NOTES

WHY IS VACCINATION DIFFERENT? A COMPARATIVE ANALYSIS OF RELIGIOUS EXEMPTIONS

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While vaccination is a hot political topic, it is largely settled as a matter of law. Ever since the Supreme Court's 1905 decision in Jacobson v. Massachusetts*, state governments have possessed the authority to enforce mandatory vaccination laws. Furthermore, courts have long recognized that States are not required to provide religious exemptions to these vaccination mandates, though most do. The Supreme Court recently denied certiorari in a Second Circuit case that rejected substantive due process and free exercise challenges to a vaccination requirement, indicating that the High Court does not plan to change its stance on the constitutionality of compulsory vaccination anytime soon.*

In contrast to the stability of compulsory vaccination doctrine, the law of religious exemptions more generally is in a state of upheaval. This Note will place the recent surge in religious exemption claim—most notably, claims for religious exemptions from the Affordable Care Act's contraceptive coverage requirement and from statutes prohibiting discrimination in public accommodations—in the context of vaccination law. In light of the Supreme Court's recent decision in Burwell v. Hobby Lobby*, it is unclear how courts should respond to the new spate of religious exemption challenges. More recently, in remanding* Zubik v. Burwell *to the circuit courts, the Supreme Court specifically declined to describe how courts determine the balance between free exercise values and the government's interest in ensuring full health care coverage.*

Thus, the heated judicial and scholarly debate remains active, and the questions about how courts should weigh the burdens faced by parties seeking religious exemptions with the burdens that would be faced by regulatory beneficiaries or other third parties if the exemptions were granted remain live. The long-settled—yet relatively neglected – treatment of religious exemption claims in the compulsory vaccination context offers conceptual and doctrinal resources that can help resolve this debate.

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INTRODUCTION

Measles was once a public health scourge: About 6,000 people died from it on a yearly basis from 1912 to 1922, and as late as the 1950s, about 48,000 people were hospitalized for measles annually.[1] Given its high mortality and morbidity rates, measles was an ever-present shadow in nineteenth and early-twentieth-century communities; most people knew, or at least knew of, someone who had suffered from a serious case of the disease. Today, on the other hand, few Americans have more than a vague grasp of the disease's symptomology. In fact, in 2000 the Centers for Disease Control and Prevention (CDC) declared measles eradicated.[2] This rapid transformation of American public health is attributable to the introduction of the measles vaccine in 1963.[3]

Fifteen years after the CDC's declaration of the triumph over measles, however, the disease was back in the news in 2015. An outbreak ultimately traced to Disneyland sickened 157 people.[4] If an effective measles vaccine is now widely available, why did this outbreak occur? The answer is that an increasing number of parents do not vaccinate their children.[5]

Although studies linking childhood vaccination with autism are now widely discredited, these studies have contributed to the growth of a public movement against vaccination.[6] Colloquially known as the "anti-vaxxer" movement, it is prominent in certain wealthy, educated communities.[7]

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1. Measles (Rubeola), Ctrs. for Disease Control & Prevention, http://www.cdc.gov/measles/about/history.html [http://perma.cc/XDX6-PEYH] (last updated Nov. 3, 2014).

2. Id.

3. Id.

4. See Rong-Gong Lin II & Patrick McGreevy, California's Measles Outbreak Is Over, but Vaccine Fight Continues, L.A. Times (Apr. 17, 2015), http://www.latimes.com/local/california/la-me-measles-20150418-story.html [http://perma.cc/ENK6-LHZJ] ("In all, 131 California residents were believed to have been infected with measles during the outbreak that began at Disneyland, as well as at least 26 people who resided in seven other states, Canada or Mexico . . . .").

5. See Karen Kaplan, Vaccine Refusal Helped Fuel Disneyland Measles Outbreak, Study Says, L.A. Times (Mar. 16, 2015), http://www.latimes.com/science/sciencenow/la-sci-sn-disneyland-measles-under-vaccination-20150316-story.html [http://perma.cc/Z677-3GH8] ("Although epidemiologists have not yet identified the person who brought measles to Disneyland, a new analysis shows that the highly contagious disease has spread to seven states and two other countries thanks to parents who declined to vaccinate their children.").

6. See Lin & McGreevy, supra note 4 ("The idea that the measles vaccine was linked to autism has been thoroughly discredited by scientists."); see also Vaccine Safety, Ctrs. for Disease Control & Prevention, http://www.cdc.gov/vaccinesafety/concerns/autism.html [http://perma.cc/99CQ-WSH7] (last updated Nov. 23, 2015) (noting "[t]here is no link between vaccines and autism").

7. See Gary Baum, Hollywood's Vaccine Wars: L.A.'s "Entitled" Westsiders Behind City's Epidemic, Hollywood Rep. (Sept. 10, 2014), http://www.hollywoodreporter.com/features/los-angeles-vaccination-rates/ [http://perma.cc/T6YR-R253] (noting West Los Angeles "isn't the only wealthy region of a liberal, cosmopolitan sensibility to harbor

Though parents who do not vaccinate their children are decidedly in the minority, they were sufficiently vocal to compel 2016 presidential candidates to address the issue of vaccination.[8]

While vaccination is a hot political topic, it is largely settled as a matter of law. Ever since the Supreme Court's 1905 decision in *Jacobson v. Massachusetts*,[9] state governments have possessed the authority to enforce mandatory vaccination laws. Furthermore, courts have long recognized that states are not required to provide religious exemptions to these vaccination mandates,[10] though most do.[11] The Supreme Court recently denied certiorari in a Second Circuit case that rejected substantive due process and free exercise challenges to a vaccination requirement, indicating that the Court does not plan to change its stance on the constitutionality of compulsory vaccination anytime soon.[12]

In contrast to the stability of the compulsory vaccination doctrine, the law of religious exemptions generally is in a state of greater upheaval. This Note will place the recent surge in religious exemption claims—most notably, claims for religious exemptions from the Affordable Care Act's[13] contraceptive-coverage requirement and from statutes prohibiting discrimination in public accommodations—in the context of vaccination law. In light of the Supreme Court's recent decision in *Burwell v. Hobby Lobby*,[14] it is unclear how courts should respond to the new spate of religious exemption challenges. More recently, in remanding *Zubik v. Burwell* to the circuit courts, the Supreme Court specifically declined to describe how courts should determine the balance between free exercise values and the government's interest in ensuring full health care coverage.[15] Thus, the heated judicial and scholarly debate remains active, and the questions about how courts should weigh the burdens faced by parties seeking religious exemptions with the burdens regulatory beneficiaries would face if the exemptions were granted remain live. The long-

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vaccine skepticism" and that "[t]hese beliefs have impacted Manhattan prep schools and classrooms in Marin County in the Bay Area").

8. See Igor Bobic & Ariel Edwards-Levy, Here's Where 2016 Candidates Stand on Vaccination, Huffington Post (Feb. 5, 2015), http://www.huffingtonpost.com/2015/02/02/2016-candidates-child-vaccinations_n_6598186.html [http://perma.cc/L4MD-TTZ8] (compiling candidates' expressed views on vaccination).

9. 197 U.S. 11 (1905).

10. See infra section I.C.1 (discussing Supreme Court jurisprudence on vaccination).

11. See infra notes 126–133 and accompanying text (discussing state laws allowing religious exemptions from vaccination requirements and identifying the few that do not).

12. See infra note 111 (discussing this Second Circuit case, Phillips v. City of New York, 775 F.3d 538, 542–44 (2d Cir. 2015)).

13. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 15, 26, 29, 30, and 42 U.S.C. (2012)); see also 42 U.S.C. § 300gg-13(a)(4) (describing minimum required coverage for preventive health services for which no "cost sharing requirements" may be imposed).

14. 134 S. Ct. 2751 (2014).

15. See 136 S. Ct. 1557, 1560 (2016) (per curiam).

settled—yet relatively neglected—treatment of religious exemption claims in the compulsory vaccination context offers conceptual and doctrinal resources that can help resolve this debate.

This Note proceeds in three parts. Part I summarizes current religious freedom and vaccination law. This Part pays particular attention to the Religious Freedom Restoration Act and its state equivalents, since many claims for religious exemptions (including the one at issue in *Hobby Lobby* itself) arise from these statutes. Part II analyzes the Supreme Court's reasoning in *Hobby Lobby* and scholarly reactions to it, focusing on doctrinal confusion over the extent to which courts should consider third-party harms when granting religious exemptions. Finally, Part III proposes that vaccination jurisprudence offers a way out of this doctrinal confusion. Specifically, this Part demonstrates that the substantial burden analysis in vaccine-exemption cases has historically included a consideration of third-party harms, and it argues that such an analysis is equally appropriate in more contested areas of religious exemption law.

I. BACKGROUND

This Part begins with a discussion of the Supreme Court's Establishment Clause[16] jurisprudence in section I.A, which notes the various tests that have been applied to determine whether a given government action violates the Establishment Clause. Section I.B will then address the Supreme Court's Free Exercise Clause[17] jurisprudence and Congress's enactment of the Religious Freedom Restoration Act (RFRA)[18] and Religious Land Use and Institutionalized Persons Act (RLUIPA).[19] In discussing both the Free Exercise and Establishment Clauses, this Part will analyze the role that third-party harms play in courts' discussions of religious freedom claims.

Following the analysis of the Supreme Court's religious freedom jurisprudence, this Part turns to the law of vaccination. Section I.C.1 analyzes the leading Supreme Court cases on vaccination, *Jacobson v. Massachusetts*[20] and *Zucht v. King*,[21] and a related discussion of vaccination law in *Prince v. Massachusetts*.[22] This section will also discuss why religious freedom claims—rather than Fourteenth Amendment due process claims—have become the predominant avenue for challenging vaccination programs.

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16. U.S. Const. amend. I, cl. 1.

17. Id.

18. 42 U.S.C. §§ 2000bb–2000bb-4.

19. 42 U.S.C. §§ 2000cc–2000cc-5; see infra notes 67–77 for a discussion of Employment Division v. Smith, 494 U.S. 872 (1990), and Congress's subsequent enactment of RFRA, as well as City of Boerne v. Flores, 521 U.S. 507 (1997), and Congress's subsequent enactment of RLUIPA.

20. 197 U.S. 11 (1905).

21. 260 U.S. 174 (1922).

22. 321 U.S. 158 (1944).

Section I.C.2 proceeds to address state law on vaccination, analyzing state vaccination programs, including statutory provisions for religious exemptions. It will also discuss how state and federal courts have dealt with religious freedom challenges to these vaccination and exemption schemes and identify the features of schemes that tend to be upheld.

A. *Establishment Clause*

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion."[23] Professor Frederick Gedicks and Rebecca Van Tassel describe this clause as "a structural bar on government action rather than a guarantee of personal rights";[24] the Free Exercise Clause,[25] discussed below, has filled the complementary latter function.

The Supreme Court has, at various times, laid out different tests for determining whether a government action violates the Establishment Clause, including the *Lemon* test of *Lemon v. Kurtzman*[26] and the "endorsement test," discussed, for example, in *County of Allegheny v. ACLU*.[27] However, the Court has decided a number of Establishment Clause cases without using either test[28] and, as will become relevant in the discussion

23. U.S. Const. amend. I, cl. 1.

24. 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. 343, 347 (2014).

25. U.S. Const. amend. I, cl. 1 ("Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof* . . . ." (emphasis added)).

26. 403 U.S. 602, 612–13 (1971) ("First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" (citation omitted) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970))).

27. 492 U.S. 573, 592–94 (1989) (framing the question as "whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion"), abrogated by Town of Greece v. Galloway, 134 S. Ct. 1811 (2014).

28. See, e.g., Salazar v. Buono, 559 U.S. 700, 719 (2010) (affirming the lower court's decision to decline to use the *Lemon* test); Van Orden v. Perry, 545 U.S. 677, 686 (2005) (finding the *Lemon* test "not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds"); Marsh v. Chambers, 463 U.S. 783, 800–01 (1983) (declining to apply the *Lemon* test to assess the constitutionality of the Nebraska state legislature's daily prayer).

of *Burwell v. Hobby Lobby*,[29] has seemed to find no Establishment Clause problem[30] with RFRA[31] and RLUIPA.[32]

Cutter v. Wilkinson[33] provides an interesting illustration of the interplay between consideration of third-party harms and the Court's Establishment Clause jurisprudence. The *Cutter* Court rejected an Establishment Clause challenge to RLUIPA, but it stated that "[p]roperly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries."[34] The case was brought by a group of prisoners, each of whom practiced what was termed a "nonmainstream" religion.[35] Petitioners contended that the prison failed to abide by § 3 of RLUIPA (which forbids the imposition of a "substantial burden" on federal prisoners' free exercise of religion[36]) since it did not

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29. 134 S. Ct. 2751 (2014).

30. See Gonzalez v. Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 423 (2006) (upholding RFRA, without discussing Establishment Clause constitutionality, as applied to a group seeking religious exemption for use of a hallucinogenic drug). The Court has explicitly rejected an Establishment Clause challenge to RLUIPA. See Cutter v. Wilkinson, 544 U.S. 709, 713–14 (2005).

31. 42 U.S.C. §§ 2000bb–2000bb(4)-4 (2012).

32. 42 U.S.C. §§ 2000cc–2000cc(5)-5. RFRA uses a similar framework to the later-enacted RLUIPA. RFRA provides, "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." Id. § 2000bb-1(b).

RLUIPA provides:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest.

Id. § 2000cc(a)(1).

RLUIPA further provides:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest.

Id. § 2000cc-1(a).

33. 544 U.S. 709.

34. Id. at 720.

35. See id. at 712 ("Plaintiffs below, petitioners here, are current and former inmates of institutions operated by the Ohio Department of Rehabilitation and Correction and assert that they are adherents of 'nonmainstream' religions: the Satanist, Wicca, and Asatru religions, and the Church of Jesus Christ Christian.").

36. 42 U.S.C. § 2000cc-1(a) (providing "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution,"

accommodate their religious beliefs.[37] The prison had moved to dismiss on the grounds, inter alia, that this provision impermissibly privileged religious rights above other rights in violation of the Establishment Clause.[38] The Supreme Court rejected this challenge—but offered several examples of countervailing concerns about third-party harms that might outweigh the interest in religious accommodation.[39] In the case at hand, the Court remanded because the record below was insufficient to determine whether the burdens to nonbeneficiaries were too great to justify granting the accommodation.[40]

At least two other Supreme Court cases, *Estate of Thornton v. Caldor*[41] and *Texas Monthly v. Bullock*,[42] are relevant to a discussion of impermissible imposition of third-party harms.[43] In *Caldor*, the Court rejected a state law granting employees a right not to work on their chosen Sabbath.[44] In *Texas Monthly*, a plurality of the Court rejected a law exempting religious newspapers and magazines from a state sales tax.[45]

In both cases, the Establishment Clause problem the Court identified related to the State's disregard for the possibility that the laws in question would have negative effects on third parties. The Court clearly articulated this value in *Caldor*:

> [The statute's] unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses, so well articulated by Judge

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unless the burden furthers a "compelling governmental interest" by "the least restrictive means").

37. *Cutter*, 544 U.S. at 712–13.

38. Id. at 713.

39. Id. at 726 ("Should inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition."). It is worth noting that some scholars have argued that RFRA and RLUIPA are themselves unconstitutional violations of the Establishment Clause. See Christopher L. Eisgruber & Lawrence G. Sager, Why the Religious Freedom Restoration Act Is Unconstitutional, 69 N.Y.U. L. Rev. 437, 457–58 (1994) (arguing RFRA violates the Establishment Clause because "RFRA does not simply favor religion; it clothes that favoritism in constitutional language and categories[,] . . . thereby direct[ing] courts to protect religious interests by performing constitutional rituals that would be appropriate if religion were constitutionally privileged").

40. *Cutter*, 544 U.S. at 725–26.

41. 472 U.S. 703 (1985).

42. 489 U.S. 1 (1989).

43. See Gedicks & Van Tassell, supra note 24, at 357–59 (using *Caldor* and *Texas Monthly* to argue "the Court has been uncharacteristically consistent in condemning permissive accommodations that protect believers at the expense of others in the for-profit workplace and other secular environments").

44. 472 U.S. at 710–11 ("We hold that the Connecticut statute, which provides Sabbath observers with an absolute and unqualified right not to work on their Sabbath, violates the Establishment Clause of the First Amendment.").

45. 489 U.S. at 5 (holding that the exemption, "when confined exclusively to publications advancing the tenets of a religious faith . . . runs afoul of the Establishment Clause").

> Learned Hand: "The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." As such, the statute goes beyond having an incidental or remote effect of advancing religion. The statute has a primary effect that impermissibly advances a particular religious practice.[46]

The court in *Caldor* applied the *Lemon* test[47] and found that the Connecticut statute impermissibly advanced religion.[48] But the Court also emphasized, as shown in the quote above, that this impermissible advancement was clear from the disregard the Connecticut statute manifested for potential harms imposed on employers and fellow employees.[49] In other words, in *Caldor*, the fact that the statute at issue facilitated Sabbath observers' exercise of religion *at the expense of nonbelievers* illustrated and signaled the Establishment Clause violation.[50]

In *Texas Monthly*, burdens on nonbeneficiaries were similarly central to the Establishment Clause analysis. The Court identified the tax exemption at issue as burdening those ineligible for it "by increasing their tax bills by whatever amount is needed to offset the benefit bestowed on subscribers to religious publications" and noted that "[t]he fact that such exemptions are of long standing cannot shield them from the strictures of the Establishment Clause."[51] The Court did not discuss in detail the facts that led to the determination that the tax exemption imposed a measurably increased financial burden on subscribers to nonreligious publications but seemed instead to regard the likelihood that a financial burden would be imposed on nonbeneficiaries as sufficient to create an Establishment Clause violation.[52]

It is clear from *Cutter*,[53] *Texas Monthly*,[54] and *Caldor*[55] that courts must consider the extent to which granting a religious exemption burdens or imposes harms on nonbeneficiaries (i.e., third parties). Even under the

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46. 472 U.S. at 710 (citations omitted) (quoting Otten v. Balt. & Ohio R.R., 205 F.2d 58, 61 (2d. Cir. 1953)).

47. See id. at 708 (noting "[i]n setting the appropriate boundaries in Establishment Clause cases, the Court has frequently relied on our holding in *Lemon* for guidance, and we do so here" (citation omitted)).

48. Id. at 710.

49. Id. at 709 ("[T]he statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath. The employer and others must adjust their affairs to the command of the State whenever the statute is invoked by an employee.").

50. Id. (noting the statute imposed "on employers and employees an absolute duty to conform their business practices to the particular religious practices of the employee by enforcing observance of the Sabbath the employee unilaterally designates").

51. Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 1, 19 n.8 (1989).

52. See id.

53. 544 U.S. 709 (2005).

54. 489 U.S. 1.

55. 472 U.S. 703.

RLUIPA–RFRA framework, the Court has indicated that in some cases, extreme public safety concerns or other third-party harms could necessitate the denial of an exemption.[56]

B. *Free Exercise Clause*

The Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]."[57] The standard the Supreme Court has applied in evaluating free exercise claims, like the standard applied for Establishment Clause purposes, has varied with time. Two midcentury cases, *Wisconsin v. Yoder*[58] and *Sherbert v. Verner*,[59] are often viewed jointly as the high-water mark of free exercise protection (and, indeed, are consequently referenced in RFRA[60]). The Court in *Sherbert* held that the denial of unemployment compensation, when an employee had quit because of her religious practices, violated the Free Exercise Clause.[61] In so deciding, the Court stated, "'[I]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.'"[62]

In *Yoder*, the Supreme Court held that members of the Amish community cannot be required to send their children to school beyond eighth grade,[63] and the Court used similarly strong language on religious exercise:

> [O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. We can accept it as settled, therefore, that, however strong the State's interest in universal compulsory

56. *Cutter*, 544 U.S. at 726 ("Should inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition.").

57. U.S. Const. amend. I, cl. 1.

58. 406 U.S. 205 (1972).

59. 374 U.S. 398 (1963).

60. 42 U.S.C. § 2000bb(b)(1) (2012) (noting a purpose of RFRA was "to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398, and Wisconsin v. Yoder, 406 U.S. 205, and to guarantee its application in all cases where free exercise of religion is substantially burdened"); see also infra notes 70–78 and accompanying text.

61. *Sherbert*, 374 U.S. at 406 ("[T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.").

62. Id. at 404 (quoting Braunfeld v. Brown, 366 U.S. 599, 607 (1961)).

63. See *Yoder*, 406 U.S. at 234 ("[W]e hold . . . that the First and Fourteenth Amendments prevent the State from compelling respondents to cause their children to attend formal high school to age 16.").

> education, it is by no means absolute to the exclusion or subordination of all other interests.[64]

Notably, though *Yoder* expressed a very high standard for government interests that could overcome individual free exercise rights, it did indicate that such interests do exist. The Court made a point to note that no "harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred,"[65] and it cited *Jacobson v. Massachusetts*,[66] a Supreme Court case upholding a state vaccination law, by way of comparison.[67]

Almost two decades after *Yoder* and *Sherbert*, considered to be full-throated expressions of free exercise rights, the Court took a different approach in *Employment Division v. Smith*.[68] In that case, the Court held that the State need not satisfy strict scrutiny as to a neutral, generally applicable law that happened to affect religious exercise.[69]

In response to the *Smith* decision, Congress passed RFRA, which requires that the government demonstrate a compelling interest and adopt the least restrictive means whenever it substantially burdens a person's free exercise of religion.[70] RFRA was an explicit attempt to return to *Yoder* and *Sherbert*'s stricter standard for the analysis of free exercise claims.[71] Although RFRA initially purported to constrain states as well as the federal government, the Supreme Court held in *City of Boerne v. Flores* that Congress exceeded its Fourteenth Amendment authority in applying RFRA to the states.[72] Following that decision, Congress enacted RLUIPA[73] to remedy RFRA's defects: RLUIPA applies only when the substantial burden is imposed by a state program that receives federal funding,[74]

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64. Id. at 215.

65. Id. at 230.

66. 197 U.S. 11 (1905).

67. *Yoder*, 406 U.S. at 230 n.20; see infra section I.C.1 (discussing *Jacobson* and other vaccination-related Supreme Court precedent).

68. 494 U.S. 872 (1990).

69. Id. at 882 (declining to hold "that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation"). The court in *Smith* explicitly disavowed the *Sherbert* test. See id. at 884 ("Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law.").

70. 42 U.S.C. §§ 2000bb–2000bb-4 (2012).

71. See id. § 2000bb(a)(4) (listing among congressional findings that "in Employment Division v. Smith, the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion" (citation omitted)); see also id. § 2000bb(b)(1) (stating a purpose of the Act was "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened" (citations omitted)).

72. 521 U.S. 507, 519 (1997).

73. 42 U.S.C. §§ 2000cc–2000cc-5.

74. Id. § 2000cc-a-2(A).

when it affects interstate commerce,[75] and in certain cases in which the burden affects the implementation of land use regulations.[76] Federal free exercise claims now arise under RFRA and RLUIPA; moreover, many states have enacted their own religious freedom restoration acts,[77] some of which, controversially, do not even require a "substantial" burden before strict scrutiny is triggered.[78]

Claims for religious exemptions may arise under a state RFRA, under the federal RFRA or RLUIPA, or under the Constitution's Free Exercise Clause. It is important to recognize, though, that these state and federal statutes impose an additional level of statutory protection for free exercise, beyond that which the Supreme Court in *Smith* held to be constitutionally required.[79] Moreover, both statutes provide that they are not intended to affect the Supreme Court's Establishment Clause jurisprudence.[80] There is a strong argument deriving from *Cutter*, *Caldor*, and *Texas Monthly* that the Establishment Clause mandates consideration of third-party harms.[81] As a result, some have argued that when a religious exemption would impose harms on third parties sufficient to cause an Establishment Clause violation, the exemption is constitutionally barred before any statutory balancing test is applied.[82] However, this approach is

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75. Id. §§ 2000cc-a-2(B), 2000cc-1-b.

76. Id. § 2000cc-a-2(C).

77. Twenty-one states have enacted such legislation: Alabama, Arizona, Arkansas, Connecticut, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia. See State Religious Freedom Restoration Acts, Nat'l Conference of State Legislatures (Oct. 15, 2015), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx [http://perma.cc/VGS5-YDNX].

78. See Jason Goldman, Note, Religious Freedom: Why States Are Unconstitutionally Burdening Their Own Citizens as They "Lower" the Burden, 2015 Cardozo L. Rev. de novo 57, 68–70, http://www.cardozolawreview.com/content/denovo/GOLDMAN.36.denovo.pdf [http://perma.cc/P2UZ-8T9Z] (identifying states, including Pennsylvania and Texas, which appear to use lower standards in their own state statutory or constitutional free exercise protections).

79. See supra notes 68–71 and accompanying text (discussing the Supreme Court's perceived lowering of a state's burden in free exercise cases and the consequent enactment of RFRA).

80. See 42 U.S.C. § 2000bb-4 (providing, as part of RFRA, "[n]othing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the 'Establishment Clause')"); id. § 2000cc-4 (providing the same in RLUIPA). But see Ada-Marie Walsh, Note, Religious Land Use and Institutionalized Persons Act of 2000: Unconstitutional and Unnecessary, 10 Wm. & Mary Bill Rts. J. 189, 201–07 (2001) (arguing RLUIPA violates the Establishment Clause); supra note 39 (discussing arguments that RFRA violates the Establishment Clause).

81. See supra section I.A.

82. See, e.g., Gedicks & Van Tassell, supra note 24, at 347–48 (noting that "compliance with the Establishment Clause is a threshold requirement" such that a balancing test is not appropriate).

complicated by the fact that RFRA and RLUIPA have themselves developed "quasi-constitutional status,"[83] at least according to some courts.[84]

Moreover, the Supreme Court has decided some free exercise cases in a manner that, as Professor Gedicks and Van Tassell argue, "exhibit[s] the same aversion to cost-shifting accommodations as is manifest in its Establishment Clause decisions."[85] *United States v. Lee*[86] and *Tony & Susan Alamo Foundation v. Secretary of Labor*[87] both illustrate Supreme Court precedent for resisting religious accommodations asserted on free exercise grounds when the accommodations impose costs on third parties.

Lee dealt with an employer who raised religious objections to paying Social Security taxes on employees;[88] *Alamo Foundation* involved an employer who objected on religious grounds to paying employees a minimum wage.[89] In both cases, the Court discussed the effects an exemption would impose on third parties as militating against the allowance of such an exemption on free exercise grounds. In *Alamo Foundation*, the Court noted that "exceptions to coverage would affect many more people than those workers directly at issue in this case and would be likely to exert a general downward pressure on wages in competing businesses."[90] In *Lee*, the Court focused on the importance to the social security system as a whole that all employers participate:

> The social security system in the United States serves the public interest by providing a comprehensive insurance system with a variety of benefits available to all participants, with costs shared by employers and employees. . . . The design of the system requires support by mandatory contributions from covered employers and employees. This mandatory participation is indispensable to the fiscal vitality of the social security system.[91]

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83. Elizabeth Sepper, Gendering Corporate Conscience, 38 Harv. J.L. & Gender 193, 231 (2015).

84. See Eternal Word Television Network, Inc. v. Sec'y, U.S. Dep't of Health & Human Servs., 756 F.3d 1339, 1350 (11th Cir. 2014) ("The statutory promise the Act embodies is necessarily intertwined with the constitutional promise of the Free Exercise Clause."); Korte v. Sebelius, 735 F.3d 654, 666 (7th Cir. 2013) ("Although the claim is statutory, RFRA protects First Amendment free-exercise rights . . . ."); Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 129 (D.D.C. 2012) (saying RFRA "covers the same types of rights as those protected under the Free Exercise Clause of the First Amendment").

85. Gedicks & Van Tassell, supra note 24, at 359.

86. 455 U.S. 252 (1981).

87. 471 U.S. 290 (1985).

88. *Lee*, 455 U.S. at 255 (describing petitioner's claim "that imposition of the social security taxes violated his First Amendment free exercise rights and those of his Amish employees").

89. *Alamo Foundation*, 471 U.S. at 294 (describing petitioners' argument "that application of the [Fair Labor Standards] Act to the Foundation violated the Free Exercise and Establishment Clauses of the First Amendment").

90. Id. at 302.

91. *Lee*, 455 U.S. at 258 (footnote omitted).

Moreover, the Court in *Lee* assumed the sincerity of the employers' beliefs and accepted their contention that their beliefs conflicted with the requirement of making Social Security payments.[92] Even assuming the sincerity of the employers' beliefs and finding the existence of a violation of their free exercise rights, the Court in *Lee* would not countenance the "impos[ition] [of] the employer's religious faith on the employees"[93] who did not share that faith.[94]

Though the RFRA framework, as discussed, protects free exercise of religion to a greater extent than is constitutionally required, the aforementioned Supreme Court precedent in the area of free exercise mandates at least some consideration of third-party harms.[95] In other words, regardless of the statutory standard that is applied, given this precedent, third-party harms must be part of the free exercise analysis.

C. *Vaccination*

1. *Supreme Court Cases.* — The Supreme Court has spoken directly on vaccine-related issues only twice. The seminal case is *Jacobson v. Massachusetts,* in which the court rejected a Fourteenth Amendment challenge to a mandatory smallpox vaccination,[96] holding that it was a constitutional

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92. Id. at 257. The Court described the Amish belief in "religiously based obligation to provide for their fellow members the kind of assistance contemplated by the social security system" and acknowledged "the Government [did] not challenge the sincerity of this belief." Id. The Court rejected the Government's contention that "payment of social security taxes will not threaten the integrity of the Amish religious belief or observance," and it concluded, "[b]ecause the payment of the taxes or receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights." Id.

93. Id. at 261.

94. The Court in *Lee* noted that an exemption would have been allowed by statute to a *self-employed* Amish individual. See id.

95. See supra notes 85–92 and accompanying text.

96. 197 U.S. 11 (1905). Jacobson had numerous objections to the Massachusetts statute pursuant to which the Board of Health of Cambridge had adopted regulations making smallpox vaccinations mandatory:

> [Jacobson argued the statute was] in derogation of the rights secured to the defendant by the Fourteenth Amendment of the Constitution of the United States, and especially of the clauses of that amendment providing that no State shall make or enforce any law abridging the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Id. at 14. The Revised Laws of Massachusetts, c. 75, § 137, the statute at issue, then provided:

> [T]he board of health of a city or town if, in its opinion, it is necessary for the public health or safety shall require and enforce the vaccination and revaccination of all the inhabitants thereof and shall provide them with the means of free vaccination. Whoever, being over twenty-one years of age and not under guardianship, refuses or neglects to comply with such requirement shall forfeit five dollars.

exercise of the State's police power to require this vaccination.[97] The Court acknowledged that it had not specifically delineated the outer constitutional limits of the State's police power but stated it had "distinctly recognized the authority of a State to enact quarantine laws and 'health laws of every description;' indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other States."[98] The Court rejected petitioner's argument that the State unconstitutionally invaded his liberty by providing a fine or imprisonment as punishment for refusing to submit to a compulsory vaccination law.[99] Asserting the general principle that "the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint,"[100] the Court found that given the increasing prevalence of smallpox in Cambridge, "it cannot be adjudged that the present regulation of the Board of Health was not necessary in order to protect the public health and secure the public safety."[101]

Jacobson does not deal with a Free Exercise Clause or Establishment Clause challenge to a vaccination requirement, and it was also decided before the First Amendment was held to apply to the states.[102] Consequently, it does not directly address the viability of free exercise challenges to vaccination laws. However, *Jacobson* certainly establishes that vaccination regimes fall well within the State's police power—despite the element of infringement of bodily control inherent in mandatory

197 U.S. at 12.

97. 197 U.S. at 35–39.

98. Id. at 25.

99. Id. at 26.

100. Id.

101. Id. at 28.

102. Both the Establishment Clause and the Free Exercise Clause have since been incorporated against the states. See Cantwell v. Connecticut, 310 U.S. 296, 303 (1939) (holding "[t]he First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof [and] [t]he Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws").

vaccination programs[103]—provided these programs do not contravene any other constitutional requirement.[104]

The second Supreme Court case to address the constitutionality of a vaccination law was *Zucht v. King*, in which the Court upheld a San Antonio city ordinance requiring students to be vaccinated in order to attend public or private schools.[105] The challenge to the ordinance, like that in *Jacobson*, was premised on the Fourteenth Amendment: The petitioner alleged deprivation of liberty without due process.[106] Citing *Jacobson*[107] and following cases,[108] the Supreme Court again concluded

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103. Interestingly, the *Jacobson* Court also drew a connection between vaccination and the military draft on the point of bodily control:

> The liberty secured by the Fourteenth Amendment, this court has said, consists, in part, in the right of a person "to live and work where he will," *Allgeyer v. Louisiana*, 165 U.S. 578; and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense. It is not, therefore, true that the power of the public to guard itself against imminent danger depends in every case involving the control of one's body upon his willingness to submit to reasonable regulations established by the constituted authorities, under the sanction of the State, for the purpose of protecting the public collectively against such danger.

Jacobson, 197 U.S. at 29–30; see also infra section III.C (discussing the historical link between vaccination and selective service).

104. See supra notes 98–101 and accompanying text (discussing the *Jacobson* Court's analysis of the constitutionality of exercise of the police power to mandate vaccination).

105. 260 U.S. 174, 174 (1922) (describing the ordinances at issue); id. at 177 (dismissing the writ of error).

106. Id. at 176. The petitioner also alleged equal protection violations in the administration of the ordinances, but the Court did not rule on this question as it found it was "not of that character which entitles a litigant to a review by this Court on writ of error," since the charge was of an "unconstitutional exercise of authority under an ordinance which is valid." Id. at 177.

107. Notably, the *Jacobson* Court had specifically referenced school exclusion statutes with seeming approval. In its discussion in support of its finding that the Massachusetts vaccination statute was substantially related to the protection of public health and safety, the Court stated, "the principle of vaccination as a means to prevent the spread of smallpox has been enforced in many States by statutes making the vaccination of children a condition of their right to enter or remain in public schools." *Jacobson*, 197 U.S. at 31–32.

108. See *Zucht*, 260 U.S. at 176 (citing *Jacobson* for the proposition that "it is within the police power of a State to provide for compulsory vaccination"). The Court also cited Laurel Hill Cemetery v. San Francisco, 216 U.S. 358 (1910), for the proposition that "a State may, consistently with the Federal Constitution, delegate to a municipality authority to determine under what conditions health regulations shall become operative," *Zucht*, 260 U.S. at 176, and Lieberman v. Van De Carr, 199 U.S. 552 (1905), to support the point that "the municipality may vest in its officials broad discretion in matters affecting the application and enforcement of a health law," *Zucht*, 260 U.S. at 176.

that the ordinances fell within the local government's broad power to protect public health interests.[109]

The Supreme Court indicated in *Jacobson* and *Zucht* that it would be highly unlikely to invalidate a vaccination requirement on Fourteenth Amendment due process grounds.[110] It is likely that this route to challenging a vaccination requirement, or a student's exclusion from school for failure to comply with vaccination requirements, is effectively foreclosed for the foreseeable future.[111]

This reality may be one reason why people who do not want to vaccinate their children—possibly for any number of reasons[112]—now often seek religious exemptions.[113] This state of affairs is analogous to Professor Elizabeth Sepper's account of the replacement of the economic substantive due process claims of the *Lochner*[114] era with religious liberty claims.[115]

The Supreme Court has ruled on the constitutionality of vaccination regimes on the aforementioned two occasions only. However, in a 1944 case, *Prince v. Massachusetts*,[116] the Court addressed in another context the tension between the parental rights to control children's upbringing

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109. *Zucht*, 260 U.S. at 177 ("[W]e find in the record no question as to the validity of the ordinance sufficiently substantial to support the writ of error. . . . [T]hese ordinances confer not arbitrary power, but only that broad discretion required for the protection of the public health.").

110. See supra notes 96–109 and accompanying text (discussing *Jacobson* and *Zucht* and their broad view of state police power in the vaccination area).

111. See, e.g., Phillips v. City of New York, 775 F.3d 538, 542–44 (2d Cir.), cert. denied, 136 S. Ct. 104 (2015) (citing *Jacobson* and *Zucht* and rejecting substantive due process and equal protection challenges to New York City's mandatory vaccination provision for schoolchildren); Workman v. Mingo Cty. Bd. of Educ., 419 F. App'x 348, 353–55 (4th Cir. 2011) (citing *Jacobson* and *Zucht* in rejecting substantive due process, equal protection, and free exercise challenges to a West Virginia vaccination requirement, which, notably, did not include a religious exemption).

112. See Jonathan D. Rockoff, More Parents Seek Vaccine Exemption, Wall St. J., http://www.wsj.com/articles/SB10001424052748703322204575226460746977850 (on file with the *Columbia Law Review*) (last updated July 6, 2010) (noting a rise in the use of religious exemptions in New Jersey, New York, and Connecticut and describing one nonvaccinating parent's concerns that it "wouldn't be safe to expose [her child's] immune system to the 'heavy metals' in the shots and the multiple doses given at one sitting").

113. See Saad B. Omer et al., Vaccination Policies and Rates of Exemption from Immunization: 2005–2011, 367 New England J. Med. 1170, 1171 (2012) (noting earlier data analysis indicated an increase in the use of nonmedical exemptions from 1991 to 2004 and a study from 2005 to 2011 showed "nonmedical exemptions have continued to increase, and the rate of increase has accelerated").

114. *Lochner v. New York*, 198 U.S. 45 (1905).

115. See Elizabeth S. Sepper, Free Exercise Lochnerism, 115 Colum. L. Rev. 1453, 1455 (2015) [hereinafter Sepper, Free Exercise Lochnerism] (noting businesses have sought "exemptions from a variety of commercial regulations" "primarily under the Religious Freedom Restoration Act but also under the Free Exercise Clause of the Constitution").

116. 321 U.S. 158 (1944).

and the State's interest in providing for the public health and welfare.[117] In *Prince*, a Jehovah's Witness challenged a child labor statute that prohibited children from distributing materials and fundraising in public streets.[118] The Court held that Massachusetts did have the power to prohibit child labor in this context without violating the parents' free exercise or equal protection rights.[119] Some of the Court's comments in support of the general proposition that the family *can* be regulated in the public interest are particularly relevant to the vaccination context.[120] The Court said that a parent "cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."[121]

In brief, although the Supreme Court jurisprudence in the area of vaccination is limited, at least three points are clear. First, generally speaking, the Court has taken a broad view of the States' ability to create vaccination regimes in exercise of their police powers and in protection of public health.[122] Second, the risk of "expos[ing] the community" to health hazards functions as a major counterweight to the liberty interests of an individual who does not want to abide by a vaccination requirement.[123] Third, even in light of the tradition of protecting parents' rights

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117. The Court has recognized parents' substantive due process rights to "direct the upbringing and education of children under their control." Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (invalidating Oregon statute requiring that children be sent to public—rather than any private, religious—school); see also Meyer v. Nebraska, 262 U.S. 390, 399–401 (1923) (recognizing substantive due process right to educate one's child in a foreign language and striking down a Nebraska statute that prohibited this practice).

118. See *Prince*, 321 U.S. at 159–61.

119. See id. at 169 ("[L]egislation appropriately designed to reach such evils [as those caused by child labor] is within the state's police power, whether against the parent's claim to control of the child or one that religious scruples dictate contrary action.").

120. *Phillips* and *Workman*, discussed in note 111, supra, both cite to *Prince*. See Phillips v. City of New York, 775 F.3d 538, 543 (2d Cir. 2015) ("[W]e agree with the Fourth Circuit, following the reasoning of *Jacobson* and *Prince*, that mandatory vaccination as a condition for admission to school does not violate the Free Exercise Clause."); Workman v. Mingo Cty. Bd. of Educ., 419 F. App'x 348, 353–54 (4th Cir. 2011) ("In sum, following the reasoning of *Jacobson* and *Prince*, we conclude that the West Virginia statute requiring vaccinations as a condition of admission to school does not unconstitutionally infringe Workman's right to free exercise.").

121. *Prince*, 321 U.S. at 166–67 (footnote omitted). The Court went on to say that "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction." Id. at 167. That is, the Court was clear that infringements on parental and religious liberty were not per se unconstitutional, but it declined to delineate clearly the outer limits on the State's ability to infringe on these liberties.

122. See supra notes 95–109 and accompanying text (discussing *Jacobson* and *Zucht* and limits on the viability of due process challenges to vaccination requirements).

123. *Prince*, 321 U.S. at 166; see also supra notes 116–121 and accompanying text (discussing *Prince* and the State's ability to regulate the family for public health purposes).

to raise their children as they see fit,[124] the interests of the children and of the community at large also weigh against the allowance of exemptions to state regulations enacted to protect public health and safety.[125]

2. *State Approaches.* — All states have laws mandating that children receive certain immunizations before starting school,[126] and all states also allow medical exemptions to these requirements.[127] Moreover, almost all states allow religious exemptions;[128] the only states that do not are Mississippi,[129] West Virginia,[130] and—most recently, and in direct response to a highly publicized measles outbreak at Disneyland[131]—California.[132] Of the states that do allow for religious exemptions, eighteen also allow for philosophical or personal-belief exemptions.[133]

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124. See supra note 117 and accompanying text (discussing *Pierce* and *Meyer* and the tradition of recognizing a substantive due process right to direct the upbringing of one's children).

125. See supra notes 116–121 and accompanying text (discussing *Prince* and the Court's rejection of a substantive due process challenge to a child labor statute and recent circuit court cases *Phillips* and *Workman*, which apply *Prince*'s logic in the vaccination context).

126. States with Religious and Philosophical Exemptions from School Immunization Requirements, Nat'l Conference of State Legislatures (Aug. 23, 2016), http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx [http://perma.cc/B765-Y2FE] [hereinafter State Exemptions] (providing schematic representation of different states' vaccination exemption schemes and noting "[a]ll 50 states have legislation requiring specified vaccines for students").

127. Id.

128. Id.

129. See Miss. Code Ann. § 41-23-37 (2017) (authorizing the state health officer to "specify such immunization practices as may be considered best for the control of vaccine preventable diseases" and making it unlawful for a child not in compliance with these practices to attend school); see also Brown v. Stone, 378 So. 2d 218, 223–24 (Miss. 1979) (upholding a statute making school attendance conditional on immunization and holding the religious exemption provision would violate the Fourteenth Amendment's equal protection guarantee by "discriminat[ing] against the great majority of children whose parents have no such religious convictions").

130. See W. Va. Code Ann. § 16-3-4 (LexisNexis 2017) (making immunization of school children compulsory unless a medical exemption is obtained).

131. See Lin & McGreevy, supra note 4 (describing the Disneyland measles outbreak, tying it to the proposed elimination of the personal-belief exemption, and noting "[a]mong those whose vaccine status was known, about 7 out of every 10 California measles patients in this outbreak were unvaccinated").

132. See Cal. Health & Safety Code § 120335 (West Supp. 2016) (making no mention of a personal-belief exemption); State Exemptions, supra note 126 (surveying the laws in all fifty states and noting only Mississippi, West Virginia, and, recently, California, do not provide religious exemptions).

133. See State Exemptions, supra note 126 (providing a list of twenty states that have philosophical exemptions and noting California and Vermont have recently repealed such exemptions).

Some have argued that the very existence of religious exemptions to vaccination requirements violates the Establishment Clause, as the State, in allowing such exemptions, may be seen to privilege religious beliefs above equally strongly held personal or philosophical beliefs. For a discussion of this argument, see Turner v. Liverpool Cent. Sch., 186 F. Supp. 2d 187, 191–92 (N.D.N.Y. 2002) (upholding a religious exemption under the

Following *Jacobson* and *Zucht*, courts have recognized that states are not required to provide religious exemptions to laws imposing vaccination requirements.[134] Free exercise challenges to the vaccination requirements therefore tend to fail, and restrictive religious exemption schemes have generally been upheld.[135] For example, the Mississippi Supreme Court held in 1979 that the State's interest in preserving public health and in protecting children overwhelmed any religious objection to the state vaccination requirement.[136] More recently, the Second Circuit, invoking *Jacobson* and *Prince*, upheld the dismissal of a free exercise challenge to a New York regulation[137] that required unvaccinated children to be excluded from school during the outbreak of a vaccine-

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Establishment Clause but noting defendant's argument that the exemption fosters excessive government entanglement with religion and "improperly advances religion because its essential effect is to entitle those holding a religious belief against immunization to be exempted from immunization"); see also Christopher Ogolla, The Public Health Implications of Religious Exemptions: A Balance Between Public Safety and Personal Choice, or Religion Gone Too Far?, 25 Health Matrix 257, 259–63 (2015) (discussing the Establishment Clause implications of allowing religious exemptions). The allowance of philosophical or personal-belief exemptions in addition to or instead of religious exemptions would mitigate Establishment Clause concerns. However, expanding the number of people eligible for exemptions would only increase other concerns about the abuse of belief exemptions. See id. at 274 (discussing a study that found "those who had religious or personal exemptions from vaccinations were on average twenty-two times more likely to acquire measles and six times more likely to acquire pertussis than vaccinated children").

134. See Cude v. State, 377 S.W.2d 816, 818–20 (Ark. 1964) (citing *Jacobson*, *Prince*, and *Zucht* in support of the conclusion that the parents did not have a legal right to prevent vaccination of their children when smallpox vaccination was a precondition for school attendance, despite parents' good-faith religious beliefs); see also Phillips v. City of New York, 775 F.3d 538, 543 (2d Cir. 2015) ("New York could constitutionally require that all children be vaccinated in order to attend public school. New York law goes beyond what the Constitution requires by allowing an exemption for parents with genuine and sincere religious beliefs."); Workman v. Mingo Cty. Bd. of Educ., 419 F. App'x 348, 354–55 (4th Cir. 2011) (citing *Zucht* for the proposition that "although a state may provide a religious exemption to mandatory vaccination, it need not do so").

135. See infra notes 141–150 and accompanying text (discussing the limited circumstances in which legal challenges to vaccination requirements or exemption schemes tend to succeed); see also Wendy Parmet, Vaccine Mandates: Second Circuit Reaffirms Their Constitutionality, Bill of Health (Feb. 3, 2015), http://blogs.harvard.edu/billofhealth/2015/02/03/vaccine-mandates-second-circuit-reaffirms-their-constitutionality/ [http://perma.cc/PMK5-VUYG] ("Although the political debate over vaccination rages on, the legal debate is as settled as the science. Last month, in *Phillips v. City of New York*, the Second Circuit reaffirmed . . . [that] states have the power to mandate that schoolchildren be vaccinated against vaccine-preventable diseases.").

136. Brown v. Stone, 378 So. 2d 218, 223–24 (Miss. 1979) (upholding a statute making school attendance conditional on immunization and holding that a religious exemption provision would violate the Fourteenth Amendment's equal protection guarantee by "discriminat[ing] against the great majority of children whose parents have no such religious convictions").

137. N.Y. Comp. Codes R. & Regs. tit. 10, § 66-1.10 (2016) (providing "in the event of an outbreak . . . of a vaccine-preventable disease in a school, the commissioner, or his or her designee, may order the appropriate school officials to exclude from attendance" students who have received religious or other exemptions to vaccination requirements).

preventable disease.[138] The Second Circuit has also been notable for upholding denials of religious exemptions for lack of sincere religious belief.[139]

In general, state courts have struck down religious exemption schemes only when they appear to make exemptions more readily available to holders of *certain types* of religious beliefs.[140] For example, an Arkansas district court invalidated a religious exemption provision that was "limited . . . to members or adherents of a recognized church or religious denomination."[141] The court found that the statute requiring vaccination as a precondition for school enrollment was constitutional.[142] However, the Arkansas court, its decision again highlighting that the states are not constitutionally required to provide *any* exemptions from vaccination requirements,[143] concluded that the religious exemption itself violated the Establishment Clause for three reasons. Applying the *Lemon* test, the court found that the exemption provision, limited as it was to members of "recognized" groups, had the primary effect of "inhibit[ing] the earnest beliefs and practices of those individuals who oppose immunization on religious grounds but are not members of an

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138. *Phillips*, 775 F.3d at 543 (holding "mandatory vaccination as a condition for admission to school does not violate the Free Exercise Clause" and "[b]ecause the State could bar Phillips's and Mendoza–Vaca's children from school altogether, *a fortiori*, the State's more limited exclusion during an outbreak of a vaccine-preventable disease is clearly constitutional"); see also Jessica L. Lentini, Note, Social Distancing in New York Schools, 16 Rutgers J.L. & Religion 184, 185–90 (2014) (discussing *Phillips* and noting it was the "first case to challenge New York's social distancing policy," that is, its policy of excluding unvaccinated children from school during outbreaks of vaccine-preventable diseases).

139. See Caviezel v. Great Neck Pub. Sch., 500 F. App'x 16, 18 (2d Cir. 2012) (unpublished table decision) (upholding the district court's finding that plaintiffs did not credibly demonstrate a sincere religious belief prohibiting vaccination, which "necessarily defeats a claim to a religious exemption from vaccination"); Mason v. Gen. Brown Cent. Sch. Dist., 851 F.2d 47, 53–54 (2d Cir. 1988) (finding plaintiff's membership in Universal Life Church (ULC) did not entitle him to a religious exemption, since ULC had, among others, "no regular contact between members and leaders, and no indication that it provides any religious services").

Some have argued that religious exemptions violate the Establishment Clause not only because they can be seen to advance religion by providing exemptions only to religious people, see supra note 133, but also because requiring courts to analyze the validity or sincerity of claimants' religious beliefs fosters an "'excessive entanglement of state and church.'" See Ogolla, supra note 133, at 260–61 (quoting Turner v. Liverpool Cent. Sch., 186 F. Supp. 2d 187, 191 (N.D.N.Y. 2002)).

140. See infra notes 143–149 and accompanying text.

141. McCarthy v. Boozman, 212 F. Supp. 2d 945, 948 (W.D. Ark. 2002).

142. Id. (citing Prince v. Massachusetts, 321 U.S. 158 (1944); Zucht v. King, 260 U.S. 174 (1922); Jacobson v. Massachusetts, 197 U.S. 11 (1905)) ("The constitutional right to freely practice one's religion does not provide an exemption for parents seeking to avoid compulsory immunization for their school-aged children.").

143. Id. ("[I]t is . . . well settled that a state is not required to provide a religious exemption from its immunization program.").

officially recognized religious organization."[144] Moreover, the court determined that the exemption required the State to involve itself too much in religious matters, in determining whether an organization merited official designation.[145] The court also noted that the exemption provision's "preferential restriction" violated the Establishment Clause's "principles of governmental neutrality."[146]

Similarly, Maryland's Court of Appeals held that a religious exemption limited to "members or adherents of recognized churches or religious denominations, the tenets of which prohibit immunization,"[147] violated the Establishment Clause.[148] The court held that the provision contravened principles of government neutrality[149] because individuals who held religious beliefs not associated with any religious denomination were unable to obtain the exemption.[150] Courts in New York,[151] New Jersey,[152] and Massachusetts[153] have struck down religious exemption schemes on similar grounds. In each case, the religious exemption scheme was severed from the statute and the vaccination mandate remained intact.[154]

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144. Id. at 949.

145. Id.

146. Id.

147. Davis v. State, 451 A.2d 107, 112 (Md. 1982).

148. Id. at 113–14.

149. Id. at 113. The court discussed the offensive provisions:

> Section 7–402(b) permits only members or adherents of certain religions to apply for and obtain exemptions from the immunization requirement. By limiting the availability of the exemption, subsection (b) has the effect of respecting the personal religious beliefs and practices of those who happen to be members or adherents of the two faiths that have been recognized while overlooking the religious beliefs and practices of those such as the petitioner.

Id.

150. Id. ("[T]he statutory language certainly fails to encompass personal religious beliefs like Davis's which are not associated with any church or denomination. As far as the government is concerned, however, such beliefs are entitled to equal respect.").

151. See Sherr v. Northport-E. Northport Union Free Sch. Dist., 672 F. Supp. 81, 87, 91 (E.D.N.Y. 1987) (holding an exemption limited to "bona fide members of a recognized religious organization" violated the Establishment Clause).

152. See Kolbeck v. Kramer, 202 A.2d 889, 893 (N.J. Super. Ct. Law Div. 1964), modified, 214 A.2d 408 (N.J. 1965) (holding the state university, which granted an exemption to Christian Scientists, could not withhold an exemption from the plaintiff whose religious beliefs conflicted with the vaccination requirement but did not belong to a recognized religion).

153. See Dalli v. Bd. of Educ., 267 N.E.2d 219, 222–23 (Mass. 1971) (striking down an exemption limited to members "of a recognized church or religious denomination" because it "extend[ed] preferred treatment" to these individuals, who could then "enjoy the benefit of an exemption which is denied to other persons").

154. See McCarthy v. Boozman, 212 F. Supp. 2d 945, 949–50 (W.D. Ark. 2002) ("The language of the statute clearly indicates that the legislature's dominant purpose was to establish a comprehensive immunization program for school children . . . . Accordingly,

As these cases highlight, even when courts have found in favor of the challengers seeking the allowance of a religious exemption, they have made it clear that the State is not constitutionally required to provide a religious exemption.[155] Once it chooses to, however, the State cannot favor certain types of religious beliefs, or inhibit the exercise of certain types of religious beliefs, in its exemption scheme.[156]

II. HOBBY LOBBY AND THE GROWING BODY OF RELIGIOUS EXEMPTION LAW

This Part will first discuss the factual background and the Court's opinion in *Burwell v. Hobby Lobby Stores, Inc.*,[157] focusing in particular on the Court's discussion of the petitioners' asserted substantial burden and of the potential negative effects on petitioners' employees (i.e., third-party harms). This Part will then address the rising number of complicity-

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the religious exemption provision . . . must be stricken, but the balance of the statute remains in full force and effect."); *Sherr*, 672 F. Supp. at 98 (striking down an exemption for "bona fide members of a recognized religious organization" because "if New York wishes to allow a religiously-based exclusion from its otherwise compulsory program of immunization of school children, it . . . must offer the exemption to all persons who sincerely hold religious beliefs" prohibiting vaccination); *Davis*, 451 A.2d at 114 (finding an unconstitutional religious exemption provision severable, given the "[l]egislature's dominant purpose was to provide for an immunization program rather than to protect those having religious beliefs against immunization"); *Dalli*, 267 N.E.2d at 223 (finding unconstitutional a religious exemption severable from the "general immunization requirement and the medical exemption," and noting though its holding would not be "welcome to those who hitherto as members or adherents of a recognized church or denomination have enjoyed the exemption," their "recourse . . . must be to the Legislature").

Kolbeck v. Kramer did not deal with a severability question. Rather, the court held that the provision in question allowed an exception to be granted to the plaintiff and that the university violated the Establishment Clause by withholding it from him but granting it to members of recognized religious groups. *Kolbeck*, 202 A.2d at 893 ("Membership in a recognized religious group cannot be required as a condition of exemption from vaccination under statute and constitutional law. It is undisputed that the plaintiff qualifies for enrollment in every other respect and the defendant university, therefore, is directed . . . to admit the plaintiff.").

155. See *McCarthy*, 212 F. Supp. 2d at 948 (citing Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944); Zucht v. King, 260 U.S. 174 (1922); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (stating that a state is not constitutionally required to provide a religious exemption from a vaccination requirement)); see also *Sherr*, 672 F. Supp. at 83–84; *Davis*, 451 A.2d at 111–12; *Kolbeck*, 202 A.2d at 890.

In *Dalli v. Board of Education*, the court distinguished *Jacobson* and other early cases on the grounds that the types of regulations then at issue provided no religious exemptions and often came into being in times of public health emergency. 267 N.E.2d at 221 (making these points but noting "[i]n the present instance, however, we do not face the question whether a statute carrying no religious exemptions would be constitutional"). The general view, however, seems to be that states are clearly not required to provide any religious exemption.

156. See supra notes 140–152 and accompanying text (discussing cases striking down religious exemption schemes that placed limits on the kinds of religious beliefs that would be eligible).

157. 134 S. Ct. 2751 (2014).

based claims for religious exemptions, especially following *Hobby Lobby*. It will proceed to discuss defenses of a broad role for religious exemptions, as well as two major criticisms of complicity-based claims and of the *Hobby Lobby* holding. Firstly, critics argue that the *Hobby Lobby* Court applied a reduced version of RFRA's "substantial burden" standard, and secondly, they argue the Court signaled that third-party harms could play a smaller role in analyses of religious exemption claims.

A. Hobby Lobby*: Background Discussion*

In *Hobby Lobby*, closely held for-profit corporations claimed that since their sincerely held religious beliefs prohibited the use of contraceptives, they were entitled under RFRA to exemptions from portions of the Affordable Care Act (ACA),[158] which would require employee health insurance plans to include contraceptive coverage.[159] The Supreme Court assumed without deciding that the provision of this coverage constituted a compelling governmental interest for RFRA's purposes,[160] but the Court explained that the government had demonstrated it had other means to ensure the coverage.[161] Therefore, the Court held that mandating that Hobby Lobby provide contraceptive coverage was not the least restrictive means by which the government could further its interest.[162] *Hobby Lobby* generated significant disagreement for its holding that closely held for-profit corporations could assert religious liberty claims,[163] but this Part will focus on controversies developing from the nature of the claims themselves.

In advance of the Court's decision in *Hobby Lobby*, some commentators had suggested that the application of RFRA to allow for-profit corporations to obtain religious exemptions from the ACA's contraceptive

158. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 15, 26, 29, 30, and 42 U.S.C. (2012)); see also 42 U.S.C. § 300gg-13(a)(4) (describing the minimum required coverage for preventive health services for which no "cost sharing requirements" may be imposed).

159. See *Hobby Lobby*, 134 S. Ct. at 2759 (framing the central question as whether RFRA "permits the United States Department of Health and Human Services (HHS) to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners").

160. See id. at 2780.

161. See id. at 2763–64 & nn.8–9 (discussing exemptions for religious employers and certain religious nonprofits and the mechanisms by which third-party administrators and health insurers not associated with an employer's policy could provide coverage at no additional cost to employees).

162. See id. at 2782.

163. See, e.g., Marc A. Greendorfer, Blurring Lines Between Churches and Secular Corporations: The Compelling Case of the Benefit Corporation's Right to the Free Exercise of Religion (with A Post-*Hobby Lobby* Epilogue), 39 Del. J. Corp. L. 819, 825–30 (2015) (discussing the controversy surrounding *Hobby Lobby*'s implication that corporations can have free exercise rights).

mandate[164] would violate the First Amendment because the allowance of such exemptions would impose on employees the very type of third-party harms prohibited by the Court's Establishment Clause[165] and Free Exercise Clause[166] jurisprudence.[167]

The *Hobby Lobby* Court implicitly referenced third-party harms in its RFRA analysis: The Court concluded that the harm imposed on Hobby Lobby's employees, should their employer be allowed an exemption from the ACA contraceptive mandate, would be "precisely zero."[168] This proposition was certainly contested in amicus briefs,[169] the dissent,[170] and in subsequent scholarship,[171] but its assertion signaled that, at the very least, third-party harms do not completely fall out of the analysis when RFRA claims are involved.[172]

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164. See 42 U.S.C. § 300gg-13(a)(4) (2012) (describing the minimum required coverage for preventive health services).

165. See supra section I.A.

166. See supra section I.B.

167. Gedicks & Van Tassell, supra note 24, at 375 ("[T]he ACA and the Mandate created an entitlement to contraception without cost sharing for employees and beneficiaries of employer health plans. . . . [RFRA] exemptions would necessarily shift some of the cost of accommodating employers' anticontraception beliefs from employers to employees.").

168. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2760 (2014).

169. See Brief of Amici Curiae American College of Obstetricians and Gynecologists, et al. in Support of Government at 16, Sebelius v. Hobby Lobby Stores, Inc., 134 S. Ct. 678 (2014) (Nos. 13-354, 13-356), 2014 WL 333893 (arguing employers' exclusion of contraceptive coverage would increase the cost and decrease the usage of contraceptive services among employees); Brief for the National Women's Law Center and Sixty-Eight Other Organizations as Amici Curiae in Support of the Government at 20, *Hobby Lobby*, 134 S. Ct. 678 (Nos. 13-354, 13-356), 2014 WL 333895 ("[W]hen effective contraception is not used, and unintended pregnancy results, it is women who incur the attendant physical burdens and medical risks of pregnancy [and] women who disproportionately bear the health care costs of pregnancy and childbirth . . . .").

170. See *Hobby Lobby*, 134 S. Ct. at 2802 (Ginsburg, J., dissenting) (arguing that Congress, in enacting the ACA, did not contemplate "[i]mpeding women's receipt of benefits 'by requiring them to take steps to learn about, and to sign up for, a new [government funded and administered] health benefit'" (alteration in original) (quoting Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,888 (July 2, 2013) (codified at 29 C.F.R. pts. 2510, 2590))); see also id. at 2801 ("No tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others—here, the very persons the contraceptive coverage requirement was designed to protect.").

171. See Douglas Nejaime & Reva B. Siegel, Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics, 124 Yale L.J. 2516, 2530 & n.57 (2015) (noting the "Court may have erred in assuming that the accommodation would impose no burdens on third parties," not only as to material costs but also as to "social meaning").

172. See Sepper, Free Exercise Lochnerism, supra note 115, at 1503 (noting the *Hobby Lobby* Court "did not exempt for-profit corporations from the mandate *without regard* for their employees' ability to continue to access contraceptives" (emphasis added)).

The Court in *Hobby Lobby* made no explicit mention of the Establishment Clause.[173] However, in a footnote, the Court seemed to undercut the importance of the third-party harm analysis in religious exemption claims, though they had previously been central to Establishment Clause analysis.[174] The majority opinion in *Hobby Lobby* acknowledged the language from *Cutter v. Wilkinson*[175] requiring that courts "'take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.'"[176] However, the *Hobby Lobby* Court rejected what it characterized as the Department of Health and Human Service's (HHS) contention that "a plaintiff cannot prevail on a RFRA claim that seeks an exemption from a legal obligation requiring the plaintiff to confer benefits on third parties."[177] This reading, the Court further reasoned, would enable the government to get around RFRA in any situation, regardless of the enormity of the burden on the regulated party or the availability of alternative means, simply by presenting a plausible argument that the disputed regulation conferred a benefit to third parties.[178]

The Court in the same footnote recognized that, in the RFRA framework,[179] third-party harms "will often inform the analysis of the Government's compelling interest and the availability of a less restrictive means of advancing that interest."[180] Moreover, Justice Kennedy's concurrence may indicate that there were not currently five votes on the Court

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173. Justice Ginsburg in dissent, however, contended that the Court, by purporting to be qualified to decide which religious beliefs were sincere enough to warrant an exemption, "ventured into a minefield" fraught with Establishment Clause problems. *Hobby Lobby*, 134 S. Ct. at 2805.

174. See supra section I.A (discussing third-party harms in the Establishment Clause context).

175. 544 U.S. 709, 720 (2005).

176. *Hobby Lobby*, 134 S. Ct. at 2781 n.37 (majority opinion) (quoting *Cutter*, 544 U.S. at 720 (2005)).

177. Id. The court concluded that this contention was inconsistent with the text and purposes of RFRA. Id. ("Nothing in the text of RFRA or its basic purposes supports giving the Government an entirely free hand to impose burdens on religious exercise so long as those burdens confer a benefit on other individuals.").

178. Id. The Court identified a few extreme examples of making RFRA inapplicable when third-party harms could be identified:

> [T]he Government could decide that all supermarkets must sell alcohol for the convenience of customers (and thereby exclude Muslims with religious objections from owning supermarkets), or it could decide that all restaurants must remain open on Saturdays to give employees an opportunity to earn tips (and thereby exclude Jews with religious objections from owning restaurants).

Id.

179. See supra notes 70–84 and accompanying text.

180. *Hobby Lobby*, 134 S. Ct. at 2781 n.37.

for the reasoning expressed in the footnote.[181] Nevertheless, the discussion of the extent to which third-party harms mattered, even though the Court had already posited that no third-party harms existed,[182] "appear[ed] to cast doubt on the third party harm doctrine."[183]

Following *Hobby Lobby*, it seemed that some lower courts understood a reduction in the importance of third-party harms[184]—relative to burden on religious exercise[185]—in their analyses of free exercise and RFRA claims. *Hobby Lobby* and the influx of claims for religious exemptions,[186] not only from the ACA contraceptive mandate[187] but also from antidiscrimination statutes aimed at protecting LGBT individuals,[188] illustrate the troubling absence of a consistent understanding of third-party harms in the context of religious exemption claims.[189]

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181. Id. at 2786–87 (Kennedy, J., concurring) (emphasizing "no person may be restricted or demeaned by government in exercising his or her religion[,]" but "neither may that same exercise unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling").

182. Id. at 2760 (majority opinion) (stating that the effect on third parties—namely, employees—if the Court were to grant the exemption to their employers, would be "precisely zero").

183. Nelson Tebbe, Religion and Marriage Equality Statutes, 9 Harv. L. & Pol'y Rev. 25, 53 n.129 (2015). Professor Nelson Tebbe urged that the footnote not be read to abrogate the third-party harms doctrine, first because of the "constitutional magnitude of the third-party harm doctrine, grounded as it is in the Establishment Clause," and second because the *Hobby Lobby* Court, as discussed, "assumed that no harm to third parties would in fact result from its ruling." Id.; see also supra section I.A (discussing the importance of the third-party harm doctrine in the Court's Establishment Clause jurisprudence).

Professor Sepper has made a related argument that religious exemption claims following *Hobby Lobby*, especially insofar as they discount the importance of third-party harms, can be analogized to the much-maligned *Lochner*-style economic substantive due process claims, see Lochner v. New York, 198 U.S. 45 (1905); she argues that these claims take the existing distribution of regulatory benefits as a baseline from which any departure must further a compelling governmental interest by the least restrictive means (under the RFRA framework). See Sepper, Free Exercise Lochnerism, supra note 115 at 1471–72 (describing business religious liberty claims as defining free exercise "by reference to businesses' ability to contract," which claimants argue entitle them "as market actors, . . . as a matter of religion, to enter into and to refuse contracts in the normal course of business"); see also id. at 1475 (describing the view of objectors that "the regulation of commerce unfairly disrupts this private order and 'redistributes' from the market baseline").

184. See infra section II.E.

185. See infra section II.D.

186. This influx both pre- and post-dates *Hobby Lobby*. See infra section II.B (discussing cases involving complicity-based claims).

187. See infra note 189–191 and accompanying text (discussing cases in which plaintiffs argue accommodation for religious employers imposed a substantial burden on their free exercise or was not the least restrictive means by which government could accomplish its purpose, in violation of RFRA).

188. See infra note 193 and accompanying text.

189. Kara Loewentheil, When Free Exercise Is a Burden: Protecting "Third Parties" in Religious Accommodation Law, 62 Drake L. Rev. 433, 438 (2014) ("Our religious accom-

This issue remains live in light of the Supreme Court's remand of *Zubik v. Burwell*, which was consolidated with a number of cases presenting the same issue: whether the submission of a notice of religious burden by religious nonprofits imposed a substantial burden on their religious exercise, in violation of RFRA.[190] The cases were remanded for the parties to "arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans 'receive full and equal health coverage, including contraceptive coverage.'"[191] The Court provided no guidance as to how this approach should be determined, and it specifically declined to answer the pressing questions about "whether petitioners' religious exercise has been substantially burdened, whether the Government has a compelling interest, or whether the current regulations are the least restrictive means of serving that interest."[192] The substantial burden question, and the importance of third-party harms in answering it, thus remains very much an open one.

B. *Complicity-Based Claims*

Following *Hobby Lobby*, there have been a significant number of what have been termed "complicity-based" claims for religious exemptions.[193] This type of argument has been mobilized most prominently in further claims for exemptions from the ACA contraceptive requirement[194] and in

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modation jurisprudence has no principled or systematic framework for taking the interests of third parties affected by religious accommodations into account.").

190. See 136 S. Ct. 1557, 1559 (2016) (per curiam) (Nos. 13-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, and 15-191).

191. Id. at 1560 (quoting Supplemental Brief for Respondents at 1, *Zubik*, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-110, and 15-191), 2016 WL 1593410).

192. Id.

193. See Nejaime & Siegel, supra note 171, at 2518–19 (2015) (defining complicity-based religious exemption claims as "religious objections to being made complicit in the assertedly sinful conduct of others" and arguing "[b]ecause these claims are explicitly oriented toward third parties, they present special concerns about third-party harm"). But see, e.g., Marc O. DeGirolami, Free Exercise by Moonlight, 53 San Diego L. Rev. 105, 111-12 (2016); Marc DeGirolami, Three Thoughts on Complicity, Dignity, and Religious Accommodation, Mirror of Just. (July 10, 2015), http://mirrorofjustice.blogs.com/mirrorofjustice/2015/07/three-thoughts-on-complicity-dignity-and-religious-accommodation.html [http://perma.cc/5JGH-4MQ3] (disagreeing with Professors Nejaime and Siegel's definition); Rick Garnett, The "Limits of Religious Liberty": Complicity, Dignity, and Demeaning, Mirror of Just. (July 10, 2015), http://mirrorofjustice.blogs.com/mirrorofjustice/2015/07/the-limits-of-religious-liberty-complicity-dignity-and-demeaning.html [http://perma.cc.LG6K-WWHN] (same); see also infra notes 193 and accompanying text (identifying cases dealing with such claims in the ACA contraceptive mandate and antidiscrimination contexts).

194. Cases in which courts found against plaintiffs asserting complicity-based claims include: Mich. Catholic Conference & Catholic Family Servs. v. Burwell, 807 F.3d 738, 741 (6th Cir. 2015) (finding an ACA religious accommodation for plaintiff religious nonprofits did not violate their rights under RFRA, after vacating and remanding for reconsidera-

claims for exemptions from antidiscrimination statutes designed to protect LGBT individuals.[195] In the former context, the argument is that the very accommodations that the government has provided create illegal burdens on religious exercise, as the administrative steps the objector must take[196] to obtain the accommodation make the objector complicit

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tion in light of *Hobby Lobby*); Catholic Health Care Sys. v. Burwell, 796 F.3d 207, 214 (2d Cir. 2015) (rejecting plaintiffs' claims that "opting out of the [ACA contraceptive] coverage requirement substantially burdens their religious exercise because they believe that by doing so, they facilitate access to products and services they find objectionable"); Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151, 1180, 1196–200 (10th Cir.), cert. granted sub nom. S. Nazarene Univ. v. Burwell, 136 S. Ct. 445 (2015), and cert. granted in part, 136 S. Ct. 446 (2015) (rejecting plaintiffs' claims and concluding the accommodation scheme did not run afoul of RFRA, the Free Exercise Clause, or the Establishment Clause); Wheaton Coll. v. Burwell, 791 F.3d 792, 798–801 (7th Cir. 2015) (denying a preliminary injunction for a Christian liberal arts college, which alleged ACA religious accommodation violated their rights under RFRA by making them complicit in provision of contraceptives); E. Tex. Baptist Univ. v. Burwell, 793 F.3d 449, 452 (5th Cir.) cert. granted, 136 S. Ct. 444 (2015) (reversing a grant of preliminary injunction to enjoin enforcement of a "requirement that [plaintiffs] either offer their employees health insurance that covers certain contraceptive services or submit a form or notification declaring their religious opposition to that coverage," which plaintiffs argued violated RFRA); Univ. of Notre Dame v. Burwell, 786 F.3d 606, 619 (7th Cir. 2015) (concluding, on remand from the Supreme Court to reconsider its opinion in light of *Hobby Lobby*, that the university was not entitled to a preliminary injunction of accommodation requiring it to sign a form declaring its authorized refusal to pay for contraceptives); Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs., 778 F.3d 422, 427 (3d Cir.), cert. granted in part sub nom. Zubik v. Burwell, 136 S. Ct. 444 (2015) and cert. granted sub nom. Geneva Coll. v. Burwell, 136 S. Ct. 445 (2015) (reversing district court's grant of a preliminary injunction to plaintiffs on the grounds that "accommodation places no substantial burden on the appellees"); Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229, 237, 253 (D.C. Cir. 2014) (finding the ACA's regulatory accommodation for religious nonprofits was the least restrictive means of furthering a compelling government interest, imposed a "de minimis" burden on nonprofits, and did not violate the Establishment Clause).

Some courts, though fewer, have found that the ACA accommodation for religious employers violates RFRA. See Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs., 801 F.3d 927, 937–44 (8th Cir. 2015) (finding an accommodation process substantially burdened religious nonprofits' free exercise and was not the least restrictive means of furthering the government interest); Eternal Word Television Network, Inc. v. Sec'y, U.S. Dep't of Health & Human Servs., 756 F.3d 1339, 1340 (11th Cir. 2014) (granting an injunction prohibiting enforcement of the accommodation against the plaintiffs pending appeal); see also id. at 1344–49 (Pryor, J., specially concurring) (arguing plaintiffs established a likelihood of success on the merits of their RFRA claim that accommodation was not the least restrictive means and that their religious exercise was substantially burdened by the accommodation, which they believed to require "material cooperation in evil").

195. See infra notes 198–199 (discussing existing antidiscrimination statutes, arguments for allowing religious exemptions to these statutes, and complaints alleging unavailability of religious exemption to antidiscrimination statute was a free exercise violation).

196. See Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,871 (July 2, 2013) (codified at 26 C.F.R. pts. 54, 2510, 2590, 45 C.F.R. pts. 147, 156); see also 29 C.F.R. § 2590.715–2713A (2015) (providing an accommodation mechanism for religious employers).

The court in *Sharpe Holdings* gives a helpful discussion of the operation of the accommodation provided by 29 C.F.R. § 2590.715–2713A:

in the offensive activity.[197] Some analogous claims have also arisen in the antidiscrimination context, and objectors make a similar argument: To require them to abide by antidiscrimination statutes[198] makes them complicit in an activity that violates their religious beliefs.[199]

> It is available for a religious organization that (1) has religious objections to providing healthcare coverage for some or all contraceptive services, (2) "is organized and operates as a nonprofit entity," (3) "holds itself out as a religious organization," and (4) complies with a self-certification process. A self-insured religious organization, after "contract[ing] with one or more third party administrators," complies with the self-certification process in one of two ways. The organization may self-certify by completing and submitting directly to its third-party administrator (TPA) an EBSA Form 700—Certification (Form 700), certifying that it is a religious nonprofit entity that has religious objections to providing coverage for some or all of the contraceptives required by the mandate. The organization may also self-certify by providing notice to HHS stating the organization's name; the basis on which it qualifies for an accommodation; its religious objections to providing coverage for some or all contraceptives, including the specific contraceptives to which it objects; its insurance plan name and type; and its TPA's name and contact information (HHS Notice). The religious organization must also update its HHS Notice "[i]f there is a change in any of the information required to be included."

801 F.3d at 934 (footnotes omitted) (citations omitted) (quoting 29 C.F.R. § 2590.715–2713A).

197. See, e.g. *Eternal Word Television*, 756 F.3d at 1343 (Pryor, J., specially concurring) ("[T]he Network attests that if a religious nonprofit employer complies with the accommodation provision of the mandate, the employer will be guilty of immoral cooperation with evil. By signing the form, the employer . . . actually becomes the agent that enables a host of immoral actions to follow." (internal quotation marks omitted)). For a list of cases in which plaintiffs made similar arguments, see supra note 194.

198. As of December 2016, twenty states and the District of Columbia prohibit public accommodations discrimination on the basis of sexual orientation and gender identity, while two states prohibit public accommodations discrimination on the basis of sexual orientation only. Human Rights Campaign, 2016 State Equality Index 16 (2016), http://hrc-assets.s3-website-us-east-1.amazonaws.com//files/assets/resources/SEI-2016-Report-FINAL.pdf [http://perma.cc/B9EJ-B4BV].

199. These claims have been largely unsuccessful. See Elane Photography, LLC v. Willock, 284 P.3d 428, 440 (N.M. Ct. App. 2012), aff'd, 309 P.3d 53 (N.M. 2013) (rejecting plaintiff's argument that "applying the [NM]HRA to force Elane Photography to photograph Willock's ceremony, and thus engage in conduct that its owners believe is disobedient to God's commands, would infringe [on Elane Photography's] and its owners' free[ ]exercise of religion under the [f]ederal and [s]tate [c]onstitutions" (alterations in original)). *Elane Photography* was a pre-*Hobby Lobby* case, but the New Mexico Supreme Court did not need to decide whether Elane Photography, a limited liability company, had free exercise rights, concluding instead that "[a]ssuming that Elane Photography has such rights, they are not offended by enforcement of the NMHRA." *Elaine Photography*, 309 P.3d at 73; see also Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 288–93 (Colo. App. 2015) (rejecting plaintiff's arguments that the application of Colorado's Anti-Discrimination Act to prohibit them from refusing to sell a wedding cake for a same-sex marriage violated their free exercise rights under United States and Colorado constitutions); Gifford v. McCarthy, 23 N.Y.S.3d 422, 420–31 (N.Y. App. Div. 2016) (finding that requiring petitioners—owners of a public accommodation—to permit same-

C. *Defenses*

This emergence of complicity-based claims, especially post-*Hobby Lobby*, has generated significant controversy.[200] Some voices have articulated broadly favorable views of an increased role for religious exemptions, especially in the ACA contraceptive requirement and antidiscrimination law arenas discussed above. Supporters' arguments generally rest on two normative propositions.[201]

First, those who envision a broader role for religious exemptions have pointed out that in a pluralistic society, as previously unrecognized rights gain new recognition, to grant religious exemptions allows individuals to opt out of the contentious social debate and can reduce social conflict. Professor Thomas Berg, for example, has argued in the same-sex marriage context that "recognizing same-sex marriage without significant religious exemptions will multiply the number of conflicts and create new legal exposure for objectors, either immediately or in the long term."[202]

Second, supporters argue that allowing a significant role for religious exemptions respects individual conscience, while requiring individuals

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sex weddings on their property did not violate free exercise rights, though petitioners argued this would compel them to "host and participate in what they consider to be a sacred event that violates their religious beliefs"); State v. Arlene's Flowers, Inc., No. 13-2-00871-5, 2015 WL 720213, at *19, *24–27 (Wash. Super. Ct. Feb. 18, 2015) (holding a closely held for-profit corporation violated Washington's antidiscrimination laws by refusing to provide flowers for a same-sex wedding, though business owner's "beliefs include both a definition of marriage that excludes same-sex marriage and an explicit rejection of same-sex marriage as a civil right").

200. See infra sections II.D–.E (discussing criticisms of the *Hobby Lobby* holding and the growing body of religious exemption law).

201. See infra notes 202–203 and accompanying text.

202. Thomas C. Berg, What Same-Sex-Marriage and Religious-Liberty Claims Have in Common, 5 Nw. J.L. & Soc. Pol'y, Fall 2010, at 206, 207; see also Douglas Laycock, Religious Liberty and the Culture Wars, 2014 U. Ill. L. Rev. 839, 852 (2014) (describing the ACA contraceptive mandate, in the absence of exemptions, as "disturb[ing] that equilibrium" that existed from 1965 to 2011 between groups that disagreed on morality of contraception); Robin Fretwell Wilson, The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State, 53 B.C. L. Rev. 1417, 1431 (2012) (arguing broad allowance of religious exemptions and accommodations "turn[s] down the temperature on heated social debates"); Ryan T. Anderson, The Defense of Marriage Isn't Over, Pub. Discourse (Oct. 8, 2014), http://www.thepublicdiscourse.com/2014/10/13889 [http://perma.cc/N83W-U5ZE] (arguing exemptions protect freedom of conscience and thereby "foster[] a more diverse civil sphere[,] . . . [and] tolerance is essential to promoting peaceful coexistence even amid disagreement"); Thomas M. Messner, From Culture Wars to Conscience Wars: Emerging Threats to Conscience, Heritage Found. (Apr. 13, 2011), http://www.heritage.org/research/reports/2011/04/from-culture-wars-to-conscience-wars-emerging-threats-to-conscience [http://perma.cc/H8PU-W6VC] (arguing exemptions protect religious liberty and "promote social peace and civic fraternity" within "pluralistic societies where consensus is elusive").

whose religious beliefs conflict to abide by laws to which they object fundamentally devalues individual conscience.[203]

Though some voices have favored the increased allowance of religious objections, others have raised concerns.[204] Two of the concerns, which will be discussed in more detail later, are, first, that the Court is hollowing out RFRA's substantial burden standard—that is, making it easier to achieve[205]—and, second, that the Court in *Hobby Lobby*, and other courts subsequently, have reduced the analytical importance of third-party harms.[206]

D. *Criticism: Reducing Substantial Burden Standard*

One critique of the *Hobby Lobby* decision is that the Court appeared to diminish the role of the substantial burden analysis in the RFRA framework (especially since decreased attention to the substantiality of the burden on the religious objector could translate to other types of religious exemption claims). Even before the decision, Professor Sepper raised qualms about the implications of recognizing the existence of a corporate conscience that could be substantially burdened:

> Current decisions characterizing the regulation of employment benefits as a substantial and unjustified burden on religious freedom on employers would have potentially radical consequences for employment regulation. Acceptance of corporate conscience would invite challenges to health, safety, and nondiscrimination regulations in the workplace and beyond. It would put the institution in a legally superior position to the individual and undermine the religious pluralism that we value in commercial and public life.[207]

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203. See, e.g., E-mail from Robin Fretwell Wilson et al., Professors of Law, to Pat Quinn, Governor of Ill. (Dec. 18, 2012), http://mirrorofjustice.blogs.com/files/ill-letter-12-2012.pdf [http://perma.cc/YV37-KURW] (proposing a specific religious liberty exemption for religious objectors to an Illinois law permitting same-sex marriage on the grounds that "conflicts between same-sex marriage and religious conscience will be both certain and considerable if adequate protections are not provided").

For a broader argument in favor of exemptions (not made in response to recent controversies), see Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1420 (1990) ("Judicially enforceable exemptions under the free exercise clause . . . ensure that unpopular or unfamiliar faiths will receive the same consideration afforded mainstream or generally respected religions by the representative branches.").

204. See infra sections II.D–.E (discussing the main criticisms of *Hobby Lobby*'s application of the RFRA standard and the effects on religious exemption litigation).

205. See infra section II.D.

206. See supra sections I.A–.B (discussing the importance of third-party harms in Free Exercise and Establishment Clause contexts); see also infra section II.E (discussing the criticism that the *Hobby Lobby* Court, and some courts hearing complicity-based religious exemption claims, have failed to take adequate account of third-party harms).

207. Elizabeth Sepper, Contraception and the Birth of Corporate Conscience, 22 Am. U. J. Gender, Soc. Pol'y & L. 303, 341–42 (2014).

But the *Hobby Lobby* decision affected the determination of substantial burden in another way: In the *Hobby Lobby* opinion, the "substantial burden" inquiry concluded that because the penalty for noncompliance with a law or regulation is high, the burden the law or regulation imposes is necessarily substantial: "If the owners . . . do not comply, they will pay a very heavy price—as much as $1.3 million per day, or about $475 million per year . . . . If these consequences do not amount to a substantial burden, it is hard to see what would."[208]

It is possible to question whether this argument follows from the RFRA framework: Is the question under RFRA whether the act of abiding by the law imposes a substantial burden, or can it be whether the penalty for failing to abide by the law imposed a substantial burden?[209] Moreover, the *Hobby Lobby* outcome also seemed to signal that there should be very little inquiry into the religious substantiality of the burden when the plaintiff asserted that it existed,[210] whereas before *Hobby Lobby*, federal circuit courts did reject RFRA claims on the grounds that the burden imposed was not truly substantial.[211] Still, the *Hobby Lobby* burden reasoning has had an impact on the lower courts' burden analyses.[212]

E. *Criticism: Failure to Account for Third-Party Harms*

The second criticism of the growing body of religious exemption law is that it does not seem to account for third-party harms in any systematic way.[213] As discussed above, there is precedent in both Establishment

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208. Burwell v. Hobby Lobby, 134 S. Ct. 2751, 2759 (2014).

209. Ira C. Lupu, *Hobby Lobby* and the Dubious Enterprise of Religious Exemptions, 38 Harv. J.L. & Gender 35, 42 (2015) ("What counts as a 'burden' under RFRA, and what makes a burden 'substantial'? May courts look at the religious weight and significance (that is, the religious cost of compliance with the law) of the asserted burden, or are they limited to examining the secular costs of non-compliance?").

210. The sincerity of the plaintiffs' religious beliefs was not at issue in *Hobby Lobby* and was reiterated throughout the opinion. *Hobby Lobby*, 134 S. Ct. at 2774 ("The companies in the cases before us are closely held corporations, each owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs.").

211. See Lupu, supra note 209, at 61 n.118 (listing cases in which courts found RFRA claimants failed to demonstrate a substantial burden).

212. See, e.g., Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs., 801 F.3d 927, 937 (8th Cir. 2015), vacated by Dept. of H&Hs v. CNS Int'l Ministries, No. 15-775, 2016 WL 2842448 (U.S. May 16, 2016) ("[T]he substantial burden imposed . . . is the imposition of significant monetary penalties should CNS and HCC adhere to their religious beliefs and refuse to comply with the contraceptive mandate or the accommodation regulations. This burden mirrors the substantial burden . . . in *Hobby Lobby*."); Eternal Word Television Network, Inc. v. Sec'y, U.S. Dep't of Health & Human Servs., 756 F.3d 1339, 1340 (11th Cir. 2014) (Pryor, J., specially concurring) ("If it fails to deliver that form, the Network faces $ 12,775,000 in penalties a year[;] . . . [i]f that is not a substantial burden on the free exercise of religion, then it is hard to imagine what would be." (citation omitted)).

213. See infra notes 218–219 and accompanying text (discussing types of third-party harms the Court may not have considered); see also supra notes 168–171 and accompany-

Clause and Free Exercise Clause cases for the requirement that third-party harms be considered in analyzing claims for religious exemptions.[214] If one identifies an individual right to receive equal treatment with respect to health benefits, to allow religious exemptions to the ACA requirement could represent an impermissible infringement. When, as the Supreme Court found in *Hobby Lobby*, an accommodation could easily be made for the objector with arguably minimal effects on third parties,[215] this argument is less weighty; but in complicity-based cases, in which even the accommodation is contended to be inadequate,[216] it is unclear how third-party harm could be alleviated if the exemption were granted.

In the public accommodations context, the argument is often made that when a replacement for the service the religious objector is unwilling to provide is readily available, the third-party harm is not significant.[217] An inquiry into the obtainability of replacement services could provide a limit on the availability of religious exemptions—but some scholars have raised objections to this type of proposed limitation, since they take the existing distribution of regulatory burdens and benefits as a baseline and consequently conclude that the costs objectors impose on other individuals and the public are minimal.[218]

There is also an argument that a dignitary harm to third parties must also be weighed in the analysis when the allowance of a religious exemption would implicitly validate the objectors' moral condemnation of third parties' legal behavior.[219]

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ing text (discussing contesting takes on the Court's assertion that its holding would have no effect on third parties).

214. See supra sections I.A–.B.

215. See supra notes 168 and accompanying text (discussing the Court's statement that its holding would have no effects on third-party employees).

216. See supra note 194 (discussing complicity-based claims in the ACA contraceptive requirement context).

217. See Thomas C. Berg, Religious Accommodation and the Welfare State, 38 Harv. J.L. & Gender 103, 138 (2015) ("If the patrons have access, without hardship, to another provider, then the legal burden on the provider is the more serious one."); Andrew Koppelman, You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions, 72 Brook. L. Rev. 125, 133 (2006) ("Anyone who wants to extend antidiscrimination protection to a new class needs to show that the class is subject to discrimination that is so pervasive that markets will not solve the problem.").

218. See Sepper, Free Exercise Lochnerism, supra note 115, at 1483 ("Courts and claimants perceive the government as intruding into new areas of commercial life. . . . [T]he ACA . . . intervenes in a purportedly private agreement between employer and employee. . . . Similarly, . . . religious objectors tend to describe same-sex marriage as a new and unprecedented intrusion on religious beliefs."); see also Eugene Volokh, A Common-Law Model for Religious Exemptions, 46 UCLA L. Rev. 1465, 1522 (1999) (arguing development of "constitutional religious exemption regime would . . . return courts to identifying their own favored view of what really constitutes others' private rights").

219. See Nejaime & Siegel, supra note 171, at 2566, 2576 (arguing that "[a]ccommodation of complicity-based conscience claims may impose material burdens on

To sum up, there are two ways by which the growing body of religious exemption law seems to suggest a reduction in the analysis of the substantiality of the burden imposed on the objector. First, *Hobby Lobby* itself suggests that the penalty for noncompliance is central to the burden analysis, which expands the types of burdens that could be considered substantial, especially in combination with *Hobby Lobby*'s indication that there need be little probing of the sincerity of an asserted burdened religious belief.[220] Secondly, the allowance of complicity-based claims, when the activity to which objectors take exception seems in many cases quite removed from the activity that violates their religious beliefs, also suggests a lower standard for substantial burden.[221] The puzzle, however, is how exactly the substantial burden analysis should be conducted and to what extent third-party harms should factor into the analysis.

III. VACCINATION: A PUZZLE AND A COUNTEREXAMPLE

This Part recovers the analysis of substantial burdens and third-party harms that courts have developed in the context of challenges to compulsory vaccination laws. It then argues that vaccination jurisprudence provides a useful model for rationalizing the substantial burden analysis and better incorporating consideration of third-party harms in the contemporary context of religious challenges to the ACA's contraceptive mandate and to antidiscrimination statutes.

A. *Substantial Burden in Vaccination Law*

Government-imposed vaccination requirements have historically been regarded as significant burdens on individual freedom. Along with the military draft,[222] vaccination was viewed in the early-twentieth century as one of the two most significant intrusions on individual freedom.[223] In a

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third parties by deterring or obstructing access to goods and services" but *also* that condemnatory "social meaning is explicitly communicated during the religiously based refusal of service").

220. See supra section II.D.

221. See supra section II.D.

222. See Daniel A. Salmon & Andrew W. Siegel, Religious and Philosophical Exemptions from Vaccination Requirements and Lessons Learned from Conscientious Objectors from Conscription, 116 Pub. Health Rep. 289, 289 (2001) ("The jurisprudence the US Supreme Court has developed in cases in which religious beliefs conflict with public or state interests suggests that mandatory immunization against dangerous diseases does not violate the First Amendment right to free exercise of religion."); see also Hope Lu, Note, Giving Families Their Best Shot: A Law-Medicine Perspective on the Right to Religious Exemptions from Mandatory Vaccination, 63 Case W. Res. L. Rev. 869, 878–79 (2013) (discussing conscientious objector cases in the military-draft context as analogous to those in the vaccination context).

223. In *Pox: An American History*, Professor Michael Willrich discusses the nature of personal liberty claims made against vaccination requirements in the late-nineteenth century. See Michael Willrich, Pox: An American History 310 (2011). Especially by comparison with quarantine, then a familiar public health safety mechanism, compulsory

way, it is easy to see why: Both vaccination and the draft involve an invasion of an individual's bodily integrity. Both examples also involve the use of a person's body to achieve a government purpose which is presented as a service of the common good, but which may not have a direct positive impact on the person involved. In the case of the draft, the governmental purpose is national security and defense; in the case of vaccination, it is the protection of public health and maintenance of herd immunity.[224] Historically, it was this bodily seizure in contravention

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vaccination "was far less intrusive" to some: "Under quarantine, a smallpox 'suspect' could be detained by the government for two full weeks. The vaccine operation lasted but a few minutes." Id. Even in light of the "conventional due process perspective, which saw seizure of a man's body or property, in the absence of public necessity and proper common law procedure, as an act of the purest tyranny," some critics of vaccination found the vaccination process more objectionable than quarantine. Id. Since vaccination, in the objectors' view, involved "the insertion of an animal virus into a presumably healthy human system," "vaccination litigants and their lawyers regarded [it] as the far greater invasion of personal liberty." Id.; see also Ellen C. Tolsma, Note, Protecting Our Herd: How a National Mandatory Vaccination Policy Protects Public Health by Ensuring Herd Immunity, 18 J. Gender, Race & Just. 313, 322–24 (2015) (discussing the emergence of numerous anti-vaccination groups in late-nineteenth century and describing their argument as centered on "'vigilance against the erosion of civil liberties, suspicion of authority figures and the prevention of disease through "natural" host resistance'" (quoting Julie-Anne Leask & Simon Chapman, 'An Attempt to Swindle Nature': Press Anti-Discrimination Reportage 1993–1997, 22(1) Austl. & N.Z. J. Pub. Health 17, 23 (1998))).

224. Doctor Allan J. Jacobs provides a helpful discussion of the phenomenon of herd immunity in *Needles and Notebooks: The Limits of Requiring Immunization for School Attendance*:

> The scientific rationale behind making immunization against a specific disease compulsory is based on the phenomenon of herd immunity. This phenomenon allows eradication of a disease from a population if most, but not all, members are vaccinated. This is because immunization interrupts transmission of disease from person to person by removing potential hosts from the chain of transmission. Therefore, vaccination of one individual benefits all susceptible persons in the community.
>
> Each communicable disease has a basic reproductive number, or R0, defined as the number of persons to whom an infected person will transmit a disease in a totally susceptible population. The infection will die out if R0 < 1. R0 is determined by the properties both of the disease and of the specific population. Factors unique to a population, such as age distribution, social patterns, and genetic susceptibility influence R0. For example, herd immunity for measles has been estimated at 55 to 95 percent in different populations. Herd immunity cannot be measured directly, but is only estimated through mathematical modeling, which requires simplifying assumptions that may be inaccurate.
>
> Vaccination decreases the R0, so the greater the number of individuals vaccinated, the lower R0 will be. Even if everyone has not been vaccinated, when the prevalence of immunity exceeds a certain level, R0 becomes < 1 and the disease will die out in a closed community. Of course, real human communities are not closed. People leave and enter. If an infected person enters the community, then members of that community who are exposed to the infected person are likely to contract the disease regardless of the vaccination rate or the rate of immunity,

of the individual's wishes that many objectors to government vaccination programs found offensive.[225]

Even today, though state vaccination programs are generally upheld,[226] they are upheld not on the premise that burdens imposed on individual religious belief, freedom of choice, or bodily control are insignificant.[227] Rather, courts express the view that countervailing values are more important in the context of vaccination.[228] Interestingly, as will be discussed below, the primary countervailing value is essentially a large-scale consideration of third-party harms, analogous to the third-party harms which are so hotly debated today in other contexts.[229]

B. *Third-Party Harms in Vaccination Law*

It may seem obvious that the justification for government-mandated vaccination programs is the avoidance of third-party harms. The central rationale for vaccination, after all, is to maintain a portion of the population immune to a contagious disease such that it cannot develop into an epidemic (herd immunity).[230] Today, most people intuitively regard nationwide public health as more important than the individual rights infringements inherent in mandatory vaccination.[231] However, as discussed

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> though if there is herd immunity the disease will eventually disappear in that community until it is reintroduced by another in-migrant.

Allan J. Jacobs, Needles and Notebooks: The Limits of Requiring Immunization for School Attendance, 33 Hamline L. Rev. 171, 176–77 (2010).

225. See John D. Lantos et al., Why We Should Eliminate Personal Belief Exemptions to Vaccine Mandates, 37 J. Health Pol. Pol'y & L. 131, 134 (2012) (describing the libertarian objection to vaccination as grounded in the belief that any person has the right to do with her body as she sees fit, meaning that government-required vaccination is therefore an invasion of bodily integrity).

226. See supra section I.C.2 (discussing cases dealing with state vaccination programs and the limited circumstances in which courts have rejected the religious exemption provisions of these statutes).

227. See supra sections I.C.1–.2 (discussing cases acknowledging the state interest in protecting public health through vaccination programs).

228. See supra sections I.C.1–.2 (discussing Supreme Court precedent and corresponding state court cases demonstrating that states have the power to require immunization and need not provide religious exemptions).

229. See supra section II.E (addressing controversy over some courts' perceived failure to account for third-party harms in religious exemption claims, especially complicity-based claims).

230. See supra note 224.

231. See Alistair Bell, Big U.S. Majority Favors Mandatory Vaccinations: Reuters/Ipsos Poll, Reuters (Feb. 26, 2015), http://www.reuters.com/article/us-usa-vaccines-poll-idUSKBN0LS15720150226 [http://perma.cc/99va-6XBR] (noting seventy-eight percent of Americans favor mandatory vaccination of children and only thirteen percent oppose vaccination); Bianca Seidman, Poll: Childhood Disease Outbreaks Raise Support for Vaccines, CBS News (July 6, 2015), http://www.cbsnews.com/news/measles-whooping-cough-cases-raised-support-for-vaccines/ [perma.cc/3S9E-3FWH] (noting one-third of parents surveyed recognized increased benefits of vaccines as compared to one year previously). But see Laura Parker, The Anti-Vaccine Generation: How Movement Against Shots

above, at one time this value balancing was hardly taken for granted—in fact, it was a highly contentious issue.[232] The debate has since evolved, however, and today two broad types of third-party harms almost always outweigh the relevant individual rights concerns.

1. *Children as Third Parties.* — Typically, religious objectors to vaccination requirements are adults, though such adults often object to requirements that they vaccinate their children (generally as a prerequisite to school attendance).[233] In upholding vaccination requirements, courts often discuss the interests of these children and of other children in the community.[234]

Despite the tradition of allowing parents great freedom in bringing up their own children,[235] vaccination is one area in which courts often do not defer to parents' preferences, even if they are strongly held or expressed in religious terms. Rather than deferring to parents' preferences or expressed beliefs, courts often instead discuss how unvaccinated children

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Got Its Start, Nat'l Geographic (Feb. 6, 2015), http://news.nationalgeographic.com/news/2015/02/150206-measles-vaccine-disney-outbreak-polio-health-science-infocus/ [http://perma.cc/2M7J-CHMJ] (discussing the growth of the antivaccination movement in recent years, which, while still in the minority, may have outsized effects due to the clustering of antivaccination parents).

232. See supra note 223 and accompanying text (discussing late-nineteenth and early twentieth-century objectors to vaccination); see also Dalli v. Bd. of Educ., 267 N.E.2d 219, 221 (1971) (listing early challenges to compulsory immunization laws and noting the "great majority of States have compulsory or local option immunization laws [that] . . . were the subject of broadscale attacks in the early years of the century and were universally upheld as proper exercises of the police power"); Elizabeth Earl, The Victorian Anti-Vaccination Movement, Atlantic (July 15, 2015), http://www.theatlantic.com/health/archive/2015/07/victorian-anti-vaccinators-personal-belief-exemption/398321/ [http://perma.cc/L7G7-Z873] (discussing the roots of the modern antivaccination movement in Victorian England and the spread of that movement to America).

233. See supra notes 126–127.

234. See Prince v. Massachusetts, 321 U.S. 158, 167, 170 (1944) ("Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."); Cude v. State, 377 S.W.2d 816, 819 (Ark. 1964) ("It is a matter of common knowledge that prior to the development of protection against smallpox by vaccination, the disease, on occasion, ran rampant . . . . [I]t is within the police power of the State to require that school children be vaccinated against smallpox . . . ."); Brown v. Stone, 378 So. 2d 218, 221 (Miss. 1979) (denying the idea that the "the First Amendment . . . [mandates] that innocent children, too young to decide for themselves, are to be denied the protection against crippling and death that immunization provides because of a religious belief adhered to by a parent or parents"); Bd. of Educ. v. Maas, 152 A.2d 394, 403 (N.J. Super. Ct. App. Div. 1959) ("We are entirely convinced that the board, in its approach to public health measures, comprehensively considered and consistently adhered to a complete prevention method in dealing with school children committed to its care."), aff'd per curiam mem., 158 A.2d 330 (N.J. 1960).

235. See supra note 117 (discussing cases in which the Supreme Court has recognized parents' rights to manage their children's upbringing).

are exposed to dangerous communicable diseases.[236] Courts have also made reference to the equal protection implications of broadly allowing parents to obtain religious exemptions to vaccination requirements on behalf of their children, in that such allowance increases the risks faced by children who cannot be vaccinated for medical reasons.[237] Both the children of the parents seeking religious exemptions and other children are technically third parties to a religious freedom claim asserted by a parent, yet these children's interests are often central to courts' decisions to uphold vaccination schemes and to limit the allowance of religious exemptions.[238]

Though the current contentious areas in religious exemption law do not involve children, the importance of children as third parties in the vaccination context has meaning for religious exemption law generally.[239] First of all, courts have emphasized that children may not hold the same religious views as their parents—and are even less likely to hold the same religious views as parents of other children in the community.[240] In the context of complicity-based claims for religious exemptions, it is equally and probably even more frequently true that employees do not hold the same views as employers and that members of the public seeking accommodations without discrimination do not hold the same religious views as the owners of these accommodations.[241] Therefore the same logic from the vaccine context—in which there is a strong resistance to exemptions that require the imposition of one person's religious beliefs on another person who does not share them—can apply in these two controversial contexts.

2. *General Public as Third Parties.* — The second way courts consider third-party harms in the vaccination context is through the invocation of public health concerns.[242] Public health interests can be viewed as an ag-

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236. See supra note 234 (identifying cases in which courts have mentioned concern for children's welfare in upholding vaccination requirements).

237. See, e.g., *Brown*, 378 So. 2d at 223–24 (upholding a statute making school attendance conditional on immunization and holding a religious exemption provision would violate the Fourteenth Amendment's equal protection guarantee by "discriminat[ing] against the great majority of children whose parents have no such religious convictions").

238. See supra note 234 (discussing cases in which courts have mentioned children's welfare in upholding vaccination requirements).

239. See infra text accompanying notes 241–242 (discussing the analogous relationship between averting harms to children in the vaccination context and avoiding other third-party harms that could be occasioned by other types of religious exemptions).

240. See supra note 234 (citing cases discussing the distinct interests of children and parents).

241. See supra note 199 (discussing complicity-based religious exemption claims relating to discrimination in public accommodations).

242. See supra section I.C (discussing Supreme Court and state court cases upholding vaccination requirements as proper exercises of state police power in the service of public health).

gregation of concerns about harms to third parties, and courts often raise these concerns in articulating why a state's vaccination program is a constitutional exercise of its police power and no exemption scheme is required.[243]

The public health concerns at issue in vaccination are, on a broad scale, arguably much more concrete than the effects on the public at large that would ensue from the granting of one complicity-based religious exemption to the ACA contraceptive-coverage mandate[244] or from antidiscrimination law.[245] That is, general unavailability of contraceptive coverage or of public accommodation for groups targeted by discrimination would not ensue if one or even numerous exemptions were granted. On the other hand, a public health crisis would not result from the granting of one or even numerous exemptions to vaccination requirements—yet the courts have held that states are not required to provide any religious exemption. Analogizing from vaccination, it makes sense to limit the role of religious exemptions in the two contentious contexts in light of the broad-lens government interests at stake, even when the effects of an individual exemption would be small.

C. *Historical Perspective*

It may seem that the substantial burden and third-party harms analyses, as applied regarding exemptions to vaccination requirements, are readily transferrable to religious exemptions in the reproductive rights and public accommodations contexts. However, it must be acknowledged that these latter two areas are simply much more controversial now[246]—from a legal perspective, at least[247]—than vaccination is. It is possible that the allowance of these two types of exemptions will decline naturally as the government interests in these policies become more widely accepted.

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243. See, e.g. Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944) ("The right to practice religion freely does not include liberty to expose the community . . . to communicable disease . . . ."); Wright v. DeWitt Sch. Dist. No. 1, 385 S.W.2d 644, 648 (Ark. 1965) (rejecting an exemption to a vaccination requirement and noting the plaintiffs' "freedom to act according to their religious beliefs is subject to a reasonable regulation for the benefit of society as a whole"); Dalli v. Bd. of Educ., 267 N.E.2d 219, 223 (Mass. 1971) (severing a religious exemption as violating the Establishment Clause but noting it appeared otherwise acceptable based on the limited public health danger described in the record).

244. See supra note 194 and accompanying text.

245. See supra note 195 and accompanying text.

246. See supra section II.C–.E (discussing the main criticisms and defenses of the growing body of religious exemption law).

247. See supra section I.C (discussing the relatively settled nature of vaccination law and Supreme Court precedent to indicate that vaccination requirements are generally constitutional and religious exemption provisions not necessary). But see notes 4–8 and accompanying text (describing the social controversy over vaccinations and the small but vocal anti-vaccination movement).

Indeed, this was the story with vaccination, which, as discussed, was once much more legally controversial a topic than it is today.[248]

CONCLUSION

The doctrinal history of religious exemptions from compulsory vaccination laws sheds light on the current controversy surrounding religious exemptions from the ACA's contraceptive mandate and from antidiscrimination statutes. Compulsory vaccination programs have almost always been upheld, and there is a century-old tradition supporting their constitutionality even in the absence of religious exemption provisions. While compulsory vaccination requirements impose obviously substantial burdens on religious objectors, courts have traditionally engaged in a careful consideration of the third-party harms that would attend religious exemptions from such requirements. In other areas of religious exemption law, where a systematic method for considering such harms is noticeably and controversially undeveloped, the history of vaccination provides much-needed guidance.

248. See supra note 223 (discussing the history of late-nineteenth- and early-twentieth-century vaccination objectors).