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# Supremacy of Law or Religion: Congress's Power to Amend the Constitution Bypassing Constraints of the Constitutional Process.

*Roman Sankovych\**

## I. INTRODUCTION

Separation of powers is an age-old concept of democratic governance that permeates democratic regimes around the world. Montesquieu, one of the greatest political philosophers provided one of the first articulations of this concept, conditioning any successful democratic regime upon it.<sup>1</sup> Ever since he introduced this idea in the *Spirit of the Laws*, democracies around the world began to adopt this model, modifying it somewhat from country to country to fit their peculiar political realities.<sup>2</sup> These ideas were also picked up by the Founding Fathers<sup>3</sup> subsequently becoming intrinsic to the American form of democracy.<sup>4</sup> Although the concept might seem easy to adopt, in many cases the line that divides the powers is less than clear, which creates a constant struggle between the three branches of the government.

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1. See MONTESQUIEU, *THE SPIRIT OF THE LAWS* 157 (Anne M. Cohler et al. eds., Anne M. Cohler et al. trans., Cambridge Univ. Press 1989) (1748) (“[T]here is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.”).

2. See, e.g., KONSTYTUTSIIA UKRAINY [CONSTITUTION] art. 6 (Ukr.) (“State power in Ukraine is exercised on the principles of its division into legislative, executive, and judicial power.”) (clearly stating that the division of powers); see also U.S. CONST. arts. I, II, III (embodying the principle of separation of power only implicitly by assigning to each branch of the government its specific functions).

3. In Federalist 47, James Madison wrote, “The oracle who is always consulted and cited on this subject [of separation of powers] is the celebrated Montesquieu.” *THE FEDERALIST* NO. 47 (James Madison).

4. U.S. CONST. arts. I, II, III (establishing three branches of the government with each having enumerated powers and duties).

The inter-branch tension is not novel in the United States, and it often encourages a plethora of policy discussion between the branches that, in the long run, benefits the American people. One of the most prominent examples of such tension is the “court-packing” attempt of President Franklin Delano Roosevelt to curb the unruly Supreme Court by expanding the number of its members and appointing the loyal candidates in the newly created seats.<sup>5</sup> Tensions also exist between the legislative branch and the judiciary when Congress’s actions aimed at overruling various Supreme Court interpretations of the law. For example, a passing of the Civil Rights Restoration Act of 1987<sup>6</sup> was a response to the Supreme Court’s decision in *Grove City College v. Bell*<sup>7</sup> where, according to Congress, the Court “unduly narrowed or cast doubt upon the broad application of [federal civil rights statutes].”<sup>8</sup> Very often these inter-branch conflicts get resolved in a way that benefits the citizens of the United States as a whole,<sup>9</sup> albeit such a positive resolution could take a long time.<sup>10</sup> Congress, however, is not immune to making mistakes.

One of the most controversial types of congressional activity is to undo Supreme Court’s interpretations of the U.S. Constitution. These efforts of Congress are usually aimed at curtailing one of the most significant powers of the Supreme Court – the power of judicial review established in *Marbury v. Madison*.<sup>11</sup> The Court’s power of judicial review lies in the center of the present inter-branch struggle around the Religious Freedom Restoration Act of 1993<sup>12</sup> (“RFRA”). On the one hand, RFRA, a legislative act, makes all law subject to its scrutiny,<sup>13</sup> correcting the Supreme Court’s abolition of “strict scru-

5. See, e.g., Anthony Lewis, *Legacy of the Court-Packing Plan: A Quarter-Century After F.D.R. Began His Unsuccessful Battle over the Supreme Court, the Tribunal’s Attitudes are Changed but Its Independence is as Secure as Ever*, N.Y. TIMES, Feb. 4, 1962 at 12 (reflecting on the history and effects of Roosevelt’s “court-packing” efforts).

6. Pub. L. No. 100-259, 102 Stat. 28 (codified as amended in scattered sections of 20, 29, 42 U.S.C.).

7. 465 U.S. 555 (1984).

8. Civil Rights Restoration Act of 1987 § 2.

9. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (abolishing the discriminatory “separate but equal” policy authorized by the Supreme Court in *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

10. *Brown* was decided 58 years after *Plessy* established “separate but equal” framework.

11. 5 U.S. (1 Cranch) 137 (1803) (In *Marbury v. Madison*, the Supreme Court famously said that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”).

12. 42 U.S.C. § 2000bb (2012).

13. *Id.* § 2000bb-3(a)-(b) (“[RFRA] applies to all Federal law, and the implementation of that law, whether statutory or otherwise . . . 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.”).

tiny” inquiry in the cases involving the Free Exercise Clause of the First Amendment and instructing the courts to use the “strict scrutiny” test in these cases.<sup>14</sup> However, at the same time, the Supreme Court issues decisions that expand and enhance citizens’ constitutional right, seemingly ignoring RFRA,<sup>15</sup> planting seeds of uncertainty in the minds of citizens and lawyers alike. On the other hand, the Supreme Court issues decisions like *Burwell v. Hobby Lobby Stores, Inc.*,<sup>16</sup> where it invalidates a provision of the Patient Protection and Affordable Care Act (“ACA”)<sup>17</sup> because it fails the strict scrutiny test established in RFRA.<sup>18</sup> This decision both reaffirms and validates RFRA. This uncertainty as to RFRA’s place in the hierarchy of law provides a fertile ground for discussion about the limits of Congress’s corrective action as to the Supreme Court’s interpretations of the Constitution.

This Comment’s goal is to question the “supremacy” of RFRA because, as it stands now, RFRA appears to enjoy supremacy above other federal and state laws as it subordinates these laws to its strict-scrutiny test. This Comment, first, gives a brief historical background of the Hobby Lobby Stores, Inc. company, as well as the evolution of the religious freedom concept in the United States. In Part III of this Comment, the discussion centers on the dubious quasi-constitutional status that Congress afforded to RFRA, which was ignored by the Supreme Court in *Hobby Lobby*. Part IV concludes the discussion by suggesting that the entire framework of RFRA stands on very shaky constitutional grounds, and, thus, the outcome of *Hobby Lobby* should be reversed.

## II. BACKGROUND

### A. *Hobby Lobby Stores, Inc.*

Hobby Lobby Stores, Inc. is an idiosyncratic corporation on the corporate map of the United States. It is a closely held, family-owned

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14. See Nancy J. Knauer, *Religious Exemptions, Marriage Equality, and the Establishment of Religion*, 84 UMKC L. REV. 749, 763 (2016) (discussing the origins of RFRA).

15. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (recognizing a right of same-sex couples to get married as a constitutional right that is enforceable in all states of the United States).

16. 134 S. Ct. 2751 (2014).

17. Pub. L. No. 111-148, 124 Stat. 119 (codified in various sections of U.S.C.).

18. *Hobby Lobby*, 134 S. Ct. at 2785. (“The contraceptive mandate, as applied to closely held corporations, violates RFRA. Our decision on that statutory question makes it unnecessary to reach the First Amendment claim.”).

corporation incorporated in Oklahoma.<sup>19</sup> While family ownership is generally an attribute of close corporations,<sup>20</sup> suggesting a small-to-medium-sized enterprise, Hobby Lobby Stores, Inc. is more like a large publicly traded corporation: it has around 750 stores throughout the United States;<sup>21</sup> it occupies a 9.2 million-square-foot headquarters complex;<sup>22</sup> it employs 32,000 people;<sup>23</sup> and, in 2015, it generated \$4 billion in revenue.<sup>24</sup> These features put Hobby Lobby Stores, Inc. on Forbes' list of America's Largest Private Corporations.<sup>25</sup> These numbers put it in the same group as big, publicly held corporations like Facebook<sup>26</sup> or British Petroleum<sup>27</sup> that occupy a significant share of the U.S. market. The volume of the company and its family-based ownership, however, do not end the list of Hobby Lobby Stores, Inc.'s peculiarities.

The company is also unique in its approach to conducting business. The company's mission statement will surprise an observer by drawing attention to two interwoven themes that the company goes to great lengths to emphasize: allegiance to the Christian religion and unequivocal veneration of the institution of family.<sup>28</sup> These company values are not only pertinent to its owners, but they are also imposed upon the customers and store employees.<sup>29</sup> In the affirmation of its religious beliefs, the stores are closed on Sundays,<sup>30</sup> and this fact is indi-

19. See *Our Story*, HOBBY LOBBY, <http://www.hobbylobby.com/about-us/our-story> (last visited Apr. 18, 2016). (The website states that the company is a private corporation.)

20. See, e.g., *Renberg v. Zarrow*, 667 P.2d 465, 471 (Okla. 1983) (“[C]lose corporations are usually family affairs.”); *Brenner v. Berkowitz*, 634 A.2d 1019, 1026 (N.J. 1993) (“Shareholders of close corporations are often family or close friends.”) (citing *Bostock v. High Tech Elevator Indus., Inc.*, 616 A.2d 1314, 1321 (Super. Ct. App. Div. 1992)).

21. See *Our Story*, HOBBY LOBBY, <http://www.hobbylobby.com/about-us/our-story> (last visited May 19, 2017).

22. *Id.*

23. *Id.*

24. *America's Largest Private Companies*, FORBES, <http://www.forbes.com/companies/hobby-lobby-stores> (last visited Apr. 18, 2016).

25. *Id.*

26. Facebook had only 9,199 employees in as of May 2015. See *The World's Most Valuable Brands*, FORBES, <http://www.forbes.com/companies/facebook> (last visited Apr. 18, 2016).

27. British Petroleum made in \$3.5 billion in profit in 2015. See *id.*

28. Hobby Lobby Stores, Inc.'s *About Us* section is written by using plural personal pronoun “we” throughout the section, and it states that one of the company's commitments is “[p]roviding a return on the *family's investment*.” See *Our Story*, HOBBY LOBBY, <http://www.hobbylobby.com/about-us/our-story> (last visited Apr. 18, 2016) (emphasis added). The section also reiterates the family's commitment to the Christian faith, which is embodied into the corporation's main commitment to “[honor] the Lord . . . by operating the company in a manner consistent with Biblical principles.” *Id.*

29. *Id.* (“Serving our employees and their families by establishing a work environment and company policies that build character, strengthen individuals, and nurture families.”).

30. *Id.*

cated in multiple places on the company's website, including the Career section.<sup>31</sup> Also, most of the stores are located outside of big metropolitan areas, which indicates that the company primarily targets more conservative, family-centered individuals.<sup>32</sup> Family is also at the heart of the corporate structure, as all of the governing bodies of the corporation – the shareholders, the board of directors, and the officers – are comprised exclusively of family members.<sup>33</sup> For example, the shareholders of the corporation are family trusts with David and Barbara Green and their children as trustees.<sup>34</sup> Also, the board of directors and the executive officers consist of David Green and his children.<sup>35</sup> While the company's corporate structure and the nature of its ownership do not directly affect the public and those who work for the company, the implementation of owners' religious beliefs in the corporate policy warrants more scrutiny as such application affects a significant number of people due to the sheer size of the corporation.

### B. *Religious Freedom in the United States*

The religious rights debate is hardly new, but, despite much discussion, many questions remain unanswered. It has been an ongoing and hotly contested issue since before the founding of the Union.<sup>36</sup> Although not originally part of the Constitution, the specific right to religious freedom was incorporated into the Bill of Rights in 1791.<sup>37</sup> This right imposed a limitation on the federal government stating, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."<sup>38</sup> The philosophical underpinnings of the religious freedom and prohibition of state religion were based on the idea of separation of church and state that dates back to

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31. See, e.g., *Store Management*, HOBBY LOBBY, <http://careers.hobbylobby.com/current-openings/store-management> (last visited Apr. 18, 2016).

32. Phillip Bump, *There Really Are Two Americas. An Urban One and a Rural One*, WASH. POST (Oct. 21, 2014), <https://www.washingtonpost.com/news/the-fix/wp/2014/10/21/there-really-are-two-americas-a-urban-one-and-a-rural-one> (discussing voters' behavior in different areas of the United States and concluding that the rural area residents tend to vote for the Republican Party, a party known for its conservative stands on social and economic issues).

33. Lyman Johnson & David Millon, *Corporate Law After Hobby Lobby*, 70 BUS. LAW. 1, 5-6 (2014).

34. *Id.* at 5.

35. *Id.*

36. Yvette Ann Walker, Note, *More Than Human: Modern Expansion of Corporate Personhood Rights in Hobby Lobby*, 24 S. CAL. REV. L. & SOC. JUST. 297, 305-06 (2015).

37. U.S. CONST. amend. I.

38. *Id.*

John Locke's model of a secular state.<sup>39</sup> The idea of a secular state was also vigorously discussed among the Founders of the United States.<sup>40</sup> For instance, Thomas Jefferson coined the term "separation of church and state" when he wrote a letter to the Danbury Baptist Association in 1802<sup>41</sup> in which Jefferson referred to the idea as "building a wall of separation between Church & State."<sup>42</sup> This discussion of the separation of church and state also had numerous critics on the other side; for example, those who feared that their religious liberties might be adversely affected, as the result of the implementation of the separation of church and state doctrine.<sup>43</sup> The result of this discussion was the adoption of an amendment that combined both the Free Exercise and the Establishment Clauses, precipitating a slew of future debates – both in the academia and in jurisprudence – on how the two clauses contradict each other.<sup>44</sup> The struggles of reconciling the two clauses and defining the contours of the Free Exercise clause shaped the current state of the law in this area.

#### i. The *Sherbert* Times

The modern era of religious rights evolutionary history could be divided into two distinct epochs: the *Sherbert* times and the *Smith* times. In 1963, the Warren Court decided *Sherbert v. Verner*<sup>45</sup> where it interpreted the Free Exercise Clause as requiring a balancing test: (1) whether the contested law imposed a "substantial burden on the practice of religion" and (2), if so, whether the law "served a compelling governmental interest."<sup>46</sup> This "strict scrutiny" test created a very exacting inquiry into the purposes of the laws enacted by the government if those laws burdened a person's religious freedom, potentially forcing the states to "single out . . . those [persons] whose behavior is religiously motivated" arguably in "violat[ion of] the constitutional

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39. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1430 (1990).

40. FRANK LAMBERT, *THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA* 11 (2003).

41. DANIEL DREIBACH, *THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* 1-2 (2002).

42. *Id.* at 2.

43. See McConnell, *supra* note 39, at 1476 ("Virginia Baptists, John Leland, opposed ratification [of the Constitution] on the ground that religious freedom was "not sufficiently secured.").

44. See, e.g., Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 982 (1995) ("'[N]eutrality' in establishment seems to contradict the need to prevent the establishment of religion by government or to protect (and privilege) religious free exercise.").

45. 374 U.S. 398 (1963).

46. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014) (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert*, 374 U.S. at 398).

limitations on state action.”<sup>47</sup> These worries eventually took a central stage, bringing about the transition to the current state of the law on religious liberty.

## ii. The *Smith* Times

Almost three decades after *Sherbert*, the U.S. Supreme Court issued a watershed decision that sent shockwaves, which still reverberate through political and legal discussions on religious liberty. Written by textualist and originalist, Justice Antonin Scalia, *Employment Division v. Smith*<sup>48</sup> curtailed the sweep of *Sherbert* by distinguishing it in a way that significantly limited its reach.<sup>49</sup> In *Smith*, the Court abandoned the strict reading of the First Amendment’s religious freedom mandate by, instead, announcing that the “compelling interest” test cannot be applied to the laws of “general applicability” because “[a]ny society adopting such a system would be courting anarchy.”<sup>50</sup> This principle was later rearticulated as the new religious liberty test: “neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.”<sup>51</sup> Almost immediately after the Supreme Court decided *Smith*, the new rule was met with harsh criticism from both liberal and conservative observers,<sup>52</sup> preparing a fertile ground for a bipartisan Congressional response.

Three years of criticism of *Smith* from all corners of the political spectrum translated into a new and current era of religious liberty rights. In 1993, the House of Representatives introduced and passed RFRA by a voice call, the Senate passed the Act by a huge 97 to 3 majority, and President William Clinton signed it into law— all within less than a year.<sup>53</sup> Congress’s vision of religious freedom was one that predated *Smith*, so, in adopting RFRA, it restored the “substantial

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47. *Sherbert*, 374 U.S. at 422 (Harlan, J., dissenting).

48. 494 U.S. 872 (1990).

49. Symposium, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35, 54 (2015).

50. *Smith*, 494 U.S. at 888.

51. *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997).

52. In 1990, the year when *Smith*, was decided, numerous newspapers printed opinions and letters that criticized the decision and the Court. See, e.g., Editorial, *Is Religious Liberty a Luxury?*, WASH. POST (Sept. 19, 1990), [https://www.washingtonpost.com/archive/opinions/1990/09/15/is-religious-liberty-a-luxury/8a57b1df-3987-4d9f-95b2-b3426c22beff/?utm\\_term=.a830da2f6721](https://www.washingtonpost.com/archive/opinions/1990/09/15/is-religious-liberty-a-luxury/8a57b1df-3987-4d9f-95b2-b3426c22beff/?utm_term=.a830da2f6721); Opinion, *Endangered “Free Exercise” Clause*, CHRISTIAN SCI. MONITOR, May 21, 1990, at 18; Letter to the Editor, *Religious Freedom Threatened by Court Decision*, N.Y. TIMES, May 21, 1990, at A20.

53. *H.R.1308 - Religious Freedom Restoration Act of 1993*, CONGRESS.GOV, <https://www.congress.gov/bill/103rd-congress/house-bill/1308/all-actions?overview=closed#tabs> (last visited May 8, 2017).



burden” test.<sup>54</sup> However, since the standard Congress did not agree with was a constitutional standard,<sup>55</sup> Congress created a dualism as to the exercise of religious freedom when it adopted RFRA, which defines religious freedom more broadly than the Constitution. This dualism of current religious liberty law is a distinct feature of the post-RFRA era, showcasing the inter-branch tension and uncertainty within the branches as to what standard is supreme and producing a dramatic resolution of high-stake issues such as insurance coverage for women.

### C. *RFRA and The Hobby Lobby Case*

Two separate federal laws clashed in the Supreme Court of the United States on March 25, 2014, when Hobby Lobby Stores, Inc. argued its case against the Secretary of Health and Human Services, Sylvia Burwell, centering insurance coverage and religious freedom as the subject of the dispute. On one side, there was RFRA, which prohibits the government from

substantially burden[ing] a person’s exercise of religion even if the burden results from a rule of general applicability, except [when the government] demonstrates that application of the burden to the person . . . is in furtherance of a compelling governmental interest [and] is the least restrictive means of furthering that compelling governmental interest.<sup>56</sup>

On the other side, there was the ACA, which imposed a “minimum essential coverage” mandate upon corporations.<sup>57</sup> The “minimum essential coverage” consisted of providing a standard health insurance plan that had to include contraception with, arguably, abortifacient qualities.<sup>58</sup> The composition of the insurance package brought the religious freedom discussion back to the Supreme Court.

The parties in *Hobby Lobby* had diametrically opposite views of the role of religion in this case. Hobby Lobby presented an argument based on RFRA, but it also interestingly interwove some of the elements of the constitutional rights of the First Amendment.<sup>59</sup> Hobby

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54. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761 (citing congressional finding that “[l]aws that are neutral toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.”) (internal quotations and punctuations omitted).

55. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398, 402 (1963); *City of Boerne v. Flores*, 521 U.S. 507, 515 (1997) (all three cases implicated the First Amendment).

56. 42 U.S.C. § 2000bb-1 (2012).

57. I.R.C. § 5000A (2012).

58. Johnson, *supra* note 33, at 1.

59. See generally Brief for Respondent, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354), 2014 WL 546899.

Lobby's RFRA argument stated that by mandating the company to purchase the abortifacients for their employees, the government "substantially burdened" its exercise of religion.<sup>60</sup> Because the government did not provide any justification that such burden was in furtherance of a compelling government interest and did not show that the government's imposition of the burden represented the least restrictive means of furthering that interest, such burden was illegal as it violated RFRA.<sup>61</sup> Hobby Lobby argued, therefore, they must be exempt from this requirement of ACA by allowing the company to exclude abortifacient contraceptives from insurance packages it provides for its employees.<sup>62</sup> The constitutional argument consisted of an assertion that the Supreme Court never said that First Amendment's religious exercise is "purely personal," that is applicable only to individuals.<sup>63</sup> It pushed further by comparing the applicability of the free exercise to corporations as having the same rationale the Supreme Court used in deciding free speech cases: the proper inquiry is "not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the challenged law] abridges expression that the First Amendment was meant to protect."<sup>64</sup> Burwell, on behalf of the government, disagreed with these arguments.

The Department of Human Services ("DHS"), the petitioner in the case, also proposed constitutional and non-constitutional arguments. According to DHS, the question of whether the exercise of religion is applicable to for-profit organizations must be viewed under the constitutional case law because "the text of neither RFRA nor the Dictionary Act supports the conclusion that for-profit corporations are 'person[s]' that themselves engage in the 'exercise of religion' in the sense Congress intended."<sup>65</sup> Expanding on the idea that for-profit corporations cannot exercise religious freedom rights, a bulk of DHS's argument was based on traditional principles governing corporate structure: (1) a corporation is a separate entity from its owner and (2) the shareholders of the corporation have no standing in bringing

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60. *Hobby Lobby*, 134 S. Ct. at 2775-76 (showing that if the company were to decline the coverage of the drugs, it would have to potentially pay \$1.3 million per day).

61. Brief for Respondent, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354), 2014 WL 546899, at \*45, 56.

62. *Id.* at \*2.

63. *Id.* at \*24.

64. *Id.* at \*25 (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)).

65. Brief for Petitioner, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354), 2014 WL 173486, at \*22.

claims for injuries on behalf of the corporation.<sup>66</sup> In addition, DHS stated that even if RFRA's strict scrutiny applied, the government met its burdens because the government had compelling interests – protection of employees' rights, public health considerations, and women's access to healthcare; further, the current framework is a least restrictive means of achieving the goals as the alternative Hobby Lobby offered – government itself could distribute contraceptives to Hobby Lobby's employees – would require creation or expansion of federal programs, which is not required by RFRA.<sup>67</sup> The Supreme Court was not persuaded by DHS's argument.

In deciding the case, the Supreme Court sided with Hobby Lobby, shattering the long-standing principles of constitutional and corporate law. First, the Supreme Court did not overrule the “laws of general applicability” standard espoused in *Smith*.<sup>68</sup> By relying solely on RFRA, the Supreme Court established the following groundbreaking rules: (1) the Court rejected the notion that the purpose of a corporation is mere profit-making, endorsing a modern approach<sup>69</sup> of setting up corporations “for any legitimate purpose”;<sup>70</sup> (2) the Court also rejected the proposition that a for-profit corporation “cannot engage in the exercise of religion,” stating that the statutory language that authorizes construction of exercise of religion “in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of [RFRA] and the Constitution” should not mean to impose restrictions on “exercise of religion”;<sup>71</sup> and (3) by assuming that ACA's mandate served a “compelling governmental interest,”<sup>72</sup> the Court found that imposition of penalties was not “least restrictive” because the government had alternative measures for the same situation in a non-profit setting.<sup>73</sup> The Court's holding, in essence, subordinated the ACA to RFRA's strict scrutiny analysis, opening the door for a plethora of robust academic and political discussion on the underlying issues.

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66. *Id.* at \*23-28.

67. *Id.* at \*38-58.

68. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (“The contraceptive mandate, as applied to closely held corporations, violates RFRA. Our decision on that statutory question makes it unnecessary to reach the First Amendment claim.”) (The majority points out that RFRA, as amended, does not implicate First Amendment issues; therefore *Smith* is not controlling here.)

69. *See* DEL. CODE ANN. tit. 8, § 101 (2015) (“A corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes.”).

70. *Hobby Lobby*, 134 S. Ct. at 2770-71.

71. *Id.* at 2772.

72. *Id.* at 2780.

73. *Id.* at 2782.

## III. A QUASI-CONSTITUTIONAL VALUE OF RFRA.

To bring order in the federalist system where a vast number of legislative acts, both federal and state, exists side by side, courts regularly treat some acts as having more authority than others. Of course, a regular practice for the Supreme Court to employ such subordination in Constitutional cases when the Supreme Court evaluates whether a particular act of a state legislature is in sync with the supreme law of the land.<sup>74</sup> For example, in *Smith*, the Supreme Court looked closely at the act of the Oregon Legislature that denied unemployment benefits to people who were fired for consuming peyote – a type of cactus with psychoactive qualities used by Native Americans for religious purposes.<sup>75</sup> The state law in that case needed to conform with the First Amendment of the U.S. Constitution, namely the Religious Freedom Clause.<sup>76</sup> In that case, the Supreme Court held that the Oregon law was not in violation the federal Constitution.<sup>77</sup> Similarly, in *Sherbert*, the Supreme Court looked whether South Carolina unemployment benefits statute complies with the First Amendment Religious Freedom Clause when the benefits are denied to those people who celebrate the Sabbath and because of this religious principle cannot find a job, holding that the statute was unconstitutional.<sup>78</sup> The Supreme Court, however, is not limited to subordinating state laws to the Constitution.

All federal laws issued by Congress and the executive branch of the government are also subordinated to the U.S. Constitution. The prime example of such hierarchy is the Supreme Court's decision in *United States v. Windsor*,<sup>79</sup> where the Court invalidated a provision of the Defense of Marriage Act (“DOMA”)<sup>80</sup> that amended the Dictionary Act by defining marriage as only between a man and a woman.<sup>81</sup> In *Windsor*, the Supreme Court used both the Fifth Amendment's Due Process Clause and the Fourteenth Amendment's Equal Protection Clause<sup>82</sup> to find DOMA unconstitutional. Similarly, in *Kore-*

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74. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (invalidating Texas law that criminalizing abortion-related activities on the basis that it was not consistent with the Due Process Clause of the Constitution).

75. *Emp't Div. v. Smith*, 494 U.S. 872, 874 (1990).

76. *Id.*

77. *Id.*

78. *Sherbert v. Verner*, 374 U.S. 398, 400-01 (1963).

79. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

80. Defense of Marriage Act of 1996, Pub. L. No. 104-199, § 3, 110 Stat. 2419, (codified in scattered sections of 1 and 28 U.S.C.).

81. *Id.* § 7.

82. *Windsor*, 133 S. Ct. at 2675.

*matsu v. United States*,<sup>83</sup> the Supreme Court evaluated the constitutionality of a presidential executive order that provided for the creation of internment camps for people of Japanese ancestry living in the United States during World War II, holding that the executive order was constitutionally valid and thus showing that all executive documents have to be in compliance with the Constitution.<sup>84</sup> The power of the Supreme Court to subordinate law does not end here either.

Finally, the Supreme Court also has the authority to subordinate state constitutions to the provisions of the U.S. Constitution. This authority is derived from the Supremacy Clause of the U.S. Constitution.<sup>85</sup> One of the most prominent examples is *Romer v. Evans*<sup>86</sup> in which the Supreme Court invalidated an amendment to the Colorado constitution that took out sexual orientation from the protected class designation, as defined by the Supreme Court.<sup>87</sup> Again, deciding *Romer*, the Supreme Court relied both on the Supremacy Clause and on the Equal Protection Clause of the U.S. Constitution to invalidate the amendment to the Colorado Constitution.<sup>88</sup> These examples illustrate that all state and federal laws, including state constitutions, are subject to Supreme Court's constitutional scrutiny, yielding their power to the U.S. Constitution if the law is in conflict with it.

Against this backdrop, *Hobby Lobby* appears to be an odd case. First, the Supreme Court did not use the Constitution as the standard for comparison; instead, the Court used RFRA as the golden standard to invalidate the ACA provision, putting aside the Constitutional arguments of the parties as inapposite.<sup>89</sup> As the majority wrote, "The contraceptive mandate [of the ACA], as applied to closely held corporations, violates RFRA."<sup>90</sup> According to the Supreme Court Justices, both the majority and dissent, RFRA has the supreme authority akin the U.S. Constitution. Such treatment is unwarranted because RFRA was adopted as a regular act of Congress, avoiding special mechanisms of higher scrutiny that would elevate its status above all other laws

83. 323 U.S. 214 (1944).

84. *Id.* at 223-24.

85. U.S. CONST. art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

86. *Romer v. Evans*, 517 U.S. 620 (1996).

87. COLO. CONST. art. II, § 30b.

88. *Romer*, 517 U.S. at 632.

89. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2790 (2014).

90. *Id.* at 2785 (emphasis added).

and just under the Constitution; thus, the outcome, in this case, is inaccurate and must be corrected as it could create a disruption in the hierarchy of law.

A. *RFRA and ACA stand on equal footing*

i. Hierarchy within hierarchy

Naturally, the U.S. Constitution sits atop of the hierarchy of law, subordinating the rest of the law. The Founding Fathers established this paradigm by inserting the Supremacy Clause into the Constitution.<sup>91</sup> But the Constitution is a very brief document that cannot cover all areas of law; it could only set a philosophical framework and grant powers to different political bodies to elaborate on the meaning of its terms. The Constitution, thus, directs Congress to take measures in making the Constitutional principles workable, not merely declaratory, in our society.<sup>92</sup> But even acts of Congress could become mere declarations if not enforced, and they could also be too broad to cover all situations that arise in the real world; it is for this reason, the Constitution created the executive branch to execute the Constitution and the acts of Congress by issuing regulations that implement the congressional acts.<sup>93</sup> As these laws have different power depending on where on the hierarchical ladder they are situated, their adoption and amending processes also differ.

The degree of ease with which a legislative document could be changed should arguably give the document considerably more or less weight. The U.S. Constitution, for example, is an extremely difficult document to amend. Since the Constitution was adopted in 1789, only 27 amendments were fully ratified and took effect, and it took over 200 years to ratify the last amendment entirely.<sup>94</sup> Such rigidity is due to a particular procedure established by the Constitution that needs to

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91. U.S. CONST. art. VI.

92. *See, e.g., Ex parte Commonwealth of Virginia*, 100 U.S. 339, 345 (1879) (It is the power of Congress . . . to enforce the [constitutional] prohibitions by appropriate legislation.”).

93. *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944) (“[Administrative acts] do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court’s processes, as an authoritative pronouncement of a higher court might do. But the Administrator’s policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. They do determine the policy which will guide applications for enforcement by injunction on behalf of the Government. Good administration of the . . . require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons.”).

94. Kathleen M. Sullivan, *Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever*, 50 REC. ASS’N B. CITY N.Y. 724, 735 (1995) (explaining the difficulties of amending constitutional provisions).

follow in order to amend the Constitution.<sup>95</sup> Congressional acts, on the other hand, are much easier to change: a bill must be approved by a simple majority of both houses of the Congress and signed by the President.<sup>96</sup> In the case of federal regulations, the President, for instance, may unilaterally issue an executive order, and he also may unilaterally rescinded such an order.<sup>97</sup> These procedures are logically consistent with the weight the courts give to each of these acts, but these procedures do not address an issue of whether the acts of the same body may have different weight as was the case in *Hobby Lobby*.

Conceivably, some acts of Congress of the same nature<sup>98</sup> may have more weight during judicial review than others. An example of such law could be one that has an embedded requirement of a supermajority vote to change it, that is, where Congress, itself, limits its ability to modify the law. In the Immigration and Nationality Act,<sup>99</sup> Congress created a provision that to change any norm that converts immigration status of a person from that of the Temporary Protected to that of the Permanent Resident, the Senate must obtain “three-fifths of the Members duly chosen and sworn.”<sup>100</sup> This language is indicative of the Congress’s intent that the provision in the statute should be construed narrowly, having some precedence over other provisions of the Immigration and Nationality Act that regulate obtaining Permanent Resident status by people in all other immigrant categories. This superiority is warranted because if Congress wanted to ascribe a different meaning to some of the terms in that section, it would have done so only if the requisite number of votes was ensured.

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95. U.S. CONST. art. V (“The Congress, whenever *two thirds of both Houses* shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when *ratified by the Legislatures of three fourths of the several States*, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”) (emphasis added).

96. *The Legislative Process*. U.S. HOUSE OF REPRESENTATIVES. [http://www.house.gov/content/learn/legislative\\_process](http://www.house.gov/content/learn/legislative_process) (last visted Apr. 18, 2016).

97. KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWERS, 36 (2001) (“Since executive orders are a tool of the president’s executive power, their reach extends as far as executive power itself.”).

98. A Bill that later becomes a binding law is of a different nature from a Resolution that is never binding but is only of an instructive character.

99. 8 U.S.C. § 1101 (2012).

100. *Id.* § 1254a.

Whenever courts interpret laws, therefore, they should take these Congressional directives into account, and RFRA is not an exception.

Although when Congress adopted RFRA it wanted to resurrect old case law, this does not afford RFRA a higher status than that of other laws. It is true that RFRA's adoption was a response to *Smith*, which abolished the two-prong test established in *Sherbert*.<sup>101</sup> Since *Sherbert*, and the line of cases that followed dealing with the First Amendment issue, it could be argued that when Congress adopted RFRA, it meant to give it a quasi-Constitutional status; Congress even implanted a reference to the First Amendment into the original statute.<sup>102</sup> It is also true, however, that the Supreme Court, in *City of Boerne v. Flores*,<sup>103</sup> invalidated RFRA as applied to states because of this reference,<sup>104</sup> as it was an "attempt [of] a substantive change in constitutional protections."<sup>105</sup> The Court said that the "legislation which alters the Free Exercise Clause's meaning cannot be said to be enforcing the Clause" because "Congress does not enforce a constitutional right by changing what the right is."<sup>106</sup> The Court then concluded that the Constitution strives to "maintain[ ] the traditional separation of powers between Congress and the Judiciary, depriving Congress of any power to interpret and elaborate on its meaning by conferring self-executing substantive rights against the States, and thereby leaving the interpretive power with the Judiciary."<sup>107</sup> Although RFRA still applies on the federal level, this position of the Court eventually created more political discussion in Congress.

In a relentless attempt to correct the Supreme Court's interpretation of religious freedom, once again at issue in *Flores*, Congress adopted another version of RFRA. The new law received the name the Religious Land Use and Institutionalized Persons Act of 2000,<sup>108</sup> as it was designed to create an exception from *Flores* for religious lands and institutions. In this version, Congress removed any reference to the First Amendment<sup>109</sup> by amending the old RFRA in the

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101. *Sherbert v. Verner*, 374 U.S. 398 (1963).

102. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 5, 107 Stat 1488 ("'[E]xercise of religion' means the exercise of religion under the First Amendment to the Constitution.") (codified in scattered sections of 5 and 42 U.S.C.).

103. 521 U.S. 507 (1997).

104. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761 (2014).

105. *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997).

106. *Id.* at 508.

107. *Id.*

108. Pub. L. No. 106-274, 114 Stat. 803 (codified in 42 U.S.C. 2000cc).

109. *Hobby Lobby*, 134 S. Ct. at 2761-62.



“exercise of religion definition”<sup>110</sup> to overcome the Supreme Court’s criticism of the original RFRA.<sup>111</sup> Nothing else was changed. Indeed, Congress still interpreted the First Amendment by adopting the law only without directly referencing it. However, comparing the earlier version of RFRA to the amended RFRA actually demoted its status compared to other laws because it lost its seemingly direct relation to the Constitution that made it a so-called quasi-constitutional act. The amended RFRA, therefore, should have become equal among equals in the realm of acts passed by Congress, as it did not require any supermajority for the amending process and it was not related to the Constitution in any way that could afford it a higher status.

## ii. The Policeman of the Laws

Congress made RFRA a policeman of the entire federal legal framework. The Act contains a rather unusual provision that states,

RFRA applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 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.<sup>112</sup>

Two noteworthy observations warrant some attention here: (1) in *Hobby Lobby*, the Supreme Court never referred to this provision to establish the superiority of RFRA over the ACA and (2) it seems like the provision does away with the long-standing presumption of Congressional knowledge of the prior law.<sup>113</sup> This provision appears to give RFRA a quasi-constitutional status.

Although RFRA’s language is expansive and unambiguous, its application creates absurd results. For example, the statute makes itself applicable to “all Federal and State law, and the implementation of that law, whether statutory or otherwise.”<sup>114</sup> The first anomaly of this statement is that all law, whether it has a direct effect on the religious freedom or a law of general applicability such as ACA or tax law, that was adopted before RFRA would be subject to RFRA, which would

110. RFRA defined “exercise of religion” as “the exercise of religion under the First Amendment to the Constitution,” but the new law defined “exercise of religion” as “includ[ing] any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” 42 U.S.C. § 2000bb-2(4) (2012); 42 U.S.C. § 2000cc-5 (2012).

111. *Hobby Lobby*, 134 S. Ct. at 2761-62.

112. 42 U.S.C. § 2000bb-3 (2012)

113. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 699 (1979) (“[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them.”).

114. 42 U.S.C. § 2000bb-3 (2012).

create a situation when no one knows what the state of that law is because it could potentially be violating someone's "religious freedom." This uncertainty would last until Congress amends all the law by "explicitly exclud[ing RFRA's] application"<sup>115</sup> or until the Supreme Court finds the laws to be in conformity with RFRA. Although this effect might seem revolutionary and potentially destabilizing, Congress has the power to change old law, so this kind of negative impact might not be as controversial as some other side effect of RFRA might produce.

One of the other potential side effects is an attempt to correct the Supreme Court's interpretations of the law. The reading of the law<sup>116</sup> unambiguously subjects Supreme Courts' decisions – i.e. federal law – to the strictures of RFRA. But the Supreme Court in *Flores*<sup>117</sup> stated that Congress is "depriv[ed] of any power to interpret and elaborate"<sup>118</sup> on constitutional principles. For example, Supreme Court's decision on same sex-marriage, *Obergefell v. Hodges*,<sup>119</sup> the Court reaffirmed that marriage is a constitutional right that the states cannot deny under both the Due Process Clause and the Equal Protection Clause of the Constitution.<sup>120</sup> Thus, this decision makes any discrimination against same-sex couples unlawful, but, as the reality shows,<sup>121</sup> the objections to this decision could be based on RFRA's provisions that presumably protect "religious freedom." Since the decision in *Obergefell* has become the law of the land, it falls under RFRA's purview because the Act refers to all "state and federal law . . . statutory or otherwise."<sup>122</sup> The question arises whether a governmental entity, to which RFRA still applies, or a close corporation, may deny a right announced in *Obergefell* because its workers hold religious beliefs that strongly disfavor any same-sex relationships. In light of RFRA, can this Supreme Court's decision withstand strict scrutiny?<sup>123</sup> And if it does not, can RFRA override the Supreme Court's decision? Most

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115. *Id.*

116. *Id.*

117. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

118. *Id.* at 506.

119. 135 S. Ct. 2584 (2015).

120. *Id.* at 2590.

121. A Kentucky Clerk, Kim Davis refused to issue licenses to same-sex couples, citing "Apostolic Christian beliefs" in justification of her actions," which define marriage between a man and a woman only. See, e.g., Arian Campo-Flores, *Defiant Kentucky Clerk Jailed for Refusing to Issue Same-Sex Marriage Licenses: Kim Davis Cites 'God's Authority' for Her Actions in the Face of Court Rulings*, WALL ST. J. (Sept. 3, 2015), <http://www.wsj.com/articles/defiant-kentucky-clerk-to-appear-in-court-over-refusal-to-issue-same-sex-marriage-licenses-1441295805>.

122. 42 U.S.C. § 2000bb-3 (2012).

123. *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (stating that "it is the rare case in which . . . a law survives strict scrutiny.").

likely, the *Obergefell* decision will stand because the *Obergefell* rule is an interpretation of constitutional provisions while RFRA is just an act of Congress. However, the conflict of the two laws is very apparent and difficult to reconcile. Perhaps understanding the broad meaning of RFRA precluded the Supreme Court from even mentioning the particular “supremacy” provision in *Hobby Lobby* decision. Understandably, the Supreme Court has more freedom to avoid following RFRA, but Congress has limited its freedom and, thus, must follow its strictures.

The post-RFRA reality demonstrations that even Congress seems to forget what that law is about. To avoid the possibility of future conflict with RFRA, Congress has to affirmatively state an exception from RFRA’s application in the text of a new bill.<sup>124</sup> This requirement seems nonsensical in that even Congress, the legislative body that adopted RFRA, does not follow this requirement.<sup>125</sup> A more compelling reason that makes this provision of RFRA a mere absurdity is RFRA itself, which establishes strict scrutiny, the test that the Supreme Court itself called one of the most exacting.<sup>126</sup> Under RFRA, all law is subject to RFRA’s strict scrutiny, yet Congress has an out, in that it only has to exclude RFRA’s applicability from law.<sup>127</sup> Such an incongruous and ambiguous nature of RFRA cannot make it more superior to all laws, save the Constitution itself; it seems that both the Supreme Court and Congress are of the same view because they either do not recognize the provision or do not follow it in its practice. Therefore, RFRA is just like any other law, and the Supreme Court erred when it invalidated the ACA’s provision because of RFRA.

### B. *ACA potentially has more overriding power than RFRA*

The ACA, arguably, has more power than RFRA. The ACA could be viewed more authoritative for at least two reasons: (1) the ACA was upheld as a constitutionally valid law passed under Congress’s taxing authority, while RFRA’s adoption as related to enumerated powers was not challenged, and, in fact, a provision was held unconstitutional by the Supreme Court on other grounds, and (2), ACA was

124. 42 U.S.C. § 2000bb-3 (2012).

125. ACA, for example, does not contain such language. It is highly unlikely to be due to oversight because dozens of lawyers and thousands of hours of work that were put into the ACA would ensure that it would conform to such a simple requirement as providing a disclaimer in its text.

126. *See, e.g.*, *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 642 (1994).

127. 42 U.S.C. § 2000bb-3 (2012).

adopted later, so Congress at least knew about RFRA and did not mean for its provisions to clash, hence the non-profit exceptions. It would be a ridiculous idea for Congress to adopt such a comprehensive law as the ACA, and yet did not account for a possible challenge under RFRA that could ultimately destroy it.

Congress can only pass laws that are within its power as delegated by the Constitution. This principle is embedded in the Constitution as a compromise between the separate states and the federal government: while the federal government has some power over states, the states enjoy a considerable degree of autonomy when it comes to regulating their own relations – this is a central principle of federalism.<sup>128</sup> The Supreme Court has long been reluctant to interpret any provisions of the Constitution in the manner that expands the reach of the federal government,<sup>129</sup> although some jurisprudence has expanded the federal government considerably<sup>130</sup> compared to what it had been at the time the Constitution was ratified.<sup>131</sup> Regardless, however, of the historical background of the Supreme Court’s use of the “enumerated powers” doctrine, all acts that stem from Congress ought to be within Congress’s authority as provided by the Constitution. RFRA, therefore, is not exempted from this scrutiny.

RFRA falling within one the enumerated powers of Congress is at best nebulous. When RFRA was a bill, Congress did not explicitly indicate under which enumerated power it enacted the bill into law.<sup>132</sup> From first glance, it could be said that RFRA is adopted under the Necessary and Proper Clause to facilitate the implementation of the rights afforded under the First Amendment. However, the problem

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128. The Constitution limits the powers of Congress in at least two places: Article I where it lists the types of affairs Congress could get involved in and the Tenth Amendment where the Constitution reserves all powers that are not enumerated to the states. *See* U.S. CONST. art. I, § 8 (listing the powers of Congress); U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

129. *See* *United States v. Lopez*, 514 U.S. 549 (1995) (stating that Congress overstepped its Commerce Clause power when it adopted the Gun-Free School Zones Act of 1990 that prohibited carrying weapons in school zones).

130. *See, e.g.,* *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (prohibiting discrimination on the private business facilities by the means of the Commerce Clause); *Gonzales v. Raich*, 545 U.S. 1 (2005) (upholding a federal law regulation of marijuana within the separate states under the Commerce Clause of Constitution).

131. *See* *McCulloch v. Maryland*, 17 U.S. 316 (1819) (“*This government* is acknowledged by all, *to be one of enumerated powers*. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted.”) (emphasis added).

132. The preamble of RFRA only indicates that the law is “to protect the free exercise of religion.” 42 U.S.C. § 2000bb (2012).

with this understanding is that the Supreme Court explicitly noted that Congress overstepped its authority by adopting RFRA as a First Amendment law.<sup>133</sup> The Supreme Court never addressed the question of whether Congress was authorized by the Constitution to pass RFRA, but absent any indication that the law is to facilitate interstate commerce under the Commerce Clause,<sup>134</sup> the law has a good chance to be stricken as beyond Congress's powers. When the Supreme Court looked at the ACA, however, it considered the authority of Congress to pass it.

ACA's validity is unquestionable since the Supreme Court has already conducted an exacting inquiry into the matter. In *National Federation of Independent Business v. Sebelius*,<sup>135</sup> the Supreme Court heard the Federation's argument that Congress did not have the requisite constitutional authority to adopt the ACA in general and to require a purchase of insurance in particular.<sup>136</sup> The Supreme Court in that case rejected the argument and held that the law was passed within Congress's Tax and Spending authority<sup>137</sup> and is therefore constitutional.<sup>138</sup> The Supreme Court also held that Congress could not have passed the ACA under the Commercial Clause authority because that provision of the Constitution "does not authorize Congress to direct them to purchase particular products in those or other markets today."<sup>139</sup> This holding was unambiguous as it was approved by a 5 to 4 majority of the Court confirming the constitutional validity of this law.

When the two acts – RFRA and ACA – are compared from the point of credibility before the Supreme Court, there is not a question that the ACA is viewed more favorably. Therefore, RFRA should be challenged on the "enumerated powers" grounds to test its validity in the eyes of the Supreme Court. Before that is done, the Supreme Court should not elevate RFRA above any other law of Congress, especially the one that has already passed that scrutiny from the Supreme Court.

133. See *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997).

134. Commerce Clause interpretation is very broad, and the use of it was authorized by the Supreme Court in many cases from direct regulation of commerce, to elimination of discrimination, and even to drug regulations.

135. 132 S. Ct. 2566 (2012).

136. *Id.*

137. U.S. CONST. art. I, § 8 ("The Congress shall have *Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.*") (emphasis added).

138. *Sebelius*, 132 S. Ct. at 2600.

139. *Id.* at 2590-91.

C. *Long term effect of the Hobby Lobby Decision*

Although limited in some respects, the decision in *Hobby Lobby* creates a threat of legalization of some forms of discrimination as well as producing a discord in our state and federal legal system. First of all, although the Supreme Court indicated that the decision was limited to the family-operated, closely held corporations,<sup>140</sup> the Court went to great lengths explaining that there is no difference between for-profit and non-for-profit corporations as far as RFRA concerns.<sup>141</sup> This is a signal to all jurisdictions that in the future they should find no distinction as well should a similar claim arise. The Supreme Court was skeptical that such a situation could transpire<sup>142</sup> because the reality is such that large corporations are composed of shareholders that hold various religious beliefs or none at all,<sup>143</sup> but it is not difficult to imagine that those shareholders of different beliefs could find a common understanding for discriminations based on religious grounds. For example, Christianity, Islam, Judaism, and some other religions all condemn homosexuality and abortion.<sup>144</sup> Shareholders who belong to those religions could agree among themselves that they will not provide some services to LGBTQ and women who have gotten abortions and later argue that RFRA protects them because of the unifying to all religions sincerely held belief. This argument could only be proposed in a federal court as the *Hobby Lobby* decision applies exclusively to the federal government,<sup>145</sup> but the threat of discrimination is not limited to the federal government alone.

On the state level, some states have adopted similar legislation to RFRA that loom over the equal treatment of people in those states. Since the decision in *Hobby Lobby*, many states have followed suit and adopted similar laws, imposing strictures of strict scrutiny on all types of infringement on religion.<sup>146</sup> Although the state courts do not need to follow *Hobby Lobby* in interpreting state RFRA's,<sup>147</sup> many states where these laws were adopted are conservative states with

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140. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2776 (2014).

141. Alex J. Luchenitser, *Religious Accommodation in the Age of Civil Rights: A New Era of Inequality? Hobby Lobby and Religious Exemptions from Anti-Discrimination Laws*, 9 HARV. L. & POL'Y REV. 63, 66-67 (2015).

142. *Id.*

143. *Id.*

144. David Masci & Michael Lipka, *Where Christian Churches, Other Religions Stand on Gay Marriage*, PEW RESEARCH CTR. (2015) (showing various religions' attitudes toward homosexuality); Georgette Bennet, *Abortion: Whose Religious Beliefs Should Prevail?* HUFFINGTON POST (2014) (analyzing various religions' attitudes toward abortion).

145. See *Luchenitser*, *supra* note 146, at 71.

146. *Id.* (listing some of the state statutes that resemble RFRA).

147. *Id.*

elected state judges;<sup>148</sup> it is, therefore, very likely that those state judges will not interpret the state RFRA more liberally than the Supreme Court did. *Hobby Lobby*, thus, created a sample for the state of how to beat the antidiscrimination laws by coating them with the protection-of-religious-beliefs glaze.

Some scholars also noted adverse socio-economic effects that *Hobby Lobby* could potentially introduce. On the one hand, the decision in *Hobby Lobby* does not only affect the health of women, but it also affects the rights of LGBTQ community in the United States.<sup>149</sup> Moreover, it affects these rights in a more direct way than it affects the right to abortion because the right to abortion is already well established in the United States legal system whereas LGBTQ rights are still in the recognition process.<sup>150</sup> One example of such hostility through a use of *Hobby Lobby* to circumvent equality is an Indiana legislation that was clearly directed against the rights of LGBTQ community of that state.<sup>151</sup> As there are skeptics to whom personal rights are no more than esoteric concepts, they should also worry about RFRA and its implications as it might dramatically affect their economic well-being.

On the other hand, *Hobby Lobby* disrupts a status quo within the realm of economic and business relationships within the Nation's marketplace. For a long time the commercial marketplace was viewed through the lens of "doux commerce,"<sup>152</sup> which announced that commerce is a "'sociable institution and can be expected to cultivate virtues' conducive to life in a diverse society."<sup>153</sup> Commerce's input in fostering equality and tolerance is enormously undermined by *Hobby Lobby* because the decision made commerce a part of heated social issues.<sup>154</sup> Another aspect of this issue is that religion is artificially extracted from the private zone of social life into the commercial life that historically excluded any mention of religion.<sup>155</sup> Such expansive intrusion into the established social and economic order is the most

148. *Id.*; see also AM. BAR ASS'N, FACT SHEET ON JUDICIAL SELECTION METHODS IN THE STATES, [http://www.americanbar.org/content/dam/aba/migrated/leadership/fact\\_sheet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.authcheckdam.pdf) (compiling a survey of the states with elective state judges positions).

149. See Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 172 (2014).

150. See *id.* at 176.

151. Amanda Terkel, *Indiana Governor Signs Anti-Gay "Religious Freedom" Bill at Private Ceremony*, HUFFINGTON POST (2015) (describing the Indiana law's history and purpose and stating its possible discriminatory effects on people of both different faith and sexual orientation from that of the business owner).

152. "Soft trade" – literally from French.

153. See Horwitz, *supra* note 154, at 177.

154. See *id.*

155. *Id.* at 178.

troubling outcome the Supreme Court has produced since *Plessy v. Ferguson*<sup>156</sup> when, for the first time, discrimination based on race was formally legalized. With *Hobby Lobby*, as it stands now, the Supreme Court placed a burden on a customer to conduct an extensive inquiry into the religious background of grocery store owners or else suffer embarrassment and humiliation.

#### IV. CONCLUSION

*Hobby Lobby* was an erroneous decision by the Supreme Court because it ignored the canons of the legislative and judicial process by putting RFRA above all other law. Congress created, and the Supreme Court legitimized, a law that established a principal that is equal in force to a constitutional principal. Such laws are allowed, of course, if they are correctly named and the proper procedure of their promulgation is followed. If Congress wanted to give the strict scrutiny test as applied to the Freedom of Religion Clause, the force it has in RFRA, Congress should have proposed it as an amendment to the Constitution. Once the amendment was properly introduced, it would have to have undergone a process of ratification by the states.<sup>157</sup> Only after this process is followed can the law have the effect that RFRA has under *Hobby Lobby*. Otherwise, if Congress is allowed to pass laws of the constitutional weight without following the amendment procedure, the value and authority of the Constitution would be close to nothing, which would uproot the tremendous work put into establishing our federal system by the Founding Fathers. The Supreme Court has made mistakes in the past, but it has been able to correct them and regain the respect of the People to its institution. The decision in *Hobby Lobby* was just that – a mistake that needs to be fixed.

The Founding Fathers adopted the First Amendment in 1791 to protect people's most cherished freedoms such as the freedom of speech and the freedom of religion from the government's interference. Since those times and until today, the First Amendment is considered

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156. 163 U.S. 537 (1896).

157. See U.S. Const. art. V ("The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.").



to be “the most important part of the Bill of Rights.”<sup>158</sup> Any changes to it, therefore, need much consideration and a robust discussion not only in Congress but also among the states. Before this process begins, the Supreme Court is the only body that could interpret the meaning of the Amendment; in the case of “religious freedom” the Supreme Court made it very clear that strict scrutiny is not the test that is used to limit government’s action. As for the debate about whether a corporation can hold religious beliefs, only one remark could be made in this Comment: around the time the United States Constitution was created, corporations, as a form of organization, were only available to the government,<sup>159</sup> so if the Founding Fathers considered the First Amendment to be applicable to corporations, such consideration would have been of the nature that the First Amendment protects the freedom of religion from corporations, not otherwise.

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158. *Constitution USA with Peter Sagal: The First & Second Amendments (PBS series)*, PBS, <http://www.pbs.org/tpt/constitution-usa-peter-sagal/rights/first-and-second-amendments> (last visited Apr. 18, 2016).

159. See Daniel J.H. Greenwood, *Neofeudalism: The Surprising Foundations of Corporate Constitutional Rights*, 2017 U. ILL. L. REC. 163, 171 (2017) (“In the early years after independence, states granted corporate charters for public works of infrastructure, such as bridges, turnpikes, colleges, and banks, which were thought to be beyond the capacities of private enterprise. Every charter had a quasi-governmental aspect, creating a ‘body politic’ to pursue a public task, often with special privileges stemming from its quasi-sovereign form.”).