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# Accommodation, Establishment, and Freedom of Religion

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# Accommodation, Establishment, and Freedom of Religion

*Richard W. Garnett\**

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## I. INTRODUCTION

The *Hobby Lobby* and *Conestoga Wood* cases<sup>1</sup> are primarily about the meaning and application of the Religious Freedom Restoration Act of 1993 (“RFRA”).<sup>2</sup> The main question presented to the Supreme Court is whether the Act requires the federal government to accommodate certain for-profit businesses by exempting them from a requirement that they include coverage for certain “contraceptive methods [and] sterilization procedures”<sup>3</sup> in their employees’ insurance plans.

This is a question of statutory interpretation. Answering it will probably involve answering others: Are “for-profit corporations conducting commercial enterprises”<sup>4</sup> “person[s]” that can engage in the “exercise of religion” (within the meaning of RFRA)? Does the “burden” that the parties describe—that is, “coercing them . . . to

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\* Professor of Law and Concurrent Professor of Political Science, University of Notre Dame. I am grateful to William Weaver and his colleagues at the *Vanderbilt Law Review* for including me in this conversation and for their patience. I also appreciate the helpful suggestions received from Randy Kozel, Kevin Walsh, Marc DeGirolami, and Nathan Chapman.

1. *Sebelius v. Hobby Lobby Stores, Inc.*, 723 F.3d 1114 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (Nov. 26, 2013) (No. 13-354); *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (Nov. 26, 2013) (No. 13-356). A petition in another related case—*Autocam Corp. v. Sebelius*, 730 F.3d 618 (6th Cir. 2013), *petition for cert. filed*, No. 13-482 (Oct. 15, 2013)—is pending.

2. 42 U.S.C. §§ 2000bb to bb-4 (2012).

3. 78 Fed. Reg. 39870, 39870 (July 2, 2013).

4. Brief for the Petitioners at 13, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S. Jan. 10, 2014).

violate their sincere belief that they cannot provide the four drugs and devices at issue”<sup>5</sup>—count as a “substantial[] burden” on the parties’ “exercise of religion” (within the meaning of RFRA)? Is the coverage requirement at issue the “least restrictive means of furthering [a] compelling governmental interest” (within the meaning of RFRA)?

These are not metaphysical or moral questions; they are questions about the meaning and application of statutes and regulations that have been enacted and promulgated and that can be revised and repealed.<sup>6</sup> In other words, contrary to what has been suggested in much of the coverage of and commentary about these cases, the question before the Justices is (thankfully) not whether corporations have a “soul”<sup>7</sup> or “whether life begins at conception.”<sup>8</sup> *Hobby Lobby* should not be seen as an attack on *Griswold*<sup>9</sup> or an opportunity to relitigate either *Citizens United*<sup>10</sup> or *NFIB v. Sebelius*.<sup>11</sup> The objections to the Affordable Care Act’s contraception-coverage rules are not maneuvers in a supposed “war on women” or on “modernity,”<sup>12</sup> they are not part of a “deadly serious and sophisticated campaign . . . by religion for primacy in the public square,”<sup>13</sup> and they have nothing to do with the wrongs of the “Catholic cardinals from Boston to Los Angeles [who] covered up the sexual abuse of children and hid priests from prosecution[.]”<sup>14</sup>

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5. Brief for the Respondents at 33–34, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S. Oct. 21, 2013).

6. See Rick Garnett, *Symposium: Accommodations, Religious Freedom, and the Hobby Lobby Case*, SCOTUSBLOG (February 28, 2014, 2:11 PM), <http://www.scotusblog.com/2014/02/symposium-accommodations-religious-freedom-and-the-hobby-lobby-case/>.

7. *Cf.*, e.g., David Cay Johnston, *In Hobby Lobby Case, Supremes Tackle the Soul of Corporations*, NEWSWEEK (Nov. 27, 2013, 8:00 PM), <http://www.newsweek.com/do-corporations-have-soul-207504>.

8. *Cf.*, e.g., Olga Khazan, *Here’s Why Hobby Lobby Thinks IUDs are Like Abortions*, THE ATLANTIC (Mar. 12, 2014, 3:35 PM), <http://www.theatlantic.com/health/archive/2014/03/heres-why-hobby-lobby-thinks-iuds-are-like-abortions/284382/>.

9. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

10. *Citizens United v. FEC*, 558 U.S. 310 (2010).

11. *NFIB v. Sebellius*, 132 S. Ct. 2566 (2012).

12. Linda Greenhouse, *Doesn’t Eat, Doesn’t Pray and Doesn’t Love*, N.Y. TIMES (Nov. 27, 2013), <http://www.nytimes.com/2013/11/28/opinion/greenhouse-doesnt-eat-doesnt-pray-and-doesnt-love.html?pagewanted=all>.

13. Linda Greenhouse, *The Stories We Tell*, N.Y. TIMES (Feb. 5, 2014), <http://www.nytimes.com/2014/02/06/opinion/greenhouse-the-stories-we-tell.html>.

14. Leslie C. Griffin, *Scandal at Notre Dame*, VERDICT (March 14, 2014), [http://verdict.justia.com/2014/03/14/scandal-notre-dame?utm\\_source=Justia+Law&utm\\_campaign=a7a094e112-summary\\_newsletters\\_practice&utm\\_medium=email&utm\\_term=0\\_92aabbfa32-a7a094e112-405962825](http://verdict.justia.com/2014/03/14/scandal-notre-dame?utm_source=Justia+Law&utm_campaign=a7a094e112-summary_newsletters_practice&utm_medium=email&utm_term=0_92aabbfa32-a7a094e112-405962825).

As I have argued elsewhere,<sup>15</sup> the Obama Administration's regulatory implementation of the statutory preventive-services provision at issue in these cases imposes an unnecessary and therefore unjustifiable burden on the exercise of religion—at least in some cases. It is true that if a party invoking RFRA and objecting to a government action on religious grounds is a corporation, it will often be relevant to the merits of that objection. It is also true that the government's regulatory authority with respect to “commerce,” “the economy,” and “employment” is substantial, and that it is difficult to exercise that authority in a way that entirely avoids imposing unintended but substantial burdens on religiously motivated or religiously inspired action. Usually, a for-profit corporation seeking an exemption on religious grounds from a generally applicable law or regulation will lose.

At the same time, for many, the life of faith and the practice of religion are not limited to what happens in one's mind, home, or house of worship. Many agree with First Lady Michelle Obama, who has remarked that “[o]ur faith journey isn't just about showing up on Sunday for a good sermon and good music and a good meal. It's about what we do Monday through Saturday as well.”<sup>16</sup> Accordingly, and as our civil rights laws illustrate,<sup>17</sup> religious commitments and obligations are and should be respected in “public” and in “private.”<sup>18</sup> It often makes sense and is the right thing to do—it is not only “permissible” but also “praiseworthy”<sup>19</sup>—to accommodate religious believers through exemptions from otherwise generally applicable laws, including laws that the majority regards as well-meaning and wise. In *Hobby Lobby*, the accommodation is required by federal law.

However, several constitutional-law and law-and-religion scholars—including Professors Gedicks and Koppelman, two friends and colleagues of mine—have argued that it would violate the First

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15. Richard W. Garnett, *The Righteousness in Hobby Lobby's Cause*, LOS ANGELES TIMES (Dec. 5, 2013), <http://www.latimes.com/opinion/commentary/la-oe-garnett-obamacare-contraception-surpreme-cou-20131205,0,2899.story#axzz2me5HYSO7>; Richard W. Garnett, *Why Contraception Mandate Should be Scrapped*, USA TODAY (Nov. 27, 2011), <http://usatoday30.usatoday.com/news/opinion/forum/story/2011-11-27/hhs-contraception-mandate/51424562/1>.

16. Devin Dwyer, *Michelle Obama Cites Jesus as Model for Citizenship*, ABC NEWS (June 29, 2012, 11:53 AM), <http://abcnews.go.com/blogs/politics/2012/06/michelle-obama-cites-jesus-as-model-for-citizenship/>.

17. See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-17 (2012).

18. See generally, e.g., ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE (2009).

19. Bd. of Educ. of Kiryas Joel Vill. Sch. v. Grumet, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring).

Amendment's Establishment Clause to exempt an "ordinary, nonreligious, profit-seeking business[]" like Hobby Lobby from the Affordable Care Act's contraception-coverage rules because that Clause "prevents the government from requiring people to bear the burden of religions to which they do not belong and whose teachings they do not practice."<sup>20</sup> Of course, an official action that is prohibited by the Establishment Clause (correctly understood) probably does not "make sense" and is not "the right thing to do." This short essay considers the Establishment Clause objection to Hobby Lobby's RFRA claim.

## II. AN INVITATION TO ACCOMMODATE

Generally speaking, as the Court put it more than sixty years ago in *Zorach*, it "follows the best of our traditions" to "respect[] the religious nature of our people and accommodate[] the public service to their spiritual needs."<sup>21</sup> The Constitution allows governments and officials to "single out" religion for "special constitutional protection."<sup>22</sup> In fact, as Professor McConnell has observed, "it is virtually impossible to understand our tradition of the separation of church and state without recognizing that religion raises political and constitutional issues not raised by other institutions or ideologies."<sup>23</sup> The First Amendment protects the free exercise of religion.<sup>24</sup> The text of the Constitution treats religion as "special" and so governments may, should, and sometimes must treat it as "special" too.<sup>25</sup> Although there is an ongoing, lively, and sophisticated debate in the academy about whether our practice and tradition of treating "religious"

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20. Frederick Mark Gedicks, *Exemptions from the 'Contraception Mandate' Threaten Religious Liberty*, WASH. POST (January 15, 2014), [http://www.washingtonpost.com/opinions/exemptions-from-the-contraception-mandate-threaten-religious-liberty/2014/01/15/f5cb9bd0-7d79-11e3-93c1-0e888170b723\\_story.html](http://www.washingtonpost.com/opinions/exemptions-from-the-contraception-mandate-threaten-religious-liberty/2014/01/15/f5cb9bd0-7d79-11e3-93c1-0e888170b723_story.html); see also Brief for Amici Curiae Church-State Scholars Frederick Mark Gedicks, et al., in support of the Government, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S. Oct. 21, 2013); Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. (forthcoming April 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2328516](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2328516); Micah Schwartzman, Richard Schragger & Nelson Tebbe, *The Establishment Clause and the Contraception Mandate*, BALKINIZATION (Nov. 27, 2013, 2:05 PM), <http://balkin.blogspot.com/2013/11/the-establishment-clause-and.html>.

21. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

22. Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 3 (2000).

23. *Id.*

24. U.S. CONST. amend. I.

25. *But see* Micah Schwartzman, *What if Religion is Not Special?*, 79 U. CHI. L. REV. 1351 (2012).

motives, practices, commitments, and institutions with particular respect and care are justifiable, they are our practice and tradition, and they are consistent with the First Amendment's rule against religious establishments.

Religion may be accommodated specifically and deliberately, and not only by accident or as part of a larger accommodation effort that includes possibly analogous, nonreligious concerns and motives. That is, the Constitution allows governments to accommodate those with religious commitments and objections even if it does not similarly accommodate people with equally deep commitments and objections that are philosophical, ethical, or conscientious in nature.<sup>26</sup> True, Justice Harlan—and others before and since—asserted the “unconstitutionality,” for exemption purposes, of a “distinction . . . between religious and nonreligious beliefs” in the *Welsh* conscientious objector case.<sup>27</sup> But, that assertion is not supported by American history and practice or by the Court's decisions. Indeed, with respect to RFRA itself, the Court has applied and enforced the Act and made it clear that “case-by-case consideration of generally applicable rules . . . does not violate the Establishment Clause.”<sup>28</sup> Justice Stevens argued to the contrary, in his *Boerne* opinion, claiming that the Act gives religious claimants “a legal weapon that no atheist or agnostic can obtain” and that such a “preference for religion, as opposed to irreligion, is forbidden by the First Amendment.”<sup>29</sup> This argument finds support in the work of some scholars and also, in fairness, in the “neutrality” language employed in some of the Court's own opinions.<sup>30</sup> But, again, it is not consistent with our history and practice, or with the text of the Constitution.

There is no incompatibility, or even tension, between the Supreme Court's *Smith* decision<sup>31</sup> and the constitutional permissibility of religious accommodation. In *Smith*, the Court held that the Free Exercise Clause does not require the accommodation of religious believers and practices through exemptions from generally applicable, nondiscriminatory laws.<sup>32</sup> More precisely, though, the

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26. See, e.g., *Yoder v. Wisconsin*, 406 U.S. 205, 215–16 (1972).

27. *Welsh v. United States*, 398 U.S. 333, 359 (1970) (Harlan, J., concurring).

28. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006) (citing *Cutter v. Wilkinson*, 544 U.S. 709 (2005)); see generally Richard W. Garnett & Joshua D. Dunlap, *Taking Accommodation Seriously: Religious Freedom and the O Centro Case*, 2005-06 CATO SUP. CT. REV. 257, 276 (2006).

29. *City of Boerne v. Flores*, 521 U.S. 507, 537 (1997) (Stevens, J., concurring).

30. See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (“Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.”).

31. *Emp't Div. v. Smith*, 494 U.S. 872 (1990).

32. *Id.*

majority rejected the idea that the federal courts are constitutionally authorized to second-guess legislative judgments about the feasibility or advisability of such exemptions.<sup>33</sup> The animating concerns in *Smith*, apart from a possible desire of some Justices to rule in accord with a particular view of the First Amendment's original meaning, seem to have involved separation of powers and federalism. The Court's rejection of the *Sherbert* standard for religion-neutral regulations that burden religiously motivated practices does not proceed from the conviction that religiously motivated conduct is particularly or especially harmful to other persons or to the common good. The ruling does not presume or assert that danger and disorder necessarily travel more closely with religious accommodations than with other legal exemptions. There is no reason to read *Smith* as endorsing the view that religious freedom is anything other than a fundamental human right or as revealing any reservations about the importance of protecting and promoting that freedom in the complicated conditions of a pluralistic, diverse society. The message of *Smith* is not that religion-blind, formal "neutrality" is the appropriate, let alone the required, approach for governments to take regarding religious belief, believers, and practices. Indeed, the Court sounded like it expected governments to do otherwise.<sup>34</sup>

After *Smith*, then, religion-respecting exemptions are usually not constitutionally required, but they are nevertheless usually worthy, welcome, and constitutional. The case does not affirm the irrelevance or the dangers of religious freedom but instead what Professor William Kelley has called the relative "primacy of political actors in [the] accommodation of religion."<sup>35</sup> By enacting the RFRA, Congress exercised that "primacy" and accepted the Court's invitation. After insisting that "free exercise of religion" is an "unalienable right" and recalling that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise," the national government subjected itself to constraints that go above the floor set by the First Amendment.<sup>36</sup> In response to the concerns expressed by the Court in *Smith* about intrusive judicial second-guessing of policy choices, Congress said, in effect: "We think religious liberty is important, that accommodations often make sense, and that exemptions are sometimes warranted. We want the courts to

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33. *Id.*

34. *Id.* at 890 ("[A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation[.]").

35. William K. Kelley, *The Primacy of Political Actors in Accommodation of Religion*, 22 U. HAW. L. REV. 403 (2000).

36. 42 U.S.C. §§ 2000bb to bb-4 (2012).

be available, on a case-by-case basis, to check our work and to give our cost-benefit calculations a second look.” In so doing, Congress did not violate the Establishment Clause.

### III. ACCOMMODATION AS A PUBLIC GOOD

It appears that most of the scholars who contend that it would violate the Establishment Clause to exempt Hobby Lobby from the contraception-coverage regulations at issue accept or are resigned to the fact that “RFRA seems *facially* to comply with the Establishment Clause.”<sup>37</sup> Their claim, instead, is that “the government may not grant religious exemptions when they impose significant burdens on nonbeneficiaries.”<sup>38</sup> Put differently, it is that “permissive accommodations” violate the Establishment Clause “when they impose significant burdens on third parties who do not believe or participate in the accommodated practice.”<sup>39</sup> And, it is urged, an exemption for Hobby Lobby from the preventive-services rules would do just that, “by shifting the material costs of accommodating anticontraception beliefs from the employers who hold them to their employees who do not.”<sup>40</sup>

Several legal scholars have responded in detail to the Establishment Clause objection to an accommodation in the *Hobby Lobby* case.<sup>41</sup> As these scholars have explained, the interpretations of the Court’s precedents on which the objection relies—including *Estate of Thornton v. Caldor*<sup>42</sup>—are mistaken. These cases do not stand for a broad rule about the impermissibility of costly or cost-shifting accommodations. And, to the extent that the Establishment Clause does place limits on accommodations that are excessively burdensome to the public or to identifiable nonbeneficiaries, RFRA would seem to incorporate those limits into its standard of review. RFRA does not

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37. Gedicks & Van Tassell, *supra* note 20, at 7.

38. Schwartzman, Schragger & Tebbe, *supra* note 20.

39. Gedicks & Van Tassel, *supra* note 20, at 8.

40. *Id.* at 9.

41. Brief of Constitutional Law Scholars as Amicus Curiae in Support of Hobby Lobby, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S. Oct. 21, 2013). I am one of the represented amici. See also, e.g., Marc DeGirolami, *On the Claim that Exemptions from the Mandate Violate the Establishment Clause*, MIRROR OF JUSTICE (Dec. 5, 2013), <http://mirrorofjustice.blogspot.com/mirrorofjustice/2013/12/exemptions-from-the-mandate-do-not-violate-the-establishment-clause.html>; Eugene Volokh, *Would Granting an Exemption from the Employer Mandate Violate the Establishment Clause?*, THE VOLOKH CONSPIRACY (Dec. 4, 2013), <http://www.volokh.com/2013/12/04/3b-granting-exemption-employer-mandate-violate-establishment-clause/>.

42. 472 U.S. 703 (1985).



say, after all, that “any person whose religious exercise is substantially burdened by a general law shall be exempted from that law.” It provides, instead, that exemptions are required in those cases where a substantial burden is imposed on religious exercise *and* the “application of the burden to the person . . . is in furtherance of a compelling governmental interest[] and . . . is the least restrictive means of furthering” that interest. It seems very unlikely that an accommodation that is required by RFRA would implicate the *Caldor* Court’s concerns about the “unyielding weighting” of religious objectors’ concerns over other (private and public) interests.<sup>43</sup> The justices said in *Cutter* that, when applying the Religious Land Use and Institutionalized Persons Act, “courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries,”<sup>44</sup> but RFRA, by its own terms, appears to require courts to do precisely that.

Now, there is broad agreement that the Constitution places some limits on the ability of governments to accommodate religious believers and institutions through exemptions from otherwise applicable rules. An accommodation could be unconstitutional, for example, if it were not “administered neutrally among different faiths.”<sup>45</sup> And, again, it is true that in a few cases the Court has treated the burdens that an accommodation would impose on third parties or on the government as relevant to the question whether the accommodation is constitutionally permissible. At the same time, it is worth remembering that any imaginable legislative accommodation will benefit some (i.e., those whose religiously motivated practices are being burdened and from whom that burden is being lifted by the accommodation) more or rather than others. There is no constitutional requirement that the accommodation of religion, “permissive” or “mandatory,” be entirely uncomplicated or completely cost-free.

There is also, as there so often is in constitutional law, the issue of the “baseline.”<sup>46</sup> The argument that an exemption for Hobby Lobby and other employers would violate the Establishment Clause takes as the relevant starting point, or baseline, the requirement that employers provide employees with no-cost-sharing contraception

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43. *Id.* at 710.

44. *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005).

45. *Id.*

46. Gedicks & Van Tassell, *supra* note 20, at 34 (“Any argument about impermissible cost shifting must identify the proper status quo ante as the baseline measure of whether and to what extent costs have been shifted.”).

coverage and employees' entitlement to that coverage.<sup>47</sup> But, surely Congress could depart from that asserted baseline by undoing the contraception-coverage rules in their entirety without violating the Establishment Clause. The argument is also strange because it allows the regulation that imposes the unnecessary and therefore unlawful burden on religious exercise to create entitlements or interests that then block the ability of a court to lift that unlawful burden through an exemption. The Affordable Care Act, like all federal laws, is subject to and incorporates RFRA's religious-exercise-protecting invitation for judicial review. It should not trump or somehow block application of that review. The "cost" that, according to the argument, is being shifted from the objecting religious employer to the employee is one that—because, we can assume, it constituted an unnecessary but substantial burden on religious exercise—RFRA did not allow the government to impose on that employer in the first place.<sup>48</sup>

Again, these and similar responses to the Establishment Clause objection have been set out in detail elsewhere. This essay concludes by proposing another way of thinking about both the accommodation of religion and the Establishment Clause objection.

It is "black letter" law and a bar-review staple that the Establishment Clause requires that government actions have a "secular purpose." The line that, in the Court's opinions, separates "secular" purposes from others is not always clear but, in any event, it is clear that the protection and promotion of religious freedom "counts" as such a purpose. Whatever the *Lemon* test means when it disapproves official actions that "advance" religion, it is not the case that the Establishment Clause forbids or calls for skepticism regarding efforts by political authorities to improve the religious-freedom landscape or to make it possible for people and institutions to exercise religion. Under our Constitution, the government is not required to settle for formal or "religion-blind" neutrality. It can and should also take positive steps to ensure that meaningful "freedom for religion" is a reality. A statute like RFRA, which invites the assistance of courts in identifying substantial but unintentionally imposed and

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47. See, e.g., *id.* at 37 ("The Mandate thus marks the baseline for measuring whether such exemptions shift costs from the accommodated employers to employees who do not share their employer's religious anti-Mandate beliefs.").

48. See generally Kevin Walsh, *A Baseline Problem for the "Burden on Employees" Argument Against RFRA-Based Exemptions from the Contraception Mandate*, MIRROR OF JUSTICE (Jan. 17, 2014), <http://mirrorofjustice.blogspot.com/2014/01/a-baseline-problem-for-the-burden-on-employees-argument-against-rfra-based-exemptions-from-the-contr.html>.

unnecessary burdens on religious exercise is just one example of such a positive step.

A community that values and is committed to religious freedom will not settle for identifying and lifting the burdens that will inevitably be imposed—even by conscientious legislators. It will also attend to what I have described elsewhere as the “infrastructure” of religious freedom.<sup>49</sup> As Professor Balkin has observed, this freedom requires “more than mere absence of government censorship or prohibition to thrive; [it] also require[s] institutions, practices, and technological structures that foster and promote [it].”<sup>50</sup> To be clear, appreciating the importance of religious freedom’s infrastructure, sustaining conditions, and ecology is entirely consistent with the rule that government action should have a “secular purpose.”<sup>51</sup> Non-coercive support for these conditions—and a working accommodations regime is such a condition—that make it possible for people to pursue a human good and enjoy a human right has, in fact, an appropriately “secular” purpose.

These sustaining conditions require investment, maintenance, and support. They sometimes “cost” us. An example: This year marks the 50<sup>th</sup> anniversary of the Court’s landmark decision in *New York Times v. Sullivan*.<sup>52</sup> In his opinion for the Court, Justice Brennan identified an atmosphere of “uninhibited, robust, and wide-open” debate as a kind of shared, public good to which we have a “profound national commitment” notwithstanding the undeniable reality that the preservation of that good comes at a cost.<sup>53</sup> As he conceded, the protection and enjoyment of this public good necessarily involves tolerating “excesses and abuses” and imposing burdens (“unpleasantly sharp attacks”) on particular and identifiable people.<sup>54</sup> Still, this atmosphere, like the physical one on which we depend for life, is a public good and sustaining it is a worthy public project. It is not cost-free, but it is worth the cost.

The same is true for religious freedom. Religious freedom in a pluralistic society and under the regulatory state requires a willingness to—sometimes, not always—accommodate religious believers and institutions through exemptions from generally

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49. See generally Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273 (2008).

50. Jack Balkin, *The Infrastructure of Religious Freedom*, BALKINIZATION (May 5, 2007, 3:15 PM), <http://balkin.blogspot.com/2007/05/infrastructure-of-religious-freedom.html>.

51. See generally Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87 (2002).

52. 376 U.S. 254 (1964).

53. *Id.* at 254.

54. *Id.* at 270–72.

applicable laws. This is true despite—or, perhaps, precisely because—of the Court’s decision in *Smith*. The accommodation will not be free or cheap, and governments should do all they can to be sure that the costs of sustaining religious freedom are fairly distributed. Contrary to the suggestion that runs through the Establishment Clause objection, though, it is not unfair that, sometimes, we have to bear some of the cost of accommodating those whose beliefs we do not share or whose religious tradition is not our own. The accommodation of religion, and the application of statutes like RFRA, should not be regarded simply as the moving around of private entitlements or the doling out of privileges and benefits to some at the expense of others. We all have a stake in efficient and transparent markets, functioning courts, and clean air. Similarly, we all benefit, whatever our religious tradition and whether or not we embrace or practice a religious faith at all, from practices and commitments—like the accommodation of religion—that place limits on the state, on its demands, and on its authority.<sup>55</sup>

#### IV. CONCLUSION

The First Amendment’s rule against establishments of religion is crucially important, even if disagreements persist about its content and contours. This rule, correctly understood, protects the freedom of religion and contributes to religious liberty by constraining government and preserving space for different ways of life, multiple authorities, distinctive communities, and individual liberty. The scholars who have reminded us of the relevance of the Establishment Clause to many of the cases involving the relationship, and sometimes the tension, between religious freedom and regulation have, in so doing, done a service. In the *Hobby Lobby* case, however, accommodation of religion would not amount to an establishment of religion.

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55. See generally Richard W. Garnett, *Religious Liberty, Church Autonomy, and the Structure of Freedom*, in JOHN WITTE JR. & FRANK S. ALEXANDER, *CHRISTIANITY AND HUMAN RIGHTS: AN INTRODUCTION* (2010).

