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Debate: The Contraception Mandate and Religious Freedom

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DEBATE

THE CONTRACEPTION MANDATE AND RELIGIOUS FREEDOM

OPENING STATEMENT

The Hard and Easy Case of the Contraception Mandate

STEVEN D. SMITH[†]

There are hard cases, and then there are easy cases. The Department of Health and Human Services' (HHS) contraception mandate (the Contraception Mandate) gives rise to both.

Whether the Mandate violates current free exercise doctrine presents a hard case, in part because the doctrine, with its malleable notions of "neutral" and "generally applicable," is easily manipulated. *Emp't Div. v. Smith*, 494 U.S. 872, 881 (1990). I would argue that the Mandate is riddled with such substantial exceptions that it cannot be regarded as a neutral law of general applicability. But given doctrinal squishiness, it is hard to be confident.

By contrast, whether enforcing the Mandate against objecting religious employers violates the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4 (2006), presents an easy case. Objecting religious employers declare, evidently in good faith, that compliance with the Mandate would require them to violate non-trivial religious commitments. See, e.g., *HHS Mandate Information Central*, BecketFund.org, <http://www.becketfund.org/hhsinformationcentral/> (last visited Mar. 24, 2013) (aggregating legal documents and news about scores of cases filed

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against the Mandate). By demanding compliance, therefore, the Mandate substantially burdens their exercise of religion. But RFRA prohibits the federal government from imposing such burdens unless the government has a compelling interest that cannot be achieved by less restrictive means. Although there is no metric for measuring the strength of asserted government interests, any claim that the government's interest is compelling is belied in this instance by the gaping exceptions the Mandate itself grants. *See* 26 U.S.C. § 4980H (2011 supp.) (small business exception), 42 U.S.C. § 18011 (2011 supp.) (grandfather exception). And even if the interest were compelling, critics have identified a variety of feasible, less restrictive ways in which that interest could be achieved. *See, e.g.,* Ed Whelan, *The HHS Contraception Mandate vs. RFRA—"Least Restrictive Means"*, Nat'l Rev. (Jan. 27, 2013), <http://www.nationalreview.com/bench-memos/289534/hhs-contraception-mandate-vs-rfra-least-restrictive-means-ed-whelan>.

So then why do many competent lawyers argue for the opposite conclusion? In part the answer has to do with strength of motivations: many people ardently want the Mandate to be enforced, even (or could it be especially?) against religious employers. But something more complicated and interesting is also going on. Familiar arguments supporting the Mandate are palpably unpersuasive, I think, *if taken as arguments about the meaning or application of RFRA*. But those arguments are more substantial if they are taken as tacitly addressing a different question—*whether the American commitment to special protection for religious freedom ought to be maintained*. And as it happens, that latter question is increasingly a live one in the legal academy and in American politics.

Many people who argue that the Mandate does not violate RFRA can be better understood as contending, wittingly or unwittingly, that religion should not receive special, legal protection. And one reason why the Contraception Mandate controversy seems so important, even to religious believers (like myself) whose faith does not proscribe the use of contraceptives, is that the controversy is a contest in miniature over the fate and future of religious freedom in America.

Consider the argument over whether the Contraception Mandate burdens the religious exercise of objecting employers. If we were merely trying to apply RFRA in accordance with received understandings of what the free exercise of religion means, then two simple facts ought to be dispositive. First, Catholic and other religious employers *declare* that compliance with the Mandate would force them to violate non-trivial religious commitments. Second, these declarations seem to be *sincere*. These two facts do not mean, of course, that objectors will ultimately be excused from complying

with the law; there is still the “compelling interest” qualification. But the facts do establish that religious exercise has been substantially burdened.

In response, defenders of the Mandate could claim that the objecting employers are insincere. But that would be a tough argument to make, and most defenders do not rely on it. Instead they claim, in essence, that *the employers are mistaken* in their belief that compliance with the Mandate would violate their religious commitments. The bishops or university presidents or other employers may believe that providing insurance covering contraceptives (and in many employers’ view, some abortifacients) would involve an impermissible “cooperation with evil,” but in fact it wouldn’t. See Robert T. Miller, *The HHS Mandate, Cooperation with Evil, and Coercion*, ThePublicDiscourse.com (Feb. 22, 2012), <http://www.thepublicdiscourse.com/2012/02/4817/> (discussing the doctrine of “cooperation with evil” and the Mandate). Or the employers may think that providing such insurance would unacceptably compromise their Christian witness; but, again, they are wrong.

With the respect to the question of RFRA’s meaning and application, however, such arguments wholly miss the mark. To be sure, Catholics (and others) properly debate whether Catholic doctrines regarding “cooperation with evil” forbid Catholic employers to provide insurance covering contraceptives. In like manner, people both inside and outside a religious institution may debate whether some action—such as providing insurance that covers contraceptives—would compromise the institution’s religious witness. These are important debates, but in applying RFRA, they should be irrelevant. What matters, *under both the Free Exercise Clause and RFRA*, is whether a person—or in this case an employer—*sincerely believes* that compliance with the Mandate would violate religious duties. Conversely, arguments that a believer is mistaken in sincerely supposing that his or her religion forbids something have long and properly been deemed incompatible with any serious respect for the free exercise of religion. Thus, when Eddie Thomas concluded that working in the production of munitions was forbidden by his religion, even fellow Jehovah’s Witnesses could doubt that Thomas had correctly understood his own faith. But it was not a court’s job, the Supreme Court observed, “to inquire whether [Thomas] or his fellow worker more correctly perceived the commands of their common faith.” What mattered was that Thomas *sincerely believed* his religion prohibited him from working in munitions. *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981).

No other position is compatible with a meaningful commitment to religious freedom. After all, during the centuries in which heresy and apostasy laws were enforced, a central premise for such repression was precisely that

those prosecuted for such transgressions were mistaken—perhaps willfully mistaken—about their own religion: that is why these laws were enforced only against persons deemed to be (deviant) Christians, not against Jews or others who had never been Christian. See Brian Tierney, *Religious Rights: An Historical Perspective*, in *Religious Human Rights in Global Perspective* 17, 25-26, 30-33 (John Witte, Jr. & Johan D. van der Vyver eds. 1996). By contrast, modern commitments to religious freedom necessarily relinquished this premise, embracing instead the idea that persons or associations can determine for themselves what they believe, and that it is no business of the state (or the courts) to correct their supposed errors. In seeking to subject employers' religious beliefs to critical examination and rejection, and on that basis denying that their religious exercise is burdened (even if the employers sincerely *believe* it is), advocates of the Mandate to that extent revert to the medieval premise that the more modern commitment to religious freedom sought to repudiate.

Professor Caroline Corbin engages in a variant of this kind of reasoning when she makes much of survey evidence indicating that most American Catholics do not believe the use of artificial contraceptives is morally wrong, and that most Catholic women actually use contraceptives. These facts may be of interest to sociologists, for example, or church leaders (and also, of course, to political strategists). But what exactly is their relevance *for free exercise purposes*? Corbin claims, it seems, that what counts as Catholic belief or teaching should be determined not by what church authorities teach but rather by what a majority of Catholics believe. See Caroline Mala Corbin, *The Contraception Mandate*, 107 Nw. U. L. Rev. Colloquy 151, 156-57 (2012). So Catholic employers are not burdened by the Mandate because Catholicism does not actually oppose contraception; its leaders only *think* it does.

As an argument about the meaning and application of RFRA, this contention commits the same error just considered, and then compounds the error. Thus, Corbin's majoritarian argument in effect tells Catholic employers (and Catholic bishops and theologians) that they are mistaken about their own doctrines. They *believe* Catholic teaching opposes contraceptives but in fact (under Corbin's majoritarian criterion) it doesn't. Even Catholics who disagree with their church about contraception might easily spot the error here: it is entirely possible for an individual Catholic to believe that the church is mistaken on some teaching while acknowledging that this *is* the church's teaching (just as it is possible for you or me to think that the Supreme Court got some decision badly wrong while acknowledging that this *was* the Court's decision and that the Court had the authority to make it). But Corbin's argument does not merely tell Catholic objectors to the

Mandate that their *beliefs* about Catholic doctrine are mistaken; it attempts to redefine *the church itself* from the outside. After all, the Roman Catholic Church is and always has been a hierarchical church; its doctrines have never been determined by simply polling the membership. Corbin's argument, however, would in essence take authority to pronounce doctrine away from bishops and church councils and transfer that authority to the laity.

There have, of course, been plenty of historical instances of secular rulers telling churches not only what their doctrines shall be but how those doctrines are to be formulated and who gets to do the formulating. Corbin's approach resonates with that precedent. So hers is not an impossible position to hold; it is merely incompatible with any serious respect for religious freedom, or at least for any freedom that extends to religion's associational or institutional dimension.

Consider one final example. Objecting employers argue that even if the government believes there is a compelling interest in ensuring that women have insurance covering contraceptives, the government could achieve that interest in ways "less restrictive" of religious exercise. Edward Whelan, *The HHS Contraception Mandate vs. The Religious Freedom Restoration Act*, 87 Notre Dame L. Rev. 2179, 2186 (2012). One obvious and "less restrictive means" would be for government itself to pay for the coverage instead of forcing other people to pay for it. *See id.* Purporting to respond to this point, the Issue Brief of the American Constitution Society asserts that "a religious person's right to an exemption does not include the right to demand that the government pay for the exemption. The government may do this if it chooses, but it is not constitutionally required to do so." Frederick Mark Gedicks, Am. Constitution Soc'y for Law & Policy, *With Religious Liberty for All: A Defense of the Affordable Care Act's Contraception Coverage Mandate* 17 (2012), available at http://www.acslaw.org/sites/default/files/Gedicks_-_With_Religious_Liberty_for_All_1.pdf.

This assertion mischaracterizes the employers' argument; it is also wholly unresponsive to that argument, and to the law as Congress enacted it. The employers are emphatically *not* "demand[ing] that government pay for" contraceptive coverage—or that anyone else pay for it. They are merely arguing that, under RFRA, and given their religious objections, they themselves should not be required to pay for the coverage, and to that end are pointing out a fact that RFRA itself makes centrally relevant—that there are "less restrictive means" of achieving the government's objective. 42 U.S.C. § 2000bb-1(b) (2006). If RFRA's requirement could be defeated merely by recharacterizing arguments about "less restrictive means," as

demands that government affirmatively act in some way, the statutory requirement would in effect be read out of the law.

Which may be the real point. The Issue Brief's argument resonates with a familiar position that would refuse (or at least refuse to *mandate*) any affirmative accommodation of religion: government should not persecute or discriminate against religion; but so long as government acts for legitimate reasons or interests, it need not go to any trouble or expense in order to accommodate religious believers.

This is a perfectly familiar and respectable position, shared by many scholars, judges, and government officials. But it is emphatically *not* the position of RFRA, which explicitly commands affirmative accommodation of religion (subject, once again, to the "compelling interest" and "less restrictive means" requirements). See 42 U.S.C. §2000bb-1(b). That is why the Issue Brief's contention is at the same time entirely off the mark *as an interpretation of RFRA* but potentially appealing if taken as a stand-alone proposition.

I have suggested that the Contraception Mandate presents an easy case under RFRA: enforcement of the Mandate against objecting religious employers would violate the statute. Contrary arguments typically do not really engage the statute so much as evade or tacitly reject it. Their rhetorical force comes not from the statute, with its deliberate policy favoring affirmative accommodation of religious exercise, but rather from a different position that opposes any such accommodation.

As it happens, that anti-accommodationist position increasingly finds favor with legal academics. Why should religion be singled out for special constitutional treatment? (Or at least for special *favorable* treatment: those same academics are typically happy enough with special restrictions that prohibit government from subsidizing or endorsing religion in the way it subsidizes and endorses other interests and views.) Douglas Laycock reports that "scholars from all points on the spectrum now question whether there is any modern justification for religious liberty." Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. Det. Mercy L. Rev. 407, 423 (2011). A similar position was evident in the Obama Administration's stance in the recent *Hosanna-Tabor* case, in which the Solicitor General argued, unsuccessfully, against giving religious institutions any special, constitutional right to select their ministerial employees on the basis of their religious doctrines and commitments.

Whether the nation's long standing commitment to special protection for religious freedom should now be discarded presents a major historic decision that is likely to become even more conspicuously contested in

coming years. *See generally* Steven D. Smith, *The Rise and Decline of American Religious Freedom* (forthcoming Harvard University Press 2013). Substantial, good faith arguments can be made on both sides, I think. But that decision is not one that courts considering challenges to the Contraception Mandate should take upon themselves.

The question for them is whether the Contraception Mandate, as applied to objecting religious employers, violates a statute that Congress enacted and the President signed into law. And *that* question, as I have argued, presents an easy case.

REBUTTAL

*Two Easy Cases: Nonprofit and For-profit Corporate Challenges to the Contraception Mandate*CAROLINE MALA CORBIN[†]

Preventive health care just got a lot more accessible. Under the Patient Protection and Affordable Care Act, health insurance plans must now offer a range of preventive services without demanding any kind of copayment, coinsurance, or deductible. Children can receive free vaccinations; adults can receive free cancer screenings; and women can receive free contraception. This last requirement, often called “the Contraception Mandate,” has led to a flurry of lawsuits by religiously affiliated employers. These employers argue that their religion condemns the use of artificial birth control, and that by making them include these drugs in the plans they provide to employees, the government is forcing them to violate their religious beliefs. These plaintiffs claim the Mandate “substantially burdens” their “religious exercise” and violates the Religious Freedom Restoration Act (RFRA). 42 U.S.C. § 2000bb-1 (2006). It does not.¹

Before explaining why the Contraception Mandate does not impose a substantial burden on anyone’s religious conscience, and in any event passes strict scrutiny, I would like to make a few clarifications about the Mandate’s scope. First, it does not apply to houses of worship or other “religious employers” as defined by the IRS. Thus, churches, synagogues, and mosques are completely exempt. Second, religiously affiliated nonprofits do not have to pay for contraception or even include it in their health care plans. Instead, their insurance provider (or, if they are self-insured, an independent provider working with a third-party administrator) will provide and pay for a separate policy. Finally, the plaintiffs in these cases are not individuals, but large organizations, nonprofit and for-profit, whose employees do not necessarily share their faith or beliefs.

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¹ My recent essay, *The Contraception Mandate*, 107 NW. U. L. REV. COLL. 151 (2012), provides supporting citations for many of the arguments presented here. It also addresses the constitutionality of the Mandate.

I. SUBSTANTIAL BURDEN ON RELIGIOUS EXERCISE

In order to support a claim under RFRA, an employer must establish that the Mandate imposes a substantial religious burden. *See id.* According to Professor Smith, to meet this requirement, all plaintiffs ought to have to do is assert—sincerely—that a law substantially burdens their religious conscience. Thus, once a Catholic institution argues, sincerely, that it is an affront to conscience to offer contraception as part of its employees' health care package because it coerces the endorsement and facilitation of religiously proscribed conduct, the organization or corporation must be exempt from the Mandate unless the Mandate passes strict scrutiny. *See supra* at 262. Professor Smith argues that to subject the entities' claims to any kind of scrutiny reveals a hidden agenda to eliminate religious accommodations and revives the medieval practice of the government rather than the church dictating the content of religious doctrine. *See supra* at 263.

The first problem with Professor's Smith deferential approach to the "substantial burden" inquiry is that most RFRA claims here are brought by institutions, not individuals. When an individual says, this act burdens my Catholic conscience, we clearly know whose conscience is at issue. But when an institution says, this act burdens our Catholic conscience, that clarity is lacking. Is it the institution's conscience? If so, do institutions even have a conscience in the way that real people do? If the argument is that the institutional conscience embodies, represents, or stands in for the individual consciences of its members, then it might be worth investigating members' view of the matter.

Polls indicate that the vast majority of American Catholics neither oppose contraception nor find its use inconsistent with being "a good Catholic." *See, e.g., CBS News Poll, Apr. 2011*, The Roper Center at the University of Connecticut (Mar. 2011), http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html In fact, almost all sexually active Catholic women in the United States have relied on contraception at some point in their lives, and most Catholics want the Pope to drop the Church's official condemnation of it. *See* RACHEL K. JONES & JOERG DREWEKE, GUTTMACHER INST., COUNTERING CONVENTIONAL WISDOM: NEW EVIDENCE ON RELIGION AND CONTRACEPTIVE USE, at 4 (2011) available at <http://www.guttmacher.org/pubs/Religion-and-Contraceptive-Use.pdf>; *USA Today/CNN/Gallup Poll Results*, USA TODAY (May 20, 2005), <http://usatoday30.usatoday.com/news/polls/tables/live/2005-04-03-poll.htm>. If most American Catholics have no religious objection to contraception and wish the Church would change its position, then it is hard to see how making contraception available violates their conscience.

Professor Smith sees this argument as beside the point, given that official church doctrine condemns artificial birth control, and as highly problematic, since it encourages the state to make pronouncements about the internal doctrine of a church, something the state has no business doing. But it is not beside the point: before the state grants a religious accommodation that will impose on others, it has an obligation to ensure that people's consciences are actually substantially burdened.

As for Professor's Smith worry that this inquiry will necessarily require the state to rule on theological questions beyond its institutional competence, his concern is not entirely misplaced. Indeed, the Supreme Court abandoned the substantial burden test for Free Exercise Clause claims in large part because the Court did not want to have to decide whether a religious burden was slight or substantial, sincere or insincere. *See, e.g., Employment Div. v. Smith*, 494 U.S. 872, 886-87 (1990) (wondering "what principle of law or logic [could] be brought to bear to contradict a believer's assertion that a particular act is 'central' to his faith"). Professor Smith believes this risk can be averted if the state automatically defers to church leadership as to what constitutes a substantial burden. Here, he argues, the Catholic Church condemns contraception, and it is official, Vatican policy that should prevail when analyzing whether a Catholic institution has been substantially burdened. *See supra* at 264-65. What this approach masks, however, is that the state *must* inevitably make a decision about whose view of Catholic conscience should control: the leadership or the membership. Professor Smith might respond that when people join a hierarchal organization, they implicitly concede to the hierarchy's control of such matters. But what if the members of the organization disagree? What if, as is the case with American Catholics today, the members of the organization concede no such thing? *See* CNN & ORC, POLL 3 (2012), *available at* <http://i2.cdn.turner.com/cnn/2012/images/02/16/rel2g.pdf>. Should the state tell them they are wrong and ignore their perspective? In short, the clash between the majority membership and the minority leadership should at the least raise questions about whether the Mandate imposes a substantial burden on an institution's conscience.

It is even harder to sustain a RFRA conscience claim when the institution is a for-profit corporation that manufactures automobile lights, cabinet doors, or HVAC equipment (as some of the current plaintiffs do). To start, there is no indication in its legislative history or language that RFRA was ever meant to protect for-profit corporations. In addition, for-profit corporations are not First Amendment rights holders in the same way that actual people are. While the Supreme Court has held that corporate speech is

protected by the Free Speech Clause in cases like *Citizens United*, they did so not because corporations have a right to speak, but because audiences have the right to hear all points of view, whatever their source. As for corporate freedom of association and corporate free exercise, the Supreme Court has summarily rejected the former in at least one case and never recognized the latter. It is not surprising then that RFRA did not contemplate protecting enterprises whose primary purpose is to earn a profit.

The second problem with Professor's Smith deferential approach to evaluating substantial burden is that even the most remote burdens must be accommodated if a law fails strict scrutiny. For example, if an institution considers it "cooperation with evil" to allow its employees to use their salary to purchase contraception, buy alcohol, or see a movie celebrating same-sex marriage, then we—according to Professor Smith—should defer to its sincere claims, and permit it to impose conditions on its employees' salaries unless laws that prohibit such conditions pass strict scrutiny. But exemptions do not occur in a vacuum. Not only are the religious rights of those who want an exemption implicated, but also the rights of those who are affected by an exemption (in this case, the employees). Deciding whether to grant a religious exemption involves a balancing act, and the calibration is off when employees' purchasing decisions can be considered a substantial burden on an employer's religious conscience.

Any burden on religious conscience created by the Contraception Mandate is similarly attenuated. No entity is forced to use, dispense, or—except for for-profit corporations—pay for contraception. Indeed, under the latest compromise, religious nonprofits do not even have to cover contraception in their health care plans; instead, their health insurance company will offer a separate policy free of charge.

Nor is any entity being compelled to *endorse* contraception use. In analyzing endorsement in a case challenging a school voucher program, the Supreme Court held that no reasonable person would conclude the government was endorsing religion even though most of the government's voucher money went to religious schools and might well have been used to promote religious activities like prayer, or to provide theological education. Why? The money ended up in religious schools' coffers as a result of the genuine and independent choice of private individuals. Any endorsement of religion should be attributed to the individual who chooses a religious school, not to the government that created the voucher program. Likewise, here, any endorsement of contraception should be attributed to the individual employee who chooses to use it, not to the employer that provided the health insurance plan (or access to a third party's plan, in the case of nonprofits).

Besides, reasonable people will understand that complying with a law does not always equal endorsement of that law, and particularly that providing government-mandated health care does not mean endorsement of every service offered. Because of state mandates, many Catholic institutions already include contraception in their health care plans, yet no reasonable person would conclude that the Vatican now supports contraception. This is especially true given that nothing impedes the religious entities from making their beliefs known. On the contrary, employers are free to declare their opposition.

Still, even if a reasonable person would understand that the religious employers are not endorsing contraception, perhaps the employers are facilitating its use by making contraception more affordable. But arguing that it imposes a substantial burden on religious exercise to make something more affordable via employees' compensation—whether it be by a larger salary or by a more comprehensive health care package—is simply too attenuated a claim to stand. After all, paying employees more than minimum wage also facilitates contraception use, yet no one would argue that religious employers should be exempt from minimum wage laws. In short, any facilitation simply does not rise to the level of a substantial burden on religious exercise.

II. STRICT SCRUTINY

In any case, the Contraception Mandate passes RFRA's strict scrutiny requirement, as it advances several compelling state interests by means that are narrowly tailored. It is not difficult to come up with compelling reasons why working women who do not wish to become pregnant should have access to contraception. Nor is there a more narrowly tailored means of increasing access to contraception for women whose religiously affiliated employer provides health insurance.

The Mandate advances several compelling state interests. Promoting health is a compelling state interest, and increasing access to contraception improves women's health and leads to healthier pregnancies since women with planned pregnancies are more likely to seek prenatal care. Promoting women's bodily integrity and women's equality are also compelling state interests, and as legions of commentators have noted, without the ability to control whether and when to have children, women could not participate as equal citizens in the social, economic, and political life of the nation. Finally, the state has a compelling interest in combatting sex discrimination in the provision of health care benefits—the likely consequence of health insurance plans that covers men's basic needs but not women's. The fact

that there are exceptions to the law—which are available to religious and nonreligious employers alike—does not negate the importance of women’s well-being, personal autonomy, and equality.

Professor Smith, however, suggests that the law is not narrowly tailored and therefore fails strict scrutiny because the government could achieve its goals by alternate means, namely, by directly providing or subsidizing contraception. But imagine a medical practice that refuses to see Hispanic patients, or an employer who provides insurance covering cancer screenings for white employees but not Asian ones. Now imagine that the medical practice or employer argues that a law banning race discrimination in places of public accommodation or the provision of employment benefits is not narrowly tailored because the government could provide the services/benefits instead. Such a claim would obviously fail, and Professor Smith’s argument should fail as well.

III. CONCLUSION

Professor Smith is no doubt correct that some who oppose exemptions to the Mandate oppose all religious accommodations. Yet, one can support exemptions for religious individuals and still conclude that exemptions for large organizations challenging the Contraception Mandate are inappropriate. Indeed, for those who care about individual conscience, it is important not to overlook the consciences of those employees who do not share the religious beliefs of their employers. “RFRA is a shield, not a sword It is not a means to force one’s religious practices upon others.” *O’Brien v. U.S. Dep’t Health Human Servs.*, No. 4:12-476 (CEJ), 2012 WL 4481208, at *6 (E.D. Mo. Sept. 28, 2012). Employees who work at religiously affiliated hospitals, schools, and charities, or at factories and stores with religious management, may have their own moral and religious reasons for limiting their family size. As the Supreme Court has said in regard to another social welfare program (social security taxes), excusing religious employers “operates to impose the employer’s religious faith on the employees.” *United States v. Lee*, 455 U.S. 252, 253 (1982). The same would be true here.

CLOSING STATEMENT

Free Exercise for “Large Organizations”

STEVEN D. SMITH

Readers will have noticed that the order of presentation in this brief debate seems to have flipped: Professor Corbin’s ostensible response reads more like an opening statement—to which my ostensible opening statement reads like a response. The reason for this reversal, probably, is that Professor Corbin had already published a defense of the Mandate, which I cited and addressed in my opening statement, and her current submission largely repeats the arguments she previously made. Thus, Professor Corbin again claims that the Mandate does not substantially burden objecting employers’ exercise of religion, even if they sincerely believe it requires them to violate non-trivial religious obligations. And she again claims that the Catholic position on contraception should be determined by survey data reporting the opinions of church members rather than by the church’s official doctrine as expounded by church leaders. My own statement has already addressed these claims, and there seems little point in repeating the arguments. So instead I will try to clarify a couple of key points and then briefly address what seems to be a major division between us.

Professor Corbin understands me to maintain that in order to establish a burden on religious exercise, “all plaintiffs ought to have to do is assert—sincerely—that a law substantially burdens their religious conscience.” *Supra* at 269. Let me try to be a bit more precise. It would be more accurate to say that the law (meaning, in this instance, RFRA, as enacted by Congress and interpreted by the courts) gets to say *what counts as a burden*, but that *whether some particular legal requirement in fact imposes such a burden* depends on the actual religious commitments of those subjected to the requirement. So if I say, “It weighs on my conscience and offends my religion that our government permits abortions [or conducts drone strikes, or closes its borders, or whatever],” an apt answer would be, “Too bad. You may be perfectly sincere, but that is not what it means in our law to impose a ‘burden’ on religion.” Conversely, if I report that a legal requirement to do X would force me to violate some sincere, substantial religious commitment that I hold, then my religious exercise *is* burdened, because that is the sort of imposition the law regards as a “burden.” And if someone then contends

that I am mistaken because I have misunderstood my own religion (which they think does not or should not *really* prohibit X), they might, in some sense, be correct—maybe my theological or scriptural understanding is flawed—but their contention also wholly misses the point. Religious freedom under our Constitution and laws means that no outsider—and certainly not the government—gets to tell me what my faith is, or what my faith does or does not prohibit.

The critic is even more off base if she contends that a legal requirement would not be burdensome *as measured by some other (religious or secular) standard or criteria*. And yet, in rejecting the employers' sincere claims of burden, this is precisely the position taken by Professor Corbin, and typically, by other Mandate supporters. The anomaly is perhaps most conspicuous in Professor Corbin's argument that because a taxpayer would not be deemed *under establishment clause doctrine* to endorse the religion of private schools that might receive public support through a voucher program, a Christian employer is mistaken if he sincerely claims, based on his *Christian faith*, that his Christian mission and witness would be compromised by providing insurance coverage that includes contraceptives or abortifacients. Professor Corbin's comparison and conclusion add up to a stark *non sequitur*.

All of this is not to say, of course, that religious objectors should automatically be excused from obeying a law so long as their objections are sincere. Under RFRA, religious exercise may be burdened if this is necessary to achieve a compelling interest that cannot be achieved through less restrictive means. Professor Corbin dislikes this "strict scrutiny" approach. She worries that many harmful practices might get legal protection under this test, and she gives as an example a hypothetical employer whose religion would be burdened if employees "use their salary to purchase contraception, buy alcohol, or see a movie celebrating same-sex marriage." *Supra* at 271.

The argument is reminiscent of Justice Scalia's "parade of horrors" in *Employment Division v. Smith*, offered to justify denying free exercise accommodation. See 494 U.S. 872, 888-89 (1990). But in enacting RFRA, Congress rejected that "parade of horrors" argumentation—and for good reason. For one thing, the horrors rarely materialize. Professor Corbin's hypothetical officious employer would likely have a hard time enticing qualified people into his employ: his freedom of religion does not mean that anybody has to work for him. And in any case, in enacting RFRA (with its explicit "compelling interest" provision), Congress evidently determined that the commitment to free exercise was worth the costs. In overtly

opposing that compelling interest test, Professor Corbin obligingly corroborates the thesis of my opening statement: Mandate supporters are in reality arguing not so much *under* or *about* RFRA, but rather *against* it.

Perhaps Professor Corbin's and my most fundamental disagreement is revealed in her questioning whether freedom of religion should extend to institutions as well as individuals. Her reluctance to protect "institutions," or "large organizations," is evident from start to finish. "[O]ne can support exemptions for *religious individuals*," she says in closing, "and yet still conclude that exemptions for *large organizations* challenging the Mandate are inappropriate." See *supra* at 273 (emphasis added).

On first look, this position may be appealing. After all, isn't it *people* who have consciences, and who elicit our concern—not "large organizations"?

On closer examination, though, Professor Corbin's position favoring free exercise protection for "religious individuals" but not for institutions fundamentally misconceives the real human concerns at stake and commits a central error that religious freedom is calculated to avoid. The manifest fact is that although some people's religion is purely private in character, many other peoples' religious commitments are more communal, leading them to form, or join, or join together in associations or institutions to which they attribute religious significance.

Sometimes, such institutions are necessary for carrying out the religion's mission of service to the world: Catholic hospitals would be an example. Sometimes the communal character of the commitment is even more essential—almost, we might say, metaphysical. Often, religious associations are not merely instances of individuals acting in concert in order to better further their own individual ends (as in a buying co-op, say, or a labor union). Rather, for these believers, the association itself—the communion—may be at the heart of what religion is.

In this respect, a religious institution is not like a union—a musicians' union, maybe—but more like an orchestra. There are forms of music—symphonies or concertos, for example—that simply cannot be performed by (as we might say) "musical individuals" acting on their own; this music can only come into being by musicians acting in concert, as a unit. Suppose someone were to propose that it is individual musicians—real human beings—who matter, not "large musical organizations," and that we should accordingly respect and further the work of individual musicians and composers, but not of musical "institutions," like orchestras. The proposal would be not merely misguided, but internally contradictory or self-defeating, because it would prevent many musicians and composers from making the kind of music they feel called to make.

Professor Corbin's preference for protecting "religious individuals" but not religious institutions is misguided in much the same way. Viewed merely as abstract, impersonal entities, "institutions" and "organizations" may not elicit our concern. We care, maybe, about persons. But to deny free exercise protection to such institutions and organizations is to frustrate the free exercise of *persons*—of the very "religious individuals" about whom Professor Corbin expresses concern.

It is true, of course, that people in religious institutions will sometimes disagree, with their leaders and with each other. (Just as people in musical groups—or business associations, or political parties, or pretty much any collective human enterprise—will often disagree.) And such disagreements can present challenges both for the associations themselves and, sometimes, for the law. Dissenters often find that their disagreements are sufficiently substantial that they choose to leave an institution; at least in the area of religion, our law categorically protects their right to do so. But insofar as such associations serve vital human purposes—purposes valuable to *the individuals* who compose the associations—the existence of disagreement is no reason to deny recognition or protection to the associations.

To be sure, many people—Professor Corbin may be one—incline toward more private or atomistic forms of religion. That is their right: our commitment to religious freedom, manifest both in the First Amendment and in RFRA, respects and protects that more inward-looking inclination. But our commitment does not impose such privatistic preferences (or permit Professor Corbin and like-minded believers to impose them) any more than it permits the more communally-oriented believers to impose *their* religious preferences. Such imposition is impermissible, from whichever direction it may come. That, surely, is what religious freedom means.

CLOSING STATEMENT

Sincere is Not Substantial and a Corporation Is Not an Orchestra

CAROLINE MALA CORBIN

According to Professor Smith, regardless of whether the religious plaintiff is an individual or an institution, courts should defer to subjective claims of substantial burden, and any attempt to apply objective limits implies hostility towards RFRA. Subjecting every law challenged as a substantial burden on religion to strict scrutiny is what RFRA contemplates, he continues, and to fear the consequences is to conjure up a “parade of horrors” that will never come to pass. *See supra* at 275-76. Yet courts adopt objective legal tests all the time for reasons other than hostility. Nor is the “parade of horrors” entirely theoretical: Indeed, one might argue that the parade is well underway when a court can entertain the notion that a secular, for-profit corporation has a religious “conscience” that is substantially burdened by offering comprehensive health insurance. *See, e.g., Grote v. Sebelius*, 708 F.3d 850, 855 (7th Cir. 2013) (staying application of Mandate to manufacturer of vehicle safety systems); *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *5 (7th Cir. Dec. 28, 2012) (same for construction firm); *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630, at *15 (E.D. Mich. Oct. 31, 2012) (same for business selling outdoor power equipment); *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1295 (D. Colo. 2012) (same for manufacturer of HVAC equipment).

I. ABSOLUTE DEFERENCE TO A SUBJECTIVE VIEW
OF RELIGIOUS BURDEN

Professor Smith argues that “[r]eligious freedom . . . means that no outsider—and certainly not the government—gets to tell me what my faith is, or what it does or does not prohibit.” *See supra* at 275. This is quite true. If someone believes their religion condemns abortion, it is not the government’s place to conclude otherwise. But not all perceived burdens equal a “substantial burden” for legal purposes. That is, a court decision that a law does not impose a “substantial burden” under RFRA does not mean that the government is asserting superior theological knowledge. Rather, it is a judgment that the government does not consider the burden the type that triggers strict scrutiny. Professor Smith would

like to conflate every alleged burden with a “substantial burden” under RFRA. But they are not necessarily the same.

As RFRA makes explicit, the law’s strict scrutiny provision is triggered only by *substantial* burdens on religion, not *all* burdens on religion. To simply assume a substantial burden whenever someone claims one exists essentially reads out that requirement. Without some objective evaluation of burden, all burdens would become eligible for accommodation. Would this really be so bad? Consider a couple of scenarios.

Scenario number one: Imagine that Plan B is not an abortifacient. (It is not.) Assume too that every reputable scientific study to examine Plan B’s mechanism concludes that it works not by preventing fertilized eggs from implanting but by immobilizing sperm and stopping ovulation in the first instance. See, e.g., Julie Rovner, *Morning-After Pills Don’t Cause Abortion, Studies Say*, NPR (Feb. 21, 2013, 5:04 PM), <http://www.npr.org/blogs/health/2013/02/22/172595689/morning-after-pills-dont-cause-abortion-studies-say>. And for the sake of argument, let’s assume there is no debate in the scientific community about this scientific fact. See, e.g., Jamie Manson, *What an Abortifacient Is—And What It Isn’t*, NATIONAL CATHOLIC REPORTER (Feb. 20, 2012), <http://ncronline.org/blogs/grace-margins/what-abortionifacient-and-what-it-isnt>. Accordingly, Plan B is contraception and covered by the Contraception Mandate. Now imagine that a plaintiff rejects these scientific findings as inconclusive and maintains that Plan B is an abortifacient and consequently believes, sincerely, that providing it to employees violates his religious conscience. Under Professor Smith’s subjective approach—where the government dare not question anyone’s conclusion that a law imposes a substantial burden—the employer should be exempt from the Mandate unless it passes strict scrutiny.

Scenario number two: Plaintiffs, owners and managers of a secular, for-profit corporation, view their company as an extension of themselves. As a result, they sincerely believe that their company’s subsidization of contraception contravenes their religious obligations and imposes a substantial religious burden on them as individuals. As a matter of law, however, corporations and their owners are entirely separate legal entities. This division is actually the point of incorporation: “Incorporation’s basic purpose is to create a distinct legal entity with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs.” *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001). Consequently, for owners to argue that requiring their corporations to pay for contraception is akin to forcing them to pay ignores the basic, legal structure of the corporation. The corporation

is not the alter ego of the owner; the corporation's money is not the owner's money. On the contrary, owners who treat corporate funds as their own would find themselves in a great deal of trouble. As Judge Ilana Rovner observed, "So long as the business's liabilities are not the [plaintiffs'] liabilities—which is the primary and invaluable privilege conferred by the corporate form—neither are the business's expenditures the [plaintiffs'] own expenditures." *Grote*, 708 F. 3d at 858 (Rovner, J., dissenting).

Should courts ignore science and accept the claim that providing Plan B violates deeply held religious beliefs against abortion? Likewise, when a business owner complains of a substantial burden, should courts ignore hornbook law that a corporation is not the alter ego of its owner? In both cases, the subjective claim of substantial religious burden may well be sincere. In both cases, however, it ought to be rejected. In doing so the government is not claiming to know the plaintiff's religious beliefs better than the plaintiff. In the first scenario, a court can assume religious opposition to abortion (even if broadly defined to include preventing implantation), but still find that, as a matter of science, Plan B it is not an abortifacient. In the second scenario, a court would not be disputing religious tenets but acknowledging that, as a matter of law, the corporation is a distinct legal entity. And once it is accepted that there are objective limits to the burdens the state must contemplate accommodating, why shouldn't the state decide that some burdens are, objectively speaking, simply too attenuated for purposes of RFRA?

In fact, courts have not only the ability but the responsibility to evaluate whether the burdens caused by the Contraception Mandate are substantial enough to merit accommodation under RFRA. After all, it is not just the rights of employers that are at stake, but the rights of their employees. Accommodating employers imposes costs on their employees. As discussed in my first reply, religiously motivated restrictions on health care implicates employees' equality and religious liberty. The suggestion that unhappy workers will simply seek employment elsewhere overlooks economic reality and the huge power imbalance between employers and employees. In any event, to require employee-protective laws to pass strict scrutiny when the burden is slight for the employers seeking to circumvent them is not the balance RFRA envisioned.

A. *Corporations as religious institutions*

So far this second reply has focused on actual people seeking the protection of RFRA, whether they are the head of a religiously affiliated organization or the owner of a company. But what if the plaintiff is not a natural

person but an institutional “person”? Professor Smith correctly observes that some people honor their religious commitments communally. His metaphor of musicians playing together in an orchestra is lovely and may well mirror people’s experience of their church, synagogue, mosque or other voluntary religious association. *See supra* at 276. Nonetheless, these types of voluntary institutions are not the institutions seeking exemptions under RFRA. Religious organizations like churches, synagogues, and mosques are not at issue in Contraception Mandate cases (or my discussion of them) because they are exempt. The Mandate does not apply to them.

The institutions seeking exemption from the Contraception Mandate are not voluntary associations but nonprofit and for-profit corporations. They are not composed of voluntary members uniting around a common religious vision; they are composed of employers and employees. Of course, it is possible that some employees view themselves as participating in a collective religious enterprise. But many of them do not. Instead, many do not share their employer’s faith and they show up for work in order to earn a living. They include factory workers, nurse’s aides, store managers, sales associates, drivers, food packers, custodial staff, and administrative assistants, among others, who depend on their paycheck and benefits to take care of themselves and their families. For many, their job is not a religious experience but a way to survive. Whatever may be said about voluntary members and religious associations, it does not translate to employees and corporations.

CONCLUSION

Religious liberty is a fundamental value in our society. But it is not the only value: Equality is as fundamental. Adding equality to the equation means first, employers should not be able to presumptively override the equal rights of their employees. And second, when arguing in favor of religious liberty, it is important to ensure that the right to religious liberty does not accrue only to the elite. Exempting for-profit corporations from the Contraception Mandate would allow the (more powerful) owners to force their religious views onto their (less powerful) workers who may hold entirely different beliefs. It would be a shame if yet another aspect of the American dream were reserved for those at the top at the expense of everyone else.

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