S. Ct. at 2681.

211. *Id.* at 2693.

212. *Id.* at 2694.

government unconstitutionally denied equal protection to same-sex marriage couples. Thus, one of the Clinton administration's pro-religion excesses was exposed; DOMA had in fact restricted equality and freedom in the name of religion.

Post-*Windsor*, all twenty federal district courts to review state same-sex marriage bans invalidated them. On June 25, 2014, in *Kitchen v. Herbert*, the Tenth Circuit became the first federal court of appeals to rule that same-sex marriage is a constitutional right, thereby striking down Utah's ban.²¹³ The court's ruling is a powerful statement of marriage equality, affirming "the Fourteenth Amendment protects the fundamental right to marry, establish a family, raise children, and enjoy the full protection of a state's marital laws." The Fourth Circuit followed with a similar ruling on July 28, 2014, the Seventh Circuit on September 4, 2014, and the Ninth Circuit on October 7, 2014.²¹⁴ After the Sixth Circuit upheld same-sex marriage bans, the Supreme Court granted cert.²¹⁵

The circuit courts' opinions also demonstrated that only illegitimate, comprehensive doctrine-based, morality-imposing reasons remain to oppose marriage equality. Nonetheless, the comprehensive doctrines fought and continue to fight same-sex marriage all the way, as the following section explains, and can be expected to do so again with the new *Hobby Lobby* weapon in their toolbox.

B. Comprehensive Marriage

Several courts recognized religion's role in restricting LGBT rights. While ruling for marriage equality, the Iowa and Connecticut Supreme Courts correctly identified religion as the primary source of opposition to gay and lesbian rights.

The unanimous Supreme Court of Iowa was most direct in reaching that conclusion. Citing a 2008 *Des Moines Register* study demonstrating that opposition to same-sex marriage rose as high as 80% among people "with a high level of religious commitment," the court acknowledged "the reason left unspoken by the County [in its defense of the anti-marriage law]: religious opposition to same-sex marriage." Recognizing that adherents of other religions—such as

213. *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014).

214. *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014); *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014).

215. *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), cert. granted sub nom. *Bourke v. Beshear*, 2015 WL 213651 (2015).

Buddhists, Quakers, Unitarians, and Reform and Reconstructionist Jews—hold equally sincere religious views that accept same-sex marriage, the Iowa court decided the case “as civil judges, far removed from the theological debate of religious clerics, and focus[ed] only on the concept of civil marriage and the state licensing system that identifies a . . . class of persons entitled to secular rights and benefits.”²¹⁶

The Iowa Justices who voted for marriage equality were promptly voted out of office by a coalition of religious groups.

Like Iowa, the Connecticut Supreme Court confirmed that “[m]uch of the condemnation of homosexuality derives from firmly held religious beliefs and moral convictions.”²¹⁷ Nonetheless, it ruled, because “marriage is a state sanctioned and state regulated institution, religious objections to same-sex marriage cannot play a role in our determination of whether constitutional principles of equal protection mandate same-sex marriage.”²¹⁸

Wherever religious concepts held sway, same-sex marriage lost. The dominant *theological* ideal that courts used to restrict marriage rights was the concept that every marital act must be procreative, which, as I explained above,²¹⁹ was the original idea of the fifth-century Christian Bishop and Saint Augustine of Hippo. Augustine thought that sexual passion was an evil desire that must be channeled solely into the procreative purpose of heterosexual marriage. Incredibly, some modern judges not only agree with him, but think Augustine’s ideas should determine the marriage laws of the states.

Reacting to the first state supreme court to require marriage equality, for example, dissenting Massachusetts Justice Robert Cordy identified the *procreative purpose of marriage* as the reason to deny equal marital status to gays and lesbians. Marriage and procreation are inextricably linked, according to Cordy; “[b]ecause same-sex couples are unable to procreate on their own, any right to marriage they may possess cannot be based on their interest in procreation, which has been essential to the Supreme Court’s denomination of the right to marry as fundamental.”²²⁰

Similarly, Ninth Circuit Judge N.R. Smith dissented from his court’s ruling invalidating Proposition 8, the California initiative that

216. *Varnum*, 763 N.W.2d at 905.

217. *Kerrigan*, 957 A.2d at 433.

218. *Id.* at 475.

219. See *supra* notes 115–19 and accompanying text.

220. *Goodridge*, 798 N.E.2d at 985.

defined marriage as between a man and a woman only. Smith argued that the district court had failed to take seriously the two state justifications for marriage, namely the “responsible procreation theory” and the “optimal parenting theory.”²²¹ The first theory argues that heterosexual marriage “steers procreation into marriage” because opposite-sex couples are the only couples who can procreate children accidentally or irresponsibly.²²² The second theory concludes that a committed relationship of one man and one woman is the best environment for raising children.²²³

In Connecticut, dissenting Justice Peter Zarella also adopted the “responsible procreation” theory because the actual purpose of marriage is “to privilege and regulate procreative conduct,” a distinction that “has its basis in biology, not bigotry.”²²⁴ Marriage has been recognized as a fundamental civil right, the justice argued, only because it is procreative.

Justice Samuel Alito used the same approach in his dissent in *United States v. Windsor*, where he contrasted two “competing views” of marriage.²²⁵ One, the “traditional,” “conjugal,” or opposite-sex vision, which says, “[M]arriage was created for the purpose of channeling heterosexual intercourse into a structure that supports child rearing.”²²⁶ Suggesting that even sterile heterosexual marriages are procreative (and therefore permissible while same-sex marriage is banned), Alito wrote that marriage “is intrinsically ordered to producing new life, even if it does not always do so.”²²⁷

In contrast, the “consent-based” view defines marriage as the “solemnization of mutual commitment—marked by strong emotional attachment and sexual attraction—between two persons.”²²⁸ Alito recognized that the consent vision of marriage is “very prominent” and “infuse[s]” our popular culture.²²⁹ Nonetheless, he concluded, because the Constitution is silent about marriage, federal and state governments are free to prefer traditional to consent-based marriage,

221. *Perry v. Brown*, 671 F.3d 1052, 1106 (9th Cir. 2012) (N.R. Smith, J., concurring in part and dissenting in part), *vacated sub nom.* *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

222. *Id.*

223. *Id.*

224. *Kerrigan*, 957 A.2d at 516–17.

225. *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting).

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

or, in other words, to impose their moral beliefs on one another in defiance of *Lawrence*.

Post-*Windsor*, Judge Paul J. Kelly dissented from the Tenth Circuit's historical ruling that same-sex marriage is a fundamental right, and Judge Niemeyer dissented from the Fourth Circuit's subsequent identical ruling that same-sex marriage is a fundamental right. What was the reason given for the dissents? The same one in both circuits: the judges accepted Utah's and Virginia's comprehensive doctrine-based (albeit unpersuasive) arguments that marriage is for procreation and that heterosexual parents are morally and biologically superior to gays and lesbians.

In recognizing a constitutional right to same-sex marriage, the Fourth, Seventh, Ninth, and Tenth Circuits rejected the religious arguments and argued about due process and equal protection. The first post-*Windsor* court of appeals to reject the right of same-sex marriage, however, returned to the procreative rationale.²³⁰ According to the Sixth Circuit in *DeBoer v. Snyder*:

People may not need the government's encouragement to have sex. And they may not need the government's encouragement to propagate the species. But they may well need the government's encouragement to create and maintain stable relationships within which children may flourish. It is not society's laws or for that matter any one religion's laws, but nature's laws (that men and women complement each other biologically), that created the policy imperative.

St. Augustine couldn't have said it any better.

The validity of the procreative argument is completely undermined by the facts that many heterosexual marriages are not procreative, the state may not legally force any married couple to bear children, technology now allows gays and lesbians to become parents, and children flourish in a wide variety of family environments. For these reasons, the judicial trend rejects comprehensive doctrine-based marriage. Yet, as the Sixth Circuit and the strong dissents in the other cases suggest, the opposition to

230. *DeBoer*, 772 F.3d 388, cert. granted sub nom. *Bourke*, 2015 WL 213651.

same-sex marriage is not yet ready to quit. RFRA has given the opponents a new tool to restrict LGBT rights, as I explain in Part III.

III. The New Threat to Civil Rights: Broad RFRA

With *Hobby Lobby's* religion-friendly standard, all federal laws are now subject to challenge, with the possibility of every citizen becoming “a law unto himself” until the rule of law is undermined.²³¹ State RFRA's can be expected to follow the federal lead.

Because of the intense religious opposition to LGBT rights as demonstrated in the history of same-sex marriage, I explain in Part III.A that gays and lesbians are now at risk of reduced insurance coverage, fewer consumer services, and less employment protection than they enjoyed pre-*Hobby Lobby*. In Part III.B, I identify numerous other rights that are threatened due to the Court's broad interpretation of RFRA.

A. The Next Threat: LGBT Rights

As explained above, much religious opposition to LGBT rights is rooted in the Augustinian worldview that all sexual activity must be heterosexual, monogamous, committed, and open to procreation. From this perspective, neither domestic partnership nor same-sex marriage is an acceptable moral choice; all same-sex partnerships are prohibited. The Roman Catholic Church, moreover, teaches that children are entitled to be born within a natural, heterosexual relationship; consequently, assisted reproductive techniques such as artificial insemination and in vitro fertilization violate the teaching of the church. Such mechanisms, of course, are the usual means by which gays and lesbians become parents.

Many comprehensive doctrines thus have broad moral objections to most aspects of LGBT life. Justice Alito handed them an easy tool for turning those objections into RFRA claims when he wrote that courts could not question the beliefs of plaintiffs who oppose “enabling or facilitating the commission of an immoral act by another.”²³² If plaintiffs believe they are cooperating with the “evil” of homosexuality or “giving scandal” by associating with gays and lesbians, they easily meet the low substantial burden standard of RFRA.²³³

231. *Smith*, 494 U.S. at 885.

232. *Hobby Lobby*, 134 S. Ct. at 2778.

233. *Id.*

Because *Hobby Lobby* is an insurance case, it opens the door to employers denying insurance coverage for the partners of their LGBT employees as well as for medical services and decisions about child bearing and rearing. An employer could argue that any health coverage for LGBT partners violates his conscience, and—if gays are not supposed to have children—try to keep his employees' children, not only their partners, off the insurance policies. An employer may additionally object to an employee who claims leave under the Family and Medical Leave Act²³⁴ to care for a same-sex spouse. Almost anything can be turned into a claim of “cooperation with evil.”

Although supporters of RFRA will argue that such claims may fail under RFRA's compelling government interest or least restrictive means tests, the Court's recent jurisprudence suggests otherwise. *Hobby Lobby* demonstrates that even the Supreme Court of the United States is willing to ignore women's constitutionally protected equality and reproductive freedom when religious groups try to defeat them. Sexual orientation discrimination receives less protection than gender discrimination under the Court's precedents, so there is reason to believe that it, too, can be ignored. Moreover, the least restrictive means test now allows plaintiffs to argue that the government can provide the protection that individual employers oppose. Thus, there is no reason to conclude that courts will side with gays and lesbians over the religious opponents of same-sex rights.

LGBT consumers are also at risk. Pre-*Hobby Lobby*, owners of commercial businesses across the country argued for a religious right not to serve customers planning same-sex marriages. In New Mexico, the owner of Elane Photography refused to photograph a same-sex marriage because of her religious belief in “traditional marriage.”²³⁵ In Colorado, the owner of the Masterpiece Cake Shop refused to bake a cake for a same-sex wedding.²³⁶ Although the New Mexico Supreme Court and the Colorado Civil Rights Commission upheld their states' antidiscrimination laws, *Hobby Lobby* offers new possibilities for federal civil rights statutes to be ignored in the corporate context.

234. 29 U.S.C. § 2601 *et seq.* (2006).

235. *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014).

236. *Craig v. Masterpiece Cake Shop*, CR 2013-0008, Colorado Office of Administrative Courts (Dec. 6, 2013), *available at* https://www.aclu.org/sites/default/files/assets/initial_decision_case_no._cr_2013-0008.pdf.

The fallout from *Hobby Lobby* will also reach to state RFRA, which will imitate and expand their own protections to be as broad or broader than *Hobby Lobby*. Indiana passed a broad RFRA to allow the state's businesses to discriminate against unfavored customers.²³⁷ Kansas, Arizona and Arkansas also tried to pass similar religious freedom bills that allowed for- and nonprofit entities to refuse services to gays and lesbians. Mississippi has had an extended debate whether its state RFRA allows corporations to refuse goods and services whenever they like. Because the Supreme Court has baptized corporate religious exercise in ways the states never did, some states can be expected to expand corporate religious rights, especially to reject LGBT customers.²³⁸

After all, as Professor Ira Lupu has argued, if other companies are available to provide goods and services to customers, then the least restrictive means test can always be met.²³⁹

Under *Hobby Lobby*, all same-sex employer-employee relations are now at risk. As Justice Ginsburg pointed out in her dissent, employers can now assert religious reasons to avoid the antidiscrimination laws. Justice Alito responded to Justice Ginsburg that the government has a compelling interest in combating racial discrimination. He said nothing, however, about gender or sexual orientation discrimination. LGBT employment discrimination faces a new threat post-*Hobby Lobby*.

And LGBT rights are only the beginning of the problem.

B. The Rest of Civil Rights

The implications of *Hobby Lobby* for reproductive rights are broad and dangerous. The Court conveniently granted certiorari on two cases with non-Catholic plaintiffs who opposed only four of the twenty covered contraceptives because they believed them to be abortifacients. The majority of the contraceptive cases, however—both nonprofit and for-profit—involve Catholic employers who

237. Garrett Epps, *What Makes Indiana's Religious Freedom Law Different?*, THE ATLANTIC, Mar. 30, 2015, at <http://www.theatlantic.com/politics/archive/2015/03/what-makes-indianas-religious-freedom-law-different/388997/>.

238. See Kansas House Bill No. 2453, 2014 Session, available at www.kslegislature.org/li/b2013_14/measures/documents/hb2453_01_0000.pdf; Arizona Senate Bill 1062, Second Regular Session 2014, available at www.azleg.gov/legtext/51leg/2r/bills/sb1062p.pdf.

239. Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER (forthcoming 2015), available at <http://ssrn.com/abstract=2466571>.

oppose all contraception and sterilization. This is another legacy of St. Augustine; the Church teaches that having sex without procreative intent treats the partner as a “fornicator” and undermines the essential procreative purpose of marriage, which is always present even when procreation cannot or does not occur.²⁴⁰

Immediately after *Hobby Lobby* issued, the Court remanded all the *for-profit* Catholic contraceptive cases with directions to decide them under the Court’s religion-friendly standard.²⁴¹ Because of *Hobby Lobby*’s plaintiff-friendly elements, I expect all the Catholic employers, for-profit and nonprofit, to win their broader challenges to the mandate so that employers are freed of any obligation to women’s health care equality, which was a fundamental purpose of the legislation.

On the subject of abortion, the Court deferred completely to the Greens’ and Hahns’ belief that some contraceptives are abortifacients without requiring any scientific proof that this was so. This conclusion will enhance the stature of the Personhood Movement, which has sought to pass statutes and constitutional amendments holding “the life of each human being begins with fertilization, cloning, or its functional equivalent,” where fertilization is defined as “the process of a human spermatozoa penetrating the cell membrane of a human oocyte to create a human zygote, a one-celled human embryo, which is a new unique human being.”²⁴² Proposed personhood amendments have been interpreted to prohibit surgical abortion, medical abortions using RU-486, termination of ectopic pregnancies, intrauterine devices, emergency contraception, some hormonal contraception, IVF treatment, IVF embryo discard, stem cell derivation, cryopreservation of eggs for women with cancer or fertility concerns, and medical treatment of pregnant women.²⁴³ Employees can now forget insurance coverage for all those items because their employers’ religious beliefs about when life begins cannot be challenged in court.

240. See Reid, Jr., *supra* note 141, at 454.

241. See, e.g., *Gilardi v. U.S. Dep’t of Health & Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013).

242. See, e.g., Jonathan F. Will, *Beyond Abortion: Why the Personhood Movement Implicates Reproductive Choice*, 39 AM. J.L. & MED. 573 (2013).

243. See Glenn Cohen, *Mississippi’s Personhood Amendment*, 2 THE J. OF LAW: PER. LAB. OF LEGAL SCHOL. 437 (2012), available at <http://prawfsblawg.blogs.com/prawfsblawg/2011/10/mississippi-personhood-amendment.html>; Maya Manian, *Lessons from Personhood’s Defeat: Abortion Restrictions and Side Effects on Women’s Health*, 74 OHIO ST. L.J. 75 (2013); Will, *supra* note 242.

The personhood definition cuts both ways. If a Jewish woman sincerely believes that personhood starts at birth, does she possess an absolute right to abortion under RFRA?

Some liberal groups have started filing their own claims for RFRA protection. The Satanists filed a clever suit, arguing that a woman's religious freedom was substantially burdened by being forced to listen to the informed consent information connected to her abortion.²⁴⁴ Why should any patient who objects to informed consent be required to give it?

Or receive vaccinations? Or pay taxes? As the dissent recognized, it is now possible to extend exemptions "to employers with religiously grounded objections to blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)."²⁴⁵ Physician-assisted suicide is also under attack.

Some sincere religious believers argue that their children should work from an early age. Others believe that women should work only at home or that men should receive higher wages than women because they are biblically heads of families. Religious groups have already argued against paying the minimum wage²⁴⁶ and equal pay for equal work.²⁴⁷ In the past they discriminated against the unmarried²⁴⁸ and refused to seat African American patrons at restaurants.²⁴⁹ They kill animals without regard to animal pain or human health and safety regulations.²⁵⁰ Using RLUIPA,²⁵¹ the parallel land use statute that matches RFRA, they expand buildings and parking lots without regard for local zoning laws or the environment.

Take your pick. "According to counsel for Hobby Lobby, 'each one of these cases . . . would have to be evaluated on its own . . . apply[ing] the compelling-interest-least-restrictive-means test.'"²⁵²

244. Meghan Keneally, *Satanists Use Hobby Lobby Decision to Play Devil's Advocate*, ABC NEWS (Jul. 30, 2014), available at <http://abcnews.go.com/Politics/satanists-hobby-lobby-decision-play-devils-advocate/story?id=24772548>.

245. *Hobby Lobby*, 134 S. Ct. at 2805 (Ginsburg, J., dissenting).

246. *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303 (1985).

247. *Dole*, 899 F.2d at 1392.

248. *In re Minnesota ex rel. McClure*, 370 N.W.2d 844, 877 (Minn. 1985).

249. *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 945 (S.C. 1966).

250. *Merced v. Kasson*, 577 F.3d 578 (5th Cir. 2009).

251. 42 U.S.C. § 2000cc *et seq.* (2006).

252. *Hobby Lobby*, 134 S. Ct. at 2805 (Ginsburg, J., dissenting).

Comprehensive doctrines get to subject every law to their own interests.

Conclusion

Long before he changed his mind about same-sex marriage, then-Senator Obama chided the secularists who “ask believers to leave their religion at the door before entering the public square”:

Frederick Douglass, Abraham Lincoln, Williams Jennings Bryant, Dorothy Day, Martin Luther King—indeed, the majority of great reformers in American history—were not only motivated by faith, but repeatedly used religious language to argue for their cause. So to say that men and women should not inject their “personal morality” into public policy debates is a practical absurdity. Our law is by definition a codification of morality, much of it grounded in the Judeo-Christian tradition.²⁵³

Nonetheless, President Obama himself later demonstrated that it is not a “practical absurdity” to leave one’s biblical religion at the door; he finally listened to the experience of gay and lesbian Americans and advocated same-sex marriage. Like President Obama, many Americans set aside their personal morality after realizing it did violence to their gay and lesbian family, friends, and neighbors.

In contrast to what the comprehensive theorists argued in Part I, it is fair, practical, and possible to follow the Constitution instead of personal morality on questions of public policy. For too long, Americans have been imposing their own personal beliefs upon the laws. “In short, we have talked and talked about how to talk about the Constitution, rather than just talking about it.”²⁵⁴

253. Senator Barack Obama, Keynote Address at the Sojourners/Call to Renewal “Building a Covenant for New America” conference: Faith and Politics (June 28, 2006), *TRANSCRIPT: Obama’s 2006 Sojourners/Call to Renewal Address on Faith and Politics*, SOJOURNERS: GOD’S POLITICS BLOG (Feb. 21, 2012, 3:36 PM), <http://sojo.net/blogs/2012/02/21/transcript-obamas-2006-sojournerscall-renewal-address-faith-and-politics>.

254. Sara Aronchik Solow & Barry Friedman, *How to Talk About the Constitution*, 25 *YALE J.L. & HUMAN.* 69, 75 (2012) (“Law professors are mired in interpretive debates. Lawyers and judges just interpret. And how those lawyers and judges interpret is telling, especially in its contrast with academic debates.”).

Contraception? Start talking about women's equality (Fourteenth Amendment) instead of your personal belief about how an IUD works. Same-sex marriage? Start talking about due process and the right to marry (Fourteenth Amendment) instead of Augustine's belief that sex needs to be channeled to avoid sin. Abortion? Start talking about women's equality and whether the Constitution defines a person instead of the moment when a soul enters a fetus.

Talk that way, and vote that way. Don't impose your comprehensive beliefs on others through force of law. *Hobby Lobby* teaches us that such imposition violates religious freedom.

* * *