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# PERMISSIVE EXEMPTIONS AND ENTRENCHMENT

Mihir Khetarpal

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# PERMISSIVE EXEMPTIONS AND ENTRENCHMENT

Mihir Khetarpal*

## ABSTRACT

*In 1993, Congress nearly unanimously passed the Religious Freedom Restoration Act ("RFRA"). That bill aimed to make it easier, at least in some instances, for people to receive exemptions from laws that infringed upon their religious beliefs, even when those exemptions were not required by the First Amendment's Free Exercise Clause. Several states followed suit, passing their own RFRAs.*

*But RFRA is uncontroversial no more. Congress and the states recently began attempting to narrow their respective RFRAs. For example, the United States House of Representatives passed a bill that would make RFRA inapplicable to certain anti-discrimination laws designed to protect LGBTQ+ individuals from discrimination. And although the Oklahoma Supreme Court has since ruled that it restricted abortions in too many cases, Oklahoma enacted a law seeking to exempt its abortion laws from the state RFRA. In short, legislative bodies are now attempting to exempt certain categories of their laws from RFRA.*

*At the same time, the Supreme Court has pulled back on its decision in Employment Division v. Smith, thereby strengthening protections for people seeking religious exemptions pursuant to the First Amendment. In doing so, it opens a path to those seeking to challenge Congress's and states' attempts to narrow RFRA. Those challengers may argue that the narrowing of RFRA itself violates the Free Exercise Clause of the First Amendment, as interpreted in Smith. In other words, those challengers may argue that once a government creates broader protections for religious liberty than required by the First Amendment, it cannot undo those protections.*

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* J.D., 2021, University of Virginia School of Law. I would like to thank my wife Maggie Bradley for her constant encouragement. And I would like to thank the wonderful editors at the *University of Pittsburgh Law Review* for their tremendous work.

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*This Article considers several arguments regarding whether Congress and state legislatures have the ability to limit RFRA's applicability under the Supreme Court's Free Exercise jurisprudence. This Article also argues that courts should look to the legislative history for evidence of neutrality or lack thereof (key to the Free Exercise analysis). The Article goes on to examine the legislative history of the Equality Act, a bill that limits RFRA and has passed one body of Congress, and an overturned Oklahoma statute that removed abortion law from the realm of the Oklahoma version of RFRA. This Article finds that, while some of the statements in the legislative history of the Equality Act are similar to the statements the Supreme Court deemed non-neutral in Masterpiece Cakeshop v. Colorado Civil Rights Commission, the Court should hold that, while inquiry into legislative history is appropriate, it takes more to find non-neutrality in statements by legislators than in statements by adjudicators. This Article concludes that there are no statements in the legislative history of that RFRA-limiting legislation enacted by the Oklahoma legislature evidencing non-neutrality. Finally, this Article argues that regardless of the Free Exercise Clause analysis, legislative entrenchment doctrine and theory require that a limitation of RFRA be deemed unproblematic under the First Amendment.*

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## INTRODUCTION

During the Warren era, the Supreme Court possessed a strong pro-religion view of the Free Exercise Clause of the First Amendment.[1] It held that a burden on a claimant's sincerely held religious belief was a violation of the Free Exercise Clause of the First Amendment unless the government could surpass strict scrutiny.[2] This was so even for neutral laws that applied to every person.[3] All the claimant had to demonstrate was that a governmental action burdened his religious beliefs.[4] If a claimant did so, and the government could not demonstrate that doing so was the least restrictive means of furthering a compelling governmental interest, then the government had to grant the claimant an exemption from the law.[5]

Conversely, during the Rehnquist era, the Court reversed course. In *Employment Division v. Smith*, authored by the late Justice Scalia, the Court held that claimants are *not* entitled to religious exemptions from laws and governmental actions that are (a) neutral and (b) generally applicable.[6] Only if the claimant can demonstrate that the law was either not neutral or not generally applicable would the government be required to surpass strict scrutiny.[7] At the time, this holding was deeply unpopular, so much so that Congress passed a law—still in effect today—known as the Religious Freedom and Restoration Act (RFRA) essentially codifying the strong pro-religion standard that existed prior to *Smith*.[8] When RFRA was challenged, the Supreme Court held that RFRA was unconstitutional as applied to the states, but held as permissible RFRA's requirement that the federal government grant exemptions even when not required by the Constitution.[9] These exemptions—

[1] Paul G. Kauper, *The Warren Court: Religious Liberty and Church-State Relations*, 67 MICH. L. REV. 269, 269, 272–75 (1968).

[2] Sherbert v. Verner, 374 U.S. 398, 399 n.1, 407 (1963).

[3] *See id.* at 406–07 (showing that qualification standards for unemployment benefits unfairly burdened plaintiff).

[4] *Id.* at 403–04.

[5] *Id.* at 406–07.

[6] Emp. Div. v. Smith, 494 U.S. 872, 879 (1990).

[7] *Id.* at 879.

[8] Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 2(a), (b), 107 Stat. 1488, 1488 (1993). This Article will refer to the Religious Freedom Restoration Act of 1993 as "RFRA." *See* City of Boerne v. Flores, 521 U.S. 507, 512 (1997), for insight into the passage of the RFRA.

[9] *Flores*, 521 U.S. at 519.

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exemptions that RFRA requires but *Smith* would not—are permissive; the political branches of government grant these exemptions because of choice (or because they are bound by their own laws, such as RFRA), not because the First Amendment requires it.

Recently, though, there has been movement to overturn *Smith* and return to the pre-*Smith* standard. Three members of the Supreme Court have indicated readiness to overturn *Smith* as soon as possible: Justices Thomas, Alito, and Gorsuch.[10] Two others, Justices Kavanaugh and Barrett, have indicated similar willingness but expressed concern about determining the correct test to apply in lieu of *Smith*.[11]

Although *Smith*'s fate remains unclear, the Court has greatly expanded Free Exercise doctrine even while working under the *Smith* framework. In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Court held that a commissioner hearing a religious claimant's case in an adjudicative setting made statements indicating hostility—and therefore non-neutrality—toward religion.[12] These statements did not mention the claimant.[13] But the Court held that they were non-neutral anyway.[14] As for *Smith*'s general applicability standard, in a "shadow docket" case involving religious claimants seeking to gather during the height of the COVID-19 pandemic,[15] the Supreme Court held that a statute or governmental policy that allows for exemptions for secular purposes but not comparable religious conduct is not generally applicable.[16] Accordingly, in the Court's view, because the state of California allowed "hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants" to gather "more

[10] *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1926 (2021) (Alito, J., concurring, joined by Thomas & Gorsuch, JJ.) ("For all these reasons, I would overrule *Smith* . . . . Those who count on this Court to stand up for the First Amendment have every right to be disappointed—as am I.").

[11] *See id.* at 1883 (Barrett, J., concurring, joined by Kavanaugh, J.).

[12] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1724 (2018).

[13] *See id.* at 1729.

[14] *Id.* at 1732.

[15] Alexander Gouzoules, *Clouded Precedent:* Tandon v. Newsom *and its Implications for the Shadow Docket*, 70 BUFF. L. REV. 87 (2022). The "shadow docket" refers to the Supreme Court's emergency docket.

[16] Tandon v. Newsom, 141 S. Ct. 1294, 1297 (2021).

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than three households at a time," it could not forbid at-home worshipers from gathering in groups of more than three households at a time.[17]

Across the variety of cases on religious liberties the Court has heard, there is a common theme. Some governments—federal, state, or local—are bound by a law or practice or policy that a religious claimant believes violates their rights when applied to them. Sometimes, the claimant claims that the governmental action violates the Free Exercise Clause of the First Amendment to the Constitution, as did the claimants in *Masterpiece Cakeshop*, *Fulton v. City of Philadelphia*, and the various shadow docket COVID-19 religious practice cases.[18] Other times, the claimant sues under RFRA, a law passed by Congress (and later copied by several states) to increase the protections for religious liberties, a route chosen by the claimants in *Burwell v. Hobby Lobby Stores, Inc.*[19] Regardless, the Supreme Court has often agreed with the claimant.[20]

This general pattern may not seem unusual to anyone familiar with the process of judicial review in federal courts. Courts often hear cases involving laws passed by Congress, state governments, or local governments. Such cases are brought by claimants who are harmed by those governmental actions, claiming that the governmental action runs counter to the Constitution or to some other controlling statute. If the Court agrees, it enjoins enforcement of the governmental action, at least to people similarly situated to the claimant.

But why stop there? Would the Supreme Court ever act, in effect, to nullify Congress's or a state's attempt to repeal a law? Could it ever hold that a governmental body's repeal of a law violated the Constitution?

That question is more than theoretical and may present itself soon. Because of the Supreme Court's increasing willingness to grant religious exemptions, Congress and some states are reconsidering their RFRA laws, at least as applied to certain categories of cases. The House of Representatives passed a bill known as the Equality Act, which amends various civil rights protections to prevent discrimination

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[17] *Id.*

[18] *Masterpiece Cakeshop*, 138 S. Ct. at 1719; Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1868 (2021); *Tandon*, 141 S. Ct. at 1294.

[19] 573 U.S. 682, 683 (2014).

[20] *Religious Liberty: Landmark Supreme Court Cases*, BILL OF RIGHTS INSTITUTE (Apr. 15, 2023, 7:42 AM), https://billofrightsinstitute.org/e-lessons/religious-liberty.

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on the basis of sexual orientation.[21] In doing so, the Equality Act carves out certain provisions from RFRA's scope. In other words, it provides that certain provisions would not be subject to the heightened review of RFRA if the Equality Act were enacted. The Equality Act is not law—it has not passed the Senate—but it may be one day.[22] At the state level, Oklahoma has *already passed* a law which exempts itself from Oklahoma's version of RFRA. In response to *Dobbs v. Jackson Women's Health Organization*, which eliminated the constitutional right to an abortion, Oklahoma passed a bill outlawing abortions (save for certain exceptions).[23] In doing so, it made sure to exempt the law from Oklahoma's version of RFRA.[24] True, the Oklahoma Supreme Court has held that the Oklahoma legislation violates the Oklahoma Constitution's limited abortion protections.[25] But what is noteworthy is that the Oklahoma legislature sought to limit RFRA challenges to the abortion law. If Oklahoma remains committed to restricting abortion, it could enact a new proscription that includes the same RFRA-limiting language.

Start with the Equality Act. Taking the statutory scheme at face value (which eliminates RFRA's application to it), a claimant with a sincerely held religious objection to the relevant provisions of the Equality Act will have to demonstrate that the law is not neutral or not generally applicable, pursuant to *Employment Division v. Smith*.[26] However, it might be difficult for a claimant to demonstrate that a law regarding civil rights broadly is not generally applicable. Absent such a showing, the claimant will fail pursuant to *Smith*. Likewise, if Oklahoma passes a new abortion restriction containing RFRA-restricting language, a person seeking a religious exemption to that law would need to demonstrate either that the law is not neutral or is not generally applicable. In short, it would be harder for those seeking religious exemptions from the Equality Act and Oklahoma's abortion laws to get it.

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[21] Equality Act, H.R. 5, 116th Cong. (as passed by House, May 17, 2019). Crucially, the Equality Act passed the House of Representatives in the 117th Congress as well. But this Article refers to the 2019 version because the legislative history on that bill was more fully developed and provides more clues on the First Amendment implications of the bill. The bill has never passed the Senate and is not law.

[22] *Id.*

[23] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2279 (2022); OKLA. STAT. tit. 63, § 1-745.55(K)(4) (2022).

[24] Section 1-745.55(J) (2022) ("Notwithstanding any other law, a civil action under this section shall not be subject to any provision . . . of the Oklahoma Religious Freedom Act . . . .").

[25] Okla. Call for Reprod. Just. v. State, 531 P.3d 117, 122 (Okla. 2023).

[26] 494 U.S. 872, 874 (1990).

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So, claimants seeking exemptions from the Equality Act (if passed) and some future version of the Oklahoma abortion law may try something else. They may argue that, by carving out RFRA from one specific class of laws (LGBTQ+ rights in the case of the Equality Act and abortion prohibition in the case of Oklahoma), the respective legislature acted non-neutrally.[27]

This Article considers how such a claim may proceed. First, claimants might argue that laws carving out RFRA are not neutral on their face because such laws evidence hostility toward the concept of religion by singling out and excising religious protections from one set area of the law (either LGBTQ+ rights or abortion prohibitions). But this Article concludes that the relevant test for First Amendment purposes is not whether a law is hostile toward the concept of religion, but whether the relevant law is hostile toward a particular claimant's specific religious belief or practice. That distinction may seem small, but it separates a philosophical debate about the source of convictions from a person's sincerely held views stemming from religion. In any event, this Article concludes that carving out certain legislative sections from RFRA or its state counterparts (such as those dealing with LGBTQ+ rights and abortion prohibitions) is not even hostile toward the concept of religion. There are numerous reasons—other than hostility toward the concept of religion—that may lead Congress or state legislatures to narrow permissive religious exemptions.

One such reason is a desire to restore a proper balance of exemptions and the general applicability of the laws. At bottom, RFRA offers broad exemptions from general laws, and a legislative body may decide that certain laws will be overly undermined if too many exemptions are granted. Another reason Congress or state legislatures may narrow permissive exemptions is that they may disagree with the Supreme Court regarding the proper interpretation of RFRA. After all, the Supreme Court held in *Burwell v. Hobby Lobby Stores, Inc.* that RFRA requires granting exemptions in situations where many people—including four Justices—did not think RFRA required exemptions to be granted.[28] Thus, Congress and state legislatures may wish to narrow RFRA in an attempt to restore RFRA to what Congress and state legislatures believe is the proper interpretation of RFRA. Finally, Congress and state legislatures may wish to consider third-party harms more thoroughly than the

[27] *Factsheet: Religious Freedom Restoration Act of 1993 (RFRA)*, BRIDGE: A GEORGETOWN UNIV. INITIATIVE (Mar. 16, 2021), https://bridge.georgetown.edu/research/religious-freedom-restoration-act-of-1993-rfra/.

[28] 573 U.S. 682, 735–36 (2014).

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Supreme Court has. Whether third parties are harmed is, at bottom, a question of fact for which the legislative fact-finding process is especially well suited and for which the Supreme Court may not have enough information. For example, in *Hobby Lobby*, the Court concluded that there would be no harms to any third parties, such as women seeking contraception, because there were other avenues by which women could obtain contraception.[29] As a matter of fact, it seems that a year after the decision in *Hobby Lobby*, there remained some women who wanted contraception but were unable to obtain it, which demonstrates that the Supreme Court might have been incorrect about third-party harms.[30] Given that potential error, Congress and the states may wish to more deeply consider third-party harms in their RFRAs. None of these purposes—restoring a proper balance of RFRA, restoring a proper interpretation of RFRA, and balancing third-party harms—is hostile to the concept of religion. Instead, each is about (1) the legal process in the United States (i.e., Congress passes laws, Courts interpret them, sometimes wrongly, and Congress can change them accordingly) or (2) third-party interests.

Second, claimants might argue that the legislative histories of the statutes (in particular, the Equality Act) evidence hostility and therefore non-neutrality toward religion.[31] This argument seems a natural consequence to the outcome in *Masterpiece Cakeshop*. There, the Court held that the Colorado Civil Rights Commission acted non-neutrally toward the cakeshop by stating in the adjudication process that religion had been used to justify discrimination in the past.[32] Potential claimants will be able to hone in on similar statements made by various Equality Act supporters on the House floor.[33] But there are a couple of differences. First, it is not clear whether legislative history should be used to determine the neutrality of a bill. After all, at least in statutory interpretation matters, the Supreme Court and many court watchers have moved away from placing much emphasis on legislative

[29] *See id.* at 691–92.

[30] Nelson Tebbe, Richard Schragger & Micah Schwartzman, *Hobby Lobby's Bitter Anniversary*, BALKINIZATION: BALKINIZATION (June 30, 2015), https://balkin.blogspot.com/2015/06/hobby-lobbys-bitter-anniversary.html ("[T]oday, a full year after the Court issued that statement, Hobby Lobby's employees are still not receiving coverage.").

[31] *See, e.g.*, Bettina Krause & Melissa Reid, *The Inequality of the Equality Act*, PUB. AFFS. & RELIGIOUS LIBERTY (Nov./Dec. 2019), https://www.adventistliberty.org/inequality-of-the-equality-act.

[32] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1729 (2018).

[33] *See, e.g.*, Daniella Diaz & Annie Grayer, *House Passes Equality Act Aimed at Ending Discrimination Based on Sexual Orientation and Gender Identity*, CNN: CNN POLS. (Mar. 16, 2021, 3:22 PM), https://www.cnn.com/2021/02/25/politics/equality-act-passes-house/index.html.

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history.[34] But after concluding that legislative history ought to be used when considering the neutrality of a law, this Article concludes that statements in legislative history ought to be treated differently than statements made in an adjudicatory setting. Statements in an adjudicatory setting are more reasonably interpreted as statements about the parties before the adjudicator. It may be reasonable to conclude, when an adjudicator is speaking about one person's case, that a statement about religion is really about the *person's specific religious belief*, because there is only one person seeking an exemption before the adjudicator. But a statement on the floor of the House of Representatives is as general as a statement can be. Absent any specific targeting, legislative history has no specific claimant toward whom non-neutrality is evident. Accordingly, the Article ultimately concludes that *Masterpiece Cakeshop*'s description of statements that constitute hostility toward religion should not be read to apply outside of adjudicatory settings.

This Article also notes another reason—potentially normative, potentially doctrinal—that the claims should not succeed: success would affect an impermissible legislative entrenchment of *permissive* religious exemptions. Generally speaking, the prohibition on legislative entrenchment ensures that a legislature may not inalterably dictate the future.[35] Much of the academic literature and case law discuss situations where a legislature attempts to entrench its laws.[36] It does so by providing (for example) that a law may not be repealed, or that it may only be repealed in certain conditions.[37] This is impermissible because it limits the powers of a future legislature: the power to repeal laws. But if the Court holds that Congress and states may not carve certain statutes out of RFRA, then *the Court* would have affected a legislative entrenchment. Neither Congress nor the states are required to pass permissive religious exemptions such as RFRA. But by holding that, once passed, RFRA and its state counterparts cannot be limited or narrowed, courts would be effectuating a scheme whereby permissive religious exemptions are permanent after passage and cannot be removed. It may not fit neatly into any doctrinal point, but

[34] VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 42 (2023).

[35] United States v. Winstar Corp., 518 U.S. 839, 872 (1996) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *90).

[36] *See* John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CALIF. L. REV. 1773, 1784 (2003).

[37] *Id.* at 1783.

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because of entrenchment, the Supreme Court should tread carefully when considering claims that limit a legislature's ability to limit RFRA.

This Article proceeds in four parts. After this introduction, Part I provides relevant and necessary background on the past, present, and potential future of Free Exercise and RFRA doctrine. Part II considers the arguments about whether carving statutes out of RFRA demonstrates non-neutrality and a lack of general applicability. Part III discusses legislative entrenchment and how it applies to RFRA carve-outs. Part IV concludes.

## I. BACKGROUND

The First Amendment covers speech and religion.[38] On religion, the First Amendment contains two relevant clauses. First, it prevents the government from making any "law respecting an establishment of religion."[39] Second, it forbids governments from "prohibiting the free exercise" of religion.[40] The doctrinal test for this latter clause—the Free Exercise Clause—has changed over time.[41] But it has changed in an unusual way. Many rights expanded by the Warren Court in the mid-twentieth century are retrenching now (such as substantive due process rights).[42] Other rights are now expanding for the first time (such as the right to bear arms).[43] Despite that theme, the trajectory of the Free Exercise Clause is hard to follow. Its protections expanded during the Warren Court era, retrenched during the Rehnquist Court era, and are apparently expanding again.[44]

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[38] U.S. CONST. amend. I.

[39] *Id.*

[40] *Id.*

[41] Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 LOY. U. CHI. L.J. 71, 71–72 (2001).

[42] Donald A. Dripps, *Beyond the Warren Court and Its Conservative Critics: Towards a Unified Theory of Constitutional Criminal Procedure*, 23 U. MICH. J.L. REFORM 591, 592 (1990).

[43] *See* D.C. v. Heller, 554 U.S. 570, 595 (2008) ("[T]he Second Amendment confer[s] an individual right to keep and bear arms."); McDonald v. City of Chicago, 561 U.S. 742, 750 (2010) ("[T]he Second Amendment right is fully applicable to the States."); N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2122 (2022) ("[T]he Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home.").

[44] Frederick Gedicks & Michael McConnell, *The Free Exercise Clause*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/amendments/amendment-i/interpretations/265#the-free-exercise-clause (last visited Apr. 18, 2023).

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Start in the nineteenth century with *Reynolds v. United States* in 1879.[45] Reynolds was a member of the Church of Jesus Christ of Latter-day Saints and was charged with illegal bigamy.[46] Reynolds argued, inter alia, that the Free Exercise Clause required that he be afforded an exemption to the bigamy law.[47] The Court disagreed, observing that requiring an exemption would "make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."[48] Thus, in the Court's early history, it disfavored religious exemptions from broadly applicable laws.

But by the mid-twentieth century, the Court was more willing to entertain requests for and require exemptions. In *Sherbert v. Verner*, the Supreme Court held that anytime a claimant's sincerely held belief is burdened by a law, the government must demonstrate that the law was narrowly tailored to a compelling governmental interest.[49] If the government could not so demonstrate, then the claimant was entitled to an exemption from the law.[50] Simply put, the Court required the government to surpass strict scrutiny anytime a claimant's religious belief was burdened by a governmental policy.[51] In *Wisconsin v. Yoder*, the Court again confirmed the holding in *Sherbert*.[52] *Sherbert* and *Yoder* made clear that a claimant was entitled to an exemption from a law when the law burdened his religion and the government could not pass strict scrutiny.[53] This was true even for generally applicable and neutral laws. Indeed, *Yoder* itself held that Amish children were entitled to exemption from compulsory school attendance laws even though those laws applied to children of every religion.[54]

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[45] 98 U.S. 145, 162 (1879).

[46] *Id.* at 161.

[47] *Id.* at 161–62.

[48] *Id.* at 167.

[49] 374 U.S. 398, 403 (1963).

[50] *Id.*

[51] John R. Hermann, Sherbert v. Verner *(1963)*, THE FIRST AMEND. ENCY., https://www.mtsu.edu/first-amendment/article/755/sherbert-v-verner (last visited Apr. 17, 2023).

[52] 406 U.S. 205, 235–36 (1972).

[53] *See id.*; *Sherbert*, 374 U.S. at 403.

[54] *See* Wisconsin v. Yoder, 406 U.S. 205, 235–36 (1972).

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Twenty years later, the Court retreated from the broad interpretations from the Warren Court. Justice Scalia wrote for the Court in *Employment Division v. Smith*,[55] which held that laws that are (1) neutral and (2) generally applicable are subject to only rational basis review. Only if a law is either not neutral or not generally applicable will the government have to surpass strict scrutiny.[56]

This loosening of religious liberty was broadly criticized.[57] So three years later, Congress (nearly unanimously) passed—and President Clinton signed into law—the Religious Freedom and Restoration Act of 1993 ("RFRA").[58] RFRA announced that:

> (1) [T]he framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution; (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise; (3) governments should not substantially burden religious exercise without compelling justification; (4) 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; and (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.[59]

RFRA's explicit purpose was "(1) to restore the compelling interest test as set forth in [*Sherbert*] and [*Yoder*] and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government."[60] Accordingly, RFRA purported to prohibit "[g]overnment" from imposing any "substantial[] burden" on a person's religious exercise unless the

[55] 494 U.S. 872, 878–79 (1990).

[56] *Id.*

[57] *The Exercise of Free Religion in America*, CONST. RTS. FOUND., https://www.crf-usa.org/resources/the-free-exercise-of-religion-in-america (last visited Apr. 20, 2023).

[58] Peter Steinfels, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES, Nov. 17, 1993, at A18.

[59] Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 2(a)(1)–(5), 107 Stat. 1488, 1488 (1993).

[60] Section 2(b)(1)–(2), 107 Stat. at 1488.

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government can surpass strict scrutiny.[61] The act applies federally, to any "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States."[62] It also purports to apply to any "State, or a subdivision of a State."[63] Congress had thus made clear that it intended RFRA to apply to states.

RFRA did not escape challenge. Indeed, a local government challenged the law, arguing that Congress had no authority to enact RFRA and that RFRA was thus unconstitutional.[64] The Supreme Court concluded that RFRA was unconstitutional as applied to states.[65] The Court, per Justice Kennedy, held that Section Five of the Fourteenth Amendment only confers on Congress the ability to enact laws that have a "congruence and proportionality" to constitutional rights *as defined by the Supreme Court*.[66] Section Five, in other words, is remedial; it does not confer upon Congress the ability to "decree the substance of the Fourteenth Amendment's restrictions on the States."[67] Subsequent decisions in the courts of appeal (and the Court's abstention from correction) have recognized that RFRA is constitutional as applied to the federal government.[68]

In response to the Supreme Court holding that RFRA was unconstitutional as applied to the states, Congress enacted the Religious Land Use and Institutionalized Persons Act ("RLUIPA") in 2000.[69] In effect, RLUIPA afforded RFRA, *Sherbert*, and *Yoder* protections to (1) religious institutions in zoning matters and (2) prisoners, even as applied to states.[70] In other words, RLUIPA required that state and local governments grant religious exemptions anytime religious exercise is burdened in the context of zoning matters and prison cases. RLUIPA also clarified that religious

[61] Section 3(b)(1)-(2), 107 Stat. at 1489.

[62] Section 5(1), 107 Stat. at 1489.

[63] *Id.*

[64] City of Boerne v. Flores, 521 U.S. 507, 511 (1997).

[65] *Id.* at 536.

[66] *Id.* at 520, 536.

[67] *Id.* at 508.

[68] *See, e.g.*, *In re Young*, 141 F.3d 854, 859–60 (8th Cir. 1998) (concluding that the portion of RFRA applicable to the federal government was severable from the unconstitutional portion applicable to the states), *cert. denied*, 119 S. Ct. 43, 43–44 (1998).

[69] Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc–2000cc-5 (RLUIPA).

[70] Sections 2000cc-2(e), 2000cc-3(a).

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exercise—for RLUIPA and RFRA purposes—means "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[71] RLUIPA was also not without challenge.[72] But the Supreme Court held that RLUIPA is constitutional, at least as applied to prisoners, despite having held that RFRA was unconstitutional as applied to the states.[73]

Further, the fact that the Supreme Court held that the federal RFRA is unconstitutional as applied to states did nothing to bar states from enacting RFRAs themselves. And just that has happened: several states have enacted state-specific RFRAs.[74] Under those state RFRAs, state governments agree to grant exceptions anytime a religious claimant's exercise is burdened.[75] As of now, twenty-one states have enacted RFRA statutes—preventing their state governments from burdening religious exercise without demonstrating that the burden surpasses strict scrutiny.[76]

Perhaps the most well-known court interpretation of the federal RFRA came in 2014 when the Supreme Court decided *Burwell v. Hobby Lobby Stores, Inc.*[77] At issue in *Hobby Lobby* were regulations issued by the Department of Health and Human Services pursuant to the Affordable Care Act.[78] The regulations required employers to provide coverage for certain contraceptives for their employees.[79] The owners of Hobby Lobby Stores claimed that the contraceptive mandate violated their sincerely held religious beliefs, because four of the contraceptives at issue—Plan B, Ella, copper IUDs, and hormonal IUDs—prevent an already fertilized egg from developing.[80] The Court, per Justice Alito, held that, under RFRA, the contraceptive mandate substantially burdened the owners' religious beliefs and that although respondent, Hobby Lobby, was a corporation, allowing it to assert RFRA claims

[71] Section 2000cc-5(7)(A).

[72] *See, e.g.*, Cutter v. Wilkinson, 544 U.S. 709, 712–13 (2005).

[73] *Id.* at 731–33.

[74] *State Religious Freedom Restoration Acts*, NAT'L CONF. OF STATE LEGISLATURES (May 4, 2017), https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.

[75] *See generally id.* ("These laws are intended to echo the federal RFRA, but are not necessarily identical to the federal law.").

[76] *Id.*

[77] 573 U.S. 682 (2014).

[78] *Id.* at 688–90.

[79] *Id.* at 682.

[80] *Id.* at 691.

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protected the religious liberties of its owners.[81] That conclusion did not end the matter. The Court had to consider whether the regulations were the least restrictive means of achieving a compelling interest.[82] But although the Supreme Court assumed, without deciding, that the government has a compelling interest in guaranteeing free access to the four at-issue contraceptives, the Court held that the government failed to show that it had used the least restrictive means of achieving that interest.[83] For example, the Court reasoned, the government could itself assume the cost of providing the contraceptive coverage when an employer asserted a religious objection.[84] Under such a scheme, as applied to Hobby Lobby, the employees of Hobby Lobby who desired contraception would submit an application to the government seeking coverage for the contraception, and the government would provide that coverage.

Crucially, the *Hobby Lobby* decision was important for reasons beyond its application of law to facts. According to Justice Ginsburg, for example, the Court had held, for the first time, that RFRA—and RLUIPA's subsequent revisions to RFRA—afforded broader protection than *Sherbert* and *Yoder* ever did.[85] Indeed, the majority observed that RLUIPA changed the definition of "exercise of religion" from "the exercise of religion under the First Amendment" to "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[86] This change led the majority to conclude that RFRA and RLUIPA reflect "an obvious effort to effect a complete separation from First Amendment case law."[87] Whether because of this interpretation by the majority or the practical impact of limiting employees' contraceptive access, *Hobby Lobby* was a controversial decision. And that may have in turn made RFRA more controversial.

While developing the law of RFRA, courts continued to develop the First Amendment's Free Exercise Doctrine. One important example came in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. There, the Court considered whether a Colorado law preventing public businesses from discriminating on the

[81] *Id.* at 726.

[82] *Id.* at 707–08.

[83] *Id.* at 728.

[84] *Id.*

[85] *Id.* at 746–48, 747 n.9 (Ginsburg, J., dissenting).

[86] *Id.* at 696.

[87] *Id.*

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basis of sexual orientation infringed on Masterpiece Cakeshop's owner's Free Exercise rights.[88] The Court concluded that the Colorado Civil Rights Commission's *adjudication* of the religious claim evidenced hostility and animus toward the owners, and therefore was not neutral.[89] Specifically, the Court concluded that two statements made by commissioners evidenced non-neutrality.[90] First was a commissioner's statement that if the cakeshop owner "wants to do business in the state and he's got an issue with the—the law's impacting his personal belief system, he needs to look at being able to compromise."[91] The Court, per Justice Kennedy, concluded that this statement was ambiguous, but that the context could demonstrate a "lack of due consideration" for the cakeshop owner's Free Exercise rights.[92] Second, a commissioner stated that "[f]reedom of religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust [sic] . . . . [T]o me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others."[93] The Court concluded that this statement was demeaning to the cakeshop owner's religious liberties in two ways: "by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere."[94] While, in a way, the Court's opinion is indeed narrow (i.e., it focuses on these particular statements made by commissioners) the Court's opinion is also broad. It finds hostility from statements that were (1) made by commissioners who were not members of the adjudicative body of last resort in the case, and (2) directed toward religion generally rather than the cakeshop owner's religion.

As the Court continued to change—with Justice Kavanaugh replacing Justice Kennedy and Justice Barrett replacing Justice Ginsburg—it seemed that *Employment Division v. Smith* was on its deathbed and that the First Amendment would revert to the *Sherbert* and *Yoder* standards. But, so far, *Smith* lives on. Although the Court has not overruled *Smith*, the Court has strengthened the First Amendment's Free Exercise protection by giving *Smith* more teeth. In a shadow docket order in *Tandon*

[88] 138 S. Ct. 1719, 1723 (2018).

[89] *Id.* at 1724.

[90] *Id.* at 1729.

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

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*v. Newsom*[95] (and later by merits opinion in *Fulton v. City of Philadelphia*[96]), the Court adopted what some have termed the "most favored nation" theory of *Smith*.[97] The theory, which has roots in an opinion by then-Third Circuit Judge Alito,[98] states that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise. . . . [W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue."[99] In *Tandon*, a shadow docket case about California's COVID policies, the Court concluded that California must permit at-home religious exercise to bring together more than three households at a time (which California had prevented due to COVID case numbers) in part because the state "permit[ed] hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants" (all settings where secular activities occur) "to bring together more than three households at a time."[100] The dissent stated, on the other hand, that gathering in a retail store was not comparable to gathering in a home for religious exercise.[101]

That same Term, the Court decided *Fulton v. City of Philadelphia*.[102] By way of background, Philadelphia relied on private foster care agencies to certify prospective families as meeting certain statutory criteria.[103] At issue in *Fulton* was Philadelphia's policy and practice to refuse to contract with private foster care agencies if those agencies refused to certify unmarried couples and same-sex married couples.[104] The agency, as justification for its actions, asserted a religious belief that

[95] 141 S. Ct. 1294 (2021).

[96] 141 S. Ct. 1868 (2021).

[97] Zalman Rothschild, *Individualized Exemptions, Vaccine Mandates, and the New Free Exercise Clause*, 131 YALE L.J.F. 1106, 1114 (2022), https://www.yalelawjournal.org/pdf/F9.RothschildFinalDraftWEB_rmo9um7h.pdf.

[98] Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 365 (3d Cir. 1999).

[99] *Tandon*, 141 S. Ct. at 1296.

[100] *Id.* at 1297.

[101] *Id.* at 1298 (Kagan, J., dissenting).

[102] 141 S. Ct. 1868 (2021).

[103] *Id.* at 1875.

[104] *Id.* at 1874.

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"marriage is a sacred bond between a man and a woman."[105] The agency claimed that Philadelphia's policy violated its Free Exercise rights under the First Amendment.[106] Applying *Employment Division v. Smith* and the "most favored nation" theory used in *Tandon*, the Court agreed with the agency that Philadelphia's policy violated the First Amendment.[107] The Court concluded that the agency's religious exercise was burdened by forcing it either to stop participating in the foster program or to certify same-sex couples in violation of its beliefs.[108] The Court held that Philadelphia's policy was not generally applicable and so fell outside of *Smith*'s purview.[109] This was so, the Court concluded, because a law or policy is not "generally applicable" if it invites the government to consider the reasons behind an entity's conduct by providing for a "mechanism for individualized exemptions."[110] Thus, the Court concluded, where the government "has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[111] *Fulton* also noted that "[a] law lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."[112] Because the relevant Philadelphia policy permitted exceptions as determined by the discretion of the commissioner, Philadelphia could not refuse an exemption when the agency asserted religious interests.[113] In other words, if Philadelphia allows exceptions to the policies for some secular reasons, it must allow exemptions for religious reasons as well.

Crucially, the Supreme Court did not overrule *Employment Division v. Smith*. Three Justices—Thomas, Alito, and Gorsuch—voted to overrule *Smith*. Justices Kavanaugh and Barrett found some arguments for overruling *Smith* to be "compelling," though they (along with Justice Breyer) expressed concern about

[105] *Id.* at 1875.

[106] *Id.* at 1876.

[107] *Id.* at 1877–82.

[108] *Id.* at 1876.

[109] *Id.* at 1877.

[110] *Id.* at 1877 (quoting Emp. Div. v. Smith, 494 U.S. 872 (1990)).

[111] *Id.*

[112] *Id.*

[113] *Id.* at 1878.

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determining the test that should replace *Smith*.[114] Because *Fulton*, in their view, comes out the same whether or not *Smith* is overruled, those Justices saw "no reason to decide in [*Fulton*] whether *Smith* should be overruled, much less what should replace it."[115]

It is clear that the Supreme Court is strengthening religious protections by strengthening the Free Exercise Clause of the First Amendment. Meanwhile, at least some states and even Congress have shown an interest in weakening religious protections by exempting certain categories of conduct from their respective RFRAs.

The most prominent example may be a statute recently passed by Oklahoma.[116] As backdrop, in the wake of *Dobbs*—which overruled *Roe v. Wade* and *Planned Parenthood v. Casey*—at least one group has criticized abortion prohibitions as violative of its religious beliefs.[117] Specifically, a Florida synagogue filed a complaint claiming that Florida's law limiting abortions after fifteen weeks violates the Florida Constitution's religious liberty protections.[118] Under the claimant's religious beliefs, "abortion is required if necessary to protect the health, mental or physical well-being of the woman, or for many other reasons not permitted under the act."[119] This sort of claim seems similar to the type of claim raised in *Hobby Lobby*: a law prohibits certain conduct that the claimants believe their religion must allow.

This sort of claim may face doctrinal challenges in any event, even under State RFRAs. But ostensibly to defend against these sorts of challenges, Oklahoma included in its abortion law an exemption from Oklahoma's RFRA (called the "Religious Freedom Act") in no uncertain terms: "Notwithstanding any other law, a civil action under this section . . . shall not be subject to any provision of the

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[114] *Id.* at 1882–83 (Barrett, J., concurring, joined by Kavanaugh, J.). Justice Breyer joined all but the first paragraph of this concurrence, in which Justice Barrett weighs the merits of the arguments for overruling *Smith*.

[115] *Id.* at 1883.

[116] OKLA. STAT. tit. 63, §§ 1-745.51 to .60 (2022).

[117] Joe Hernandez, *Some Jewish Groups Blast the End of* Roe *as a Violation of Their Religious Beliefs*, NPR (June 26, 2022, 6:04 PM), https://www.npr.org/2022/06/26/1107722531/some-jewish-groups-blast-the-end-of-roe-as-a-violation-of-their-religious-belief.

[118] Jim Saunders, *South Florida Synagogue Sues Over Florida's New 15-Week Abortion Ban*, MIA. HERALD (June 14, 2022, 3:29 PM), https://www.miamiherald.com/news/politics-government/state-politics/article262496912.html.

[119] *Id.*

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Oklahoma Religious Freedom Act . . . ."[120] Although that law has been ruled unconstitutional by the Oklahoma Supreme Court,[121] it is nonetheless noteworthy because the legislature attempted to exempt itself from Oklahoma's RFRA. The legislature's goal in doing so is apparent. Those with religious objections to the abortion law would have to meet the more stringent test of *Employment Division v. Smith* to prevail, rather than the easier, more religion-friendly test of RFRA. In other words, under RFRA, the objectors could shift the burden to the government to surpass strict scrutiny so long as their religious exercise was burdened. Under *Smith*, they must first demonstrate that the law is either not neutral or not generally applicable.

At the federal level, and outside of the abortion context, some have attempted to create certain exemptions to the federal RFRA in the wake of *Hobby Lobby*. The House of Representatives has passed (most recently in 2021) a bill entitled the "Equality Act."[122] The purpose of the act is to "prohibit discrimination on the basis of sex, gender identity, and sexual orientation."[123] It amends various existing rules that prohibit discrimination on other grounds to also prohibit discrimination on the basis of gender identity and sexual orientation.[124] For instance, it amends Title XI of the Civil Rights Act of 1964 to prohibit discrimination on those bases.[125] Like the Oklahoma abortion statute, the Equality Act contains a provision exempting it from RFRA: "The Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb et seq.) shall not provide a claim concerning, or a defense to a claim under, a covered title, or provide a basis for challenging the application or enforcement of a covered title."[126] The idea—similar to Oklahoma's statute—is to make it more difficult for those with religious claims against the law to seek exemptions. A person or entity with religious beliefs that may conflict with relevant portions of the Equality Act would need to demonstrate that the law is either not neutral or is not generally applicable. Unlike in *Hobby Lobby* and unlike the RFRA standard, merely asserting a burden on religious exercise would be insufficient.

Supporters of Oklahoma's statute or the Equality Act may face a problem. It is conceivable that those with religious beliefs contrary to the policy underlying the

[120] Section 1-745.55.

[121] Okla. Call for Reprod. Just. v. State, 531 P.3d 117, 122 (Okla. 2023).

[122] Equality Act, H.R. 5, 116th Cong. (as passed by House, May 17, 2019).

[123] *Id.*

[124] *Id.* §§ 3–12.

[125] Section 9.

[126] *Id.*

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Oklahoma statute or the Equality Act could challenge their carve-out from RFRA itself as not neutral or not generally applicable. The challengers could claim that by picking one type of conduct to remove from RFRA's protections while leaving every other type of conduct in RFRA's protections, the government is acting in a non-neutral way or in a way that creates laws that are not generally applicable. Accordingly, the challengers would say, the law exempting RFRA's protections fails *Smith*, and, therefore, RFRA protections must be afforded to the challengers. More broadly, these challengers would be arguing that once a government grants permissive religious exemptions—those not required by the First Amendment (such as exemptions granted as part of RFRAs)—the government cannot repeal those exemptions, at least piecemeal. The argument, at first impression, is intuitive yet profoundly novel. It is initially intuitive to believe that granting broad religious exemptions, then taking them away for certain categories, evidence religious animus. But it is novel to suggest that an exemption not compelled by the First Amendment can become compelled by the First Amendment at a later time. If successful, this sort of argument would have profound implications, and the cumulative effect here would essentially serve to entrench RFRA protections once passed.

This Article examines these potential arguments. It considers whether such laws are neutral and generally applicable for purposes of *Smith*. It also considers practical entrenchment considerations—the effect of the Court essentially refusing to allow Congress and states to repeal portions of its laws.

## II. A LAW THAT CONTAINS AN EXEMPTION FROM RFRA DOES NOT VIOLATE THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT

At the outset, it is important to note that the crucial question is whether, *in effect*, Congress or the states cannot exempt a statute they pass from their respective RFRAs. Of course, Congress and the various states have the pure legal authority to exempt a statute they pass from their RFRAs. Indeed, the federal RFRA specifically provides for Congress's ability to do so,[127] and Congress would likely have the authority to do so even if RFRA did not provide for such an ability.[128] Also, at the federal and state level, one of the most basic tenets of statutory interpretation is that a law (such as RFRA) can be narrowed or repealed by a future legislature.

[127] Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 6(b), 107 Stat. 1488, 1488 (1993) ("Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.").

[128] *See generally* Branden Lewiston, *RFRA as Legislative Entrenchment*, 2017 PEPP. L. REV. 26, 30–34 (2017).

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Now consider if someone who has a religious objection to the requirements of the Equality Act or some future version of the Oklahoma abortion statute sues, arguing that RFRA carve-outs demonstrate non-neutrality or nongeneral applicability. If the Court agrees that RFRA carve-outs are not neutral or not generally applicable, the government would have to surpass strict scrutiny, and the effect would be that the government has to meet the stringent RFRA standard. For instance, take the Equality Act. If the Court agrees that its RFRA carve-out is either not neutral or not generally applicable, the federal government would have to demonstrate that removing RFRA's applicability to the Equality Act is narrowly tailored to a compelling governmental interest. This is no different from what it would have to do if the law contained no RFRA carve-out: the government then would have to demonstrate that the provisions of the Equality Act are narrowly tailored to a compelling governmental interest. Now consider some future version of the Oklahoma abortion statute. If the Court agrees that its state RFRA carve-out is either not neutral or not generally applicable, Oklahoma would have to show how the carve-out is narrowly tailored to a compelling governmental interest. This is no different from what it would have to do if the law contained no RFRA carve-out: Oklahoma then would have to demonstrate that the provisions of the abortion law are narrowly tailored to a compelling governmental interest.

Put simply, if the Supreme Court decided that RFRA carve-outs were not neutral or generally applicable, the government would have to meet the same strict-scrutiny standard as it would under RFRA. It is thus important to consider whether the carve-outs in the Equality Act and the Oklahoma statute—if re-enacted to comply with the Oklahoma Supreme Court's ruling[129]—satisfy the *Employment Division v. Smith* standard. That is, are those legislative acts both neutral and generally applicable?[130] Though the concepts of neutrality and general applicability are related,[131] they require courts to employ distinct legal tests. Crucially, a law must

[129] *See* Okla. Call for Reprod. Just. v. State, 531 P.3d 117 (Okla. 2023).

[130] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (citing Emp. Div. v. Smith, 494 U.S. 872 (1990)) ("[O]ur cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.").

[131] *Id.* at 557–58 (Scalia, J., concurring) ("[C]ertainly a law that is not of general applicability . . . can be considered 'nonneutral'; and certainly no law that is nonneutral . . . can be thought to be of general applicability.").

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survive both tests to escape strict scrutiny: the law must be *both* neutral *and* generally applicable.[132]

On neutrality, a governmental action "will not qualify as neutral if it is 'specifically directed at . . . religious practice.'"[133] An action can fail this test if it "'discriminate[s] on its face,' or if religious exercise is otherwise its 'object.'"[134] Regarding general applicability, a governmental action is not generally applicable if it "'prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way,' or if it provides 'a mechanism for individualized exemptions.'"[135] This Article considers whether a law that contains a RFRA carve-out is neutral and generally applicable. It concludes that it is both neutral and generally applicable. Accordingly, challenges to laws that exempt themselves from the applicable RFRA miss the mark.

### *A. A Law that Contains an Exemption from RFRA Is Neutral*

To begin with, it is important to consider whether a law or bill that contains an exemption from RFRA (such as the Equality Act or some future version of the Oklahoma abortion statute) is neutral, at least insofar as the RFRA exemption is concerned.[136] This Article concludes that such a law is neutral. This is because of two main reasons. First, the face of such a provision and its applicability are neutral, and second, the legislative history of the Equality Act and the Oklahoma abortion statute, for example,[137] do not indicate hostility toward religion. To be sure, the Supreme Court has never held that it is appropriate to look to legislative history in determining the neutrality or lack thereof of a law, but at least some members of the

[132] *Id.* at 531.

[133] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2422 (2022) (alteration in original) (quoting Emp. Div. v. Smith, 494 U.S. 872, 878 (1990)).

[134] *Id.* (alteration in original) (quoting *Church of the Lukumi*, 508 U.S. at 533).

[135] *Id.* (quoting Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021)).

[136] It is possible to hypothesize a law that contains an exemption from RFRA but is not neutral on its face for some other provision of the law. Because this Article is concerned with the exemptions from RFRA, the other potential provisions of a law are not relevant to this Article.

[137] Of course, if some other bill or law purported to exempt itself from the applicable RFRA, the legislative history of *that* particular bill or law would need to be considered. Considering the legislative history of the Equality Act and the Oklahoma abortion statute, then, is useful in that they provide examples of how the analysis may proceed for any similar legislation.

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Supreme Court are willing to engage in such an inquiry.[138] Accordingly, this Article contains analysis relating to legislative history in a separate section.

#### 1. A Law that Limits RFRA Is Neutral on Its Face and Has Neutral Effects

A governmental action is not neutral if it is "specifically directed at . . . religious practice."[139] In other words, a law or other governmental action is not neutral if it "discriminate[s] on its face" or if religious exercise is otherwise its "object."[140] Thus, the key question under this standard in analyzing statutes that exempt themselves from RFRA is whether *the concept of religion* in general is equivalent to a *particular claimant's religious exercise*. Laws containing RFRA carve-outs are more likely to have as their object the concept of religion rather than a particular religious exercise. Indeed, laws that exempt themselves from RFRA do not focus on or target a particular religious exercise. Instead, they seek to reduce religious exemptions writ large.

It is not immediately clear whether hostility toward the *concept* of religion is sufficient under *Employment Division v. Smith* to warrant strict scrutiny, though, of course, hostility toward a plaintiff's religious belief or exercise is sufficient. This section will first argue that hostility toward the concept of religion is insufficient under *Smith* to warrant strict scrutiny. Second, this section will demonstrate that even if hostility toward the concept of religion is sufficient under *Smith* to warrant strict scrutiny, a provision exempting legislation from RFRA is not hostile toward the concept of religion. Finally, this section will demonstrate that a provision exempting legislation from RFRA is not facially hostile toward the religion of any potential plaintiff.

##### a. Non-Neutrality Toward the Concept of Religion Is Not the Same as Non-Neutrality Toward a Particular Plaintiff's Religion, and Therefore Does Not Trigger Strict Scrutiny

Hostility toward the concept of religion is not the same as hostility toward a particular religion. To demonstrate the difference, suppose that there are two religions with practices "P1" and "P2." If Congress passed a statute that provided

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[138] *Church of the Lukumi*, 508 U.S. at 540 ("In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases. . . . Relevant evidence includes . . . the legislative or administrative history . . . ."). For this portion of the opinion, Justice Kennedy did not have a majority. *See id.* at 523.

[139] *Bremerton Sch. Dist.*, 142 S. Ct. at 2422 (quoting Emp. Div. v. Smith, 494 U.S. 872, 878 (1990)).

[140] *Id.* (alteration in original) (quoting *Church of the Lukumi*, 508 U.S. at 533).

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that "no exemptions shall be granted for practice P1" or "no exemptions shall be granted for practices P1 or P2," then the statute would lack facial neutrality because it refers to a religious practice. If, on the other hand, the statute provided that "no religious exemptions shall be granted beyond what is required by the First Amendment," the law would be facially neutral, because it did not refer to any religious practice.

Supreme Court cases have focused on hostility towards a particular religion as opposed to the concept of religion more broadly. Take *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* as an example. There the Supreme Court emphasized that "a law targeting *religious beliefs* as such is never permissible."[141] The Court also emphasized that a law is not neutral if its object "is to infringe upon or restrict practices because of their *religious motivation*."[142] The Court, "[t]o determine the object of a law, [begins] with its text, for the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality *if it refers to a religious practice* without a secular meaning discernible from the language or context."[143] This language framing the analysis refers consistently to a religious belief or practice rather than the concept of religion.[144]

The Court's decision in *Masterpiece Cakeshop*[145] is also helpful in determining that hostility toward a specific religion or religious exercise is different than hostility toward the concept of religion. There, the Court held that an adjudicatory process was not neutral due to evidence of commissioner's hostility.[146] In the conclusion of the majority opinion, Justice Kennedy succinctly indicated the broad reasoning for the holding: the petitioner "was entitled to a neutral decisionmaker who would give full and fair consideration to *his* religious objection as he sought to assert it in all of

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[141] *Church of the Lukumi*, 508 U.S. at 533 (emphasis added) (citations omitted).

[142] *Id.* (emphasis added).

[143] *Id.* (emphasis added).

[144] *See also* Locke v. Davey, 540 U.S. 712, 712 (2004) (upholding a public scholarship scheme that forbids a recipient from using the scholarship to pursue a degree in devotional theology).

[145] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018). The Supreme Court there held that the commission that adjudicated the petitioner's claims for a religious exemption was not neutral due to statements hostile to the petitioner's religion. *Id.* at 1732. The Justices disagreed about whether the commission's actions could ever be neutral, even absent hostile statements. *Compare id.* at 1732–34 (Kagan, J., concurring), *with id.* at 1734–40 (Gorsuch, J., concurring).

[146] *Id.*

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the circumstances in which this case was presented, considered, and decided."[147] This statement indicates the Court found hostility toward the petitioner's specific religion rather than to the concept of religion in general.

To be sure, other areas of the *Masterpiece Cakeshop* opinion may indicate differently, at least upon first glance. The Court found hostility when a commissioner stated "[f]reedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery [or] whether it be the holocaust [sic] . . . ."[148] It seems, on its face, that this statement is more hostile toward the concept of religion than to the petitioner's particular religion or religious exercise. After all, the statement makes no reference to the specific religious belief of the petitioner. It may seem that this means the Supreme Court, in using this statement to support the idea that the commission was not neutral, is willing to substitute hostility toward the concept of religion in place of hostility toward a plaintiff's religion.

However, despite the natural reading of the commissioner's statements, the Court was not concerned with hostility toward the concept of religion. Immediately following the quotation from the commissioner, Justice Kennedy, for the Court, stated that "[t]o describe *a man's faith* as 'one of the most despicable pieces of rhetoric that people can use' is to disparage *his* religion in at least two distinct ways: by describing *it* as despicable, and also by characterizing *it* as merely rhetorical—something insubstantial and even insincere."[149] Justice Kennedy, therefore, interpreted the commissioner's statement, however general it may have been, as being hostile toward the petitioner's religion. Though it is unclear exactly why Justice Kennedy and the majority in *Masterpiece Cakeshop* interpreted the commissioner's statement in this way, one reason may be because *Masterpiece Cakeshop* is a case regarding an adjudicatory setting. The commissioner who made those statements did so in the context of hearing a specific case, much like a court would. Accordingly, those statements can more reasonably be thought to apply to the specific religion of the claimant, rather than the concept of religion writ large.

Further, it makes more sense in an adjudicatory setting to attribute statements by commissioners about the concept of religion to a particular person's religion. In an adjudicatory setting, the adjudicators are concerned with resolving the specific

[147] *Id.* at 1732 (emphasis added).

[148] *Id.* at 1729.

[149] *Id.* (emphasis added).

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controversy applicable to the parties in front of them, so saying something about religion may reasonably be interpreted as saying something about the person's religion. In any event, although it is unclear why the majority interpreted the statements this way,[150] nothing written by Justice Kennedy in the majority opinion suggests that hostility toward the concept of religion, in and of itself, is sufficient to find non-neutrality.[151]

#### b. Even if Non-Neutrality Toward the Concept of Religion Is Sufficient to Trigger Strict Scrutiny, a Statute Containing an Exemption from RFRA Is Not Hostile Toward the Concept of Religion

Even if the Court were to extend the logic of *Masterpiece Cakeshop* to non-adjudicatory settings and hold that in all contexts, non-neutrality toward the concept of religion is effectively the same as non-neutrality toward religion, provisions exempting legislation from RFRA would not require strict scrutiny, because they are not *hostile* toward the concept of religion.

In determining whether a statute, law, or provision is non-neutral, the first place to begin is with the text.[152] A provision that exempts legislation from RFRA would have some language to the effect of "[t]he Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb et seq.) shall not provide a claim concerning, or a defense to a claim under, a covered title, or provide a basis for challenging the application or enforcement of a covered title," as the Equality Act does.[153] The Oklahoma abortion statute likewise provided that, "[n]otwithstanding any other law, a civil action under this section . . . shall not be subject to any provision of the Oklahoma Religious Freedom Act."[154] These provisions are not even hostile to the RFRAs to which they refer; merely referencing a statute does not indicate hostility toward that statute. To be hostile toward RFRA would require the provision to have "ill will or a desire to

[150] Some have noted that the statements made by the commissioners, when taken in full context, cannot be reasonably understood as hostile to religion. *See* Leslie Kendrick & Micah Schwartzman, Comment, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 139 (2018).

[151] This same logic applies to another statement by a commissioner that "[I]f a businessman wants to do business in the state and he's got an issue with [the] law's impacting his personal belief system, he needs to look at being able to compromise." *Masterpiece Cakeshop*, 138 S. Ct. at 1729 (alteration in original).

[152] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

[153] Equality Act, H.R. 5, 116th Cong. (as passed by House, May 17, 2019).

[154] OKLA. STAT. tit. 63, § 1-745.55(J) (2022).

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harm"[155] RFRA, which is impossible if RFRA specifically contemplated that the future legislation could be excluded from its standard.

Even if a provision exempting legislation from RFRA were hostile to RFRA, it would not be hostile toward the concept of religion. For one, the federal RFRA (for instance) specifically contemplated that future legislation could be excluded from the RFRA standard.[156] And in any event, hostility and non-neutrality require an impermissible motive, as evident from the text of the statute or its effects.[157] In the case of a provision exempting a new bill or law from RFRA, there could be at least three justifications for such a proposal that do not have the object or purpose of discriminating against a religion or the concept of religion. Any of these three motives would be proper motives for the purposes of the Free Exercise Clause analysis, and as such would save the legislation from strict scrutiny.

### (1) Correcting Errors of Statutory Interpretation

Congress and states may seek to narrow RFRA by exempting certain statutes from RFRA's orbit due to a concern regarding the statutory interpretation of RFRA by courts. Rather than being unhappy with RFRA's implications for certain legislative priorities—such as antidiscrimination provisions for LGBTQ+ folks and abortion restrictions—legislative bodies instead may be narrowing RFRA in response to court decisions that broadened RFRA beyond what they had intended.

Take the Supreme Court's decision in *Hobby Lobby*. The Court in *Hobby Lobby* stated that the RFRA was a "complete separation from First Amendment case law" because Congress amended the RFRA's definition of "exercise of religion" to delete reference to the First Amendment.[158] This view is controversial,[159] and Congress may be trying to return RFRA to what it views as the proper balance of permissive religious accommodations and civil rights. In other words, when Congress enacted RFRA, it may have thought the statute incorporated a fair enough balance between

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[155] *Hostile*, BLACK'S LAW DICTIONARY (10th ed. 2009).

[156] Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 6(b), 107 Stat. 1488, 1488 (1993) ("Federal statutory law adopted after [November 16, 1993,] is subject to this Act unless such law explicitly excludes such application by reference to this Act.").

[157] At least some Justices want to consider more factors in the analysis. *See supra* text accompanying note 138. Discussion of legislative history, therefore, is saved for later in the Article. *See infra* text accompanying notes 203–38.

[158] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 696 (2014).

[159] *See, e.g.*, Tebbe et al., *supra* note 30.

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protecting religious liberties and not thwarting the laws Congress enacts. If the Court has interpreted RFRA differently, then Congress may attempt to narrow RFRA's ambit to itself strike the proper balance.

It is proper and customary for Congress and the Court to engage in this "dialogue"[160] where Congress passes a bill, the Court interprets it, and Congress then changes the bill due to the Court's interpretation. As Justice Gorsuch noted when discussing his RFRA jurisprudence in his confirmation hearings before the Senate:

> Congress can change the law. It can go back to [*Employment Division v. Smith*] if it wants to, eliminate RFRA altogether. It could say that only natural persons have rights under RFRA. It could lower the test on strict scrutiny to a lower degree of review if it wished. It has all of those options available, Senator, and if we got it wrong, I am sorry. But we did our level best . . . and it is a dialogue like any statutory dialogue between Congress and the courts.[161]

Justice Gorsuch's notion about statutory dialogue is empirically supported. Congress has amended statutes when it disagreed with the Supreme Court's interpretation of the statute numerous times, including in many cases related to the Civil Rights Act of 1991.[162] This is not lost on the Supreme Court Justices themselves. At times, Justices across the ideological spectrum have concurred in decisions to indicate how Congress might respond to statutory interpretation decisions.[163] The Supreme Court engages in this "dialogue" with Congress in regard to other matters too. Just recently, Justice Sotomayor, joined by Justice Barrett, wrote a separate opinion calling for the Sentencing Commission to be staffed back to a

[160] *Confirmation Hearings on the Nomination of Hon. Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 123–24 (2017) [hereinafter *Neil Gorsuch Confirmation Hearings*] (statement of Neil Gorsuch, Nominee for J. of Supreme Court).

[161] *Id.* Justice Gorsuch cited *Smith v. Maryland* in this quotation but later clarified that he intended to refer to *Employment Division v. Smith*. *Id.* at 124 ("[I]t is not *Smith v. Maryland*. That is third-party doctrine. It is *Employment Division v. Smith* that we are talking about. I apologize to you for that.").

[162] Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425, 425–27 (1992).

[163] *See, e.g.*, Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 556–57 (2013) (Kagan, J., concurring) ("If Congress thinks copyright owners need greater power to restrict importation and thus divide markets, a ready solution is at hand . . . the one the Court rejected in *Quality King*.").

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quorum.[164] Shortly thereafter, the President nominated members to each seat, and the Senate confirmed them all.[165]

If it is clear that Congress can act and amend statutes in response to Supreme Court decisions on statutory interpretation, it would be odd to characterize Congress's decision to do so as "hostile" to the subject of the original statute. Rather, a better understanding is the one that Justice Gorsuch had: Congress is just engaging in the standard dialogue that comes with statutory interpretation.[166] So RFRA carve-outs do not demonstrate hostility toward the concept of religion, but rather serve as an attempt to restore the interpretation of RFRA that Congress had intended.

Critics may respond by stating that it makes little difference whether the Court's decision in *Hobby Lobby* was true to Congress's intent with regard to statutory interpretation. Even if a legislative body seeks to correct what it views to be an incorrect decision regarding statutory interpretation by limiting RFRA, doing so would be hostile toward religion, because it would reduce the number of permissive religious exemptions. But this argument fails. The relevant inquiry is whether an action is non-neutral, and seeking to correct errors in statutory interpretation is a neutral purpose and goal. That a piece of legislation, enacted with neutral motives and effects, has the side effect of reducing the number of religious exemptions does not somehow eliminate the neutrality of the legislation. If every legislation that had the side effect of burdening religion more—such as by not granting exemptions—was somehow non-neutral, the neutrality test in *Smith* would lose all meaning, because almost all legislation would fail the initial *Smith* prongs and need to surpass strict scrutiny. Such a rule would effectively overrule *Smith*. Thus, critics who make the argument that it would be hostile toward religion to limit RFRA, even if a legislative body seeks to correct what it views to be an incorrect decision regarding statutory interpretation, are incorrect under the current *Smith* framework.

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[164] United States v. Guerrant, 849 F. App'x 410 (4th Cir. 2021), *cert. denied*, 142 S. Ct. 640 (2022) (Sotomayor, J., concurring).

[165] Nate Raymond, *Newly-Reconstituted U.S. Sentencing Panel Finalizes Reform Priorities*, REUTERS (Oct. 28, 2022 1:05 PM), https://www.reuters.com/legal/government/newly-reconstituted-us-sentencing-panel-finalizes-reform-priorities-2022-10-28/.

[166] *See Neil Gorsuch Confirmation Hearings*, *supra* note 160.

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### (2) Third-party Harms Balancing

Another reason Congress may be neutral to religion but seek to limit the RFRA is the Court's interpretation in *Hobby Lobby* of third-party harm doctrine.[167] Cases applying the *Sherbert* and *Yoder* standard had always considered third-party harms—harms to private citizens not involved in the case as a result of granting a religious exemption—when determining whether a religious exemption should be granted.[168] Sometimes, the Court considered third-party harms as an analysis standing on its own.[169] Sometimes, the Court folded consideration of third-party harms into the compelling interest analysis.[170] Even in *Hobby Lobby*—which ultimately rejected the third-party harm argument levied against the religious exemption sought—the Court acknowledged the need to at least consider third-party harms.[171] In that case, though, the Supreme Court concluded that there were no third-party harms. Justice Alito, writing for the Court, stated that "[t]he effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero."[172] This was because, according to the Court, there were alternative means for Hobby Lobby employees to receive coverage for the at-issue contraceptives.[173] This is a debatable claim, and one that did not go undisputed: One year after the decision, some claimed that Hobby Lobby's employees were still not receiving coverage for those contraceptives.[174]

But despite the important role that third-party harm considerations play in doctrine, third-party harms are difficult for courts to consider. Third parties, definitionally, are not parties to the case. Third parties have no opportunity to argue or to submit briefing (beyond, perhaps, amicus briefs in some circumstances). The best that third parties can hope for is (1) that amicus briefs will be sufficient to inform the court about third-party harms resulting from religious exemptions and (2) the government seeking to avoid granting the exemption will defend the interests of third parties. Still, in the context of a case, there may not be enough information to fully

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[167] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 693, 729–730 n.37 (2014).

[168] *Reframing the Harm: Religious Exemptions and Third-Party Harm After* Little Sisters, 134 HARV. L. REV. 2186, 2190 (2021).

[169] *See id.*

[170] *See id.*

[171] *Hobby Lobby*, 573 U.S. at 730 n.37; *id.* at 764 (Ginsburg, J., dissenting).

[172] *Id.* at 693.

[173] *Id.* at 732.

[174] Tebbe et al., *supra* note 30 ("[T]oday, a full year after the Court issued that statement, Hobby Lobby's employees are still not receiving coverage.").

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ascertain the harms to various third parties. Such harms may not be evident at the time of the decision, and even if they are, it may not be immediately clear whether there are solutions that mitigate the harms, notwithstanding any religious exemptions. For example, in *Hobby Lobby*, although the Court reasoned that there were alternative means available for women seeking contraceptives to obtain those contraceptives, the Court could not really know whether those means would be effective.

Because assessing third-party harms is difficult for courts, Congress or a state legislature may wish to amend statutes to account for third-party interests. Take, for instance, the Equality Act. Congress may be conducting third-party balancing up front, concluding that courts will not be able to accurately quantify and consider the harms to LGBTQ+ individuals if religious exemptions are granted to entities whose religious beliefs would deny services to those individuals. Now consider the Oklahoma abortion statute. In adding the RFRA-limiting language to its abortion proscription, Oklahoma's legislature might have been concerned that courts would have discounted the harm to the potential life of a fetus if they granted religious exemptions.

Critics will argue that emphasizing third-party harms over religious accommodations in the legislative process is non-neutral toward religion. These critics will point to the Court's recent adoption of the "most favored nation" theory of religious accommodation.[175] Under this theory, government regulations are not neutral and generally applicable and therefore trigger strict scrutiny under the Free Exercise Clause whenever they treat *any* comparable secular activity more favorably than the comparable religious activity.[176] Determining "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue."[177] Using this logic as support, critics may argue that if Congress favors secular interests over religious

[175] *See, e.g.*, Vikram David Amar & Alan E. Browstein, *Exploring the Meaning of and Problems with the Supreme Court's (Apparent) Adoption of a "Most Favored Nation" Approach to Protection Religious Liberty Under the Free Exercise Clause: Part One in a Series*, JUSTIA: VERDICT (Apr. 30, 2021), https://verdict.justia.com/2021/04/30/exploring-the-meaning-of-and-problems-with-the-supreme-courts-apparent-adoption-of-a-most-favored-nation-approach-to-protecting-religious-liberty-under-the-free-exercise-c.

[176] Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (citing Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67–68 (2020)) ("First, government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise.").

[177] *Id.* (citing *Cuomo*, 141 S. Ct. at 67).

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ones, it is acting with sufficient discriminatory intent to trigger strict scrutiny under *Smith*.

But the "most favored nation" theory deals with secular and religious *exemptions*.[178] Granting a secular exemption and not a religious one may indicate hostility to religion, because having a law with secular exemptions may demonstrate that the interests the government is advancing are "worthy of being pursued only against conduct with a religious motivation."[179] The Equality Act and the Oklahoma abortion statute are different, however, because they do not deal with *exemptions* for secular interests; they are not exempting certain groups from a law for secular reasons while failing to exempt religiously motivated groups from the same law. Rather, the Equality Act and the Oklahoma abortion statute deal with protections for secular interests. Unlike the situations in *Fulton* and *Tandon*, the Equality Act and the Oklahoma abortion statute do not purport to allow exemptions for certain secular interests but not religious ones. If those laws were active, they would merely remove certain permissive religious exemptions. They may do so because of secular reasons—a desire to prevent third-party harms, or a desire to restore the balance of religious accommodation and public accommodation laws—but they do not meet the standard from *Fulton* and *Tandon* regarding what constitutes a violation of *Smith* under the "most favored nation" theory.

### (3) Establishment Clause Balancing

Finally, a RFRA carve-out is not hostile toward religion because Congress must balance the Free Exercise Clause with the Establishment Clause of the First Amendment. True, it has been clear since the founding that the judiciary has the authority to interpret the law.[180] The *judiciary* thus decides what is required by the Free Exercise Clause and what is required by the Establishment Clause. But members of Congress swear an oath to uphold the Constitution, and, as part of that oath, Congress members cannot pass laws that they believe to be unconstitutional.[181] This

[178] Andrew Koppelman, *The Increasingly Dangerous Variants of the "Most-Favored Nation" Theory of Religious Liberty, Part I: The New Law of Free Exercise*, REASON (Aug. 14, 2022 8:01 AM), https://reason.com/volokh/2022/08/15/the-increasingly-dangerous-variants-of-the-most-favored-nation-theory-of-religious-liberty-part-i-the-new-law-of-free-exercise/.

[179] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542–43 (1993).

[180] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

[181] *See* Paul A. Diller, *When Congress Passes an Intentionally Unconstitutional Law: The Military Commissions Act of 2006*, 61 SMU L. REV. 281, 286 (2008).

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is relevant always, but particularly given the unique nature of the Free Exercise Clause and the Establishment Clause.

The First Amendment contains a Free Exercise Clause and an Establishment Clause.[182] If either of these clauses were taken alone to its extreme, it would clash with the other.[183] The Supreme Court certainly has its own jurisprudence on the tension between the two.[184] And, indeed, there may be jurists who believe that a certain activity is prohibited by one clause while other jurists believe it is compelled by the other.[185] But Congress also has an independent duty to ensure it does not pass unconstitutional legislation.[186] The fact that there are dissents[187] and legal commentators[188] criticizing decisions demonstrates that there can be dispute as to whether a particular permissive religious exemption constitutes an unlawful establishment of religion. Additionally, the Court's jurisprudence on establishments of religion has changed. As an example, take the school funding cases. The Court

[182] The First Amendment provides that "Congress shall make no law respecting *an establishment of religion*, or prohibiting the *free exercise* thereof . . . ." U.S. CONST. amend. I (emphasis added).

[183] *See, e.g.*, Paul J. Batista, *Balancing the First Amendment's Establishment and Free Exercise Clauses: A Rebuttal to Alexander & Alexander*, 12 J. LEGAL ASPECTS SPORT 87, 92 (2002) (citing Walz v. Tax Comm'r of the City of N.Y., 397 U.S. 664, 668–69 (1970)) ("The conflict between the two Clauses occurs because . . . 'both . . . are cast in absolute terms, and either . . . , if expanded to a logical extreme, would tend to clash with the other.'").

[184] Bradley Girard & Gabriela Hybel, *The Free Exercise Clause vs. the Establishment Clause: Religious Favoritism at the Supreme Court*, 47 HUM. RTS., July 2022, at 29, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/intersection-of-lgbtq-rights-and-religious-freedom/the-free-exercise-clause-vs-the-establishment-clause/.

[185] *See, e.g.*, Cutter v. Wilkinson, 544 U.S. 709, 714 (2005) (quoting Corp. of Presiding Bishop of Church of Jesus Christ Latter-day Saints v. Amos, 483 U.S. 327, 334–35 (1987)) ("At some point, accommodation may devolve into an unlawful fostering of religion.").

[186] *See* Diller, *supra* note 181, at 286.

[187] *See, e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 473 (2017) (Sotomayor, J., dissenting) ("The Establishment Clause does not allow Missouri to grant the Church's funding request because the Church uses the Learning Center, including its playground, in conjunction with its religious mission."); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2113 (2019) (Ginsburg, J., dissenting) (citing Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 817 (1995) (Ginsburg, J., dissenting)).

[188] *See, e.g.*, Andrew A. Thompson, Note, Trinity Lutheran Church of Columbia, Inc. v. Comer *and the "Play in the Joints" Between Establishment and Free Exercise of Religion*, 96 TEX. L. REV. 1079, 1080 (2018) ("*Trinity Lutheran* is wrongly decided and conceptually infirm, and should be limited and reversed in the future."); Richard Schragger & Micah Schwartzman, *Establishment Clause Inversion in the Bladensburg Cross Case*, 3 AM. CONST. SOC'Y SUP. CT. REV. 21, 23–24 (2019) ("*American Legion* represents a significant development in the dismantling of Establishment Clause jurisprudence.").

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has gone from considering whether the Establishment Clause *forbids* states from funding religious private schools,[189] to considering whether states are *allowed* to fund religious private schools,[190] to holding that the Free Exercise Clause *requires* states to fund religious private schools.[191] The school funding cases thus provide a clear indication that the line between the Free Exercise Clause and the Establishment Clause is fluid and changing. Legislators, however, will have some discretion. Especially now, with the Court's narrow view of the Establishment Clause, there will be laws that legislators may believe violate the Establishment Clause, even if the Court would conclude that those laws actually do not run afoul of the Establishment Clause. In accordance with their oaths of office, legislators should not pass laws that they believe to be unconstitutional, even if the Court may disagree and uphold the law anyway.

In *Locke v. Davey*, the Supreme Court agreed with this view of the religion clauses.[192] In *Locke*, the Court noted that there is "play in the joints" between the Establishment and Free Exercise Clauses, in which some action is not forbidden by one but not required by the other.[193] The Court held that governments have a "substantial" interest in seeking to prevent Establishment Clause violations, even if no technical Establishment Clause violation was implicated by the governmental policy.[194] That decision supports the notion that Congress can have concerns about the Establishment Clause even if it is not an actual Establishment Clause violation. The Supreme Court's recent decision in *Carson ex rel. O.C. v. Makin* does not change this view.[195] That case merely held that, when the Establishment Clause is not actually violated, the government does not have a *compelling* interest in proactively preventing Establishment Clause violations.[196] That holding means that if the government has to meet strict scrutiny (for infringing upon the Free Exercise Clause's orbit), it cannot satisfy that standard by asserting an interest in not violating

[189] Everson v. Bd. of Ed., 330 U.S. 1, 4 (1947).

[190] Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2251 (2020).

[191] Carson *ex rel.* O.C. v. Makin, 142 S. Ct. 1987, 1997 (2022).

[192] Locke v. Davey, 540 U.S. 712, 718–19 (2004).

[193] *Id.*

[194] *Id.* at 725.

[195] *Carson*, 142 S. Ct. at 1997.

[196] *Id.* at 1989.

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the Establishment Clause when the Establishment Clause is not actually violated.[197] This makes doctrinal sense. The Court will not allow Congress to thwart what the Court determines to be a constitutional violation (a violation of the Free Exercise Clause) to avoid what Congress, but not the Court, thinks is an Establishment Clause violation. But Congress still has an interest in limiting *permissive* exemptions (such as RFRA) when *it* believes those exemptions could otherwise run afoul of the Establishment Clause.

Critics may argue that it is the job of the Supreme Court to interpret the Constitution, and if Congress believes that a given policy is unconstitutional despite the Court holding otherwise, then, while Congress does not need to pass a bill, it cannot be said that refusing to pass a bill is constitutionally mandated. But the appropriate issue is not whether Congress could or could not pass a bill, but rather what the object or purpose of Congress was when it acted. Further, the decision in *Locke v. Davey* suggests that there is "play in the joints" between the two clauses, and legislative bodies can legislate in between the two religion clauses.[198]

### c. A Provision that Exempts the Legislation from RFRA Is Not Hostile Toward the Religion of Any Potential Plaintiff

Of course, that the Equality Act and the Oklahoma abortion exempting statute exempt themselves from the applicable RFRAs does not end the inquiry. It is still important to consider whether provisions that exempt a law from RFRA evidence hostility to any particular plaintiff's religion. A law can fail for a lack of neutrality if it is a "religious gerrymander[]" of sort, where the "effect of [the] law in its real operation is strong evidence of its object" to target a religion.[199] In *Lukumi*, the Supreme Court noted that under the ordinance at issue, "few if any killings of animals are prohibited other than Santeria sacrifice."[200] In other words, the ordinance was a religious gerrymander because it only prohibited killings when used in a religious way.[201]

This is not the case with legislation that contains a provision exempting the legislation from RFRA. The Equality Act applies to all conduct that the statute seeks

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[197] *Id.*

[198] *Locke*, 540 U.S. at 718–19.

[199] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534–35 (1993).

[200] *Id.* at 536.

[201] *Id.*

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to regulate, regardless of whether it is performed in a religious ceremony or with a religious motivation—or if performed for purely secular reasons. The same is true for the Oklahoma abortion statute, which sought to proscribe abortions regardless of whether the abortion was sought for religious or secular reasons.[202] Thus, neither the Equality Act nor the Oklahoma abortion statute are aimed at targeting any specific religion, and neither are hostile toward the religion of any particular complainant, at least on their face.

#### 2. The Legislative History of the Equality Act Indicates Neutrality Toward Religion

Beyond the face of the bill, the legislative history of the Equality Act indicates neutrality toward religion. To begin with, however, it is important to consider whether it is even appropriate to turn to the legislative history of a statute in considering whether the statute is neutral toward religion. After all, in recent years, the Supreme Court has become increasingly hostile to the probative value of legislative history in the statutory interpretation context. In *Masterpiece Cakeshop*, the Court dodged the question. The relevant conduct occurred in an adjudicative setting, so the Court did not need to consider whether it is appropriate to consult legislative history when a statute is being challenged as violating the Free Exercise Clause.[203] However, for the reasons that follow, this Article concludes that it is appropriate to consult a statute's legislative history in determining neutrality or lack thereof toward religion. In the case of the Equality Act, the legislative history is consistent with a neutral object and purpose.

##### a. The *Arlington Heights* Factors, Including Legislative History, Should Be Used to Determine the Object of a Law for First Amendment Purposes

Legislative history, including contemporaneous statements of members of Congress, should be used to aid the determination of the object of a law for First Amendment purposes. Doing so will not only provide clarity in close cases but also align First Amendment doctrine with Fourteenth Amendment doctrine.

In *Lukumi*, Justice Kennedy could not garner a majority for the portion of his opinion which stated that "[i]n determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in [the Supreme Court's]

[202] S.B. 612, 54th Gen. Assemb., Reg. Sess. (Okla. 2022).

[203] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018).

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equal protection cases."[204] Justice Kennedy applied the holding from the key equal protection case of *Arlington Heights*[205] to the First Amendment context to find that "[r]elevant evidence" of non-neutrality "includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body."[206]

In *Masterpiece Cakeshop*, the Supreme Court once again left unclear whether using legislative history and contemporaneous statements was appropriate, but the Court did acknowledge that in adjudicative bodies it was appropriate to look to such statements.[207] Justice Kennedy, writing for a majority, noted that while Justices "have disagreed on the question whether statements made by lawmakers may properly be taken into account in determining whether a law intentionally discriminates on the basis of religion," it is an appropriate consideration in the context of an adjudicatory body deciding a particular case.[208]

The Supreme Court, once again, did not squarely decide this matter in *Trump v. Hawaii*.[209] While there was an issue in that case as to whether statements from the President could be used in First Amendment analysis, the case "differ[ed] in numerous respects from the conventional Establishment Clause claim" because "[u]nlike the typical suit involving religious displays or school prayer," *Trump v. Hawaii* dealt with a "national security directive regulating the entry of aliens abroad."[210] It remains an open question, then, as to whether the Supreme Court will consider statements by decisionmakers in a "typical" Free Exercise case.

Justice Scalia, for his part, believed that the *Arlington Heights* factors were inappropriate in the First Amendment context.[211] Justice Scalia reasoned that "[t]he First Amendment does not refer to the purposes for which legislators enact laws, but

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[204] *Church of the Lukumi*, 508 U.S. at 540.

[205] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

[206] *Church of the Lukumi*, 508 U.S. at 540.

[207] *Masterpiece Cakeshop*, 138 S. Ct. at 1730.

[208] *Id.*

[209] Trump v. Hawaii, 138 S. Ct. 2392 (2018).

[210] *Id.* at 2418.

[211] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 558 (1993) (Scalia, J., concurring).

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to the effects of the laws enacted . . . ."[212] In his view, if all legislators set out to suppress religious belief, but failed to do so, there is no First Amendment problem, nor can pure-hearted legislators save a facially non-neutral statute.[213]

There are several responses to Justice Scalia's objections. First, it is important to note that no matter the legislative history, a statute that on its face is non-neutral toward religion necessitates a strict scrutiny analysis.[214] As to the other notions, Justice Scalia is not incorrect conceptually, but rather as a matter of practicality. Looking to the legislative history can inform the analysis when the face of a statute is ambiguous and can be interpreted in both a neutral and non-neutral way. As then-Chief Judge Breyer put it, "[L]egislative history is a judicial tool, one judge's use to resolve difficult problems of judicial interpretation. It can be justified, at least in part, by its ability to help judges interpret statutes, in a manner that makes sense and that will produce a workable set of laws."[215]

Another reason to apply the *Arlington Heights* factors to the First Amendment context is to create symmetry between the Court's First Amendment cases and the Court's Equal Protection Clause cases. The Court will routinely look to legislative history in the context of the Equal Protection Clause of the Fourteenth Amendment, and, indeed, *Arlington Heights* was decided with regard to the Equal Protection Clause.[216] There is no distinction that would indicate that inquiry to legislative history in the Fourteenth Amendment is appropriate but not in the First Amendment.

So, this section focuses on legislative history. This section will examine the Equality Act and the contemporaneous statements made when members of the House of Representatives voted on the bill. Importantly, to ensure a broad scope, examination of the legislative history of the Equality Act is limited to discussion about the RFRA exemption provision as opposed to other substantive portions of the bill.[217]

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[212] *Id.* at 558 (Scalia, J., concurring).

[213] *Id.* at 558–59 (Scalia, J., concurring).

[214] *See id.* at 546.

[215] Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 867 (1992) (emphasis omitted).

[216] *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977).

[217] The discussion of legislative history is also limited to legislative history of the House of Representatives, as the Senate has not taken action on the bill. If this bill becomes law, similar analysis will need to be made on the whole record.

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### b. The Legislative History of the Equality Act and Oklahoma's Abortion Statute Indicate Neutrality Toward Religion

The standard of what counts as a non-neutral statement in legislative history is unclear. As noted above, *Masterpiece Cakeshop* dealt with questions of hostility in an adjudicatory setting rather than a legislative setting, and expressly noted as much.[218] In *Masterpiece Cakeshop*, the Supreme Court held that statements by members of an adjudicatory body indicated hostility toward the petitioner's religious beliefs.[219] One of the problematic statements was by a commissioner:

> Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust [sic], whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.[220]

Justice Kennedy, writing for a majority, found this statement to be inconsistent with the First Amendment:

> To describe a man's faith as "one of the most despicable pieces of rhetoric that people can use" is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere. The commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral

[218] *See supra* text accompanying notes 146–51.

[219] *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1732 (2018). The Court did not decide whether the same result, without the problematic statements, could ever be permissible. Of the seven Justices in the majority, four wrote separately to indicate their view on this question: Justices Kagan and Breyer would answer in the affirmative while Justices Gorsuch and Alito would answer in the negative. *Id.* at 1732–34 (2018) (Kagan, J., concurring, joined by Breyer, J.); *id.* at 1734–40 (Gorsuch, J., concurring, joined by Alito, J.).

[220] *Id.* at 1729.

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> enforcement of Colorado's antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation.[221]

The question, then, is how this holding applies to legislative statements. This Article has already described how hostility toward the concept of religion is insufficient to find hostility toward a plaintiff's religion in a legislative context, even if it is sufficient in an adjudicative context like *Masterpiece Cakeshop*.[222] For similar reasons, statements that rise to the level of non-neutrality in adjudicatory contexts do not necessarily rise to the level of non-neutrality in legislative contexts.

It helps to place this analysis in context with real examples. So, consider some of the most controversial statements found in the legislative history of the Equality Act. The Equality Act has been passed twice by the House of Representatives.[223] In 2019, when the Equality Act was debated heavily, members of the House of Representatives made contemporaneous statements that contained several different messages. Some of the statements made by members of Congress who supported the Equality Act indicated a desire to protect religious freedom. Chairman Jerry Nadler of the House Judiciary Committee (the committee that heard the bill) stated that "protections for sexual orientation and gender identity have worked in more than 20 States and that, in these places, women still have rights [and] religious freedom is still protected . . . ."[224] The bill's sponsor noted that "[t]he Equality Act doesn't force churches to act as public accommodations or eliminate the ability of religious institutions to accept Federal money."[225] It seems clear that the intent of the bill sponsor and the Chairman of the Judiciary Committee was to ensure that religion was protected.

There are some statements, however, that may require more analysis. One proponent of the bill stated:

> This bill also ensures that the Religious Freedom Restoration Act, the RFRA, cannot be used as a free pass to discriminate. RFRA was originally enacted as a

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[221] *Id.*

[222] *See supra* Part II.A.1.a.

[223] *Get The Facts: Equality Act*, SAGE (Apr. 1, 2022), https://www.sageusa.org/get-the-facts-equality-act.

[224] 165 CONG. REC. H3934 (daily ed. May 17, 2019) (statement of Rep. Jerry Nadler).

[225] *Id.* at H3935 (statement of Rep. David Cicilline).

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> shield to serve as a safeguard for religious freedom, but recently it has been used as a sword to cut down the civil rights of too many individuals.[226]

There is one other potentially problematic statement by a proponent of the Equality Act:

> Our predecessors rejected the familiar hysterical arguments that equal rights for African Americans in restaurants and hotels and at lunch counters meant discrimination against the religious rights of the owners of the restaurants and the motels and lunch counters, which is precisely the argument that was made back in that day. Today, we legislate equal rights under the exact same act for millions of Americans in the LGBT community. This is a triumphant and glorious moment for the House of Representatives and for the United States of America.[227]

On its face, these statements may look to be indistinguishable from the statements by the commissioner in *Masterpiece Cakeshop*, which led the Court to find hostility and thus a Free Exercise Clause violation. There are, however, several distinctions between those statements and those of the commissioners in *Masterpiece Cakeshop*. First, the content of the statements is different. True, they both have the same general theme—comparing invocations of religion today to those used to justify horrendous actions in the past. But the statements made in support of the Equality Act have direct relevance to the business of the House of Representatives. The comparison to segregation harkens back to the passage of the Civil Rights Act in the 1960s. This is in contrast to the statements by the commissioner in *Masterpiece Cakeshop* who made comparisons to the Holocaust and American slavery, two events which have no relation to the job functions of the commissioner in Colorado.

The second distinction—related to but separate from the first—is that the statements made in support of the Equality Act were made in the context of a legislative body and not an adjudicatory setting. This is relevant because the conflation in *Masterpiece Cakeshop* between the concept of religion and a particular person's religious belief is not applicable in a legislative setting for the reasons discussed above.[228] Thus, when an adjudicator says "religion has been used to justify all kinds of discrimination throughout history," he may be referencing a specific

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[226] *Id.* at H3936 (statement of Rep. Bobby Scott).

[227] 165 CONG. REC. H3941 (daily ed. May 17, 2019) (statement of Rep. Jamie Raskin).

[228] *See supra* Part III.A.1.a.

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person's religion because there is only one party seeking an exemption in front of the adjudicator.[229] However, this argument does not extend to a legislative context wherein there is no *one* person in reference.[230]

Third, it would be illogical to determine that a law had a non-neutral object because of the statements of only two members of Congress when those two members were not necessary to the passage of the Bill. To do so would offer bad incentives to members of Congress. Opponents of a bill could make statements containing animosity and vote for the bill, knowing that their statements may lead to the law being struck down. This ties back to the second distinction—only one or a few commissioners may hear particular cases, but it takes a majority in both the House and the Senate to enact a piece of legislation. It is natural to consider statements made by commissioners as applying to the particular issue the commissioners are deciding, but it would be illogical to give the statements of each of the 535 members of Congress an equal voice in determining that a bill is non-neutral. This sort of objection is similar to those championed by textualists in resisting the use of legislative history in statutory interpretation. While this Article argues that legislative history *should* be taken into account in determining the object of laws, there are hierarchies of legislative histories and different strengths.[231] Floor statements are among the weakest.[232]

Critics may respond by noting that in *Masterpiece Cakeshop*, the Court attributed animus to the commissioners, even though a court reviewed the claims *de novo* and did not make any statements of animus.[233] According to Justice Kennedy, this was because the reviewing court did not repudiate the commissioners' statements.[234] Critics would therefore argue that here, the inquiry is not how many Representatives made statements that were non-neutral, but rather whether other members condemned those statements. In other words, critics may argue that *any* statement of animus that goes unrepudiated is sufficient to find non-neutrality.

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[229] *Masterpiece Cakeshop*, 138 S. Ct. at 1730, 1736–37.

[230] *Id.* at 1729.

[231] BRANNON, *supra* note 34, at 44.

[232] *Id.*

[233] *Masterpiece Cakeshop*, 138 S. Ct. at 1736–37.

[234] *Id.* at 1729–30.

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But, as just noted, courts are different than legislative bodies, because courts involve only the parties in front of them rather than a general public. So, while a court reviewing the issue may have a responsibility to repudiate hostile statements, this same responsibility cannot be found in a legislative setting where there are no direct parties involved.

Although the Oklahoma statute has been ruled unconstitutional,[235] examining its legislative history is still instructive. Doing so illustrates the motives underlying the statute's enactment, which may be the same if Oklahoma tries again to narrow abortion in the state. In practice, however, the legislative history on the Oklahoma statute is sparse. Much of the debate centered, understandably, on the merits of the various abortion restrictions in the bill rather than the RFRA carve-out. The only somewhat relevant piece of information is a post-signing admission from the bill's co-author "confirm[ing] that the goal of the religion-related language was to prevent legal challenges."[236] The representative stated: "This section seeks to anticipate and nullify a possible legal challenge to the law."[237] This statement is far more vague than the statements made during the debate about the Equality Act. Furthermore, it is more innocuous than the statements at issue in *Masterpiece Cakeshop*. Rather than making statements about religion or a particular religion, or evidencing religious hostility, the Oklahoma representative made a vague statement about seeking to eliminate challenges to the bill.[238] In other words, this statement is an exemplar of neutrality after *Masterpiece Cakeshop*: it does not make broad claims about religion or specific rights; it talks only of legal challenges. The statement evidences perhaps the purest legislative purpose (avoiding legal challenges) without hitting on the trigger statements from *Masterpiece Cakeshop*.

### *B. A Law that Contains an Exemption from RFRA Is Generally Applicable*

Next, it is important to consider whether laws that contain exemptions from RFRA are generally applicable. Recently, in *Fulton v. City of Philadelphia*, the Court clarified that the test for general applicability is distinct from the test for neutrality.[239]

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[235] Okla. Call for Reprod. Just. v. State, 531 P.3d 117, 122 (Okla. 2023).

[236] Kelsey Dallas, *Does Religious Freedom Law Give You a Right to Abortion?*, DESERET NEWS (May 15, 2022, 12:00 AM), https://www.deseret.com/2022/5/14/23069017.

[237] *Id.*

[238] *Id.*

[239] 141 S. Ct. 1868, 1877 (2021).

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The Court also provided a case study of what meets and does not meet that test.[240] A more detailed discussion of that case is above,[241] but the bottom line is this. Where a government "has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[242] The *Fulton* Court also noted that a law lacks general applicability "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."[243] Importantly, one point made clear is that the religious entities or conduct must be "comparable" to the secular conduct at issue.[244]

This does not have much applicability to the Equality Act, which does not facially allow covered entities to discriminate for secular reasons. It is conceivable, of course, that agencies may make certain exceptions for certain entities for secular reasons, which may allow religious entities to sue for an exemption if the secular conduct exempted is of a similar category.

The Oklahoma abortion statute—if reenacted to comply with the Oklahoma Supreme Court's recent abortion protections[245]—may face some challenges under this test, but those challenges are equally meritorious with or without the RFRA exemption. For example, the currently enjoined Oklahoma abortion statute allows abortions if "necessary to save the life of a pregnant woman in a medical emergency" or if "[T]he pregnancy is [a] result of rape, sexual assault, or incest that has been reported to law enforcement."[246] If the Oklahoma statute is reenacted and still contains this provision, a religiously motivated claimant seeking an abortion could sue under *Fulton* by arguing that the law permits certain secular exemptions to the abortion proscription—life of the mother, rape, incest, sexual assault. Therefore, in their view, the law must allow an abortion whenever the claimant's religious belief would. However, this potential claim is not dependent on the RFRA carve-out but is dependent on the other exemptions in the law. This makes sense, because the relevance of the RFRA carve-out goes more to neutrality (i.e., is the law treating

[240] *Id.* at 1877–78.

[241] *See supra* Part II.

[242] *Id.* (quoting Emp. Div. v. Smith, 494 U.S. 872, 884 (1990)).

[243] *Id.*

[244] *Id.* at 1877; Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021).

[245] *See* Okla. Call for Reprod. Just. v. State, 531 P.3d 117, 122 (Okla. 2023).

[246] OKLA. STAT. tit. 63, § 1-745.52 (2022).

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religion, through the RFRA, on par with how it treats secular interests?) than to general applicability.

### *C. A Note on Compelling Interests*

If the Supreme Court were to apply strict scrutiny, whether a provision exempting the RFRA were permissible[247] would depend on whether the provision were the least restrictive means of achieving a compelling governmental interest.[248] Congress cannot, logically speaking, have a compelling interest in exempting itself from the RFRA, because any compelling interest Congress has would be taken into account in the strict scrutiny stage of the RFRA analysis. For instance, in the Equality Act context, if Congress has a compelling interest in preventing discrimination on the basis of sexual orientation,[249] then that can factor into the RFRA compelling interest analysis. Congress cannot have a compelling interest that justifies why the RFRA should not apply if it is not also a compelling interest for the RFRA test.

The only other compelling interest Congress could have is the interest in preventing legislative entrenchment.

## III. LEGISLATIVE ENTRENCHMENT DOCTRINE AND THEORY DICTATE THAT A STATUTE CONTAINING AN EXEMPTION FROM RFRA CANNOT RECEIVE STRICT SCRUTINY

The previous sections of this Article argue that under *Employment Division v. Smith*, a provision exempting legislation from the RFRA is neutral and generally applicable, and therefore does not trigger strict scrutiny.[250] This section argues that

[247] For the purposes of this Article, the strict scrutiny analysis will be applied to the provision in a general context. If the Court were to take up the Equality Act, it may consider the provision as part of the whole and not as a severable matter. Because this Article examines whether Congress can exempt legislation from the RFRA, this section examines whether Congress can ever have a compelling interest to exempt legislation from the RFRA. Thus, the analysis here is similar to if Congress had repealed the RFRA completely.

[248] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993).

[249] There is a strong argument to be made that based on the factors set forth in *Frontiero v. Richardson*, Congress should have a compelling interest in preventing discrimination on the basis of sexual orientation. *See* Frontiero v. Richardson, 411 U.S. 677 (1973); *see also* Vincent J. Samar, *Interpreting* Hobby Lobby *to Not Harm LGBT Civil Rights*, 60 S.D. L. REV. 457, 464–68 (2015) (discussing conservative religious leaders' reactions to the *Hobby Lobby* decision within their faith communities). For a counterargument, see Douglas Laycock, *The Broader Implications of* Masterpiece Cakeshop, 2019 BYU L. REV. 167, 187–96 (2019). Whether Congress has a compelling interest in preventing discrimination on the basis of sexual orientation is a topic deserving of its own paper.

[250] *See supra* Parts I–III.

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even if a general *Smith* analysis of such a provision would trigger strict scrutiny, legislative entrenchment doctrine should counsel the Court to hold either that such a provision does not trigger strict scrutiny or that the RFRA is unconstitutional.

It is unconstitutional for Congress to pass a law that restricts a future Congress or limits a future Congress's power.[251] If a court were to hold a provision exempting legislation from RFRA as not neutral or not generally applicable, it would, in effect, be stating that Congress can never exempt from the RFRA legislation it passes, triggering constitutional problems of legislative entrenchment. Because legislative entrenchment is forbidden by the Constitution, the Court should be wary of any analysis that has as its effect Congress being unable to exempt new legislation from its prior legislation. So, regardless of the analysis under *Employment Division v. Smith*, the Supreme Court should hold that a provision exempting itself from RFRA does not trigger strict scrutiny. This section will first discuss relevant background on legislative entrenchment and then proceed to apply that background to a provision exempting legislation from RFRA.

### *A. Background on the Unconstitutionality of Legislative Entrenchment*

Legislative entrenchment, generally speaking,[252] is the principle that "[a] legislature may not inalterably dictate the future."[253] The academic field on entrenchment is still developing,[254] but an older piece has discussed four types of entrenchment: absolute entrenchment, procedural entrenchment, transitory entrenchment, and preconditional entrenchment.[255] Absolute entrenchment is when a legislature passes a law and prevents repeal of that law forever, under any circumstances.[256] An example of this would be if RFRA contained a provision stating

[251] Fletcher v. Peck, 10 U.S. 87, 135 (1810) ("The principle asserted is . . . that one legislature cannot abridge the powers of a succeeding legislature. The correctness of this principle, so far as respects general legislation, can never be controverted.").

[252] This Article presents only essential background to the RFRA entrenchment argument.

[253] Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 12 AM. BAR FOUND. RSCH. J. 379, 381 (1987).

[254] *See, e.g.*, Michael D. Gilbert, *The Law and Economics of Entrenchment*, 54 GA. L. REV. 61, 62 (2019) (describing ideas "plant[ing] seeds for a new and fruitful field").

[255] Eule, *supra* note 253, at 384–85.

[256] *Id.* at 384.

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that RFRA may not be repealed by any future Congress.[257] The second form of entrenchment is procedural entrenchment, which is when a legislature does not necessarily intend to bind the future legislative body irrevocably, but prescribes the "'manner and form' by which the promulgated directives can be changed."[258] Transitory entrenchment "seeks to prevent alteration for a specified period of time only."[259] Finally, preconditional entrenchment seeks to "permit change only on the occurrence of a preordained event."[260] In practical terms, each of the four types of entrenchment can be categorized as substantive entrenchment or procedural entrenchment, the former referring to legal requirements that would prevent a future Congress from repealing a former act of Congress, and the latter specifying certain procedures a future Congress must follow to repeal an act of Congress.[261]

"[C]ourts and constitutional law experts have uniformly condemned the idea of entrenchment. . . ."[262] The Court, in fact, "has long held that legislative entrenchment is unconstitutional. In *Ohio Life Insurance & Trust Co. v. Debolt*, the Court held that a legislature could not limit the ability of its successors to impose taxes."[263] Chief Justice Taney, writing for a majority, noted that "no one Legislature can, by its own act, disarm their successors of any of the powers or rights of sovereignty confided by the people to the legislative body, unless they are authorized to do so by the constitution under which they are elected."[264] Similarly, in *Newton v. Mahoning County Commissioners*, "the Supreme Court held that the Ohio legislature could move its state capitol, despite a prohibition of such an action enacted thirty years earlier."[265] In *Reichelderfer v. Quinn*, the Supreme Court applied this same logic to Congress, noting that "the will of a particular Congress . . . does not impose itself

[257] RFRA does not contain such a provision. *See* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993).

[258] Eule, *supra* note 253, at 384–85.

[259] *Id.* at 385.

[260] *Id.*

[261] Roberts & Chemerinsky, *supra* note 36, at 1779.

[262] *Id.* at 1783. For an argument that there is no problem with legislative entrenchment, see Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665 (2002).

[263] *See* Roberts & Chemerinsky, *supra* note 36, at 1782 (citing Ohio Life Ins. & Tr. Co. v. Debolt, 57 U.S. (16 How.) 416, 431 (1854)).

[264] *Debolt*, 57 U.S. (16 How.) at 431.

[265] Roberts & Chemerinsky, *supra* note 36, at 1783 (citing Newton v. Mahoning Cnty. Comm'rs, 100 U.S. 548, 563 (1879)).

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upon those to follow in succeeding years."[266] Legislative entrenchment doctrine has "lurked in the background" of more modern cases in which the Supreme Court has rejected Congress's attempts to require "magical passwords" for future Congresses to undo or limit prior legislation.[267] In other words, Congress may not require a future Congress to use certain phrases or verbiage in order to undo or limit legislation.[268]

There are various provisions in the Constitution that prevent legislative entrenchments.[269] This Article will not explore each of these in depth but will discuss relevant provisions as they relate to RFRA analysis. Importantly, whether any of these provisions of the Constitution prohibit legislative entrenchment is contested,[270] but this Article will set aside the debate for another time and assume that the Constitution does prohibit entrenchment—because that is the current prevailing view of scholars and the courts.[271]

### *B. Legislative-Entrenchment Doctrine Counsels Against Holding that Laws Cannot Be Exempt from RFRA*

To start, the RFRA-exemption situation admittedly does not fit neatly into the Supreme Court's legislative-entrenchment doctrine, because RFRA does not expressly provide for a permanent entrenchment.[272] Yet if one thinks that Congress cannot exempt laws from RFRA, the effect is the same: a prior Congress passed a law that has the effect of limiting a future Congress's powers. The specific power that is limited is the ability to pass legislation that incidentally burdens religion even though it is not the least restrictive means of achieving a compelling governmental interest.[273]

There are several legitimate objections worth considering to the idea that the legislative-entrenchment doctrine is implicated. The first potential objection is that

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[266] Reichelderfer v. Quinn, 287 U.S. 315, 318 (1932).

[267] *See* Lewiston, *supra* note 128, at 32–33.

[268] *Id.* at 33.

[269] *See* Roberts & Chemerinsky, *supra* note 36, at 1782–95.

[270] *See id.* at 1783–95; Posner & Vermeule, *supra* note 262, at 1673–92.

[271] Roberts & Chemerinsky, *supra* note 36, at 1783.

[272] *See* Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103–141, § 6(b) 107 Stat. 1488, 1489 (1993).

[273] *Compare* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (citing Emp. Div. v. Smith, 494 U.S. 872 (1990)) ("[O]ur cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest . . . ."),

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the doctrine and theory of legislative entrenchment deal with explicit entrenchment, not implicit entrenchment, which is the issue here. The second objection is that nothing in legislative entrenchment doctrine or theory prohibits *the judicial branch* from causing an entrenchment. This Article will address these objections in turn.

First, legislative entrenchment doctrine and theory are, or ought to be, concerned not just with explicit entrenchment, but with implicit entrenchment as well. For the purposes of this Article, explicit entrenchment would be a situation where RFRA provided that future legislation may not contain an exemption from RFRA, whereas implicit entrenchment is a situation where although nothing in a statute explicitly prohibits exemption or repeal, it is prohibited in effect. While the doctrine does not speak precisely on this issue, the reasoning against legislative entrenchment favors a finding that all entrenchment, explicit or implicit, is forbidden.

One of the main justifications for a doctrine against legislative entrenchment is that permitting such entrenchment "prevents those with the greatest knowledge of societal needs from acting" because, at a given point in time, legislators of today are better suited for today's problems than legislators of yesterday.[274] This analysis holds true for the RFRA entrenchment. If we assume that the *Employment Division v. Smith* analysis would not allow a statute to be exempt from RFRA, then the Supreme Court is in effect giving more weight to the legislators of the past in their decision to require more exemptions than to current legislators in their decision to require fewer exemptions.

Another rationale is the principle of democratic accountability. In a sense, entrenchment limits accountability because it limits the ability of the people to change the law by electing new legislators.[275] This is true whether the entrenchment is explicit or implicit.

Further, case law does not distinguish between implicit and explicit entrenchment. In *Ohio Life Insurance & Trust Co. v. Debolt*,[276] the Supreme Court stated that "no one legislature can, by its own act, disarm their successors of any of the powers or rights of sovereignty confided by the people to the legislative body,

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*with* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 691–92 (2014) ("Under RFRA, a Government action that imposes a substantial burden on religious exercise must serve a compelling government interest . . . .").

[274] Eule, *supra* note 253, at 387.

[275] Roberts & Chemerinsky, *supra* note 36, at 1796.

[276] Ohio Life Ins. & Tr. Co. v. DeBolt, 57 U.S. (16 How.) 416 (1854).

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unless they are authorized to do so by the constitution under which they are elected."[277] The Supreme Court did not attempt to draw a line between whether the legislature explicitly or implicitly limited a future legislature. Rather, the Court was concerned with the effects. The language does not require an *explicit* act, but, rather, just an act.

The second objection is primarily concerned not with whether there is an entrenchment, but with which body is doing the entrenching. Legislative entrenchment, critics may argue, would require the *legislature* to have entrenched a particular law, not the courts. If the Supreme Court were to hold that *Employment Division v. Smith* prevents Congress from exempting legislation from a permissive exemption, the argument would be that Congress did not entrench the exemption, but rather the Supreme Court did.

This reasoning is mistaken. The Supreme Court, in this context, has no power to create new laws. Rather, it is engaging in a mix of statutory and constitutional interpretation. Indeed, as Chief Justice Marshall stated in the oft-quoted case *Marbury v. Madison*, "It is emphatically the province and duty of the judicial department to say what the law is."[278] Since the Constitution forbids rather than requires entrenchment, this means that the Supreme Court would be finding entrenchment in RFRA itself. Because RFRA is a statute passed by Congress, it is Congress that is responsible for the entrenchment, not the courts.

Critics may further respond by saying that courts interpret laws *and the Constitution*, and because strict scrutiny would be required due to an interpretation of the First Amendment, it is the Constitution doing the entrenching, not the legislature. Such entrenchment, critics would say, is permissible because the Constitution has numerous provisions of entrenchment.[279] But the answer to this is in causation: what would cause RFRA to be un-exemptible? Consider two worlds. The first is a hypothetical world in which RFRA was never enacted, and as such, no legislation passed by Congress can or need contain an exemption from RFRA. The second is the current world (hypothesizing that the Equality Act or a similar piece of legislation becomes law). In the former, there can be no debates about whether limiting or repealing RFRA causes problems under *Employment Division v. Smith* because, in that world, RFRA does not exist. In the latter, there can be debates, which is what is discussed in this Article. Therefore, if the Court holds that passing and then limiting or repealing RFRA indicates hostility toward religion, the basis for that

[277] *Id.* at 431.

[278] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[279] *See* Roberts & Chemerinsky, *supra* note 36, at 1781–82.

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decision is not constitutional; it is statutory, as no such objection could exist without the RFRA statute.

In short, the Supreme Court should be wary of holding that Congress (or the states) cannot exempt laws from RFRA. Doing so would affect a legislative entrenchment—something the Supreme Court has carefully guarded against in other contexts.

## IV. CONCLUSION

Because the Supreme Court has greatly strengthened its Free Exercise jurisprudence in recent years, it makes what otherwise should be a simple question in fact not so simple: can Congress and the states repeal laws after they have been enacted? Although this Article concludes that the Free Exercise Clause is no impediment to their ability to do so, the fact that it is even a question is noteworthy. In any event, for both doctrinal reasons and for concerns of legislative entrenchment, the Supreme Court should be skeptical of challenges to laws exempting themselves from RFRA.

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