Why We Can't Be Friends: Quakers, *Hobby Lobby*, and the Selective Protection of Free Exercise

Zachary A. Albun[†]

Introduction

Members of the Religious Society of Friends, commonly known as Quakers, have long sought exemptions from martial legal obligations because of their faith's pacifist "Peace Testimony."[1] In the United States, at least since the advent of the federal income tax, neither the Free Exercise Clause of the First Amendment nor any independent congressional statute has protected theo-pacifist refusal to pay taxes in support of the military or of specific military endeavors.[2] In the wake of the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.* (*Hobby Lobby*),[3] some Quakers have argued that such tax resistance now has a legal basis.[4] However, both the majority and

---

†. J.D. Candidate 2016, University of Minnesota Law School; B.A. 2012, Macalester College. I would like to thank Professor Jill Hasday for helping me get off on the right foot, and I would also like to thank Professors Ben Casper and Kate Evans for their invaluable general guidance. Special thanks to Andrew Glasnovich for his leadership and friendship and to Anne Dutton for her constancy and acumen. I am so grateful to the entire *Law and Inequality* staff for all of its hard work. Most of all, I would like to thank my parents.

1. *See, e.g.*, GEORGE FOX, THE JOURNAL OF GEORGE FOX 398–403 (John L. Nickalls ed., Cambridge Univ. Press 1952) (1694) (quoting "A Declaration from the Harmless and Innocent People of God, Called Quakers, 'Against All Plotters and Fighters in the World'" addressed to Charles II by George Fox and eleven other Quakers, Jan. 21, 1661); *see also* MARGARET E. HIRST, THE QUAKERS IN PEACE AND WAR 194–224 (1923), https://archive.org/details/quakersinpeacewa00hirsuoft (tracing the development of the Peace Testimony through various eighteenth-century wars); David Harding, *Quaker Tax Protesters Challenge Law*, ACCT. AGE (Mar. 10, 2005), http://www.accountancyage.com/aa/analysis/1763122/quaker-tax-protesters-challenge-law (discussing the refusal by modern-day Quakers to pay taxes in the United Kingdom).

2. *See* Adams v. Comm'r, 170 F.3d 173 (3d Cir. 1999); United States v. Phila. Yearly Meeting of the Religious Soc'y of Friends (*Yearly Meeting I*), 753 F. Supp. 1300, 1304 (E.D. Pa. 1990); *see also* United States v. Lee, 455 U.S. 252, 260 (1982) (stating the proposition in dicta).

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

4. *See, e.g.*, MManion, *If Quakers Had Petitioned the Supreme's*, DAILY KOS (July 03, 2014, 11:20 AM), http://www.dailykos.com/story/2014/07/03/1311529/-If-Quakers-Had-Petitioned-the-Supreme-s (questioning why the Court's logic did not extend to pacifist tax resistance); Sarah Ruden, *Scalia's Major Screw-up: How*

dissent in *Hobby Lobby* took great pains to specify that the decision should not apply to "tax cases."[5] This Note will argue that the majority and dissent both erred in this respect. Specifically, this Note will argue that the tax theory of mandates in *National Federation of Independent Businesses v. Sebelius* (*NFIB*)[6] and the Court's expansive reading of the "least restrictive means" test in *Hobby Lobby*[7] effectively vitiate the government's ability to override religious beliefs.[8] Thus, if the issue of Quaker theo-pacifist resistance to income taxes recurs, the Court should recognize that the Religious Freedom Restoration Act of 1993 (RFRA)[9] abrogated and superseded *United States v. Lee*[10] and *Adams v. Commissioner*.[11] However, the miniscule likelihood that this would actually occur[12] points to a fundamental—and arguably unconstitutional[13]—inequity in the Court's present jurisprudence: privileging certain religious beliefs, such as opposition to birth control, over others, such as pacifism.

Part I of this Note begins with a review of the political history of Quaker theo-pacifism, with an eye towards the United States' eventual abandonment of accommodations in its

---

SCOTUS Just Gave Liberals a Huge Gift, SALON (July 14, 2014, 3:45 PM), http://www.salon.com/2014/07/14/scalias_major_screw_up_how_scotus_just_gave_liberals_a_huge_gift/ (arguing that *Hobby Lobby* would protect pacifist Quakers from income tax liability).

5. *Compare Hobby Lobby*, 134 S. Ct. at 2784 ("[It is] untenable to allow individuals to seek exemptions from taxes based on religious objections to particular Government expenditures."), *with id.* at 2804 (Ginsburg, J., dissenting) (reiterating that *Lee*, 455 U.S. 252, is "a tax case" and turns on the particularities of a national system of taxation, but noting that "the *Lee* Court made two key points one cannot confine to tax cases").

6. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2594 (2012).

7. *See Hobby Lobby*, 134 S. Ct. at 2780–81 (quoting City of Boerne v. Flores, 521 U.S. 507, 516 (1997) (citing the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1)).

8. *See, e.g.*, Emp't Div. v. Smith, 494 U.S. 872 (1990) (holding that state laws criminalizing peyote, including sacramental peyote, did not violate the Free Exercise Clause because those laws were facially neutral); United States v. Lee, 455 U.S. 252 (1982) (holding that government interest in Social Security trumped an Amish employer's religious objections to Social Security taxes).

9. Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. §§ 2000bb-1–2000bb-4 (2012).

10. *Lee*, 455 U.S. 252.

11. Adams v. Comm'r, 170 F.3d 173 (3d Cir. 1999).

12. *See Hobby Lobby*, 134 S. Ct. at 2784 (discussing *Lee*'s holding with approval and stating that *Lee* and *Hobby Lobby* are "quite different").

13. *See* U.S. CONST. amend. XIV, § 1, cl. 2 (guaranteeing equal protection under the law); *see also* Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (ruling that the Equal Protection Clause applies to the federal government via the Due Process Clause of the Fifth Amendment).

generalized tax schemes. Part I then discusses Quakers' collective response to this abandonment through legislative initiatives including the Peace Tax Fund. Part II discusses the development of the First Amendment free-exercise doctrine in the mid-to-late twentieth century that led to Congress's adoption of RFRA in 1993. Part II also chronicles litigation concerning Quaker theo-pacifist tax resistance to illustrate how the adjudication of such claims has closely mimicked broader developments in free-exercise and RFRA doctrines. Finally, Part II demonstrates how *Lee*, a case concerning an Amish individual with a religious objection to Social Security, came to control Quaker tax-resistance cases. Part III discusses the Supreme Court's extremely controversial *Hobby Lobby* decision in light of its equally controversial decision in *NFIB* the prior year. Part III juxtaposes these two cases in order to highlight the implicit distinction the *Hobby Lobby* court draws between "tax" and "non-tax" cases. Part IV uses close reading and statutory interpretation to show that the distinction described in Part III is a false one and that provisions designated by Congress as "taxes," including the federal income tax, are wholly subject to *Hobby Lobby*'s precedential weight. Part V seeks to transcend the Court's false dichotomy and apply the *Hobby Lobby* holding to hypothetically re-litigated cases involving religious objections to Social Security and income tax provisions. Part V also contrasts its own conclusions with on-point, but utterly contrary, portions of *Hobby Lobby*'s dicta. Part VI reflects upon the discrepancy between *Hobby Lobby*'s dicta and its substantive analysis and concludes that the case's internal contradiction is likely a symptom of the Court's disregard for equal protection principles in this context. But before attempting to understand "why we can't be Friends,"[14] it is important to understand who the Friends are.

I. Background on Quaker Resistance to Taxation

A. Early History

The origins of the Quakers' pacifist "Peace Testimony" date to the founding of the sect, also known as the Society of Friends, or "Friends,"[15] by George Fox in the mid-seventeenth century.[16] The

14. *See* WAR, *Why Can't We Be Friends?*, *on* WHY CAN'T WE BE FRIENDS? (United Artists Records 1975).

15. *See, e.g.*, Defendant's Memorandum of Law in Support of Cross-Motion for Summary Judgement, United States v. Phila. Yearly Meeting of the Religious Soc'y of Friends (*Yearly Meeting II*), 322 F. Supp. 2d 603 (E.D. Pa. 2004) (No. 03-CV-4254), 2004 WL 3693418 (referring to Quakers and Friends interchangeably).

Peace Testimony directs Quakers to uniformly avoid supporting violence, since "all outward wars and strife" are considered contrary to Christian teaching.[17] The Testimony has broad applications, as Friends are directed to "beware of supporting preparations for war even indirectly."[18]

As early as 1755, a delegation of Quakers went to the Pennsylvania Assembly to warn lawmakers that they would not be able to comply with a tax that had been proposed to finance the Crown's military efforts in the French and Indian War.[19] Later, during the U.S. Civil War, Congress accommodated the religious objections of some Quakers by providing that the commutation fee, which was levied in the instance of absent tax payments, would be used to finance humanitarian projects: namely, the care of sick or wounded soldiers.[20] Eventually, Congress ceased its practice of assessing special "war taxes" to pay for periodic military expenditures and began financing the military through a generalized income tax.[21] However, many Quakers adhered to their pacifist principles and withheld funds, often doing so in proportion to their calculation of the military budget.[22] This triggered a series of lawsuits that challenged the constitutionality of the taxation, as well as the constitutionality of the various penalties flowing from such resistance.[23] Though free-exercise

16. *See id.*

17. FOX, *supra* note 1, at 399.

18. Brief for New York Yearly Meeting of the Religious Society of Friends as Amicus Curiae Supporting Petitioner at 7, Packard v. United States, 529 U.S. 1068 (2000) (No. 99-1391), 2000 WL 34015023.

19. *Id.* at 8.

20. Act of Feb. 24, 1864, ch. 13, sec. 17, 13 Stat. 6, 9; *see* Brief for New York Yearly Meeting of the Religious Society of Friends as Amicus Curiae Supporting Petitioner, *supra* note 18, at 13.

21. *See* U.S. CONST. amend. XVI. *But see* Marjorie E. Kornhauser, *For God and Country: Taxing Conscience*, 1999 WIS. L. REV. 939, 954 (discussing continued theo-pacifist nonparticipation in voluntary war finance schemes, such as war bonds, throughout the twentieth century).

22. *See* Jenney v. United States, 755 F.2d 1384, 1385 (9th Cir. 1985).

23. *See, e.g.*, *U.S. Sues Quaker Group over Taxes*, N.Y. TIMES (July 27, 2003), http://www.nytimes.com/2003/07/27/us/us-sues-quaker-group-over-taxes.html (discussing one such lawsuit); *see also* Adams v. Comm'r, 170 F.3d 173, 179 (3d Cir. 1999) (discussing the constitutionality of such taxation in general); *id.* at 180 (discussing the constitutionality of the penalties for failure to pay such taxes).

doctrine evolved substantially over the course of the twentieth century,[24] courts remain averse to allowing objections to income taxation based on religious freedom.[25]

B. A Modern Response: The Peace Tax Fund

Throughout the twentieth century, Quakers joined with other pacifist groups in proposing legislation to segregate their tax receipts into a non-military "Peace Tax Fund" that would enable pacifists to behave consistently with both their religious principles and the law.[26] In 1961, a group of Friends drafted a bill to divert conscientious objectors' tax receipts to the United Nations Children's Fund (UNICEF).[27] Notably, the bill proposed publicizing those who opted into the diversion program, as well as increasing their individual tax liability by five percent in order to discourage insincere use of the provision.[28] Each year from 1972 to 1999, some new version of the Peace Tax Fund proposal was introduced in Congress.[29] The concept of a Peace Tax Fund proved popular among Quakers, and some Friends even sought to place portions of their tax receipts in escrow subject to the establishment of a Peace Tax Fund.[30]

On June 25, 2013, Representative John Lewis introduced the 113th Congress's version of the Peace Tax Fund.[31] The bill directed the Secretary of the Treasury to establish a segregated Treasury account for the deposit of all monies "paid by or on behalf

---

24. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2791 (2014) (positing that the purpose of enacting RFRA in 1993 was to "restore the compelling interest test" announced in *Sherbert v. Verner*, 374 U.S. 398 (1963)).

25. *See, e.g.*, United States v. Lee, 455 U.S. 252, 260 (1982) ("The tax system could not function if denominations were allowed to challenge it because tax payments were spent in a manner that violates their religious belief."); *see also Yearly Meeting II*, 322 F. Supp. 2d 603, 612 (E.D. Pa. 2004) (ruling that wage garnishment is the "least restrictive means" of effectuating the compelling state interest in recovering funds unpaid because of theo-pacifist protest).

26. *See* Kornhauser, *supra* note 21, at 985; *see also Miscellaneous Tax Bills and Peace Tax Fund: Hearing Before the Subcomm. on Select Revenue Measures of the H. Comm. on Ways and Means*, 102d Cong. 128–30 (1992) (quoting testimony by Elenora Giddings Ivory, Director of the Washington Office of the Presbyterian Church, supporting the establishment of a Peace Tax Fund).

27. Kornhauser, *supra* note 21, at 986 (citations omitted).

28. *Id.* (citations omitted).

29. *Id.*

30. *See, e.g.*, Jenney v. United States, 755 F.2d 1384, 1385 (9th Cir. 1985) (holding that the individual income tax return of a couple who purported to hold a portion of their tax receipts in escrow due to their conscientious objection to war was a frivolous tax return that exposed the couple to civil penalties).

31. *See* H.R. 2483, 113th Cong. (2013).

of taxpayers who are designated conscientious objectors."[32] The bill neither required the Internal Revenue Service (IRS) to segregate the portion of an objector's tax payment that would go to military purposes nor designated how the monies collected should be allocated, other than to a "nonmilitary purpose."[33] Further, the bill would not have affected the federal government's ability to "replace" the lost funds by proportionally over-allocating money to military purposes from nonparticipating individuals' tax receipts.[34] In this respect, the bill compares to other accommodations that apply to Quakers, such as the allowance for conscientious objections to the selective service.[35] However, the bill died in committee.[36]

II. Free Exercise Between *Sherbert* and RFRA

A. The Initial Compelling Interest Test

Protection of free exercise of religion originates in the First Amendment.[37] Contemporary free-exercise jurisprudence flows largely from *Sherbert v. Verner*[38] and *Wisconsin v. Yoder*.[39] Per these two cases, the balancing test for free exercise depends on two factors: (1) whether a given government action "substantially burdens" the party's free exercise of religion, and, (2) if it does, whether government action is necessary to advance a compelling

32. *Id.* § 4.

33. *See* H.R. 2483.

34. *See id.*

35. *See, e.g.*, Wheaton Coll. v. Burwell, 134 S. Ct. 2806, 2812–13 (2014) (Sotomayor, J., dissenting) (quoting Univ. of Notre Dame v. Sebelius, 743 F.3d 547, 556 (7th Cir. 2014) (noting that a conscientious objector to the draft is unable to prevent the government from drafting someone else in his place).

36. *See* Congressional Research Service, *H.R. 2483: Religious Freedom Peace Tax Fund Act of 2013*, CONGRESS.GOV, https://www.congress.gov/bill/113th-congress/house-bill/2483 (last visited Nov. 22, 2015).

37. *See* U.S. CONST. amend. I; United States v. Lee, 455 U.S. 252, 252 (1982). *But see* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2761–62 (2014) (stating that Congress, in passing the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000ee-5(7)(A), created an independent statutory right and "effect[ed] a complete separation from First Amendment case law").

38. Sherbert v. Verner, 374 U.S. 398, 399 (1963) (holding that South Carolina could not deny unemployment compensation to a claimant who refused employment because her religious beliefs would not allow her to work on Saturdays).

39. Wisconsin v. Yoder, 406 U.S. 205, 235–36 (1972) (holding that the First and Fourteenth Amendments prevented a state from requiring Amish parents to go against Amish religious tenets and enroll their children, who had graduated eighth grade, in formal high school).

government interest.[40] However, beginning in the 1980s, the Court somewhat backtracked on free-exercise protections by limiting the use of the *Sherbert* test.[41]

In *Lee*, the Court held that the Free Exercise Clause did not allow an Amish employer to refrain both from withholding social security taxes and from receiving Social Security benefits for himself and his employees.[42] Specifically, the Court did not allow the plaintiff, an employer, to opt into a statutory exception to Social Security for self-employed Amish because "the Government's interest in assuring mandatory and continuous participation in and contribution to the social security system is very high,"[43] and because "[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief."[44] *Lee* has enormous implications for both Quaker tax resistance and the *Hobby Lobby* case.[45] In both *Lee* and *Hobby Lobby*, an employer cited personal religious objections to a statutory obligation and sought eligibility for a previously established exemption from that obligation.[46] Further, in both cases an employer's religious practices undermined the ability of employees to receive the benefits of a statutorily mandated program.[47] However, in *Lee*, unlike in *Hobby Lobby*,[48] the Court held that the compelling government interest in the program outweighed the employer's free-exercise rights.[49]

---

40. *See infra* Part III.

41. *See, e.g.*, Emp't Div. v. Smith, 494 U.S. 872, 882–84 (1990) (limiting application of the *Sherbert* test to "the unemployment compensation field"); Bowen v. Roy, 476 U.S. 693, 706–08 (1986) (declining to apply *Sherbert*). *But see, e.g.*, Thomas v. Review Bd. of Indep. Emp't Sec. Div., 450 U.S. 707, 717–19 (1980) (applying *Sherbert*, 374 U.S. at 403–04, to hold that Indiana's purported interests were not "sufficiently compelling to justify the burden upon [the plaintiff's] religious liberty").

42. *Lee*, 455 U.S. at 257.

43. *Id.* at 258–59.

44. *Id.* at 260.

45. *See id.* ("If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax.").

46. *Compare* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2763–64 (2014) (discussing the existence of, eligibility criteria for, and exemptions to the Affordable Care Act's (ACA) "contraceptive mandate," 45 C.F.R. § 147.131(a), (b)), *with Lee*, 455 U.S. at 255–56 (discussing the statutory exemption for Social Security, 26 U.S.C. § 1402(g), for self-employed Amish persons).

47. *See Hobby Lobby*, 134 S. Ct. at 2804 (Ginsburg, J., dissenting).

48. *See id.* at 2780 (majority opinion).

49. *See Lee*, 455 U.S. at 260.

B. Abandonment in Smith, *Overcompensation in RFRA?*

1. *Smith* Sets the Stage

Free-exercise protection arguably reached its nadir in *Employment Division v. Smith*.[50] Justice Scalia's majority opinion in that case stated that the *Sherbert* test should only be used for employment-compensation questions and should not apply to "religion-neutral laws that have the effect of burdening a particular religious practice."[51] Thus, such laws were per se constitutional with respect to free exercise.[52] Accordingly, the Court held that an Oregon law uniformly attaching criminal liability to the possession and consumption of peyote, and the state's subsequent denial of unemployment compensation to an individual who violated the law as part of a religious ceremony, did not violate free-exercise protections.[53] In reaching this conclusion, Justice Scalia drew largely from pre-*Sherbert* common law.[54] *Smith* seemed to reflect Justice Steven's *Lee* concurrence more so than *Lee*'s eight-justice majority opinion.[55] Justice O'Connor's *Smith* concurrence, joined in part by the case's dissenting Justices, more closely resembles the *Lee* majority's interpretation of *Yoder* and *Sherbert*,[56] as well as subsequent

---

50. 494 U.S. 872 (1990); *see also* City of Boerne v. Flores, 521 U.S. 507, 512 (1997) (stating that Congress "enacted RFRA in direct response" to *Smith*). *But see* René Reyes, *The Fading Free Exercise Clause*, 19 WM. & MARY BILL RTS. J. 725, 737 (2010) ("The nadir of the Free Exercise Clause was reached in [Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010)]."). Reyes's proposition seems doubtful because the exercise in question in *Martinez* took place in the context of a public university, see Christian Legal Soc'y v. Martinez, 561 U.S. 661, 667–68 (2010), rather than in private religious observance, as in *Smith*. 494 U.S. at 874.

51. *Smith*, 494 U.S. at 886 n.3.

52. *Id.*

53. *Id.* at 890.

54. *E.g.*, *id.* at 879 ("Conscientious scruples have not . . . relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities." (quoting Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594–95 (1940))), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

55. *See* United States v. Lee, 455 U.S. 252, 262 (1982) (Stevens, J., concurring) ("In my opinion, it is the objector who must shoulder the burden of demonstrating that there is a unique reason for allowing him a special exemption from a valid law of general applicability.").

56. *See id.* at 257 (majority opinion) ("The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." (citations omitted)).

developments in religious freedom law,[57] by emphasizing the balancing of compelling government interests with the burdens on individual exercise:

> In my view, however, the essence of a free exercise claim is relief from a burden imposed by government on religious practices or beliefs, whether the burden is imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws that, in effect, make abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community.[58]

A few months after *Smith*, the U.S. District Court for the Eastern District of Pennsylvania decided *United States v. Philadelphia Yearly Meeting of the Religious Society of Friends* (*Yearly Meeting I*).[59] Per *Smith*, the court held that war-tax resisters had no constitutional argument negating their income tax liability, because the income tax was a religion-neutral law that had the collateral effect of burdening religion.[60] So long as *Smith*'s "animus/neutrality" theory of free exercise prevailed, Quaker resistance to taxation remained a legally hopeless endeavor.[61]

2. The Religious Freedom Restoration Act

Congress passed RFRA in response to *Smith* and its ilk.[62] As stated in the Senate report, the purpose of the act was to overturn *Smith* and to "restore the compelling interest test as set forth in *Sherbert* . . . and . . . *Yoder* . . . ."[63] Unlike the holdings in those cases, which required that the government only show a "compelling state interest" in order to potentially infringe on free exercise,[64] the text of RFRA requires both a showing that the action is "in furtherance of a compelling governmental interest"[65]

---

57. *See* 42 U.S.C. § 2000bb-1(a)–(b) (2012).

58. *Smith*, 494 U.S. at 897 (O'Connor, J., concurring).

59. *See Yearly Meeting I*, 753 F. Supp. 1300, 1302–03 (E.D. Pa. 1990).

60. *Id.* at 1303–04.

61. *See, e.g.*, Montgomery v. Cnty. of Clinton, 743 F. Supp. 1253, 1260–61 (S.D. Mich. 1990) (dismissing plaintiff's claims on summary judgment based on *Smith*).

62. 42 U.S.C. §§ 2000bb–2000bb-4 (2012); *see also* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2761 (2014) ("Congress responded to *Smith* by enacting RFRA.").

63. *Hobby Lobby*, 134 S. Ct. at 2791 (Ginsburg, J., dissenting).

64. *See id.* (discussing the test as applied in *Sherbert* and *Yoder*).

65. 42 U.S.C. § 2000bb-1(b)(1) (2012); *see also Hobby Lobby*, 134 S. Ct. at 2767 ("By enacting RFRA, Congress went far beyond what this Court has held is constitutionally required." (citations omitted)).

and that it is the "*least restrictive means*" to further that interest.[66] By imposing a uniform review of whether or not a given law "substantially burdens" a religious exercise, RFRA can be understood as a rejection of Justice Scalia's theory in *Smith* that, in order to violate the Free Exercise Clause, a law must derive from an anti-religious animus, either against a specific religion or religion in general.[67] In requiring courts to uniformly evaluate whether facially neutral laws have indirectly burdened sincerely held religious beliefs, Congress essentially displaced Justice Scalia's *Smith* opinion with Justice O'Connor's *Smith* concurrence.[68]

Following RFRA's passage, the Third Circuit Court of Appeals heard *Adams v. Commissioner*.[69] In that case, a Quaker, Priscilla Adams, raised free-exercise objections to both her tax liability in support of military expenditures and the corresponding penalties for her failure to pay.[70] The *Adams* court held that the income tax substantially burdened Adams's free exercise, but it also found that "[t]he least restrictive means of furthering a compelling interest in the collection of taxes . . . is in fact, to implement that system in a uniform, mandatory way, with Congress determining in the first instance if exemptions are . . . built into the legislative scheme."[71] Therefore, according to the court, Adams had no free-exercise basis for exemption.[72] The difference in reasoning between *Adams* and *Yearly Meeting I* reflects RFRA's revision of *Smith*.[73] Indeed, district courts reached parallel conclusions in *Packard v. United States*[74] and in *United States v. Philadelphia Yearly Meeting of the Religious Society of Friends* (*Yearly Meeting II*).[75]

---

66. 42 U.S.C. § 2000bb-1(b)(2); *see also Hobby Lobby*, 134 S. Ct. at 2759.

67. City of Boerne v. Flores, 521 U.S. 507, 531 (1997) ("It is difficult to maintain that [such laws] are examples of legislation enacted or enforced due to animus or hostility to the burdened religious practices or that they indicate some widespread pattern of religious discrimination in this country.").

68. *See* Emp't Div. v. Smith, 494 U.S. 872, 897 (1990) (O'Connor, J., concurring).

69. 170 F.3d 173 (3d Cir. 1999).

70. *Id.* at 174–75.

71. *Id.* at 179.

72. *Id.* at 180.

73. *See Yearly Meeting I*, 753 F. Supp. 1300, 1302–03 (E.D. Pa. 1990).

74. *See* Packard v. United States, 7 F. Supp. 2d 143, 145 (D. Conn. 1998), *aff'd*, 198 F.3d 234 (2d Cir. 1999) (holding that the plaintiff, who claimed she was entitled to have her penalty fees returned after she refused to pay a tax for religious reasons, failed to make a claim under 26 U.S.C. § 6651).

75. *See Yearly Meeting II*, 322 F. Supp. 2d 603, 605 (E.D. Pa. 2004) (holding that RFRA did not exempt the defendant Quaker group "from honoring the [IRS]

III. *NFIB* and *Hobby Lobby*

A. An Introduction to Hobby Lobby

On the final day of its 2012 October Term, the Supreme Court issued one of its most controversial decisions in recent memory,[76] *Burwell v. Hobby Lobby Stores, Inc.*[77] *Hobby Lobby* concerned a provision of the Patient Protection and Affordable Care Act (ACA)[78] that required participating employers' group health plans to provide coverage for twenty contraceptive methods approved by the Food and Drug Administration (FDA), including "four . . . [that] may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus."[79] After the ACA's passage, employers in the form of closely held, for-profit, private corporations sought preliminary injunctions against tax penalties for providing health-care coverage minus the contraceptives at issue.[80] In *Conestoga Wood Specialties Corp. v. Secretary of the U.S. Department of Health and Human Services*, the Third Circuit held as a threshold matter that such employers could not assert free-exercise rights.[81] However, in *Hobby Lobby Stores, Inc. v. Sebelius*, the Tenth Circuit ruled not only that such employers could assert free-

---

levy" on an employee's salary, but noting that the group was not liable for a fifty percent penalty due to a dispute over the "legal effectiveness of the levy" (quoting 26 C.F.R. § 301.6332-1(b)(2))).

76. *E.g.*, Richard A. Epstein, *The Defeat of the Contraception Mandate in* Hobby Lobby, 2014 CATO SUP. CT. REV. 35, 35 ("*Burwell v. Hobby Lobby* is this year's most controversial Supreme Court decision.").

77. 134 S. Ct. 2751 (2014).

78. *Id.* at 2761.

79. *Id.* at 2762–63. *But see* Robin Abcarian, *The Craziest Thing About the Supreme Court's* Hobby Lobby *Decision*, L.A. TIMES (June 30, 2014), http://www.latimes.com/local/abcarian/la-me-ra-craziest-thing-about-hobby-lobby-20140630-column.html (discussing scientific literature stating that those four drugs do not cause abortion).

80. *Hobby Lobby*, 134 S. Ct. at 2765; *see also* 26 U.S.C. § 4980D (2012) (detailing the repercussions for noncompliance with the Health Resources and Service Administration's (HRSA) determinations for "group health plan requirements"); 42 U.S.C. § 300gg-13(a)(4) (2012) (requiring participating employers to cover "preventative care and screenings . . . with respect to women" as a distinct group); 45 C.F.R. § 147.130(a)(1)(iv) (2014) (empowering HRSA, an agency of the U.S. Department of Health and Human Services (HHS), to determine the forms of preventative care and the screenings that employers must cover for women).

81. Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't. of Health and Human Servs., 724 F.3d 377, 382–83, 389 (3d Cir. 2013), *overruled by* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

exercise rights,[82] but that RFRA precluded enforcement of the ACA with respect to the contraceptive mandate.[83] The Supreme Court consolidated review of the two cases to decide the matter.[84]

The Court's majority opinion, authored by Justice Alito,[85] affirmed the Tenth Circuit's opinion in *Hobby Lobby Stores, Inc. v. Sebelius*, including its holding[86] that the ACA's contraceptive mandate was not the "least restrictive" means to accomplish the "compelling governmental interest" of providing the contraceptive methods in question to the public.[87] The government contended that the issue fell under the purview of *Lee*, but Justice Alito's majority opinion rejected this argument because the "holding in *Lee*," like that of *Adams*, "turned primarily on the special problems associated with a national system of taxation."[88] It approvingly quoted *Lee*'s dicta that "[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief."[89]

In a narrow sense, this proposition was corroborated by the dissent, in which Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, emphasized that *Lee* "was a tax case and the court in *Lee* homed in on '[t]he difficulty in attempting to accommodate religious beliefs in the area of taxation,'"[90] but that the majority erred in "dismiss[ing] *Lee* as a tax case" because "[t]he *Lee* Court made . . . points one cannot *confine* to tax cases."[91] The dissent characterized the majority as "hold[ing] that commercial enterprises . . . can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs."[92] Thus, while the dissent argued that *Lee* ought to guide the Court's *Hobby Lobby* decision, it suggested that *Lee* made

82. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1129 (10th Cir. 2013) (en banc) (citing 1 U.S.C. § 1), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

83. *Id.* at 1146–47.

84. *Hobby Lobby*, 134 S. Ct. at 2764–67.

85. The majority opinion was joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas. *Hobby Lobby*, 134 S. Ct. at 2758.

86. *Hobby Lobby*, 723 F.3d at 1147.

87. *Hobby Lobby*, 134 S. Ct. at 2780–81 (citing 42 U.S.C. § 2000bb-1).

88. *Id.* at 2784.

89. *Id.* (alteration in original) (quoting United States v. Lee, 455 U.S. 252, 260 (1981)).

90. *Id.* at 2803–04 (Ginsburg, J., dissenting) (quoting United States v. Lee, 455 U.S. 252, 259 (1981)).

91. *Id.* at 2804 (emphasis added).

92. *Id.* at 2787.

several holdings that one *could* confine to tax cases. Taken in context, this amounted to an admission that the government interest at issue in *Lee* was not analogous to the government's interest in administering the ACA's contraceptive mandate, with its remedial taxes for noncompliance.[93]

Elsewhere, the majority opinion referred to these potential consequences of the employer's noncompliance with the relevant provisions of the ACA:

> If the companies continue to offer group health plans that do not cover the contraceptives at issue, they will be *taxed* $100 per day for each affected individual . . . . For Hobby Lobby the bill could amount to $1.3 million per day or about $475 million per year.[94]

The majority contrasted this outcome with another strategy that employers might use to avoid financing contraception: "dropping insurance coverage altogether" and causing their employees to seek coverage through one of the ACA's statutory health insurance exchanges.[95] In this instance, the "*penalties* would amount to roughly $26 million for Hobby Lobby."[96] The majority's careful deference to the distinction drawn between the punitive "tax" under 26 U.S.C. § 4980D and the punitive "penalty" under 26 U.S.C. § 4980H is undoubtedly a consequence of the Court's landmark ruling—or, more accurately, *one* of the Court's landmark rulings[97]—in *NFIB*.[98]

B. The Basis for the Tax Distinction in NFIB

NFIB concerned several provisions of the ACA, including the constitutionality of the Act's requirement that "most Americans . . . maintain 'minimum essential' health insurance coverage."[99] The individual mandate imposes, subject to statutory exemptions,[100] a "penalty" for failure to get minimum health insurance coverage.[101] Congress's classification of the remedial

---

93. *See id.* at 2803–04.

94. *Id.* at 2775–76 (majority opinion) (emphasis added) (citing 26 U.S.C. § 4980D).

95. *Id.* at 2776.

96. *Id.* (emphasis added) (citing 26 U.S.C. § 4980H).

97. *See, e.g.*, Stephen M. Feldman, *Chief Justice Roberts's Marbury Moment: The Affordable Care Act Case (*NFIB v. Sebelius*)*, 13 WYO. L. REV. 335, 335–46 (2013) (discussing *NFIB*'s holdings with respect to the federal government's commerce, spending, and taxing powers).

98. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2608 (2012).

99. *Id.* at 2571 (citing 26 U.S.C. § 5000A).

100. *See* 26 U.S.C. § 5000A(e) (2012).

101. 26 U.S.C. § 5000A(a)–(b) (2012).

measure as a "penalty" rather than as a "tax" has nuanced and somewhat confounding implications for Chief Justice Roberts's majority opinion.

In brief, *NFIB* held that Congress, in labeling the individual mandate's punitive measure a "penalty," precluded it from being treated as a tax for the purposes of the Anti-Injunction Act.[102] According to the Court, the determination of how "creatures of Congress's own creation . . . relate to each other is up to Congress."[103] The Court explicitly stated that this ruling was confined to the realm of statutory interpretation.[104] Thus, the majority held that, because the individual mandate functionally operated as a tax, the mandate was cognizable as a tax for the purposes of constitutional, but not statutory, classification.[105] The majority conceded that the individual mandate is regulatory and aimed at the promotion of particular individual conduct.[106] Still, it held that the mandate is not a "penalty," because that term "means punishment for an unlawful act or omission,"[107] and the ACA "need not be read to declare that failing to [purchase health insurance] is unlawful."[108]

RFRA is a statutory, rather than constitutional, provision,[109] and the remedial measures at issue in *Hobby Lobby* are labeled as taxes within their statutory framework.[110] Thus, it follows from *NFIB* that the remedial fines for failure to provide complete coverage should, as a general proposition, be considered tax provisions for the purposes of RFRA.[111] Justice Alito did not

---

102. *NFIB*, 132 S. Ct. at 2583 (discussing the inapplicability of the Anti-Injunction Act to the controversy as issue).

103. *Id.*

104. *See id.* ("It is true that Congress cannot change whether an exaction is a tax or a penalty for *constitutional* purposes simply by describing it as one or the other.").

105. *Id.* at 2595.

106. *Id.* at 2596.

107. *Id.* (citations omitted).

108. *Id.* at 2597.

109. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2756 (2014) ("[I]f RFRA's original text were not clear enough, the RLUIPA amendment surely dispels any doubt that Congress intended to separate . . . [it] from that in First Amendment case law.").

110. *See* 26 U.S.C. § 4980D (2012).

111. *See NFIB*, 132 S. Ct. at 2583. *But see* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1127 (10th Cir. 2013) (en banc) (holding that the remedial provisions were not a tax under the Anti-Injunction Act), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014). However, *NFIB* analyzed whether 26 U.S.C. § 4980D ought to be treated as a tax for the specific purposes of the Anti-Injunction Act, and did not use it for general statutory interpretation. *NFIB*, 132 S. Ct. at 2583.

address the tax/penalty dichotomy in his majority *Hobby Lobby* opinion.[112] However, the Tenth Circuit opinion in that case explicitly characterized the tax articulated in 26 U.S.C. § 4980D as "no more than a *penalty* for violating regulations related to health care and employer-provided insurance."[113] Thus, the Tenth Circuit's holding suggests some tension between *NFIB* and *Hobby Lobby* as to how to classify statutorily defined taxes with respect to other statutes.[114]

C. Hobby Lobby *Outside the Tax Issue*

Neither Justice Alito's majority nor Justice Ginsburg's dissent in *Hobby Lobby* limited analysis of *Lee* to the formal question of whether or not it applies as a "tax case."[115] Turning first to the issue of RFRA's breadth, the Court ruled that the least restrictive means test that the statute imposes on the federal government goes "far beyond" the constitutional protections for free exercise that the Court had previously articulated.[116] Still, the majority affirmed the outcome in *Lee*, stating:

> [I]f the issue in *Lee* were analyzed under RFRA framework, the fundamental point would be that there is *simply no less restrictive alternative to the categorical requirement to pay taxes*. . . . [T]he contraceptive mandate is very different. ACA does not create a large national pool of tax revenue for use in purchasing healthcare coverage.[117]

Subsequently, the Court rejected the government's contention that imposing the contraceptive mandate on closely held corporations was essential to the ACA's statutory scheme.[118] Instead, the Court ruled that the government had not demonstrated that the regulation was the "least restrictive" way to accomplish the compelling government interest of providing access

---

112. *See Hobby Lobby*, 134 S. Ct. at 2759–85.

113. *Hobby Lobby*, 723 F.3d at 1127–28 (emphasis added) (comparing the identical construction of the "penalty" HHS can impose on non-compliant insurers under 42 U.S.C. § 300gg-22(b)(2)(C)(i) with the "tax" imposed on non-compliant employers under 26 U.S.C. § 4980D(b)(1), and noting that other potential consequences of employer noncompliance are categorized as "penalties"); *see also id.* at 1152 (Gorsuch, J., concurring) (referring to § 4980D's provisions as "crippling penalties").

114. *See NFIB*, 132 S. Ct. at 2583 ("Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally.").

115. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2784 (2014); *id.* at 2804 (Ginsburg, J., dissenting).

116. *Hobby Lobby*, 134 S. Ct. at 2767 (majority opinion).

117. *Id.* at 2784 (emphasis added).

118. *Id.* at 2782.

to the birth control at issue.[119] The "less restrictive" means proposed by the majority included: (1) having the government directly purchase the contraceptives for any woman unable to attain them through private insurance, or (2) making closely held for-profit corporations eligible for the contraceptive mandate's opt-out provision already available to self-certified religious nonprofits under 45 C.F.R. § 147.131(b)(4).[120] The Court added that it saw no legal reason that prevented it from ruling that RFRA required the creation of a new government program.[121]

This final ruling, in particular, begs the question of how the Court might handle an argument that RFRA requires Congress to adjust income tax laws to include the Peace Tax Fund or something similar. However, this is not the only inconsistency between *Hobby Lobby*'s substantive ruling and its treatment of *Lee*. For instance, it is worth considering whether the contraceptive mandate's statutory punitive mechanism, 26 U.S.C. § 4980D, is actually a tax, and therefore whether Justice Alito draws a false distinction between "tax cases," such as *Lee*, and non-tax cases, such as *Hobby Lobby*.

IV. Is *Hobby Lobby* a Tax Case?

A. Substantive Background to the Tax Issue

Hobby Lobby Stores, Inc. v. Sebelius, the Tenth Circuit decision affirmed by the Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.*, discussed whether the tax imposed by 26 U.S.C. § 4980D is a "tax" provision within the meaning of the Anti-Injunction Act (AIA).[122] In a nutshell, the Tenth Circuit noted that Congress's use of the word "tax" created a "strong indication [that it] intend[ed] the AIA to apply,"[123] but ultimately concluded that 26 U.S.C. § 4980D is a purely regulatory tax.[124] Therefore, the panel

119. *Id.* at 2780.

120. *Id.* at 2782; *see also* Univ. of Notre Dame v. Burwell, 786 F.3d 606, 621–22 (7th Cir. 2015) (holding that, following *Hobby Lobby*, the opt-out provision did not substantially burden religious organizations).

121. *Hobby Lobby*, 134 S. Ct. at 2781.

122. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1126–28 (10th Cir. 2013) (en banc), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

123. *Id.* at 1127.

124. *See id.* ("The statutory scheme makes clear that the tax at issue here is no more than a penalty for violating regulations related to health care and employer-provided insurance . . . .").

held, it was not subject to the AIA.[125] As in *NFIB*,[126] the government never contended that the AIA should preempt a merits analysis,[127] and the Court only addressed the issue on the assumption that the AIA creates a general bar to subject matter jurisdiction.[128]

Though its method of analysis is instructive, the Tenth Circuit's conclusion that the tax codified in § 4980D is not a "tax" for the purposes of the AIA is inapposite to the relevant inquiry here: Whether or not the tax codified in § 4980D is a "tax" for the purposes of RFRA. At first, this question seems somewhat obtuse. Unlike the AIA,[129] the statutory language codifying RFRA does not use the term "tax,"[130] and neither did the underlying session law passed by Congress.[131] Additionally, neither the codified nor the session-law version of RFRA refers to non-tax "penalties."[132] Thus, one could quite reasonably argue that *Hobby Lobby Stores, Inc. v. Sebelius*'s[133] and *NFIB*'s[134] respective determinations of whether 26 U.S.C. §§ 4980D and 5000A(a)–(b) are "taxes" were a necessary

125. *Id.* at 1127–28; *see also id.* at 1152–59 (Gorsuch, J., concurring) (arguing that the AIA created a waivable defense for the government, rather than a jurisdictional limit on a court). Perhaps the most remarkable portion of Judge Gorsuch's concurrence, joined by Judges Kelly and Tymkovich, is his statement that Hobby Lobby's "claim in this case closely parallels claims the Supreme Court vindicated in *Thomas* and *Lee*." *Id.* at 1153. Judge Gorsuch then discussed Lee's contention, accepted by the Supreme Court, that the government could not contest the religious merits of Lee's objection to Social Security because "[i]t is not within 'the judicial function and judicial competence,' . . . to determine whether appellee or the Government has the proper interpretation of the Amish faith." *Id.* (citing United States v. Lee, 455 U.S. 252, 257 (1982) (quoting Thomas v. Review Bd. of Indep. Emp't Sec. Div., 450 U.S. 707, 716 (1981))). Thus, perhaps in using the word "case," Judge Gorsuch meant something like "aspect." Still, in grouping *Lee* with both *Thomas* and his opinion in *Hobby Lobby*, Judge Gorsuch inadvertently highlighted the apparent discrepancy between the Court's present religious freedom jurisprudence and its holding in *Lee*.

126. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

127. *Hobby Lobby*, 723 F.3d at 1128.

128. *See id.* at 1127.

129. *See* 26 U.S.C. § 7421 (2012).

130. *See* 42 U.S.C. § 2000bb-1 (2012).

131. *See* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-1041, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb–2000bb-4 (2012)).

132. *See* 42 U.S.C. § 2000bb-1; 107 Stat. at 1488–90.

133. *Hobby Lobby*, 723 F.3d at 1126.

134. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2583 (2012).

function of the AIA's statutory interpretation,[135] but that such an inquiry is asinine where a law makes no use of such formalist categories.

However, if there is no cognizable category of "tax cases" within the canon of free-exercise and RFRA precedents, it becomes difficult to ascertain the meaning of Justice Ginsburg's statements that *Lee* "was a tax case"[136] but that "the *Lee* Court made two key points one cannot confine to tax cases,"[137] or to make sense of her assertion that the majority holding would apply to every law "saving only tax laws."[138] This contradiction might be resolved if Justice Ginsburg's characterization of the majority was without basis. However, that does not seem to be the case. While Justice Alito rejected the theory that his opinion enabled "commercial enterprises . . . [to] 'opt out of any law (saving only tax laws),'" it was on the grounds that *Hobby Lobby* would be more *narrowly* applied than the dissent feared; he did not suggest that *Hobby Lobby* could affirmatively impact tax laws.[139] Furthermore, as a means to distinguish *Hobby Lobby* from *Lee*, Justice Alito pointed out that the latter "turned primarily on the special problems associated with a national system of taxation,"[140] suggesting that the contraceptive mandate creates no such national system. However, even assuming that there is some basis for a dichotomy between tax and non-tax provisions with respect to RFRA claims, *Hobby Lobby*'s attempt to distinguish its facts from "tax cases" (such as *Lee* and *Adams*) is dubious because, per *NFIB*, the contraceptive mandate *is itself a tax provision.*

B. The Contraceptive Mandate as a Tax Provision

The argument that 28 U.S.C. § 4980D ought to be interpreted as a tax provision is a relatively straightforward one. RFRA and the ACA "are creatures of Congress's own creation," and, therefore, the legally correct understanding of the relationship between the

---

135. *See* Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 273 (1995) ("Congress did not exempt the tax code from RFRA. Congress did not exempt the Social Security Act from RFRA. . . . Congress, by failing to exclude given programs or policies from RFRA, has implicitly conceded that none of those interests is categorically 'compelling.'").

136. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2804 (2014) (Ginsburg, J., dissenting).

137. *Id.* (implying that the remainder of *Lee*'s holding *can* be confined to "tax cases").

138. *Id.* at 2787.

139. *See id.* at 2760 (majority opinion).

140. *Id.* at 2784.

two is determined by Congressional intent.[141] Congress chose to categorize § 4980D as a tax.[142] That alone is significant, because other provisions in the ACA are labeled as "penalties," rather than "taxes."[143] "Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed Congress acts intentionally."[144] This simple canon provides the legal basis for theory that, generally speaking, § 4980D ought to be classified as a "tax" when interpreting other congressional statutes.[145] Of course, the specific content of the aforementioned statutes might undermine such a classification.[146]

The counterargument to this assertion would likely mimic the Tenth Circuit's discussion of the AIA.[147] Its decision in *Hobby Lobby Stores, Inc. v. Sebelius* contended that § 4980D is not actually a tax, but rather "no more than a penalty for violating regulations related to health care and employer-provided insurance . . . ."[148] To demonstrate the contraceptive mandate's punitive nature, the Tenth Circuit compared the monetary equivalence of § 4980D's provisions and "the maximum '*penalty*' that the Secretary of HHS can impose on non-compliant insurers."[149] It further compared the "tax" that providing employers would pay for refusing to cover the instant contraception, about $475 million per year, to the "tax" that employers would pay for dropping health care coverage entirely, about $26 million per year.[150] Additionally, the court noted: "[A] regulatory tax is just one of many collateral consequences that can result from a failure to comply with the contraceptive-coverage requirement."[151] Echoing the arguments in *NFIB*, one might

141. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2583 (2012).

142. *See* 28 U.S.C. § 4980D (2012).

143. *NFIB*, 132 S. Ct. at 2582–83.

144. *Id.* at 2583 (citing Russello v. United States, 464 U.S. 16, 23 (1983)).

145. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1127 (10th Cir. 2013) (en banc) (stating that Congress's use of the word "tax" created a strong presumption in favor of applying the AIA to the measure), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

146. *See id.* (holding that the specifics of the AIA rebutted that presumption).

147. *Id.*

148. *Id.*

149. *Id.* (emphasis added) (citing 42 U.S.C. § 300gg-22(b)(2)(C)(i)).

150. *Id.* at 1141; *see also id.* at 1125 (describing the provision, consistent with Congress's designation but inconsistent with *NFIB*, as a "penalty").

151. 42 U.S.C. § 300gg-22(a)(92) (2012); *Hobby Lobby*, 723 F.3d at 1127 (citing 29 U.S.C § 1132(a)(5) (2012)).

contend that the "tax" imposed by § 4980D is too obviously a regulatory, punitive mechanism to qualify as a "tax" for the purposes of statutory interpretation.[152]

The response to such an argument is that pure formalism controls here and that the actual function of § 4980D does not matter. *NFIB* expressly demonstrates that, with respect to other statutes, the Court should construe such provisions as "taxes" according to Congress's designation—*even when that designation is substantively erroneous.*[153] By engaging in a functionalist inquiry as to whether or not § 4980D really is a "penalty," the Tenth Circuit came close to ignoring the controlling opinion in *NFIB* in favor of its dissent, which contended that the AIA analysis was "more appropriately addressed in the significant constitutional context of whether it is an exercise of Congress's taxing power."[154] Indeed, the analytical crucible applied by the Tenth Circuit, whether the provision was essentially punitive or revenue-raising in purpose,[155] was used in *NFIB* for constitutional analysis, but expressly not for statutory interpretation.[156] Still, in fairness to the Tenth Circuit, the specific provisions of the AIA invite a functionalist analysis.[157] But even so, that analysis says that the AIA is an exception to the general rule, whereas RFRA, which contains no such qualifications as to "taxes,"[158] ought to be interpreted solely in terms of implied and explicit congressional intent.[159]

---

152. *Compare* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2596 (2012) ("In distinguishing penalties from taxes, this Court has explained that 'if the concept of penalty means anything, it means punishment for an unlawful act or omission.'"), *with Hobby Lobby*, 723 F.3d at 1127 ("The statutory scheme makes clear that the tax at issue here is not more than a penalty for violating regulations . . . ."). *But see NFIB*, 132 S. Ct. at 2583 (stating that functional analysis is appropriate for constitutional purposes, whereas formalist analysis is appropriate for statutory interpretation).

153. *See NFIB*, 132 S. Ct. at 2583 (citing Bailey v. Drexel Furniture Co., 259 U.S. 20, 36–37 (1922)) (discussing the application of the AIA to the litigation flowing from the Child Labor Tax Law, even after that law was ruled to exceed Congress's authority under the taxing power).

154. *Id.* at 2656 (Scalia, J., dissenting).

155. *Hobby Lobby*, 723 F.3d at 1127.

156. *See NFIB*, 132 S. Ct. at 2583; *id.* at 2595–97.

157. *See* 26 U.S.C. § 7421 (2012); *see also* Cohen v. United States, 650 F.3d 717, 727 (D.C. Cir. 2011) ("[The AIA] requires a careful inquiry into the remedy sought, the statutory basis for that remedy, and any implication the remedy may have on assessment and collection."); Robertson v. United States, 582 F.3d 1126, 1127–28 (7th Cir. 1978) (ruling that the AIA does not apply to "purely regulatory tax[es]").

158. *See* Paulsen, *supra* note 135, at 273.

159. *See NFIB*, 132 S. Ct. at 2583; *id.* at 2595–97.

That *Lee* was decided on constitutional grounds, rather than according to RFRA, might mean that *Lee* is a "tax case" in a discrete category that *Hobby Lobby* cannot be.[160] Undoubtedly, Social Security and income taxes fall within *NFIB*'s boundaries of the taxing power,[161] whereas the constitutional basis for the contraceptive mandate is far less certain.[162] However, as explained in detail below,[163] RFRA collapses the relevance of any such distinctions.[164] 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."[165] Congress has not authorized such an exception to either the Social Security Act[166] or the income tax code.[167] Therefore, while *Lee* itself is not subject to RFRA, the statutory provisions at issue in *Lee,* as well as in *Adams*, are subject to RFRA.[168] Furthermore, as Congress designated Social Security contributions,[169] income taxes,[170] and § 4980D liabilities as "taxes," so too are they "taxes" for the purposes of RFRA. Thus, to the extent *Adams* was a "tax case" for RFRA analysis, it follows that *Hobby Lobby* was as well.

C. The Ultimate Insignificance of the Tax Issue

In demonstrating that *Hobby Lobby* is itself a "tax case," the method of statutory interpretation mandated by *NFIB* undermines Justice Ginsburg's categorical assertions that *Lee*'s holding could be largely confined to tax cases[171] and that *Hobby Lobby*'s holding would not apply to "tax laws."[172] To Quaker tax resisters, such recognition begs a delicious question: In holding that RFRA

160. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2787 (2014) (noting that *Lee* was decided under free exercise).

161. *See NFIB*, 132 S. Ct. at 2595–97.

162. *See id.*

163. *See infra* Part IV.C.

164. *See* Paulsen, *supra* note 135, at 273.

165. 42 U.S.C. § 2000bb-3(a)–(b) (2012).

166. *See* Adams v. Comm'r, 170 F.3d 173, 179 (2d Cir. 1999).

167. *See* Miller v. Comm'r, 114 T.C. 511, 517–18 (2000).

168. *See* Paulsen, *supra* note 135, at 273 (noting that "Congress did not exempt" the Social Security Act or income tax from RFRA).

169. *See* United States v. Lee, 455 U.S 252 (1982) (referring to Social Security collection as a "tax").

170. *See Adams*, 170 F.3d at 179.

171. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2804 (2014) (Ginsburg, J., dissenting).

172. *Id.* at 2787.

compelled the non-enforcement of a specific tax provision (§ 4980D), did the *Hobby Lobby* court suggest that RFRA can compel the non-enforcement of tax provisions in general? Such an argument takes the form of the following syllogism: (1) In *Hobby Lobby*, the Court ruled that RFRA means free-exercise objections trumped the statutory duty to comply with § 4890D; (2) section 4890D is a tax provision for the purposes of RFRA; (3) Social Security and the income tax are tax provisions for the purposes of RFRA; and (4) RFRA means that free-exercise objections trump the statutory duty to comply with Social Security and income taxes. The problem with such a view is that it depends on the same faulty premise as its converse: Justice Ginsburg's and, to a lesser extent, Justice Alito's view that RFRA makes a distinction between "tax" and "non-tax" cases.[173] In reality, RFRA makes no such distinction.[174]

As initially passed, RFRA applied to all previous and subsequent federal and state laws, except for those laws explicitly exempted.[175] While the Supreme Court ruled in *City of Boerne v. Flores* that RFRA is unconstitutional as applied to the states, RFRA still occupies a superior position relative to every other federal law, save the laws into which Congress has inserted a statutory exemption.[176] This is the only distinction contemplated by the law.[177] The reason *Hobby Lobby* may impact litigation with facts analogous to those in *Lee* and *Adams* is not because each case concerned "tax provisions," but rather because each case concerned federal laws lacking statutory exemptions for the accommodation of religious exercise.[178] In terms of legal formalism, *Hobby Lobby* has no greater relevance for tax laws than for any other federal law.

Thus, the tax issue ultimately reveals itself as a cypher. One cannot plausibly argue that *Hobby Lobby* has a special significance for tax laws. But the legal logic undermining that argument cuts both ways. If a statutory provision's classification as a "tax" is non-dispositive—or even irrelevant—in the analysis of whether the provision violates RFRA, then Justices Alito and Ginsburg

173. *See id.* at 2787; *id.* at 2784 (majority opinion).

174. *See* RFRA 42 U.S.C. § 2000bb-3(a)–(b) (2012).

175. *Id.* § 2000bb-3(a).

176. *See id.* § 2000bb-3(a)–(b); *see also* Paulsen, *supra* note 135, at 283–84 (emphasizing RFRA's superiority as a "super statute").

177. *See* RFRA § 2000bb 3(a)–(b).

178. *See* 26 U.S.C. § 4980D (2012); *cf.* Adams v. Comm'r, 170 F.3d 173, 179 (2d Cir. 1999) (indicating that RFRA exempts neither Social-Security nor income taxes).

have no basis in legal formalism for insulating "tax cases" such as *Lee*, *Adams*, *Yearly Meeting I*, *and Yearly Meeting II* from the effects of the Court's decision in *Hobby Lobby*, even assuming that 26 U.S.C. § 4890 is a punitive, non-tax penalty.

Hobby Lobby represents the Court's most recent analysis of RFRA. And, as a pure matter of statutory hierarchy, RFRA trumps the ACA, the Social Security Act, and the income tax statutes alike.[179] The majority's generalized claim that "recognizing religious objections to particular expenditures from general tax revenues" would "threaten the viability" of any general tax provision's statutory scheme[180] does not recognize the common-law segregation of "tax cases." Rather, common-law tax cases merely represent a recurring obstacle to proving that the government's burdening action is not the "least restrictive means" to achieve a compelling state interest.[181]

Though much of the foregoing analysis might now seem pointlessly academic, it is illustrative of a subtle point: A lower court hearing a case similar to *Lee* might read *Hobby Lobby* as implying that *Lee* stands isolated from and unmodified by RFRA.[182] However, it would be an error for that court to follow *Adams* and dismiss the case with a pithy citation to *Lee* due to its belief that Social Security and income tax provisions are (still) categorically beyond RFRA's impact.[183] Instead, the court would need to engage in a case-by-case analysis weighing the modified *Sherbert* factors.[184] RFRA demands nothing less.

---

179. Paulsen, *supra* note 135, at 283–84.

180. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2784 (2014). *But see id.* at 2787 (Ginsburg, J., dissenting) (criticizing the majority's interpretation of the common-law segregation of "tax cases").

181. *See id.*

182. *See* Adams v. Comm'r, 170 F.3d 173, 179 (2d Cir. 1999) ("[T]he nature of the compelling interest involved—as characterized by the Supreme Court in *Lee*—converts the least restrictive means inquiry into a rhetorical question that has been answered by the analysis in *Lee*.").

183. *See Hobby Lobby*, 134 S. Ct. at 2784; *see also id.* at 2784 n.43 (indicating that RFRA abrogated *Lee* in part).

184. *See, e.g.*, *id.* at 2791 (Ginsburg, J., dissenting) ("RFRA's purpose is specific and written into the statute itself. The Act was crafted to restore the compelling interest test as set forth in *Sherbert* . . . .").

V. Lifting the Veil: A "Post-Tax Case" Reading of *Lee* and *Adams*

A. The Supreme Court's Alternative Theories for Distinguishing Hobby Lobby

Perhaps acknowledging the previously discussed nonexistence of a legal basis for distinguishing *Lee* as a "tax case," in *Hobby Lobby*, Justice Alito repeatedly reminded his readers that *Lee* concerned free exercise, rather than RFRA.[185] Of course, a contemporary *Lee* analogue *would* be decided under RFRA, so the majority continues, "our holding in *Lee* turned primarily on the special problems associated with a national system of taxation."[186] As previously discussed, one cannot meaningfully interpret this statement as a per se rule that RFRA cannot compel exceptions to national systems of taxation.[187] After all, under a formalist view, the contraceptive mandate is one such system.[188] Rather, *Hobby Lobby* must mean that the specific tax at issue in *Lee*—Social Security—requires uniform participation in order to effect the underlying compelling government interest.[189]

Oddly, Justice Alito did not discuss the Social Security system, but instead borrowed from *Lee*'s analogy to the income tax: "Because of the enormous variety of government expenditures funded by tax dollars, allowing taxpayers to withhold a portion of their tax obligations on religious grounds would lead to chaos."[190] The majority then pointed to a purportedly crucial distinction between the income tax and the contraceptive mandate: The contraceptive mandate does not create a single pool of funds in order to provide healthcare coverage.[191] According to Justice Alito, because employers fund plans directly rather than through a national system, the viability of the ACA, unlike that of the income tax, is not threatened by religious accommodation.[192] However, Justice Ginsburg pointed to *Lee* to support the proposition that an employer's voluntary entry into the world of commerce renders his or her beliefs subject to statutory schemes governing that activity, and that the Court should not recognize

185. *See id.* at 2784 n.43 (majority opinion).
186. *Id.* at 2784.
187. *See supra* Part III.C.
188. *See Hobby Lobby*, 134 S. Ct. at 2784.
189. *See id.*
190. *Id.*
191. *Id.*
192. *Id.*

religious exemptions that "operat[e] to impose [an] employer's religious faith on [his or her] employees."[193] Nevertheless, like the majority, the dissent viewed *Lee* as indicative of a baseline for religious freedom—specifically, one beyond which the federal government is no longer able to function.[194]

The Supreme Court's fractured consensus does not reflect judicial unanimity that the underlying factual circumstances in *Lee* and *Hobby Lobby* easily distinguish the two cases. In *Hobby Lobby Stores, Inc. v. Sebelius*, the Tenth Circuit held:

> Hobby Lobby and Mardel stand in essentially the same position as the Amish carpenter in *Lee*, who objected to being forced to pay into a system that enables someone else to behave in a manner he considered immoral. That is precisely the objection of Hobby Lobby . . . .[195]

Despite his own efforts to preserve *Lee*, Justice Alito admits that the portion of *Lee*'s holding concerning the superimposition of commercial actors' personal beliefs upon the statutory scheme governing others in that activity is "squarely inconsistent with" RFRA.[196]

B. Applying a Hobby Lobby *Analysis to* Lee

1. General Equivalence of the Cases

It is telling that, when purporting to examine the application of RFRA to the facts in *Lee*, the majority discussed the income tax rather than Social Security.[197] The factors considered by the Court in determining whether the contraceptive mandate was the "least restrictive means" map closely to those that would have to be considered for a contemporary rehearing of *Lee*.[198] In other words, the same reasoning used by the Court in *Hobby Lobby* would compel a resolution for the plaintiff in *Lee*.

As Justice Ginsburg pointed out: "Congress amended the Social Security Act in response to *Lee*" so as to allow "Amish sole proprietorships and partnerships (but not Amish-owned

193. *See id.* at 2804 (Ginsburg, J., dissenting).

194. *See id.* at 2805–06. Of course, unlike the majority, the dissent views *Hobby Lobby* as compromising that baseline. *See id.*

195. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1141 (10th Cir. 2013) (en banc), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); *see also id.* at 1153 (Gorsuch, J., concurring).

196. *See Hobby Lobby*, 134 S. Ct. at 2784 n.43.

197. *See id.* at 2784 ("The obligation to pay the social security tax initially is not fundamentally different from the obligation to pay income taxes." (quoting United States v. Lee, 455 U.S. 252, 260 (1981))).

198. *See id.*

corporations)" to opt out of Social Security taxes and benefits for co-religionist employees "who likewise seek an exemption and agree to give up their Social Security benefits."[199] Thus, there are three foreseeable plaintiffs for contemporary litigation analogous to *Lee*: (1) Amish-owned closely held corporations seeking permission to opt into the expanded exemption under RFRA; (2) Amish employers seeking to apply the exemption to all of their employees, regardless of employee consent; and (3) plaintiffs seeking both.

Each of these plaintiffs would be identically situated to those in *Hobby Lobby* with respect to the essential points of that decision. First, there is no legal basis for categorically excluding Amish-owned closely held corporations, as *Hobby Lobby* definitively held that closely held corporations can exercise religious beliefs and that such beliefs are protected by RFRA.[200] Furthermore, *Hobby Lobby* makes clear that any non-consenting employee's statutory rights to his or her Social Security benefits are subordinate to his or her employer's "super-statutory" rights under RFRA.[201] Although the majority opinion cited *Cutter v. Wilkinson* to concede that "courts must take adequate account of the burdens a requested accommodation may impose on non-beneficiaries,"[202] it then arguably removed the teeth from that principle by ruling that, because the government might re-describe *any* burdening activity as a benefit to third parties, RFRA's prohibition on undermining third-party rights is not absolute.[203] This, in turn, gives the court ample leeway to decide which third-party benefits are real and which are products of government sophistry in the ensuing "compelling interest" and "restrictive means" inquiries.[204] Assuming sincerity of belief and substantial burdening, the government would have no recourse to dispute the theological validity of a plaintiff's categorical opposition to Social

199. *See id.* at 2804 n.29 (Ginsburg, J., dissenting).

200. *See id.* at 2767–74 (majority opinion).

201. *See id.* at 2784 n.43 ("Under RFRA, when followers of a particular religion choose to enter into commercial activity, the Government does not have a free hand in imposing obligations that substantially burden their exercise of religion."). The majority never discussed the legal significance of the consent of those employees whose statutory right to birth control was at issue. *Id.* at 2759–85.

202. *Id.* at 2781 n.37 (citing Cutter v. Wilkinson, 544 U.S. 709, 720 (2005)).

203. *See id.*

204. *See id.*

Security.[205] The only remaining issues, then, are the determinations of: (1) the precise "government interest" contemplated in and challenged by the suit, and (2) whether the government's challenged policy is the "least restrictive" means of effecting that goal.

2. Compelling Government Interest

Read narrowly, the majority opinion in *Lee* characterized the government interest at issue as the "assuran[ce of] mandatory and continuous participation in and contribution to the social security system."[206] However, *Lee* itself concerned the availability of a statutory exemption to the usually mandatory Social Security rules.[207] *Hobby Lobby* suggests that the continued tolerated existence of exemptions undermines the possibility that the government has a compelling interest in the uniform enforcement of a statute.[208]

Another possibility is that the *Lee* Court may have also considered the balance Congress struck between religious freedom and Social Security functionality to allow certain Amish, but not others, to opt into the Social Security exemption.[209] Under this view, Congress's decision to cap a statutory opt-out provision at a certain point implies that a compelling interest exists in limiting the availability of the provision beyond said point.[210] Stated differently, there was "a 'compelling interest' in the uniform application of [the Social Security] scheme simply because that [was] the way Congress drafted the statute."[211] Though this may well have been the compelling interest the Court contemplated in *Lee*, *Hobby Lobby* makes clear that equivalent interests are no

---

205. *See* United States v. Lee, 455 U.S. 252, 257 (stating that it is "not within 'the judicial function and judicial competence'" to determine the proper interpretation of religious beliefs (quoting Thomas v. Review Bd. of Indep. Emp't Sec. Div., 450 U.S. 707, 716 (1981))).

206. *Id.* at 251–52.

207. *Id.* at 260–61.

208. *See Hobby Lobby*, 134 S. Ct. at 2780 (discussing the existence of "grandfathered" health-care plans that provide no contraceptive coverage).

209. *See* Paulsen, *supra* note 135, at 272–73; *see also Lee*, 455 U.S. at 259 ("[B]alance must be struck between the values of the comprehensive social security system, which rests on a complex of actuarial factors, and the consequences of allowing religiously based exemptions. To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good.").

210. *See* Paulsen, *supra* note 135, at 272–73.

211. *Id.* at 272.

longer available.[212] There, the Court assumed that "guaranteeing cost-free access to the four challenged contraceptive methods" was a compelling interest.[213] The fact that Congress had balanced the religious freedoms of certain employers against financial realities in a specific way (by carving out an exemption for religious nonprofits but not for closely held for-profit corporations) did not create a compelling interest in the policy of excluding closely held corporations.[214]

Instead, the *Hobby Lobby* Court assumed that there was a compelling interest in the targeted policy outcome of the statutes: cost-free access to the challenged contraceptives. Whereas the Department of Health and Human Services (HHS),[215] Justice Kennedy's concurrence,[216] and subsequent decisions[217] have characterized the government interest as comprised of broad policy outcomes, this conception of "compelling interest" was rejected by the *Hobby Lobby* majority, which suggested that when identifying compelling interests, courts must apply a "focused inquiry [that] requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law to the . . . particular claimant."[218] In other words, the compelling interest must be achieved not just by the program as a whole, but by the application of the burdening activity to the claimant in the instant case. Thus, per *Hobby Lobby*, in a case with facts analogous to *Lee*, the compelling interest considered by a court would be something similar to an interest in providing late-life funds to the employers challenging the law, as well as to their employees.[219] Of course, as seen in *Hobby Lobby*, this outcome-

212. *See Hobby Lobby*, 134 S. Ct. at 2782–83 (affording no deference to Congress's and HRSA's decisions not to allow closely held for-profit corporations to exempt themselves from the contraceptive mandate per 45 C.F.R. § 147.131(b)).

213. *Id.* at 2781.

214. *See id.* at 2782–83.

215. *Id.* at 2779 (identifying the policy interests behind the contraceptive mandate as "public health" and "gender equality").

216. *Id.* at 2785–86 (Kennedy, J., concurring) ("[T]he Government's compelling interest in providing insurance coverage [is] to protect the health of female employees . . . .").

217. *See, e.g.*, Priests for Life v. U.S. Dep't of Health and Human Servs., 772 F.3d 229, 257 (D.C. Cir. 2014) ("The government contends that the regulations are amply supported because they arise at the intersection of overlapping governmental interests, each of which is compelling: public health, and women's well-being.").

218. *Hobby Lobby*, 134 S. Ct. at 2779.

219. *See id.*

driven approach has the effect of granting courts broad leeway to determine whether the government could find a "less restrictive means" to accomplish its ends.

3. Least Restrictive Means

According to the *Hobby Lobby* Court, the government failed to demonstrate that the punitive mechanism in § 4980D was the least restrictive means to guarantee free access to the challenged birth control.[220] In so doing, the Court looked for possible alternatives to accomplish the compelling interest.[221] In its dicta discussing *Lee*, the Court stated that allowing religious-freedom exceptions of any sort to Social Security would eviscerate the government interest therein.[222] But the facts of *Lee* are much closer to those of *Hobby Lobby* than the majority let on.

Examining *Lee* under RFRA, the *Hobby Lobby* majority held that "the fundamental point would be that there simply is no less restrictive alternative to the categorical requirement to pay taxes," suggesting that this categorical imperative necessarily overrides *any* religious objections.[223] However, that cannot possibly be the case, because Social Security exemptions existed at the time of *Lee*'s decision and have been subsequently expanded within a tolerable margin.[224] These exceptions and exemptions to Social Security belie the fact that, in practice, there is no "categorical requirement to pay [identical] taxes."[225] Indeed, the Court's logic here only makes sense if the "compelling interest" is of the sort that, in *Hobby Lobby*, it recognized RFRA as superseding. The *Hobby Lobby* dissent had a subtly different test, requiring the government to demonstrate only that there is "no less restrictive, *equally effective* means" of accomplishing the contemplated

---

220. *Id.* at 2780–81.

221. *See id.* at 2781–82.

222. *Id.* at 2784.

223. *Id.*

224. *See id.* at 2804 n.29 (Ginsburg, J., dissenting) (discussing Congress's subsequent expansion of the Social Security exemption at issue in *Lee*).

225. *See* Univ. of Notre Dame v. Burwell, 786 F.3d 606, 621 (7th Cir. 2015) (Hamilton, J., concurring) ("We have a long tradition of governing in ways that accommodate the free exercise of religion . . . . From conscientious objector status in the military draft to federal and state tax codes . . . our governments at every level have long made room for religious faith by allowing exceptions from generally applicable laws."). *But see Hobby Lobby*, 134 S. Ct. at 2784 (stating that RFRA does not mandate religious accommodations for income taxation).

interest.[226] But, perhaps because it risks swallowing RFRA's unique super-statutory application, this is not the test expressly adopted by the majority.[227]

Thus, were a *Lee* analogue to come before a court, *Hobby Lobby* suggests the court would need to consider *any* plausible alternative means for the government to achieve its narrowly defined policy goal: providing late-life funds to both the employers challenging the law and to their employees. Congress could ameliorate this problem by requiring exempted employers to personally guarantee the difference in lost benefits to employees who do not consent to opting out of Social Security, and/or by authorizing the IRS or Social Security Administration to periodically audit a privately held account designated to accrue funds for private payments to employees in lieu of Social Security.[228] True, this system might not be as effective as the current Social Security System. But HHS plausibly contended in *Hobby Lobby* that allowing privately held businesses to opt out of the mandate and expanding the red tape associated with the supplementary government contraceptives threatened to undermine contraceptive access.[229]

Yet the Court rejected this notion, essentially assuming that the government-run supplementary system would be as efficiently run and that all employers would comply with their attendant duties to "provid[e] information and coverage."[230] Similarly, the exemption for Amish sole proprietorships and partneships,[231] which has continuously accommodated Amish business owners without apparent incident, shows that the expansion of that exemption, more so than the new, "untested" *Hobby Lobby* exemption,[232] is worthy of the benefit of the Court's doubt. In any

226. *Hobby Lobby*, 134 S. Ct. at 2801 (Ginsburg, J., dissenting) (emphasis added); *see also id.* at 2792–93 (contending that the compelling interest test imposed by RFRA is not stricter than the free-exercise compelling-interest test in the *Sherbert* line of cases).

227. *See id.* at 2767–68 (majority opinion) (construing RFRA to go "far beyond" free-exercise protections).

228. *Cf. id.* at 2781 (suggesting that RFRA can require the legislature to modify an existing program or to create an entirely new program).

229. *See id.* at 2802 (Ginsburg, J., dissenting).

230. *See id.* at 2782–83 (majority opinion).

231. 26 U.S.C. § 3127(2012).

232. 45 C.F.R. § 147.131(a) (2015).

case, *Hobby Lobby* interpreted RFRA to require the government to *affirmatively* prove that "plausible" alternative means, such as any of the alternatives proposed here, are not possible.[233]

Finally, the *Lee* Court expressed grave concern that Social Security could not withstand a de facto transformation into a voluntary system.[234] But this criterion only makes sense in the context of the generalized, broad policy goals that the *Hobby Lobby* majority foreclosed from consideration in the "focused inquiry" of RFRA analysis.[235] Furthermore, it is unlikely that enough employers have sincere religious objections to Social Security such that the broader system's integrity would be threatened.[236] However, even if such concerns are fair game, whether or not the accommodation sought would threaten Social Security would need to be addressed on a case-by-case basis, and the burden of proof would be on the government.[237] Assuming the government would not be able to satisfy that burden, after *Hobby Lobby*, it strains reason to think that RFRA does not protect a modern-day Edwin Lee's right to withdraw himself and his employees from Social Security.[238]

C. Applying a Hobby Lobby *Analysis to* Adams

1. Compelling Interest

Even if *Hobby Lobby* effectively vitiated *Lee*'s proscription on religious-freedom objections to Social Security taxation, it does not automatically follow that it had the same effect upon religious-freedom objections to income taxation. The income tax code is vastly more complex than the Social Security Act,[239] and the

---

233. *See Hobby Lobby*, 134 S. Ct. at 2780–81.

234. *See* United States v. Lee, 455 U.S. 252, 258–59 (1982).

235. *See Hobby Lobby*, 134 S. Ct. at 2779.

236. *See id.* at 2774 (stating that sincerity, though not disputed in the instant case, is a relevant part of RFRA inquiry); *see also* Paulsen, *supra* note 135, at 278 (arguing that administrative burdens do not rise to the level of compelling interests unless the burdens themselves threaten the viability of some other "paramount interest").

237. *See Hobby Lobby*, 134 S. Ct. at 2781–83 (holding that the government failed to demonstrate that proposed accommodations to its statutory scheme would not work). However, the Court did not rule on whether the plaintiffs successfully demonstrated that such accommodations *would* work. *Id.*

238. *See id.*

239. *Compare* 26 U.S.C. §§ 1–1400U-3 (tax code), *with* 42 U.S.C. §§ 301–1397mm (2012) (Social Security Act). For additional comparison, see CSX Corp. v. United States, 518 F.3d 1328, 1343 (Fed. Cir. 2008).

federal government's interests and means in administering the income tax are different from those in administering Social Security.[240]

However, as foreshadowed by Chief Justice Burger's[241] and Justice Alito's[242] analogies between the Social Security Act and income tax laws, the analysis is fundamentally the same. There is no doubt—and indeed, courts have held—that income tax incidentally but substantially burdens Quakers' sincerely held religious beliefs.[243] And, as with Social Security,[244] Congress has not designated the income tax as exempt from RFRA.[245] Therefore, taxing Quakers and using those receipts to finance "any and all outward wars and strife"[246] is only permissible if the government has a compelling interest in doing so, and it accomplishes that interest by the least restrictive means available.[247]

The government cannot meaningfully argue that it has a compelling interest in the uniform collection of taxes when the tax code is riddled with so many exemptions and exceptions that tax receipts are literally individualized.[248] So too with Social Security. Further, there is nothing specifically compelling about the *particular* constellation of statutes and federal regulations that comprise the tax code and the IRS's collection mechanisms.[249] Instead, when such cases arise, the government will have to assert a compelling interest in the policy outcome contemplated by income tax law as narrowly applied to the "particular claimant"

---

240. *See* United States v. Lee, 455 U.S. 252, 260 (1982) (stating that the difference between Social Security tax and income tax is that "social security tax revenues are segregated for use only in furtherance of the statutory program"). *But see id.* ("There is no principled way, however, for purposes of this case, to distinguish between general taxes and those imposed under the Social Security Act.").

241. *See id.*

242. *See Hobby Lobby*, 134 S. Ct. at 2784 ("The obligation to pay the social security tax initially is not fundamentally different from the obligation to pay income taxes." (quoting *Lee*, 455 U.S. at 260)).

243. *E.g.*, *Yearly Meeting II*, 322 F. Supp. 2d 603, 608–09 (E.D. Pa. 2004) ("The record demonstrates that the levy on Ms. Adams's wages substantially burdened the Yearly Meeting's exercise of religion within the meaning of RFRA.").

244. *See* Miller v. Comm'r, 114 T.C. 511, 517–18 (2000).

245. *See* Adams v. Comm'r, 170 F.3d 173, 179 (3d Cir. 1999).

246. *See* Brief for New York Yearly Meeting of the Religious Society of Friends as Amicus Curiae Supporting Petitioner at 8, Packard v. United States, No. 99-1391 (U.S. 2000), 2000 WL 34015023.

247. *See Hobby Lobby*, 134 S. Ct. at 2780–81.

248. *Cf. Miller*, 114 T.C. at 516–19 (discussing the importance of assigning individual Social Security Numbers in order to uniformly implement the federal tax system).

249. *See Hobby Lobby*, 134 S. Ct. at 2782–83.

challenging the law.[250] In this case, the compelling interest would be the ability of the federal government to use the tax receipts *of the burdened individual* to finance his or her share of its liabilities and appropriations.[251] The only remaining question would be whether this goal could be accomplished by a means other than using Quakers' tax receipts to finance violent activities.

2. Least Restrictive Means

The answer to that question is straightforward. There may be no "less restrictive alternative to the categorical requirement to pay taxes,"[252] but there is no categorical requirement to pay the *same* taxes. In *Adams*, the Third Circuit held: "The least restrictive means of furthering a compelling interest in the collection of taxes . . . is in fact, to implement that system in a uniform, mandatory way, *with Congress determining in the first instance if exemptions are . . . built into the legislative scheme.*"[253] The Supreme Court expressly rejected that reasoning in ruling that courts can, where applicable, interpret RFRA to require Congress to create new programs.[254] If, under RFRA, courts do not need to defer to Congress's decision *not* to accommodate certain religious objections to laws of general applicability, *Hobby Lobby* frees courts to play the role of legislator and to determine whether any other policy might afford an accommodation.

Thus, there is no clear reason why a federal court should not rule that RFRA requires Congress to authorize the Peace Tax Fund, or something similar. The most recent Peace Tax Fund proposal[255] likely would not affect the federal government's ability to allocate funds.[256] And because *Hobby Lobby* placed the burden of proof on the government,[257] the government would have to demonstrate that the proposal *would* hinder its ability to allocate funds. Thus, it was bizarre for the Court to imply that the income

---

250. *See id.* at 2779.

251. *See id.*

252. *Id.* at 2784.

253. Adams v. Comm'r, 170 F.3d 173, 179 (3d Cir. 1999) (emphasis added).

254. *See Hobby Lobby*, 134 S. Ct. at 2780; *see also* Paulsen, *supra* note 135, at 272–73 (arguing that, following RFRA, the government does not have a compelling interest in a particular set of exemptions just because Congress arrived upon that set).

255. *See* H.R. 2483, 113th Cong. (2013).

256. It would only affect the government's ability to allocate funds if the total budget for "impermissible uses" exceeded the sum of the gross of tax receipts of those who did not opt into the Peace Tax Fund.

257. *See Hobby Lobby*, 134 S. Ct. at 2781–82.

tax is insulated from RFRA claims. The Court's view that, in light of the many possible expenditures of income tax, "allowing taxpayers to withhold a portion of their tax obligations on religious grounds would lead to chaos,"[258] contradicts *Hobby Lobby*'s requirement that compelling interests be cognized in terms of the "application of the challenged law to . . . the *particular* claimant."[259] So, just as the *Hobby Lobby* majority required the government to prove that it could not afford to directly provide the challenged contraceptives to the effected women, a court operating in *Hobby Lobby*'s wake ought to require the government to prove that it cannot afford to establish and administer the Peace Tax Fund.

Conclusion: Compelling State Interests, but Compelling to *Whom*?

Under *Hobby Lobby*, the government must prove that there is no possible "less restrictive" alternative to the statutory scheme challenged in a RFRA claim—even if such an alternative would be less effective at achieving the government's interest than the challenged federal law.[260] However, the most striking thing about *Hobby Lobby* is how the Court banally assumed as dicta that the government will meet its burden when Social Security and income tax provisions are challenged under RFRA.[261]

In his concurring opinion in *University of Notre Dame v. Burwell*, decided after *Hobby Lobby*, Seventh Circuit Judge David Hamilton emphasized the importance of religious accommodation in the American democratic scheme:

> Any student of United States history learns the central roles that religious faith and tolerance have played . . . in the founding of the British colonies and the modern States and the federal Republic . . . . From conscientious objector status in the military draft to federal and state tax codes, from compulsory school attendance laws to school lunch menus, from zoning law to employment law and even fish and wildlife rules, our governments at every level have long made room for religious faith by allowing exceptions from generally applicable laws. Through such exceptions and accommodations, we respect diverse faiths, and we govern with reasonable compromises that avoid unnecessary friction between law and faith.[262]

---

258. *Id.* at 2784.
259. *Id.* at 2779 (emphasis added).
260. *Id.* at 2781–83.
261. *Id.* at 2784.
262. Univ. of Notre Dame v. Burwell, 786 F.3d 606, 621 (7th Cir. 2015)

Here, Judge Hamilton reflected upon the broad, historical application of the principle accepted by the Supreme Court that "the Constitution . . . affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."[263] The fundamental question underlying this Note is why this principle has not, and, in the current Court's view, cannot apply to Quaker pacifism, even though RFRA supersedes all non-exempted federal statutes, tax and non-tax provisions alike.[264] It is not clear why the Court appeared to definitively rule on the extension of *Hobby Lobby* to theo-pacifist tax resistance when that issue arose within the case and controversy only because HHS made an analogy to *Lee*.[265] That the Court overreached in *Hobby Lobby*'s dicta might not be so egregious if the majority's conclusions within that dicta flowed from the fundamental logic of the decision. However, as the above analysis demonstrates, the two directly contradict each other. This begs the question of what, if not legal logic, caused the *Hobby Lobby* majority (and, indeed, the entire Court)[266] to preemptively insulate *Lee* and *Adams*, rather than allow for the possibility—or an argument on the merits—that RFRA religious accommodation extends to the tax system. One possible answer is as prosaic as it is taboo: political considerations.

Social Security has long been called the "third rail of politics," implying that any measures taken to tinker with its fragile formulation will result in the tinkerer's demise.[267] At the other end of that spectrum, Quaker pacifists have lobbied for accommodations since the seventeenth century, and have been rebuked since (at least) the nineteenth century.[268] In 2014, Social Security and defense spending together constituted forty-two percent of the federal budget, with $615 billion going to defense spending alone.[269] The contraceptive mandate, on the other hand, was a component of one of the most controversial pieces of

---

(Hamilton, J., concurring).

263. Lynch v. Donnelly, 465 U.S. 668, 673 (1984).

264. *See* Paulsen, *supra* note 135, at 283–84.

265. *See Hobby Lobby*, 134 S. Ct. at 2783–84.

266. *Id.* at 2787 (Ginsburg, J., dissenting).

267. *See, e.g.*, Jared S. Childers, *Touching the Third Rail: An Analysis of Social Security and the Recently Revealed U.S.-Mexico Social Security Totalization Agreement*, 26 PENN ST. INT'L L. REV. 227, 231–32 (2007) (explaining the criticisms of and controversy surrounding the Social Security system).

268. Kornhauser, *supra* note 21, at 983.

269. *See* CTR. ON BUDGET & POLICY PRIORITIES, POLICY BASICS: WHERE DO OUR FEDERAL TAX DOLLARS GO? 1 (2015), http://www.cbpp.org/sites/default/files/atoms/files/4-14-08tax.pdf.

legislation in the nation's history and was passed at a time when American women's access to healthcare—specifically, to birth control—was rapidly declining.[270] In lieu of any legal reasons why *Hobby Lobby* is an aberration, the underlying controversies surrounding the ACA and reproductive rights provide countless political reasons why it is.[271] In theory, political considerations should have no place in the Court's jurisprudence. Of course, it would be naïve to think Chief Justice Roberts came to his novel conclusion in *NFIB* absent political calculation of any kind.[272] But there, such reasoning was arguably tolerable under accepted canons of constitutional interpretation.[273] However, as RFRA's cheerleaders in the judiciary[274] and academia[275] have made clear, RFRA tolerates no such interpretations: Absent express exemption, the law operates uniformly.[276]

Yet the Social Security Act and income tax laws are not the only statutory provisions the *Hobby Lobby* majority sought to insulate from its own holding.[277] Indeed, despite the aggressive application of RFRA to *Hobby Lobby*'s facts, the Court went out of its way to limit the opinion's breadth.[278] Accordingly, perhaps the so-called "tax cases" are not the odd exceptions to *Hobby Lobby*'s expansive holding, but *Hobby Lobby* is itself the exception to a more timid general interpretation of RFRA's approach to "compelling government interest."[279] To wit, the same majority

---

270. *See* Saundra Young, *White House Set To Reverse Health Care Conscience Clause*, CNN (Feb. 27, 2009, 5:31 PM), http://www.cnn.com/2009/POLITICS/02/27/conscience.rollback/index.html?eref=ib_us.

271. *See* Steve Heilig, *The Abortion Wars: Men Who Trust Women*, HUFFINGTON POST (Feb. 1, 2014, 5:59 AM), http://www.huffingtonpost.com/steve-heilig/the-abortion-wars_b_4319839.html (discussing the ongoing culture war over birth control).

272. *See, e.g.*, Feldman, *supra* note 97, at 337 ("Chief Justice Roberts established key constitutional doctrine . . . yet he did so in a politically diplomatic manner.").

273. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2594 (2012) (stating that the Court should afford acts of Congress a constitutional interpretation so long as that interpretation was "fairly possible," even if it is not the "natural" interpretation).

274. *See, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1146 (10th Cir. 2013) (en banc) ("Congress thus obligated itself to *explicitly exempt* later-enacted statutes from RFRA, which is conclusive evidence that RFRA trumps those federal statutes when RFRA has been violated."), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

275. *See, e.g.*, Paulsen, *supra* note 135, at 250–53 (explaining that RFRA is a "super statute" that supersedes previously and subsequently enacted federal laws).

276. *See Hobby Lobby*, 723 F.3d at 1146.

277. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2783 (2014).

278. *Id.* at 2760.

279. *Id.*

opinion that disparaged HHS's putative compelling interests in "public health" and "gender equality" as "couched in very broad terms"[280] went on to declare: "The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race."[281] Likewise, Justice Kennedy suggested that *Hobby Lobby* may not apply to federal rules requiring immunization because of the "interest [in] combat[ting] the spread of infectious diseases."[282] Is a governmental interest in "women's health"[283] or "gender equality"[284] really any more amorphous than a categorical interest in an "equal opportunity to participate in the workforce,"[285] in "combatting . . . diseases,"[286] or in having citizens "pay taxes"?[287] In theory, once the Court assumes that there *is* a compelling government interest, those compelling interests ought to be treated equally under RFRA's balancing test.[288]

Any discussion of why the Justices approach the government's interest in providing contraceptives, and subsequent religious objections thereto, anomalously is inherently speculative when compared to those interests listed above. However, there may be an objective clue in the vocabulary used in the opinions with respect to the value—or lack thereof—of the challenged contraceptives. Justice Kennedy's concurrence acknowledged HHS's argument that the government had a compelling interest in "providing insurance coverage that is necessary to protect the health of female employees"; but, in his view, the Court assumed only that the mandate furthered a "compelling interest in the health of female employees."[289] Yet if the majority opinion actually

280. *Id.* at 2779.

281. *Id.* at 2783.

282. *Id.* at 2783 (Kennedy, J., concurring).

283. *Id.* at 2788 (Ginsburg, J., dissenting).

284. *Id.* at 2779 (majority opinion).

285. *Id.* at 2783.

286. *Id.* at 2783 (Kennedy, J., concurring).

287. *Id.* at 2784.

288. *See* 42 U.S.C. § 2000bb-1 (2012); *see also* U.S. CONST. amend. XIV, § 1 (guaranteeing equal protection under the law); Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (holding that the Equal Protection Clause of the Fourteenth Amendment applies to the federal government via the Fifth Amendment). While I do not contend the Supreme Court's *Hobby Lobby* decision violated the Fourteenth Amendment per se, the Court's inconsistent approach to beneficiaries of different government interests is, at minimum, contrary to the spirit of equal protection. *See Hobby Lobby*, 134 S. Ct. at 2801 (Ginsburg, J., dissenting) ("[N]o prior decision under RFRA[] allows a religion-based exemption when the accommodation would be harmful to others . . . .").

289. *Hobby Lobby*, 134 S. Ct. at 2786–87 (Kennedy, J., concurring).

made such an assumption, would it not have said so? Eschewing even the slightest reference to the ACA's goal of ensuring that all women have access to adequate healthcare, the majority assumed only a compelling interest in "guaranteeing cost-free access to the four challenged contraceptive methods."[290] In light of *Hobby Lobby*'s internal contradictions, it seems unlikely that the majority assumed even that much.

290. *Id.* at 2780.