

The Public Meaning of RFRA Versus Legislators' Understanding of RLPA: A Response to Professor Laycock

*James M. Oleske, Jr. **

[I]f we're going to look at any legislative history as shedding light on this, I would suggest you look at Professor Laycock's brief, which goes into great detail about the legislative debates involved in . . . the RLPA, the Religious Liberty Protection Act [T]he issue of the statute's application and RFRA's application to for-profit corporations was squarely put at issue by the Nadler Amendment [to RLPA]. And that amendment was rejected and the House report that demonstrates the rejection of that amendment could not be clearer that they understood that for-profit corporations would be covered.

– Paul Clement, Counsel for Hobby Lobby,
Oral Argument in *Sebelius v. Hobby Lobby Stores, Inc.*¹

If there was any doubt about the influence of Douglas Laycock's amicus brief in the *Hobby Lobby* case,² it was put to rest by Paul Clement's invocation of the brief at oral argument before the Supreme Court. Mr. Clement had previously relied upon Professor Laycock's argument in Hobby Lobby's merits brief—contending that the legislative history of never-enacted RLPA demonstrated an “undisputed public understanding that the language in RFRA protected for-profit corporations and their owners”³—and Clement doubled down on that point during oral argument. In particular, he highlighted Professor Laycock's treatment of the “Nadler Amendment,” which would have denied the protection of RLPA to “all but the very smallest businesses” in civil rights cases.⁴

* Assistant Professor of Law, Lewis & Clark Law School. For helpful comments and suggestions, I am very grateful to Chip Lupu and John Parry.

1. Transcript of Oral Argument at 12, *Sebelius v. Hobby Lobby Stores, Inc.* (No. 13-354), and *Conestoga Wood Specialties Corp. v. Sebelius* (No. 13-356) (U.S. March 25, 2014).

2. See Brief Amicus Curiae of Christian Legal Society et al., *Sebelius v. Hobby Lobby Stores, Inc.* (No. 13-354), and *Conestoga Wood Specialties Corp. v. Sebelius* (No. 13-356) (U.S. 2014) [hereinafter Laycock Brief]. Over 80 amicus briefs were filed in the case; they are collected at http://www.americanbar.org/publications/preview_home/13-354-13-356.html.

3. Brief for Respondents at 17, *Sebelius v. Hobby Lobby*, No. 13-354 (U.S. 2014) [hereinafter Hobby Lobby Brief] (citing Laycock Brief, supra note 2, at 32).

4. Laycock Brief, supra note 2, at 2.

In claiming that the 1999 debate over the Nadler Amendment to RLPA revealed the unambiguous “public meaning” of RFRA,⁵ Professor Laycock’s brief argues (1) that RLPA was “worded identically with RFRA in every relevant respect”⁶ and (2) that there was universal agreement that RLPA “protected everyone, including large corporations,” as demonstrated by the fact that “[s]upporters of the Nadler Amendment knew they needed an amendment to exclude corporate claims.”⁷

In my initial contribution to this roundtable, I pointed out that the first assertion is simply mistaken.⁸ The 1999 version of RLPA included a “broad construction” provision that was not included in RFRA.⁹ In his reply to my essay, Professor Laycock acknowledges that “[t]his is true,” but maintains that the broad construction provision can be disregarded because it was not cited during a floor debate over RLPA.¹⁰ This is a remarkable argument. The key disputed issue with regard to RLPA was the breadth of the bill’s protection, and specifically, whether it would extend to for-profit commercial businesses in civil-rights cases. The broad construction provision, which was not included in the 1998 version of RLPA co-sponsored by Representative Nadler, but which was included in the 1999 version opposed by Representative Nadler out of concern for civil rights cases, provided that the bill “should be construed in favor of a *broad protection of religious exercise, to the maximum extent permitted by its terms and the Constitution.*”¹¹ Moreover, the provision was added to RLPA shortly after a high-profile circuit court decision that Professor

5. *Id.* at 2, 10, 13, 18, 32, 34 (using the phrase “public meaning” eight times and the phrase “public understanding” twice).

6. Laycock Brief, *supra* note 2, at 4. *See also id.* at 11 (asserting that RLPA tracked RFRA’s language “verbatim, except for stylistic tweaks that could not possibly affect meaning”); *id.* at 12 (asserting that “on the issues presented here,” RLPA was “substantially identical to RFRA”); 32 (asserting that “the relevant language of RLPA was substantially identical to the relevant language of RFRA”).

7. *Id.* at 30. *See also id.* at 12 (“Everyone agreed on the meaning of the unamended language”); *id.* at 13 (“[T]he two sides agreed on what the bill meant.”); *id.* at 30 (“There was no disagreement about what the bill meant”); *id.* at 32 (asserting that “everyone agreed” the RFRA/RLPA language “protected for-profit corporations”); *id.* (“Both sides agreed that the language protected for-profit corporations and their owners. The public meaning of this language was not disputed.”).

8. *See* James M. Oleske, Jr., *Obamacare, RFRA, and the Perils of Legislative History*, 67 VAND. L. REV. EN BANC 77, 83, 86 (2014) [hereinafter Oleske Essay].

9. H.R. 1691, § 5(g) (1999).

10. Douglas Laycock, *Imaginary Contradictions: A Reply to Professor Oleske*, 67 VAND. L. REV. EN BANC 89, 94 (2014) [hereinafter Laycock Reply].

11. H.R. 1691, § 5(g) (1999) (emphasis added). *See generally* Laycock Brief, *supra* note 2, at 18 (noting that Mr. Nadler “had been a lead sponsor of RFRA” and “one of the two original bipartisan sponsors of RLPA” in 1998 before unsuccessfully insisting on an amendment to the 1999 RLPA).

Laycock acknowledges “focused [Congress Members’] attention on the question” of “for-profit corporations” claiming religious exemptions.¹² Against that background, the Court would be hard pressed indeed to conclude that the provision’s explicit text commanding a broad construction of RLPA’s protections can be deemed irrelevant to Members’ understanding that RLPA’s protections extended to for-profit corporations. And to reach this conclusion simply because the provision was not cited in a floor debate—a floor debate during which Professor Laycock admits “no one” cited the separate legislative language that he finds more relevant to the corporate-coverage issue¹³—would be to elevate the most speculative form of legislative-history analysis over logically drawn inferences from manifestly relevant legislative text.

Moreover, even putting aside the textual discrepancy between the 1998 and 1999 versions of RLPA, the legislative history of the bill still does not “make clear that for-profit corporations and their owners are protected by RFRA.”¹⁴ In my original essay, I quoted at length Professor Laycock’s testimony at the 1998 and 1999 RLPA hearings.¹⁵ In that testimony, Laycock sharply distinguished between “very small-scale operations” like the “Mrs. Murphy landlord” and the “three-man office” doing pro-bono religious work—which he said might receive protection under RLPA depending on whether they were “more like the church or more like the outside world”—and owners of commercial businesses clearly operating in the outside world, where the “courts have never disagreed” that “religiously motivated people have to comply with the civil rights law.”¹⁶ Professor Laycock assured the House that “without the factor of smallness and without the factor of operating in an intensely religious way,” there was “no way in the

12. Laycock Reply, *supra* note 10, at 95.

13. *Id.* Notably, when Congress amended RFRA in 2000 to include certain provisions from RLUIPA, the successor to RLPA, it did *not* include in those amendments the RLPA/RLUIPA broad-construction provision. Congress did, by contrast, include a RLPA/RLUIPA definitional provision clarifying that protected religious exercise is not limited to practices that are “compelled by, or central to, a system of religious belief.” See 42 U.S.C. § 2000cc-5(7)(A) (RLUIPA); 42 U.S.C. § 2000b-2(4) (RFRA). In his 1999 testimony, Professor Laycock explained that this definitional language merely “codified the intended meaning of RFRA as reflected in its legislative history” and corrected a “misinterpretation” that had been “read into the statute by some courts after RFRA’s enactment” without any textual basis and contrary to the teachings of the Supreme Court. 1999 Senate Testimony at 93-94. Although Professor Laycock’s 1999 testimony treated this definitional language as merely clarifying RFRA’s original meaning, today he argues that it “further strengthened” RFRA and “broaden[ed] its scope.” Laycock Brief at 2, 31-32; Laycock Reply, *supra* note 10, at 90 & n.11.

14. Laycock Brief, *supra* note 2, at 38.

15. See Oleske Essay, *supra* note 8, at 84-86 & nn. 36-38.

16. *Hearings on H.R. 4019 Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 105th Cong. 236-38 (June 16 and July 14, 1998) [hereinafter 1998 House Hearing].

world courts are going to say that the civil rights laws don't prevail."¹⁷ And he assured the Senate that for

a RLPA claim *to be plausible*, the employer would have to have only a small number of employees, he would have to be personally involved in running the business, and the business would have to be infused or integrated with a religious mission. Otherwise, the claim that his choice of employees is an exercise of religion *will not be plausible* [T]he only landlords who can make a *plausible claim of burden on religious exercise* are those who are personally involved in managing a small number of units.¹⁸

As I observed in my initial essay, this testimony seems difficult to reconcile with arguments that civil rights advocates "needed" the Nadler Amendment to preclude RLPA claims by larger commercial businesses and that "everyone agreed" the unamended version of RLPA protected for-profit corporations and their owners.¹⁹ Professor Laycock, however, contends that I have conjured up "imaginary contradictions."²⁰ His chief argument in this regard is that I quoted his testimony "without regard to context."²¹ According to Professor Laycock, there is "nothing inconsistent" about his argument today and his testimony in 1998 and 1999 because "the testimony was about civil rights cases and *Hobby Lobby* and *Conestoga Wood* are not civil rights cases."²²

There are at least three difficulties with this explanation. First, the case Professor Laycock cited in his 1998 testimony for the proposition that "once the courts characterize [an operation] as commercial, the religious liberty claim loses"²³ was *not* a civil rights case. Rather, it was "the *Tony Alamo* case," which involved "a commercial operation owned by a church"²⁴ that failed to comply with federal wage laws.²⁵ If the commercial nature of the church's operation in *Tony Alamo* is what Professor Laycock believes precluded an exemption from wage laws, it is difficult to understand why the commercial nature of Hobby Lobby's operation does not similarly preclude an exemption from health-benefits laws.

17. *Id.* at 238.

18.. See *Hearing S. 106-689 on Issues Relating to Religious Liberty Protection Before the Comm. on the S. Comm. on the Judiciary*, 106th Cong. 153, 154 (June 23 and Sept. 9, 1999) [hereinafter 1999 Senate Hearing] (paragraph breaks omitted) (emphasis added).

19. Oleske Essay, *supra* note 8, at 83-86.

20. Laycock Reply, *supra* note 10, at 89. Although Professor Laycock goes on to say that my essay "purports to reveal egregious contradictions," *id.* at 96, the strongest language I use in comparing Professor Laycock's RLPA testimony to his brief in *Hobby Lobby* is "considerable tension," which I use only once. See Oleske, *supra* note 8, at 85.

21. Laycock Reply, *supra* note 10, at 89.

22. *Id.* at 92. See *id.* at 89 ("The testimony was about civil rights cases . . .").

23. 1998 House Hearing at 237.

24. *Id.*

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

Second, although Professor Laycock insists that Hobby Lobby's substantial burden claim "is nothing like" the claims involving the "employment discrimination" laws,²⁶ he neglects to address other claims discussed in his RLPA testimony that appear indistinguishable from Hobby Lobby's claim. With respect to the burdens imposed by employment-discrimination laws, Professor Laycock argues they are different because "as the number of employees grows" the "employment relationship becomes less personal."²⁷ By contrast, Professor Laycock argues, Hobby Lobby's growth in size does not mitigate the burden of the contraceptive-coverage requirement because the requirement forces a decision that "must be made and implemented at corporate headquarters."²⁸ But even accepting this distinction of Hobby Lobby's case from hiring cases, Professor Laycock *also* testified with respect to housing that "the only landlords who can make a plausible claim of burden on religious exercise are those who are personally involved in managing a small number of units."²⁹ He even went so far as to say that a 50-unit apartment complex "owned by the church" would not be entitled to an exemption from a requirement to rent to gay couples.³⁰ It is difficult to fathom why if *a church* can be required to rent units to couples it believes are violating God's command simply because its commercial operation has grown to 50 units, the owners of Hobby Lobby cannot be required to provide contraception coverage they oppose when their for-profit commercial operation has grown to over 500 stores.

Third, it is far from clear that "*Hobby Lobby and Conestoga Wood* are not civil rights cases."³¹ The EEOC and at least one federal court have concluded that an employer's failure to include female prescription contraception in health plans that provide comprehensive health coverage to men violates Title VII as amended by the Pregnancy Discrimination Act ("PDA"),³² and the Solicitor General

26. Laycock Reply, *supra* note 10, at

27. *Id.*

28. *Id.*

29. 1999 Senate Hearing at 154.

30. 1998 House Hearing at 237.

31. Laycock Reply, *supra* note 10, at 92.

32. See Comm'n Decision on Coverage of Contraception, 2000 WL 33407187 (E.E.O.C. Guidance Dec. 14, 2000); *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001). See also Charu A. Chandrasekhar, *Rx for Drugstore Discrimination: Challenging Pharmacy Refusals to Dispense Prescription Contraceptives Under State Public Accommodations Laws*, 70 ALB. L. REV. 55, 84 (2006) ("Several other state and federal legal decisions have relied upon some combination of Title VII and the PDA to require various employers to provide coverage for prescription contraceptives in health plans on the same terms that they provide prescription coverage to other medicines."). *But see* *In re Union Pac. R.R. Emp't Practices Litig.*, 479 F.3d 936, 939-45 (8th Cir. 2007) (rejecting the EEOC's position and holding that exclusion of prescription

argues in *Hobby Lobby* that application of the contraceptive-coverage requirement assures that women have “equal access” to recommended health-care services.³³ If Hobby Lobby nonetheless receives an exemption, owners of other corporations with hundreds or thousands of employees will no doubt raise religious objections to equality mandates. As Judge Rovner of the Seventh Circuit recently noted, it is easy to see such claims being made by business owners who oppose same-sex marriage, cohabitation, or parenting.³⁴ In his reply, Professor Laycock asserts that Hobby Lobby’s claim is “vastly stronger” than claims by businesses for exemption from gay-rights statutes, but in the debate over whether businesses should be permitted to refuse marriage-related services to same-sex couples, Professor Laycock has written that

the right to one’s own moral integrity should generally trump the inconvenience of having to get the same service from another provider nearby. Requiring a merchant to perform services that violate his deeply held moral commitments is far more serious, different in kind and not just in degree, from mere inconvenience.³⁵

Professor Laycock also claims that my essay “conflates different elements of the statutory claims at issue” by failing to attend to the “distinctions” between the “threshold” question of RFRA coverage, the “substantial burden” issue, and the “compelling government interest” issue.³⁶ Yet, I explicitly introduced Professor Laycock’s testimony by noting that he was responding to a question about “compelling interest,” I immediately followed my quotation of his testimony with a paragraph assessing the very “threshold question versus merits” distinction he now makes regarding his brief in *Hobby*

contraception from an employer health plan does not violate either the PDA or Title VII). I am indebted to Alec Unis for initially bringing these decisions to my attention.

33. Brief for the Petitioners at 49-51, *Sebelius v. Hobby Lobby*, No. 13-354 (U.S. 2014).

34. *Korte v. Sebelius*, 735 F.3d 654, 691-93, 719 (7th Cir. 2013) (Rovner, J., dissenting) (positing a hypothetical claim for an exemption from the Family and Medical Leave Act, 42 U.S.C. § 2601). Such claims would become increasingly frequent if Congress were to enact the Employment Non Discrimination Act to ban employment discrimination on the basis of sexual orientation.

35. Douglas Laycock, *Afterword*, SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock et al. eds., 2008). See *id.* at 201 (“[I]n a substantial range of cases ... the hardship imposed by refusing to exempt conservative religious business people would far outweigh the hardship to same sex couples of allowing exemptions.”).

As I have discussed at length elsewhere, Professor Laycock is part of a prominent group of scholars that has written letters to elected officials in 11 states over the past 5 years arguing that any legal recognition of same sex marriage should be accompanied by religious exemptions from state antidiscrimination laws that would allow commercial businesses to discriminate against same-sex couples. See James M. Oleske, Jr., *Interracial and Same-Sex Marriages: Similar Religious Objections, Very Different Responses*, 50 HARV. C.L.-C.R. L. REV. (forthcoming 2015), available at SSRN: <http://ssrn.com/abstract=2400100> [hereinafter *Interracial and Same-Sex Marriages*].

36. Laycock Brief, *supra* note 2, at 89, 93.

Lobby, and I treated the “substantial burden” issue separately and explicitly in a footnote.³⁷

More fundamentally, although Professor Laycock now emphasizes the importance of precisely distinguishing between the “different elements” of a RFRA claim when addressing claims in the commercial context, his RLPA testimony did no such thing,³⁸ and neither do the lower court decisions.³⁹ The reason for this is simple: although the Supreme Court famously taught in *United States v. Lee* that free-exercise exemptions are not required in the realm of “commercial activity,”⁴⁰ it was less than clear about where that teaching fit into the doctrinal analysis. That has enabled the government in *Hobby Lobby* to claim there is a rule against free-exercise exemptions for commercial activities at the threshold stage, while some courts have invoked the *Lee* teaching at the substantial-burden stage, and others have invoked it at the compelling-interest stage. But wherever the teaching is placed in the doctrinal framework, one thing is clear—the Supreme Court stated it in undeniably categorical terms:

When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption [from an employee benefit program] to an employer operates to impose the employer’s religious faith on the employees.⁴¹

This clear teaching from *Lee*, which Professor Laycock echoed in his 1998 testimony,⁴² and upon which I placed principal reliance in

37. Oleske, *supra* note 8, at 84-85 & n.36.

38. Compare 1999 Senate Hearing at 153 (discussing the commercial context as relevant to whether the claimant’s practice “*is an exercise of religion*”) (emphasis added), *with id.* at 154 (discussing the commercial context as relevant to whether the claimant can “*show a substantial burden on religious exercise*”) (emphasis added), *with* 1998 House Hearing at 235-38 (discussing the commercial context as relevant to whether the government can show a “compelling interest” and asserting that “courts have never disagreed that in the outside world, religiously motivated people have to comply with the civil rights law”).

39. Compare *Smith v. Fair Employment & Hous. Com.*, 913 P.2d 909, 923-29 (1996) (finding the commercial context dispositive at the substantial-burden stage), *with* *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274, 283 (Alaska 1994) (finding the commercial context dispositive at the compelling state interest stage).

40. *United States v. Lee*, 455 U.S. 252, 261 (1982). See generally David B. Cruz, Note, *Piety and Prejudice: Free Exercise Exemption from Laws Prohibiting Sexual Orientation Discrimination*, 69 N.Y.U. L. REV. 1176, 1193 (1994) (“In its free exercise cases, the Supreme Court has emphatically affirmed the government’s authority to regulate commercial affairs. This power is nearly absolute; time and again the Court has rejected free exercise challenges in the commercial world. Its decisions establish that the free exercise clause does not demand exemptions from regulation of commercial activities even when those activities are pursued for religious reasons and compliance with the law burdens the religious individual.”).

41. *Lee*, 456 U.S. at 261.

42. See 1998 House Hearing at 237 (asserting that “once the courts characterize [the operation] as commercial, the religious liberty claim loses”). Professor Laycock expressed a

my essay,⁴³ is conspicuously absent from Professor Laycock's reply to my essay.⁴⁴

Finally, Professor Laycock attempts to discount both his own RLPA testimony and that of Christopher Anders of the ACLU because "[n]o member of Congress said that corporations might not be covered."⁴⁵ But in his brief, Professor Laycock explicitly states that the "RLPA debates showed public understanding . . . because the *interest groups were involved*."⁴⁶ In light of that reliance, it makes little sense to discount the testimony of Professor Laycock and Mr. Anders, who were affiliated with the two largest interest groups involved in the debate over RLPA.⁴⁷ In addition, to rely exclusively on Member floor statements at the exclusion of commentary from religious liberty experts and precedent like *Lee* would be to fundamentally misconstrue the nature of the "public meaning" inquiry as laid out in the seminal case Professor Laycock invokes in his brief: *District of Columbia v. Heller*.⁴⁸ In *Heller*, the Court began and ended its public-meaning inquiry by examining the analysis of "legal scholars" and "commentators," and it focused extensively on precedent.⁴⁹

Under the interpretative methodology of *Heller*, the following two points are thus very relevant: First, Professor Laycock, who has been one of the nation's leading religious liberty scholars for more than three decades, testified during the 1998 RLPA hearings that "once the courts characterize [an operation] as commercial, the

similar view 16 years earlier, explaining that when a "religiously motivated citizen . . . participates in government or the secular economy, he must obey the secular rules that apply to all." Douglas Laycock, *Tax Exemptions for Racially Discriminatory Schools*, 60 TEX. L. REV. 259, 263 (1982). For a more extensive discussion of this once-prevailing view, and its erosion in recent years, see Oleske, *Interracial and Same-Sex Marriages*, *supra* note 35.

43. Oleske, *supra* note 8, at 87.

44. It is also conspicuously absent from Hobby Lobby's own brief in the case, which instead makes the stunning claim that *Lee* supports its position because the *Lee* Court was "unfazed by the commercial context." Hobby Lobby Brief, *supra* note 3, at 53.

45. Laycock Reply, *supra* note 10, 95-96 (emphasis in original).

46. Laycock Brief, *supra* note 2, at 13. *See id.* at 12 ("The leaders on both sides of the debate were consulting the interest groups who cared about the bill").

47. Professor Laycock was part of the Coalition for the Free Exercise of Religion and Mr. Anders represented the ACLU. The chief sponsor of RLPA thanked Professor Laycock on the record: "I would like to express my gratitude to Prof. Douglas Laycock . . . for his invaluable legal analysis during the drafting and passage of the Religious Liberty Protection Act." 145 Cong. Rec. 17575 (July 22, 1999) (statement of Mr. Canady). The opponents of the 1999 version of RLPA read from the ACLU's letter on the floor of the House. *See* Laycock Brief at 22 (quoting Mr. Conyers quoting an ACLU letter).

48. 554 U.S. 570 (2008). *See* Laycock Brief, *supra* note 2, at 13 (quoting *Heller*).

49. *Heller*, 554 U.S. at 605-19.

religious liberty claim loses.”⁵⁰ Second, that categorical statement reflected the clear teaching of the Court’s pre-*Smith* jurisprudence that free-exercise exemptions do not extend to the realm of for-profit “commercial activity.”⁵¹ To borrow Professor Laycock’s phrasing,⁵² “[t]his is a much clearer and far more specific demonstration of [the] statutory meaning” embodied in RFRA—which was explicitly intended to restore the Court’s pre-*Smith* jurisprudence and was identical to the 1998 version of RLPA—“than anything offered” about a subsequent floor debate over the more broadly drafted 1999 RLPA.

The only genuinely difficult question for the Court in *Hobby Lobby* should be *where* in the RFRA analysis to place the explicit teaching of *Lee* about religious exemptions in the commercial realm. Placing it at the threshold stage, and concluding that for-profit corporations simply are not persons who exercise religion, would have the considerable advantage of clarity.

That said, placing *Lee*’s teaching later in the analysis, where it could be treated as a general rule, but not necessarily an absolute one, might also have an advantage. This approach would make sense if the core rationale behind *Lee*’s teaching is that “in the commercial context, religious exemptions will almost always impose burdens on third parties, whether employees, customers, or business competitors.”⁵³ If that is the reason for the *Lee* rule, perhaps there will be exceptions that prove the rule, like the Kosher butcher whose hypothetically banned butchering practices are viewed as benefitting customers and burdening no one.⁵⁴ Treating *Lee*’s teaching as a nearly irrefutable presumption that denying exemptions in the commercial realm is the least restrictive means of advancing a compelling interest in avoiding third-party harms would leave open the possibility of granting an

50. 1998 House Hearing at 237. *See also id.* at 240 (statement of Professor Steven Green) (“Professor Laycock is exactly right. It really depends on how close the activity looks like a church or how close it looks like a run-of-the-mill commercial activity.”).

51. *Supra* text accompanying note 41.

52. *See* Laycock Brief, *supra* note 2, at 32.

53. Oleske, *Interracial and Same-Sex Marriages*, *supra* note 35. *See Lee*, 456 U.S. at 261 (“Granting an exemption . . . to an employer operates to impose the employer’s religious faith on the employees.”); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 n.5 (1968) (rejecting as “patently frivolous” a restaurant owner’s argument that he had a religious right to refuse service to certain customers); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 435 (2006) (“In *Braunfeld v. Brown*, 366 U.S. 599 (1961) (plurality opinion), the Court denied a claimed exception to Sunday closing laws, in part because allowing such exceptions “might well provide [the claimants] with an economic advantage over their competitors who must remain closed on that day.”).

54. *See generally* *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1135 (10th Cir. 2013) *cert. granted*, 134 S. Ct. 678 (2013) (“Would an incorporated kosher butcher really have no claim to challenge a regulation mandating non-kosher butchering practices?”).

exemption in the very rare case where the basis for the presumption (a third-party harm) does not exist.

Whatever the merits of putting this third-party-harm gloss on *Lee*'s teaching, it cannot help Hobby Lobby. For Hobby Lobby is seeking an exemption that—much more dramatically than the requested exemption in *Lee*—would impose burdens on its employees by depriving them of their statutory rights.⁵⁵

55. Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC. 51, 55 (2014) (“If the Court were to uphold Hobby Lobby’s claim for a RFRA exemption from the Mandate, it would deprive Hobby Lobby’s thousands of female employees and its employees’ covered female dependents of this entitlement [to contraceptive coverage]. This would saddle many employees with significant burdens ranging from the substantial out-of-pocket expense of purchasing certain contraceptives to the personal and financial costs of unintended pregnancies.”)