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## RELIGIOUS EMPLOYERS AND LABOR LAW: BARGAINING IN GOOD FAITH?

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*This Article explores an important question that follows in the wake of last Term's decision in Hobby Lobby v. Burwell: When employee rights under the National Labor Relations Act ("NLRA") and employer religious commitments*

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*conflict, which will have priority? This is a surprisingly difficult question to which multiple statutory regimes arguably apply. First, there is the NLRA itself. The NLRA does not exempt religious employers on its face, but the Supreme Court nonetheless construed it to exclude certain religious employers in NLRB v. Catholic Bishop. Catholic Bishop is remarkable: as an exercise of constitutional avoidance the Court adopted an implausible reading of the NLRA in order to avoid an improbable constitutional question. In addition, the decision's vague language has proven difficult to apply to new contexts, leading to pervasive conflicts between the National Labor Relations Board and the circuit courts over its meaning. Yet, despite these many flaws, Catholic Bishop has held fast, even as the law of religious exercise has overtaken it.*

*There is also the Religious Freedom Restoration Act ("RFRA"), which allows exemptions from federal laws that conflict with religious adherents' sincere beliefs, unless there is no less restrictive means of satisfying a compelling government interest. But RFRA's application leaves many unanswered questions in the labor law context: Does the NLRA qualify as the least restrictive means of satisfying a compelling government interest? Should accommodations be available even if they shift costs onto employees? And if so, how could accommodations be structured to protect religious adherents while minimizing burdens on others?*

*This Article offers answers to the complex questions associated with statutory religious accommodation claims arising in the labor law context. First, it proposes a new framework for courts to interpret legislative enactments that arguably override constitutional avoidance decisions, like Catholic Bishop. Applying this principle, it argues that courts should treat RFRA—a statute that makes clear Congress's preferred method of accommodating religious objectors to labor law—as having legislatively overturned Catholic Bishop. Second, the Article analyzes the thorny questions that will arise when courts apply RFRA in the NLRA context. Ultimately, the Article concludes that the NLRA constitutes the least restrictive means of furthering a compelling government interest. However, recognizing that some appellate courts may reach the opposite conclusion, it also presents a model of limited accommodations for religious employers that are carefully shaped to minimize burdens on employees.*

#### INTRODUCTION

In the wake of the Supreme Court's high-profile decision in *Burwell v. Hobby Lobby Stores, Inc.*,<sup>1</sup> courts and federal administrative agencies will face new types of religious exemption claims from non-profit and closely held for-profit employers. It is a virtual certainty that some of these employers will claim exemption from their obligations under the National Labor Relations Act

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<sup>1</sup> 134 S. Ct. 2751 (2014).

(“NLRA” or “the Act”)—generally, to respect workers’ rights to engage in concerted activity for mutual aid and protection, and to bargain collectively with elected unions<sup>2</sup>—because of conflicts between these obligations and their religious beliefs.<sup>3</sup>

But the National Labor Relations Board (“NLRB” or “the Board”) and the lower federal courts will not be drawing on a blank canvas when they address the scope of employer religious exemptions from labor law; they have previously considered a range of arguments that certain employers should be exempt from labor law for religious reasons, with varying results.<sup>4</sup> Many of these cases attempt to apply a thirty-five-year-old Supreme Court decision, *NLRB v. Catholic Bishop of Chicago*,<sup>5</sup> in which the Court construed the NLRA to exempt parochial high school teachers as a matter of constitutional avoidance.<sup>6</sup> That relatively short decision created considerable disagreement among the Board and the lower federal courts that persists to this day; more than three decades after *Catholic Bishop* was announced, it is still disputed whether and to what extent it applies outside the context of religious elementary and secondary school teachers.<sup>7</sup> In fact, the Board’s most recent attempt to faithfully apply *Catholic Bishop* resulted in a sharply divided December 2014 decision in the *Pacific Lutheran University* case involving adjuncts at that religiously affiliated university.<sup>8</sup>

Arguably, then, religious non-profits have two possible statutory sources of exemption from the NLRA: the Act itself (as construed by the Court in *Catholic Bishop*) and the Religious Freedom Restoration Act (“RFRA”).<sup>9</sup> But this Article argues that this two-track approach is contrary to congressional intent and that there is instead only one statutory source of labor law exemptions for religious employers.<sup>10</sup> Specifically, it argues that the Board and the courts should treat *Catholic Bishop*—in which the Court applied an especially aggressive form of constitutional avoidance to the NLRA—as having been legislatively overruled by RFRA.

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<sup>2</sup> 29 U.S.C. § 158(a), (d) (2012).

<sup>3</sup> There will be some number of employers that conclude (or have already concluded) that aspects of their obligations under the NLRA conflict with their sincere religious beliefs. Other employers may be tempted to feign religious objections in order to obtain what they perceive as a competitive advantage.

<sup>4</sup> *Infra* Section I.A.3.

<sup>5</sup> 440 U.S. 490 (1979).

<sup>6</sup> *Id.* at 507.

<sup>7</sup> *Infra* Section I.A.2.

<sup>8</sup> Pac. Lutheran Univ., 361 N.L.R.B. No. 157 (2014).

<sup>9</sup> There is also the possibility of a freestanding constitutional claim. A small number of employees and employers may be exempt from labor law under the ministerial exception or the church autonomy doctrine, while others may attempt a Free Exercise claim. These arguments are briefly discussed in Section I.A.4 *infra*, but they are generally beyond the scope of this Article.

<sup>10</sup> *Infra* Section I.C.

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Aggressive constitutional avoidance decisions—those in which courts adopt improbable or even contraindicated statutory interpretations—are sometimes justified by normative preferences to protect constitutional values. However, those normative preferences only go so far—court decisions that effectively rewrite federal statutes to avoid constitutional questions should not then become practically impervious to congressional override. Instead, Congress should be able to overcome these decisions relatively easily by simply indicating its preferred approach for dealing with the problem. Following this rule, *Catholic Bishop* was overruled by RFRA, with which Congress amended the NLRA (like all other federal statutes) to indicate how employers' requests for religious exemptions should be treated. Accordingly, RFRA, along with the First Amendment itself, should determine when employers (both for- and non-profit) are entitled to religious accommodation of their obligations under the NLRA; *Catholic Bishop* should no longer play a role in this determination.

This Article then discusses key remaining questions about religious employers and labor law under RFRA. In short, RFRA entitles persons (including closely held corporations) to accommodations when federal law substantially burdens exercise of their sincere religious beliefs, unless the federal law is the least restrictive way of furthering a compelling government interest. Thus, several questions will arise when employers assert religious exemptions from their obligations under the NLRA, which the Article addresses in turn. It begins by discussing threshold inquiries concerning how the NLRB and the courts can determine whether religious objections to collective bargaining are sincere—particularly considering the economic incentive to make insincere claims—and whether an employer's religious exercise has been substantially burdened. Then, the Article turns to the critical question of whether the NLRA is the least restrictive means of furthering a compelling government interest. The Board and a few U.S. Courts of Appeals have previously found that the NLRA meets this standard, although with limited explanation. This Article takes up where they left off, fleshing out the argument that the NLRA is the least restrictive means of furthering the compelling state interests in labor peace and worker voice.<sup>11</sup>

However, it is possible (and even likely) that some courts will reach the opposite conclusion and decide that the NLRA is not the least restrictive means of meeting any compelling government interest. Accordingly, this Article goes on to discuss how the Board might structure religious accommodations to minimize impingements on employees' rights to act collectively for improved working conditions.<sup>12</sup>

This Article has two parts. Part I first reviews *Catholic Bishop* and its reception before the NLRB and the courts. It then explains why the best justifications for the canon of constitutional avoidance assume that Congress has the practical ability to legislatively overturn avoidance decisions. Finally, it

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<sup>11</sup> *Infra* Section II.C.

<sup>12</sup> *Infra* Section II.D.

argues that these principles lead to the perhaps surprising conclusion that RFRA should be read as having overturned *Catholic Bishop*. Part II discusses the application of RFRA in the context of labor law.

### I. RELIGIOUS EXEMPTION CLAIMS IN THE LABOR LAW CONTEXT

The NLRB's recent decision in *Pacific Lutheran University* to accept jurisdiction over a group of adjunct professors at a religiously affiliated university is just the most recent example of the Board's ongoing struggle to apply the NLRA's exemption for certain religiously affiliated employers, which was read into the statute by the Supreme Court in *Catholic Bishop*.<sup>13</sup> This Part explains how that exemption came to be and criticizes the unwieldy and opaque *Catholic Bishop* decision. Then, it argues that principles of statutory interpretation and basic separation of powers should lead to the conclusion that RFRA legislatively overruled *Catholic Bishop*.

#### A. *Non-Profit Religious Employers and Catholic Bishop*

The NLRB has a longstanding policy of declining jurisdiction over employees "who are involved in effectuating the religious purpose" of their employer.<sup>14</sup> However, the Board does assert jurisdiction over employees of religiously affiliated employers when those employees have essentially secular jobs.<sup>15</sup> The modern history of this approach to religious exemptions from labor law begins in 1979 with the Supreme Court's decision in *NLRB v. Catholic Bishop of Chicago*.<sup>16</sup> As this Section discusses, *Catholic Bishop's* legacy was to set labor law on a separate—and at times quite divergent—path than other types of religious exemption claims brought by employers.

##### 1. *NLRB v. Catholic Bishop*

*Catholic Bishop* involved a challenge to the NLRB's assertion of jurisdiction over lay teachers working at parochial high schools.<sup>17</sup> After canvassing the Board's historical position on union representation within

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<sup>13</sup> *Pac. Lutheran Univ.*, 361 NLRB No. 157, slip op. at 14 (2014) (holding that adjunct professors were not exempt from NLRA coverage because the university did not hold them out as performing specific religious functions).

<sup>14</sup> *Jurisdictional Standards*, NLRB, <http://www.nlr.gov/rights-we-protect/jurisdictional-standards> [<http://perma.cc/R6ZZ-MBQF>]; see also *St. Edmund's Roman Catholic Church*, 337 N.L.R.B. 1260, 1260 (2002) ("[T]he Board will not assert jurisdiction over nonprofit, religious organizations.").

<sup>15</sup> *E.g.*, *Catholic Soc. Servs.*, 355 N.L.R.B. 929, 930 (2010) (holding that the Board has jurisdiction over employee who did not "inculcate and teach religious values").

<sup>16</sup> 440 U.S. 490, 507 (1979) (holding that the Board did not have jurisdiction over teachers in a parochial high school).

<sup>17</sup> *Id.* at 491.

educational institutions,<sup>18</sup> the Court turned to the statutory interpretation question of whether Congress intended the NLRB to assume oversight over labor relations between unions and religious employers. It began this discussion from the premise that “it is incumbent on us to determine whether the Board’s exercise of its jurisdiction here would give rise to serious constitutional questions.”<sup>19</sup> As others have observed (and as is discussed in greater detail below), this is a particularly strong application of the “modern” constitutional avoidance canon, in which the Court assesses whether potential constitutional problems are present, and, if so, seeks a statutory construction—even an improbable one—that eliminates the need to answer those questions.<sup>20</sup>

Applying this principle, the *Catholic Bishop* Court’s discussion of the potential First Amendment problems posed by permitting the NLRB to assert jurisdiction over parochial high schools was cursory at best. The Court first identified in its precedent “the critical and unique role of the teacher in fulfilling the mission of a church-operated school.”<sup>21</sup> In support of this proposition, it cited *Lemon v. Kurtzman*,<sup>22</sup> which had held that certain public subsidy programs for secular education at religious schools violated the Establishment Clause.<sup>23</sup> The Court proceeded to discuss whether, under *Lemon*’s “excessive entanglement” test, “the exercise of the Board’s jurisdiction presents a significant risk that the First Amendment will be infringed.”<sup>24</sup> Here, the Court focused on two potential entanglements: first, that the Board would assess school administrators’ motives in deciding later unfair labor practice proceedings; and second, that the Board would determine which

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<sup>18</sup> Specifically, the Court observed that the Board declined jurisdiction over educational institutions until 1970, when it first asserted jurisdiction over private post-secondary educational employers, extending that rule to primary and secondary schools shortly thereafter. *Id.* at 497 (“The Board now asserts jurisdiction over all private, nonprofit, educational institutions with gross annual revenues that meet its jurisdictional requirements whether they are secular or religious.”).

<sup>19</sup> *Id.* at 501.

<sup>20</sup> Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1949 (1997) (contrasting “modern avoidance,” in which “the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress,” from “classical avoidance,” in which the Court uses the potential constitutional problem as a tiebreaker to choose among competing reasonable interpretations of a statute (quoting Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Constr. Trades Council, 485 U.S. 568, 575 (1988))); see also William N. Eskridge, Jr., & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 599 (1992) (stating that the Burger Court applied modern constitutional avoidance principle “most prominently” in *Catholic Bishop*).

<sup>21</sup> *Catholic Bishop*, 440 U.S. at 501.

<sup>22</sup> 403 U.S. 602 (1971).

<sup>23</sup> *Id.* at 613-14 (holding that the subsidies in question came with promises that would require policing, which involves “excessive entanglement” between church and state).

<sup>24</sup> *Catholic Bishop*, 440 U.S. at 502.

aspects of school administration were mandatory subjects of bargaining.<sup>25</sup> The Board had not decided either of these questions in *Catholic Bishop* itself; both were hypothetical questions that the Court feared might arise in the future. Nonetheless, the Court concluded, quoting *Lemon*, that “[t]he substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid.”<sup>26</sup>

Having identified “serious First Amendment questions” that would follow “from the Board’s exercise of jurisdiction over teachers in church-operated schools,”<sup>27</sup> the Court turned to whether there was any available reading of the NLRA that would eliminate the Board’s jurisdiction over parochial schools, and with it, the need to answer the constitutional questions the Court raised.<sup>28</sup> Here, the Court applied a clear statement rule,<sup>29</sup> concluding that unless the statute were amended to include affirmative statutory language indicating that church-operated schools were covered by the Act, they would be deemed excluded.<sup>30</sup> In other words, the presence of an arguable constitutional question led the Court to adopt an atypical approach to statutory interpretation—one that did not focus primarily on effectuating congressional intent as expressed in the statutory text.<sup>31</sup> Accordingly, it was not enough that the NLRA contains a broad definition of covered employers, along with a list of specific exclusions that does not include religious employers.<sup>32</sup> Instead, for the NLRA to cover those employers, Congress would have to go out of its way to do so—for example, by stating that the Act covers “all employers, including parochial schools.”

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<sup>25</sup> *Id.* at 502-03.

<sup>26</sup> *Id.* at 503 (quoting *Lemon*, 403 U.S. at 616).

<sup>27</sup> *Id.* at 504.

<sup>28</sup> *Id.*

<sup>29</sup> See generally Eskridge & Frickey, *supra* note 20 at 632 (analyzing the use of “super-strong clear statement rules,” as applied in *Catholic Bishop*, to protect constitutional norms).

<sup>30</sup> *Catholic Bishop*, 440 U.S. at 504-06 (holding that Congress did not affirmatively state that teachers in church-operated schools should be covered by the Act and thus the Court was not required to read it that way).

<sup>31</sup> *Id.* at 507 (Explaining that “in the absence of a clear expression of Congress’ intent to bring teachers in church-operated schools within the jurisdiction of the Board,” the Court will avoid the constitutional questions).

<sup>32</sup> 29 U.S.C. § 152(2) (2012) (“The term ‘employer’ . . . shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.” (citation omitted)). This approach is inconsistent with normal principles of statutory interpretation, such as *expressio unius est exclusio alterius*. See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 455 (1989) (“[B]y expressly singling out those people to whom it wanted to grant the good, Congress implicitly decided to deny all others the good.”).

Four dissenters criticized the majority's conclusion in *Catholic Bishop* on multiple levels. They both questioned the majority's approach to constitutional avoidance<sup>33</sup> and its conclusion that the NLRA could plausibly be read to exclude religious employers under the text of the statute, its legislative history, or the Court's own precedent.<sup>34</sup> While the dissenters did not then go on to reach the constitutional question—a question they noted was “not without difficulty”<sup>35</sup>—it is nonetheless telling that they dissented rather than concurred in the judgment.

## 2. *Catholic Bishop*'s Doctrine

As I discuss in the next Section, the Board and the lower federal courts have not been able to agree on what *Catholic Bishop* requires.<sup>36</sup> The most recent chapter in this ongoing saga is the Board's *Pacific Lutheran University* decision.<sup>37</sup> That *Catholic Bishop*'s legacy is still in flux is in one sense surprising—the decision is over three decades old—but then again, it is hardly a model of clarity. This is in large part because the Court did not specify the First Amendment principles upon which the decision rested, and in part because of the Court's flawed understanding of labor law.

One available reading of *Catholic Bishop* is as a prototype extension of the Court's church autonomy doctrine; indeed, that is the reading of the case that Douglas Laycock advanced in a seminal article on that doctrine.<sup>38</sup> Others since then have arrived at the same conclusion.<sup>39</sup> But this is not to say *Catholic*

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<sup>33</sup> *Catholic Bishop*, 440 U.S. at 508 (Brennan, J., dissenting) (characterizing majority opinion as “justified solely on the basis of a canon of statutory construction seemingly invented by the Court for the purpose of deciding this case”).

<sup>34</sup> *Id.* at 511 (“The interpretation of Nation Labor Relations Act announced by the Court today is not ‘fairly possible.’”).

<sup>35</sup> *Id.* at 518.

<sup>36</sup> On the value of dialogue between the judiciary and the elected branches of government with respect to statutory interpretation, see GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 163-71 (1985) (discussing the capacity of judges to respond to obsolete statutes); Ronald J. Krotoszynski, Jr., *Constitutional Flares: On Judges, Legislatures, and Dialogue*, 83 MINN. L. REV. 1, 4-9 (1998) (“Perhaps an open dialogue between the federal judiciary . . . and the Congress and/or executive branch, would lead to more enlightened public policy.”).

<sup>37</sup> See *supra* note 13 and accompanying text (explaining the enduring difficulties of applying *Catholic Bishop*).

<sup>38</sup> Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1401 (1981) (“Thus, the serious constitutional issue that the Court [in *Catholic Bishop*] avoided was the question of church autonomy in the labor relations context.”).

<sup>39</sup> E.g., Mark E. Chopko & Michael F. Moses, *Freedom To Be a Church: Confronting Challenges to the Right of Church Autonomy*, 3 GEO. J.L. & PUB. POL'Y 387, 420 (2005) (explaining that *Catholic Bishop* “demonstrate[s] that government intrusion into religious

*Bishop* is clearly a church autonomy case.<sup>40</sup> The closest the Court came to making a church autonomy argument explicitly was its observation that the NLRB had “recognize[d] that its assertion of jurisdiction over teachers in religious schools constitutes some degree of intrusion into the administration of the affairs of church-operated schools.”<sup>41</sup> Moreover, although church autonomy was not the main thrust of the school’s merits brief before the Supreme Court, it did cite two church autonomy cases.<sup>42</sup> Yet, the Supreme Court did not cite either one—a curious choice if the Court really had church autonomy in mind.

Further, the Supreme Court soon backed off the broad approach to church autonomy that *Catholic Bishop* might have previewed. Later in the same Term, the Court decided another church autonomy case relatively narrowly.<sup>43</sup> And a few years later, in *Tony & Susan Alamo Foundation v. Secretary of Labor*,<sup>44</sup> the Court rejected both Free Exercise and *Catholic Bishop*-style entanglement challenges to the application of the Fair Labor Standards Act (“FLSA”) to for-profit enterprises operated by (and in support of) a church.<sup>45</sup> Here, the Tony and Susan Alamo Foundation’s entanglement challenge focused on the FLSA’s recordkeeping and reporting requirements.<sup>46</sup> The Court, however, simply observed that the “routine and factual inquiries” imposed by the FLSA “bear no resemblance to the kind of government surveillance the Court has previously held to pose an intolerable risk of government entanglement with religion.”<sup>47</sup> Likewise, in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*,<sup>48</sup> the Court permitted a sex discrimination case to go forward

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organizations and their relationships with their workforce may sometimes infringe their autonomy”).

<sup>40</sup> See Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of Smith*, 2004 BYU L. REV. 1633, 1645 (stating that it is “unclear” whether *Catholic Bishop* “meant to suggest that any government regulation that interferes with internal church affairs raises First Amendment problems”).

<sup>41</sup> NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 499 (1979).

<sup>42</sup> Brief for Respondents at ii-iv, *Catholic Bishop*, 440 U.S. 490 (No. 77-752), 1978 WL 207227 (citing *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929)).

<sup>43</sup> *Jones v. Wolf*, 443 U.S. 595, 602 (1979) (holding that a state can resolve church property disputes as long as the decision is not based on religious doctrine and the court defers to the church’s “resolution of issues of religious doctrine”); see also Douglas Laycock, *Church Autonomy Revisited*, 5 GEO. J.L. & PUB. POL’Y 253, 259 (2009) (“[T]he precise peak for the constitutional right to church autonomy was the three months between *Catholic Bishop* and *Jones v. Wolf*, in the spring of 1979.”).

<sup>44</sup> 471 U.S. 290 (1985).

<sup>45</sup> *Id.* at 305-06 (holding that the FLSA’s requirements are secular in nature and not significantly “intrusive into religious affairs”).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 305.

<sup>48</sup> 477 U.S. 619 (1986).

against a Christian school, remarking that the school would have an opportunity to litigate its constitutional claim during the merits phase.<sup>49</sup>

Related to whether *Catholic Bishop* was really a church autonomy case, the Court has recently recognized a ministerial exception to labor and employment law, albeit one that cuts with much more precision than *Catholic Bishop*.<sup>50</sup> In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the Court held that legislatures and courts may not interfere with churches' selection of ministers, even to enforce important non-discrimination norms.<sup>51</sup> However, the *Hosanna-Tabor* Court was careful to stress that its decision applied only to employees who qualified as "ministerial"—a distinction the *Catholic Bishop* Court did not make.<sup>52</sup> *Catholic Bishop* could have been intended (consciously or not) as an early, statutory version of the ministerial exception. However, once the Court finally grappled with the constitutional question instead of avoiding it, its answer was much more precise.

*Catholic Bishop*'s discussion of the NLRA is no less cursory than its discussion of the religion clauses. For example, in addressing the possibility that parochial schools would be forced to cede authority over religious matters during bargaining, the Court observed that it was unclear what bargaining subjects were mandatory in the context of education, citing several decisions interpreting state public sector labor statutes.<sup>53</sup> But public sector labor laws often operate quite differently than the NLRA, which applies only in the private sector.<sup>54</sup> One key difference is that public sector labor law often requires employers and unions that have reached impasse at the bargaining table to resolve their differences by procedures such as interest arbitration.<sup>55</sup>

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<sup>49</sup> *Id.* at 628

<sup>50</sup> *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 707-08 (2012) (finding "ministerial exception" to employment discrimination law grounded in Establishment Clause and the Free Exercise Clause).

<sup>51</sup> *Id.* at 710 ("The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. . . . The church must be free to choose those who will guide it on its way.")

<sup>52</sup> *Id.* at 708 (describing who may be considered a "minister" and thus covered by the ministerial exception).

<sup>53</sup> *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502-03 (1979).

<sup>54</sup> See *supra* note 32 and accompanying text (explaining that the NLRA defines "employer" to exclude governmental employers).

<sup>55</sup> Interest arbitration generally involves ceding authority to determine terms and conditions of employment to an arbitrator, who decides based on facts presented by the parties. See generally Arvid Anderson & Loren A. Krause, *Interest Arbitration: The Alternative to the Strike*, 56 *FORDHAM L. REV.* 153 (1987) (describing the practice and scope of interest arbitration); Charles B. Craver, *Public Sector Impasse Resolution Procedures*, 60 *CHI.-KENT L. REV.* 779 (1984) (describing the procedural contours of interest arbitration); Martin H. Malin, *Two Models of Interest Arbitration*, 28 *OHIO ST. J. ON DISP. RESOL.* 145

This process, if imposed by law on an unwilling religious employer, could indeed raise First Amendment problems by requiring the employer to accept particular employment terms; however, the NLRA neither requires nor encourages interest arbitration.<sup>56</sup> Instead, it permits an employer who has reached an impasse during bargaining to unilaterally implement its final offer.<sup>57</sup> In other words, the NLRA never requires an employer to accept a bargaining proposal from a union, much less one that conflicts with the employer's religious commitments.<sup>58</sup> Yet, the *Catholic Bishop* Court neither attempted to identify specific conflicts between bargaining obligations and religious practice nor confronted the reality that a bargaining mandate carries with it no obligation to agree to any particular term.<sup>59</sup> Similarly, the Court discussed the Board's adjudication of unfair labor practice charges alleging discrimination but did not explain why the Board's inquiry would need to go beyond a determination of whether the employer's asserted religious motivations for discharging a (non-ministerial) employee were sincere—an inquiry that courts regularly undertake in other contexts.<sup>60</sup>

As Christopher Lund recently put it, after *Catholic Bishop*, “[n]o one knows whether, if push came to shove, the government could force collective bargaining on Catholic schools. All we have are nine Justices cryptically agreeing that the case presents ‘difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.’”<sup>61</sup> As we will see in the next Section, this leaves the Board and the courts in a difficult position.

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(2013) (analyzing the advantages and disadvantages of relying on interest arbitration for impasse resolution).

<sup>56</sup> See *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970) (“One of the[] fundamental policies [of the NLRA] is freedom of contract.”).

<sup>57</sup> See *Employer/Union Rights and Obligations*, NLRB, <http://www.nlr.gov/rights-we-protect/employerunion-rights-and-obligations> [<http://perma.cc/FL2E-4SCR>] (“If after sufficient good faith efforts, no agreement can be reached, the employer may declare impasse, and then implement the last offer presented to the union.”).

<sup>58</sup> *H.K. Porter*, 397 U.S. at 108 (holding that NLRB may not “compel agreement” on any contract term).

<sup>59</sup> Some commentators—particularly Douglas Laycock—have argued that even if there is no specific conflict between the NLRA's requirements and a religious employer's religious doctrine, the presence of a union with which the employer must bargain could erode church autonomy and revise religious doctrine over time. Laycock, *supra* note 38, at 1400 (explaining that interference with “personnel matters [occasioned by application of the NLRA] interferes with the further development of the religion”).

<sup>60</sup> *Infra* Section II.C.2.

<sup>61</sup> Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 20 (2011) (footnote omitted) (quoting *NLRB v. Catholic Bishop of Chi*, 440 U.S. 490, 507 (1979)).

### 3. *Catholic Bishop* at the Board and in the Courts

The Board and the circuit courts continue to apply *Catholic Bishop* to assess whether religiously affiliated employers are exempt from the NLRA.<sup>62</sup> As it rests on statutory rather than constitutional grounds, *Catholic Bishop* has spawned its own line of NLRB and circuit court cases, which run alongside First Amendment case law.<sup>63</sup> Ironically, then, because the *Catholic Bishop* Court invoked constitutional avoidance—a method sometimes lauded for facilitating the development of law<sup>64</sup>—the decision has become ossified and entrenched even as the Court’s religion clause jurisprudence developed rapidly, and in a fashion that undermined *Catholic Bishop*’s foundation.

The key questions in *Catholic Bishop*’s wake are as follows: First, does *Catholic Bishop* apply to employers other than parochial primary and secondary schools? Second, does *Catholic Bishop* apply to employees other than parochial school teachers? Third, by what method should the Board and the courts analyze the foregoing questions? In some instances, the Board and the courts are in relative agreement; for example, they generally agree that the Board may invoke jurisdiction over religiously affiliated employers who provide secular services, such as religiously affiliated hospitals and childcare centers.<sup>65</sup> They also agree that the Board may take jurisdiction over employees who indisputably play no role in their religiously affiliated employer’s mission, such as the custodians at a parochial school.<sup>66</sup> Recently, however, the Board

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<sup>62</sup> See, e.g., *Catholic Soc. Servs.*, 355 N.L.R.B. 929, 929 (2010) (applying *Catholic Bishop* and determining that Board jurisdiction over residential treatment specialists at religiously affiliated child welfare agency was proper).

<sup>63</sup> *Id.* (discussing application of *Catholic Bishop* formula).

<sup>64</sup> *Infra* Section I.C (discussing the doctrine of constitutional avoidance, its impact post-*Catholic Bishop*, and why the NLRB and the courts should view RFRA as having rejected the precedent from *Catholic Bishop*).

<sup>65</sup> Kathleen A. Brady, *Religious Organizations and Mandatory Collective Bargaining Under Federal and State Labor Laws: Freedom from and Freedom for*, 49 VILL. L. REV. 77, 78, 84 (2004) (listing contexts in which the Board and the Court have found *Catholic Bishop* does not preclude NLRB jurisdiction over religiously affiliated employers); see also *NLRB v. Hanna Boys Ctr.*, 940 F.2d 1295, 1302 (9th Cir. 1991) (holding that “cooks, cook’s helpers, recreation assistants and maintenance workers” at a residential school for boys did not involve religion to a degree that would preclude NLRB jurisdiction); *Catholic Soc. Servs.*, 355 N.L.R.B. at 929 (asserting NLRB jurisdiction over religiously affiliated childcare center in 2-1 decision). *But see Catholic Soc. Servs.* 355 N.L.R.B. at 931 (Schaumber, M., dissenting) (arguing that residential treatment specialists are like parochial school teachers).

<sup>66</sup> The Board generally assumes jurisdiction over employees who work for employers that are connected to churches (without being churches themselves) but whose jobs are unconnected to the religious mission of the employer. *E.g.*, *Salvation Army*, 345 N.L.R.B. 550, 550 (2005) (asserting jurisdiction over youth resident advisors who did not perform religious function); *Hanna Boys Ctr.*, 284 N.L.R.B. 1080, 1083 (1987) (taking jurisdiction in a case involving bargaining unit of childcare workers, cooks, and maintenance employees

and the federal circuit courts have split over how the decision should apply to faculty at religious colleges and universities. Although they agree that the key inquiry is whether the employer is of a “substantial religious character,” they disagree over the application of *Catholic Bishop* to the entanglement question.

Until December 2014, the Board’s approach involved a multi-factor inquiry in which it evaluated “the purpose of the employer’s operations, the role of the unit employees in effectuating that purpose, and the potential effects if the Board exercised jurisdiction.”<sup>67</sup> Within that inquiry, the Board “consider[ed] such factors as the involvement of the religious institution in the daily operation of the school, the degree to which the school has a religious mission and curriculum, and whether religious criteria are used for the appointment and evaluation of faculty.”<sup>68</sup> In a sense, then, the Board re-created *Catholic Bishop*’s reasoning by asking the types of questions that would help a decision-maker determine whether NLRB jurisdiction might create a risk of entanglement in a subsequent unfair labor practice proceeding. These questions focused variously on the nature of the employer, the role of the particular employees in the proposed bargaining unit, and the role played by religion in the relationship between the employer and the bargaining unit employees. However, following *Catholic Bishop*’s lead, the Board’s inquiry did not focus on the scope of the specific conflicts between an employer’s religious commitments and labor law.<sup>69</sup>

The D.C. Circuit, however, rejected the NLRB’s approach in *University of Great Falls*, concluding that such a case-by-case approach *itself* risked the excessive entanglement that concerned the *Catholic Bishop* Court.<sup>70</sup> Instead, the D.C. Circuit asks only whether the educational institution (1) “‘holds itself out to students, faculty and community’ as providing a religious educational environment;” (2) “‘is organized as a ‘nonprofit;’” and (3) “‘is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious

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whose roles were entirely unconnected from the employers’ religious mission), *enforced*, 940 F.2d 1295 (9th Cir. 1991); *cf.* *St. Edmund’s Roman Catholic Church*, 337 N.L.R.B. 1260, 1260 (2002) (declining jurisdiction over janitors who were directly employed by church, and citing similar cases).

<sup>67</sup> *Univ. of Great Falls*, 331 N.L.R.B. 1663, 1664 (2000), *vacated*, 278 F.3d 1335 (D.C. Cir. 2002).

<sup>68</sup> *Id.* at 1664-65.

<sup>69</sup> *Id.* at 1664 (stating that the Board’s post-*Catholic Bishop* decisions have focused on the “substantial religious character” of employers and whether assertion of Board jurisdiction would “present a risk of significantly infringing on that employer’s First Amendment rights”).

<sup>70</sup> *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1342 (D.C. Cir. 2002) (“Here too we have the NLRB trolling through the beliefs of the University, making determinations about its religious mission, and that mission’s centrality to the ‘primary purpose’ of the University.”); *see also* *Universidad Cent. de Bayamon v. NLRB*, 793 F.2d 383, 398 (1st Cir. 1985) (en banc) (Breyer, J.) (concluding, in a 3-3 decision, that NLRB could not take jurisdiction over faculty union at religious university).

organization, or with an entity, membership of which is determined, at least in part, with reference to religion.”<sup>71</sup> As to the risk that an employer might falsely assert a religious belief in order to evade Board jurisdiction, the D.C. Circuit stated “[w]here a school, college, or university holds itself out publicly as a religious institution, ‘[w]e cannot doubt that [it] sincerely holds this view.’”<sup>72</sup> This test has the advantage of being predictable and easy to apply; conversely, it will result in many more exemptions from NLRA coverage, including in cases where the relevant employees are not integral to the employer’s religious mission—a key factor for the *Catholic Bishop* Court.

The Board declined to adopt the D.C. Circuit’s approach and recently formulated a new test in the *Pacific Lutheran University* case.<sup>73</sup> The school in that case, Pacific Lutheran University (“PLU”), took the position that it was exempt from the NLRA’s coverage under *Catholic Bishop* because of its religious character.<sup>74</sup> In the course of briefing before the NLRB, the school described its religious tradition but not the conflict (if any) between its religious practice and the NLRA’s requirements.<sup>75</sup> Holding that it had jurisdiction over the school, three members of the Board adopted a new two-part test. Under that test, the university must first demonstrate “that it holds itself out as providing a religious educational environment.”<sup>76</sup> Once it has done that, it “must then show that it holds out the petitioned-for faculty members as performing a religious function.”<sup>77</sup>

The *Pacific Lutheran University* Board explained that its new test grew from its understanding of *Catholic Bishop*, which required that it avoid “any intrusive inquiry into the character or sincerity of a university’s religious views.”<sup>78</sup> And indeed, a sincerity inquiry does seem to be foreclosed by *Catholic Bishop*: the Court identified the risk of “inquiry into the good faith of the position asserted by the clergy-administrators” during an unfair labor practice proceeding as a problematic aspect of Board jurisdiction over religious schools.<sup>79</sup> But of course, courts regularly consider a putative religious

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<sup>71</sup> *Univ. of Great Falls*, 278 F.3d at 1343.

<sup>72</sup> *Id.* at 1344 (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000)).

<sup>73</sup> 361 N.L.R.B. No. 157, slip op. at 5 (2014).

<sup>74</sup> PLU’s Brief in Support of Review at 1, *Pac. Lutheran Univ.*, 367 N.L.R.B. No. 157 (2014) (No. 19-RC-102521), <http://apps.nlr.gov/link/document.aspx/09031d4581469f72> [<http://perma.cc/5S7Z-M6AT>] (arguing that the Board should adopt the *Great Falls* three-prong test because the “substantial religious character violates the Religion Clauses of the First Amendment” and PLU is clearly exempt from the NLRA under the *Great Falls* test).

<sup>75</sup> *Id.* at 2-11; see also Employer’s Request for Review at 4-13, *Pac. Lutheran Univ.*, 361 N.L.R.B. No. 157 (No. 19-RC-102521), <http://apps.nlr.gov/link/document.aspx/09031d45812f58f4> [<http://perma.cc/J2Y7-LQJ4>] (explaining the importance of religion to PLU and the university’s ties to the Lutheran Church).

<sup>76</sup> *Pac. Lutheran Univ.*, 361 N.L.R.B. No. 157, slip op. at 1.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 3 (emphasis added).

<sup>79</sup> *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979).

objector's sincerity in other religious freedom cases;<sup>80</sup> this limitation is imposed by *Catholic Bishop* but not by the First Amendment.

Instead, the first part of the Board's new test stands in as a sort of proxy for a sincerity inquiry, but without any "intrusive" questioning. It adopts the first two prongs of the D.C. Circuit's three-prong test: whether the college or university (1) "holds itself out to students, faculty and the community as providing a religious educational environment[;]" and (2) "is organized as a nonprofit."<sup>81</sup> The second prong, the Board wrote, "provides an objective way of differentiating between a church or religion's profit-making ventures and its endeavors to carry out its religious mission."<sup>82</sup> However, the *Pacific Lutheran University* Board wisely rejected the third prong of the D.C. Circuit's test (which required the school to be affiliated with a recognized religious order); that prong would have almost certainly constituted an unconstitutional preference among religions.<sup>83</sup>

The second part of the Board's new test—"whether the university holds out its petitioned-for faculty members as performing a specific role in creating and maintaining [a religious] environment"<sup>84</sup>—asks whether "faculty members are subject to employment-related decisions that are based on religious considerations."<sup>85</sup> Again, the focus on how the university "holds out" its faculty members is aimed at avoiding too much scrutiny of the religious institution. Apparently the "holding out" inquiry is all there is: the Board "will not seek to look behind [job descriptions, employment contracts, faculty handbooks, statements to accrediting bodies, and statements to prospective and current faculty and students] to determine what specific role petitioned-for faculty actually play in fulfilling the religious mission of a school or inspect the university's actual practice with respect to faculty members."<sup>86</sup>

Still, a dispute between the *Pacific Lutheran University* majority and dissent about how the test would apply to PLU faculty shows that this prong is hardly going to be uncontroversial or even easy to apply. The majority wrote that

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<sup>80</sup> See, e.g., *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (holding that a prisoner bringing a religious free exercise claim under the Religious Land Use and Institutionalized Persons Act must show "that the relevant exercise of religion is grounded in a sincerely held religious belief"); *Welsh v. United States*, 398 U.S. 335, 340 (1970) (holding that "if an individual deeply and sincerely holds beliefs that are purely ethical or moral in source or content but nevertheless impose upon him a duty of conscience" then that person's beliefs are sincere and meaningful); *United States v. Seeger*, 380 U.S. 163, 163 (1965) ("The test of [religious] belief . . . is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God . . .").

<sup>81</sup> *Pac. Lutheran Univ.*, 361 N.L.R.B. No. 157, slip op. at 6-7 (quoting *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1343-44 (D.C. Cir. 2002)).

<sup>82</sup> *Id.* at 7.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 10 n.19.

<sup>86</sup> *Id.* at 9.

“when the university . . . asserts a commitment to diversity and academic freedom,” it puts forth “the message that religion has no bearing on faculty members’ job duties or responsibilities.”<sup>87</sup> The dissenters disagreed, arguing that such a commitment can be part of a university’s system of religious beliefs, and not just a concession to secular higher education norms.<sup>88</sup>

The dissenters also argued that the majority was not applying *Catholic Bishop* in the spirit in which it was intended. They argued that the Board must “avoid striving for jurisdictional boundaries that could violate the First Amendment.”<sup>89</sup> In other words, the dissenters thought the Board should “interpret the Act to avoid *even the risk of* a constitutional conflict.”<sup>90</sup> Accordingly, they found the question a simple one: reasoning by analogy, if the Board may not take jurisdiction over lay teachers in a parochial school, it also may not take jurisdiction over lay faculty at a religious university.<sup>91</sup>

Despite winning before the Board, the union in *Pacific Lutheran University* withdrew its petition shortly after the Board’s decision came down. Thus, there will be no appeal in that case. However, the new test will be applied in several pending cases also involving adjuncts at religiously affiliated colleges and universities and reach a circuit court once a union wins one of those elections.

#### 4. Post-*Catholic Bishop* Developments in Religious Liberty Law

There is one final piece of groundwork: the Religious Freedom Restoration Act.<sup>92</sup> This Section briefly discusses RFRA in order to set up the next Section, which argues that RFRA overruled *Catholic Bishop*.

In the years after *Catholic Bishop*, the Court’s Free Exercise jurisprudence became increasingly resistant to accommodation claims, culminating in *Employment Division, Department of Human Resources of Oregon v. Smith*.<sup>93</sup> For example, in *United States v. Lee*,<sup>94</sup> the Court rejected a Free Exercise claim brought by an Amish employer who, together with his employees, objected to withholding and paying social security tax.<sup>95</sup> The *Lee* Court first noted that the

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<sup>87</sup> *Id.* at 8.

<sup>88</sup> *Id.* at 32 (Johnson, M., dissenting) (“Contrary to the majority, ‘diversity’ is a belief that can indeed be wholeheartedly consonant with and part of a religious belief system; so is ‘academic freedom.’”).

<sup>89</sup> *Id.* at 28.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* (arguing that the logic of *Catholic Bishop* requires the Board to decline jurisdiction because the situation in *Pacific Lutheran University* is “substantively identical” to that in *Catholic Bishop*).

<sup>92</sup> Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb to 2000bb-4).

<sup>93</sup> 494 U.S. 872 (1990).

<sup>94</sup> 455 U.S. 252 (1982).

<sup>95</sup> *Id.* at 254-55, 261 (holding that the State’s overriding governmental interest in maintaining the Social Security System justified a limitation on religious liberty when

government did not question the sincerity of the Amish defendants' "religiously based obligation to provide for their fellow members the kind of assistance contemplated by the social security system."<sup>96</sup> On the other hand, the government did question whether the asserted conflict between that religious belief and paying social security was real.<sup>97</sup> However, the Court refused to undertake that inquiry, stating that "[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; '[c]ourts are not arbiters of scriptural interpretation.'"<sup>98</sup>

Once the conflict between the Social Security Act and the Amish defendants' religious practice was established, the Court considered whether the burden on religious practice was justified by "an overriding governmental interest."<sup>99</sup> Here, the Court easily found that the government's interest in the integrity of the social security system was "very high."<sup>100</sup> Finally, the Court completed the last step of the *Yoder/Sherbert* analysis, concluding that there was no workable way to accommodate the many potential religious objections that taxpayers might raise in the future.<sup>101</sup> Thus, the Court concluded that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."<sup>102</sup>

The Court then went further, rejecting the *Sherbert* analysis for most purposes in *Smith*.<sup>103</sup> The *Smith* majority observed that the Court had "never invalidated any governmental action on the basis of the *Sherbert* test except the

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religious individuals enter into commercial activity as a matter of choice). Interestingly, the Amish defendants in *Lee* did not even argue that enforcement of the Social Security Act caused excessive entanglement, despite the fact that *Lee* was decided three years after *Catholic Bishop* and three years before *Alamo Foundation*. See generally Brief for Appellee Edwin D. Lee, *Lee*, 455 U.S. 252 (No. 80-767).

<sup>96</sup> *Lee*, 455 U.S. at 257. Whether beliefs are sincerely held is the first step in the *Yoder/Sherbert* analysis. This is followed by an inquiry into whether the beliefs are "unduly burden[ed]" by the law. If both questions are answered in the affirmative, courts must then apply strict scrutiny. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>97</sup> *Lee*, 455 U.S. at 257.

<sup>98</sup> *Id.* (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981)).

<sup>99</sup> *Id.* at 257-58.

<sup>100</sup> *Id.* at 259. Significantly, the Court viewed the potential impact on the social security system in the aggregate, rather than simply asking whether that system would be compromised should the individual objectors in *Lee* prevail. *Id.*

<sup>101</sup> *Id.* at 260 ("The 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 beliefs.").

<sup>102</sup> *Id.* at 261.

<sup>103</sup> *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 884-85 (1990).

denial of unemployment compensation.”<sup>104</sup> Of course, as a statutory decision, *Catholic Bishop* played no part in this analysis. Indeed, it was not even cited in the parties’ briefs. Thus, the Court held that *Yoder/Sherbert* strict scrutiny did not apply to Free Exercise challenges to “generally applicable prohibitions of social harmful conduct” as well as “other aspects of public policy . . . .”<sup>105</sup> However, it may still be possible to challenge laws that do not qualify as neutral and generally applicable under the Free Exercise Clause.<sup>106</sup>

The *Smith* Court left open the possibility that legislatures would create statutory exemptions for religious adherents.<sup>107</sup> Congress soon did just that, enacting RFRA in order to repudiate *Smith* and restore the *Yoder/Sherbert* test or something like it.<sup>108</sup> In its present form, RFRA mandates that the federal government “shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability,” unless the “application of that burden . . . is in furtherance of a compelling government interest . . . [and] the least restrictive means of furthering that compelling governmental interest.”<sup>109</sup> However, RFRA is explicit that it does not make any adjustment to the Court’s Establishment Clause standards.<sup>110</sup>

So far, this Section has sketched the development of the law of religion as it relates to employers’ workplace decisions outside of labor law, and the entirely different developmental path pursued by the NLRB and the courts as they sought to apply *Catholic Bishop* to determine the extent of the Board’s jurisdiction over religious employers. The next Section argues that *Catholic Bishop* should be discarded in light of RFRA.

#### B. *Whither Catholic Bishop?*

As just described, there exists a patchwork of potentially applicable exemptions from the NLRA. Some non-profit, religiously affiliated

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<sup>104</sup> *Id.* at 883.

<sup>105</sup> *Id.* at 885.

<sup>106</sup> See *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993) (“A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.”); Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise: Smith, Lukumi and the General Applicability Requirement*, U. PA. J. CONST. L. 850, 864 (2001) (“[I]f a law is either not neutral or not generally applicable, it must pass through the gauntlet of superlatives that is strict scrutiny and will be upheld only if it a governmental interest of ‘the highest order’ and is narrowly tailored in pursuit of that truly compelling interest.” (footnote omitted)).

<sup>107</sup> *Smith*, 494 U.S. at 890 (explaining that “a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation” and observing that several states have passed such laws).

<sup>108</sup> 42 U.S.C. § 2000bb(a)-(b) (2012); *Holt v. Hobbs*, 135 S. Ct. 853, 859-60 (2015) (describing how *Smith* was superseded by RFRA).

<sup>109</sup> 42 U.S.C. § 2000bb-1(a)-(b).

<sup>110</sup> RFRA, as well as the Court’s interpretation of that statute in *Hobby Lobby*, is discussed in Section II.B, *infra*.

employers—certainly parochial schools, maybe religiously affiliated universities, and doubtfully other religiously affiliated nonprofits—can continue to claim exemption from the Act under *Catholic Bishop*, though continued litigation about what that case means is a near certainty. And then there is RFRA, which covers nearly all employers, including non-profit and closely held for-profit employers<sup>111</sup> that are not eligible for an exemption under *Catholic Bishop*.<sup>112</sup> Finally, where statutory exemptions fail, it is possible that employers could make freestanding First Amendment arguments. These are outside the scope of this article, but could include ministerial exemption claims as to qualifying employees as well as possible church autonomy claims, and conceivably even Free Exercise Clause claims, were a Court to determine that the NLRA was not neutral and generally applicable.

This state of affairs is both normatively and doctrinally undesirable. First, it leaves a tremendous amount of uncertainty for religiously affiliated employers and their employees; the passage of thirty-five years has failed to resolve the proper application of *Catholic Bishop*, and *Hobby Lobby* adds to the mix a host of unresolved questions about RFRA. Thus, when employers arguably qualify for an exemption, unions, employers, and employees may fight a contentious battle over whether employees should vote in favor of union representation at all, only to have a cloud of uncertainty hover over their ultimate decision for the years that it can take to conclusively resolve the threshold question of NLRA applicability.<sup>113</sup> Even if the NLRA is ultimately deemed to apply,

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<sup>111</sup> Corporate law scholars have observed both that there is no single definition of “closely held,” and that some very large corporations qualify as closely held under common definitions of that term. See Stephanie Armour & Rachel Feintzeig, *Hobby Lobby Ruling Raises Question: What Does ‘Closely Held’ Mean?*, WALL ST. J. (June 30, 2014), <http://www.wsj.com/articles/hobby-lobby-ruling-begs-question-what-does-closely-held-mean-1404154577> [<http://perma.cc/GF2A-WHK8>]; Ellen Aprille, *Hobby Lobby and the Tax Definition of Closely Held Corporation*, THE CONGLOMERATE (July 16, 2014), <http://www.theconglomerate.org/2014/07/hobby-lobby-and-the-tax-definition-of-closely-held-corporation.html> [<http://perma.cc/5YSY-K5ZL>]; Anne Tucker, *The Meaning of Hobby Lobby: Bedrooms, Boardrooms & Burdens*, THE CONGLOMERATE (July 16, 2014), <http://www.theconglomerate.org/2014/07/the-meaning-of-hobby-lobby-bedrooms-boardrooms-burdens.html> [<http://perma.cc/F9JM-EULL>]. This question is beyond the scope of this Article, though it will likely add to the confusion surrounding employers’ entitlements to RFRA accommodations.

<sup>112</sup> Tucker, *supra* note 111 (arguing that *Hobby Lobby*’s reasoning “is broadly stated with no distinction and will prove to be powerful arrows in the quiver of future litigants wanting to extend the scope of the holding to other entities”).

<sup>113</sup> The process of appealing an NLRB determination that a group of employees are eligible to form a union is cumbersome, exacerbating the problem of long-term uncertainty. That process is as follows: First, an NLRB regional director is responsible for making the initial determination of whether to order a union election. The NLRB may grant review over that determination, but there is no circuit court review available. If the NLRB finds that it has jurisdiction, then the election proceeds. If the union wins, the employer’s duty to bargain in good faith is triggered. If the employer violates that obligation, the Board may

employees' initial support for union representation may have eroded over time—possibly to the point of non-existence—by the time the decision is final. Conversely, where an employer is found to be exempt from the NLRA (either in general or with respect to a particular set of employees), the initial union drive and its attendant collateral damage will have been unnecessary.<sup>114</sup>

Second, this uncertainty is compounded by the fact that some applications of *Catholic Bishop* are inconsistent with principles espoused by Justice Kennedy, a potential swing vote in any case concerning religious exemptions from labor law. The Court—and in particular Justice Kennedy—has expressed significant distaste for statutory schemes that dispense civil liberties protections based on corporate form. This distaste is most well known in the First Amendment context.<sup>115</sup> However, Justice Kennedy's *Hobby Lobby* concurrence expressed

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pursue an unfair labor practice charge against the employer. If the Board sustains the charge, the employer may then appeal the finding to a circuit court, at which point the employer can raise the question of whether the NLRB had jurisdiction in the first place. In other words, circuit court review of an NLRB decision to accept jurisdiction in a particular case is available only if the employees ultimately vote in favor of representation, and the employer then refuses to bargain with the newly certified union. This process—in which the Board orders an election, the union wins the election, and the employer refuses to bargain, eventually defending the ensuing unfair labor practice charge on religious exemption grounds—may take years. Moreover, if the NLRB determines that the employees are *not* eligible to form a union, then there is no way for the union to obtain review from a circuit court. In this scenario, each particular dispute is resolved more quickly, but long-term uncertainty may develop, as Board precedent becomes entrenched without the benefit of circuit court (much less Supreme Court) review. *See generally The NLRB Process*, NLRB, <https://www.nlr.gov/resources/nlr-process> [<http://perma.cc/J7FL-P48J>].

<sup>114</sup> Kate Bronfenbrenner, a leading researcher of union organizing and union avoidance campaigns, found in a study of hundreds of organizing campaigns that anti-union tactics such as firing union supporters and threatening to close plants or decrease pay and benefits are commonplace. Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing*, ECON. POLICY INST. 1-2 (May 20, 2009), [http://epi.3cdn.net/edc3b3dc172dd1094f\\_0ym6ii96d.pdf](http://epi.3cdn.net/edc3b3dc172dd1094f_0ym6ii96d.pdf) [<http://perma.cc/5WG7-G22E>] (finding that in the 562 election campaigns supervised by the NLRB between January 1, 1999 and December 31, 2003 “employers threatened to close the plant in 57% of elections, discharged workers in 34%, and threatened to cut wages and benefits in 47% of elections”). Thus, union drives often carry real risks, and employers' responses impose real costs, for employees.

<sup>115</sup> Justice Kennedy has repeatedly indicated that he views speaker-based distinctions, including distinctions that turn on corporate form, with great skepticism. *See, e.g., Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2667 (2011) (stating that when a statute “imposes a speaker- and content-based burden on protected expression . . . that circumstance is sufficient to justify application of heightened scrutiny”); *Citizens United v. FEC*, 558 U.S. 310, 365 (2010) (“[T]he Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”); *cf. Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 658 (1994) (“[S]peaker-based laws demand strict scrutiny when they

much the same sentiment, criticizing the Department of Health and Human Services (“HHS”) for “distinguishing between different religious believers—burdening one while accommodating the other . . . .”<sup>116</sup> That some of these believers adopted the corporate form for the purpose of making profits while others did not was irrelevant to Justice Kennedy, just as it has been in the speech context.

It is not surprising, then, that *Catholic Bishop* has been criticized from all sides.<sup>117</sup> At the same time, while *Catholic Bishop*’s reading of the NLRA is weak in the context of nonprofit, religiously affiliated employers, it is utterly unsupportable in the context of closely held, for-profit employers. The NLRA has applied to innumerable such employers since its enactment in 1935, with no plausible suggestion that the religious commitments of their owners bore any relationship to NLRB jurisdiction. This incongruity simply illustrates the problematic nature of *Catholic Bishop*; there is no principled stopping place because the case lacks a sturdy foundation.

Yet, the Court has not revisited *Catholic Bishop* during the intervening decades, and there is no indication that it will do so soon. Moreover, the tension between the *Catholic Bishop* rule and the Court’s rule against discrimination based on corporate form is not so severe as to permit the conclusion that the Court has sub silentio eviscerated *Catholic Bishop*. The question, then, is whether interested parties must wait for the Court to reverse *Catholic Bishop*, or whether there is another way forward.

C. *Here Today, Gone Tomorrow: Constitutional Avoidance, RFRA, and Catholic Bishop*

*Catholic Bishop* has staying power because it is a statutory case resting on constitutional avoidance; its holding has been immune to developments in First Amendment law, and, as is discussed *infra*, Congress is unlikely to enact an explicit overrule of a constitutional avoidance decision. This is in part an effect of the decision itself—a rational legislator would be unlikely to spend political capital on a bill that the Court has already stated to be constitutionally suspect,<sup>118</sup> and, even then, the Court may resist the override in a subsequent

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reflect the Government’s preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say).”).

<sup>116</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2786 (2014) (Kennedy, J., concurring).

<sup>117</sup> See, e.g., Mark Rienzi, *God and the Profits: Is There Religious Liberty for Money-Makers?*, 21 GEO. MASON L. REV. 59, 99 n.262 (2013) (noting that, while courts exclude for-profit employers from exemptions under *Catholic Bishop*, there are few religious schools that operate on a for-profit basis).

<sup>118</sup> Cf. CALABRESI, *supra* note 36, at 26-27 (discussing wave of new death penalty statutes enacted after *Furman v. Georgia*, 408 U.S. 238 (1972)).

case.<sup>119</sup> In other words, decisions like *Catholic Bishop* risk undermining Congress in at least two ways: first, when the Court adopts an implausible statutory construction over a plausible one; and second, when the Court makes it more difficult for Congress to override the Court.

This Section argues that the Court should view its adoption of an implausible statutory interpretation as an overture that invites congressional response. That is to say, once a court has applied a clear statement rule as in *Catholic Bishop*, courts should be on the lookout for, and then broadly construe, a response from Congress. If one comes, then courts should reverse the earlier improbable statutory interpretation and start again.

Applying that principle would lead to the conclusion that Congress legislatively overruled *Catholic Bishop* when it enacted RFRA because RFRA constitutes a clear statement regarding the treatment of religious exemption claims under the NLRA. Neither the fact that Congress did not expressly state within RFRA itself that *Catholic Bishop* was overruled nor the fact that *Catholic Bishop* and RFRA can co-exist should impede this conclusion. Rather, the premises justifying the canon of constitutional avoidance themselves call for a fluid interchange between the Court and Congress, in which Congress can overcome the Court's statutory constructions with relative ease.

I begin this Section by briefly discussing the various justifications advanced by the Court and commentators for constitutional avoidance. I then turn to a question that has been surprisingly neglected in the literature so far: If constitutional avoidance is supposed to be part of a conversation between the Court and Congress, how loudly or clearly should Congress have to reply? This discussion forms the basis for my conclusion that the NLRB and the courts should view RFRA as having effectively rejected and replaced *Catholic Bishop*.

#### 1. Why Constitutional Avoidance?

Proponents of the canon of constitutional avoidance have traditionally proceeded from two premises: first, that judicial minimalism requires the Court to avoid striking down statutes wherever possible; and second, that Congress should be presumed to abide by the Constitution in its legislative drafting.<sup>120</sup> This conception of constitutional avoidance directed early courts to choose a

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<sup>119</sup> See Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 877-80 (2012) (discussing the Court's tendency to limit congressional overrides of the Court's own statutory interpretations, even when Congress has spoken clearly of its desire to override the Court).

<sup>120</sup> See William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 837 (2001) (describing early accounts of constitutional avoidance as follows: "The Court should presume that Congress, as the lawmaking body, has legislated constitutionally; and as an unrepresentative body should avoid inserting itself in a manner that rejects the product of the democratic process").

plausible, constitutional interpretation of a statute instead of striking a statute down as unconstitutional; the choice was preservation or destruction.<sup>121</sup>

However, the Court soon undertook a subtle shift: rather than deciding the constitutional question conclusively and then approaching the statutory interpretation question accordingly, the Court began to adopt limiting interpretations in order to avoid answering difficult constitutional questions.<sup>122</sup> Justice Brandeis famously articulated this approach in his concurrence in *Ashwander v. Tennessee Valley Authority*:

The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . “When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”<sup>123</sup>

Under this formulation, the choice is between two plausible readings of a statute: one that presents difficult constitutional questions and one that does not. The advantage of this formulation is that it does not require courts to determine that one reading of a statute is unconstitutional, only to turn that conclusion into dicta by adopting another reading of the statute.<sup>124</sup> Now, however, the Court is making a different choice: rather than choosing certain preservation or certain destruction, it is choosing between certain preservation and *uncertain* destruction.

*Catholic Bishop* is emblematic of a further shift in the constitutional avoidance canon: in that case, the Court avoided the constitutional question based on the absence of a clear statement of Congress’s intent to cover religious employers.<sup>125</sup> That brings two variables into play in cases where constitutional avoidance is a possibility. The first is the difficulty of the

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<sup>121</sup> *Id.* at 839 (“Until early in [the Twentieth] century, the avoidance canon was generally about preferring a statutory reading that met constitutional scrutiny to one that was *actually* unconstitutional.”).

<sup>122</sup> *Id.* at 840-41 (“[T]he Court moved to the rule of modern avoidance—that courts should avoid interpretations *even raising serious constitutional doubts*—in order to avoid rendering advisory opinions on constitutional questions.”). The degree of difficulty of the questions in which the Court invokes constitutional avoidance varies dramatically. Anthony Vitarelli, *Constitutional Avoidance Step Zero*, 119 *YALE L.J.* 837, 841 (2010) (contrasting cases that “diverge on the threshold level of constitutional doubt that warrants use of the avoidance canon”).

<sup>123</sup> *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347-48 (1936) (Brandeis, J., concurring) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

<sup>124</sup> *Kelley*, *supra* note 120, at 840 (“[T]he canon obliged the court to adopt a different, but still permissible, interpretation, which then had the effect of appearing to turn into dicta what had come before.” (footnote omitted)).

<sup>125</sup> Eskridge & Frickey, *supra* note 20 at 632.

constitutional question (and attendant possibility that it will be resolved against the government); the second is the plausibility of the statutory interpretation that avoids that question. “Modern” constitutional avoidance moves the needle on both questions, with *Catholic Bishop* at the outer perimeter.<sup>126</sup>

*Catholic Bishop* reflects a modern constitutional avoidance that is unmoored from the values of judicial minimalism and fidelity to congressional intent that initially prompted the development of the doctrine.<sup>127</sup> Instead, other scholars have observed that modern constitutional avoidance reflects judicial activism more than judicial minimalism; it is not at all clear that Congress would prefer to have its handiwork narrowed through judicial construction, rather than run the relatively small risk that a statute will be struck down.<sup>128</sup> As Judge Friendly put it, “[i]t does not seem in any way obvious, as a matter of interpretation, that the legislature would prefer a narrow construction which does not raise constitutional doubts to a broader one which does raise them.”<sup>129</sup> In the same vein, Philip Frickey explained that constitutional avoidance “involves judicial lawmaking, not judicial restraint; the outcomes it produces are at least sometimes inconsistent with probable current congressional preferences; and it will not always foster a deliberative congressional response.”<sup>130</sup> And, to Justice Scalia, the aggressive form of constitutional avoidance is little more than a way

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<sup>126</sup> Adrian Vermeule coined the phrase “modern avoidance” to describe these shifts. Vermeule, *supra* note 20, at 1949. *Catholic Bishop* is not the only case in which the Court has aggressively applied “modern” constitutional avoidance. See Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance By the Roberts Court*, 2009 SUP. CT. REV. 181, 181-82 (2009) (discussing *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. 193 (2009) and suggesting the Court “embraced a manifestly implausible statutory interpretation to avoid the constitutional question”).

<sup>127</sup> Kelley, *supra* note 120, at 846-47 (observing that “it is no service to Congress, no great act of deference, to construe a statute in a manner contrary to its text and history in order to avoid even confronting a constitutional doubt” and discussing *Catholic Bishop* as prime example of constitutional avoidance that fails to defer to legislative supremacy).

<sup>128</sup> As other scholars have observed, the Court invokes the canon of constitutional avoidance unpredictably, adding another sense in which constitutional avoidance can be understood as activist rather than minimalist. See Hasen, *supra* note 126, at 182 (contrasting the Roberts Court’s use of *Catholic Bishop*-style constitutional avoidance in some cases to its use of “anti-avoidance”—in which the Court “eschew[s] a plausible statutory interpretation in order to decide a difficult constitutional question”—in others).

<sup>129</sup> HENRY J. FRIENDLY, BENCHMARKS 210 (1967); see also Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 74 (1995) (“[I]n interpreting statutes so as to avoid ‘unnecessary’ constitutional decisions, the Court frequently interprets a statute in ways that its drafters did not anticipate, and, constitutional questions aside, in ways that its drafters may not have preferred.” (footnote omitted)).

<sup>130</sup> Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 402 (2005).

for judges to rewrite statutes in order to achieve their preferred results.<sup>131</sup> The price of this approach is not limited to accuracy in statutory interpretation (though that is certainly a significant cost); in a slightly different context, Frickey and William Eskridge persuasively argued that avoidance of “immediate constitutional conflict” comes at the “price of a candid ventilation of constitutional concerns . . . .”<sup>132</sup> Worse, constitutional avoidance decisions often lack “the corresponding care that ordinarily goes into constitutional decisionmaking in cases where the court forthrightly acknowledges that such decisionmaking is taking place.”<sup>133</sup>

The traditional justification for constitutional avoidance is particularly inapt in the context of as-applied challenges, like *Catholic Bishop*. When the Court narrows a statute in the course of a facial challenge, it is at least possible that Congress would prefer something to nothing: a narrowed statute to the risk of one that is struck down in its entirety. For example, in challenges that raise the issue of congressional authority to enact a challenged law, the adoption of a narrowing construction through constitutional avoidance may save the remainder of the statute so that it can be applied to others.<sup>134</sup> But when the Court avoids a constitutional question in an as-applied challenge, as in *Catholic Bishop*, the on-the-ground outcome is the same whether the Court actually sustains a constitutional challenge to the statute’s application to the plaintiff or avoids that question. It is utterly implausible that legislators would prefer that the Court read a statute in an unnatural way when the only possible effect is to increase the chance that the as-applied challenge will succeed.

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<sup>131</sup> See *Reno v. Flores*, 507 U.S. 292, 314 n.9 (1993) (“The ‘constitutional doubts’ argument has been the last refuge of many an interpretive lost cause. Statutes should be interpreted to avoid *serious* constitutional doubts . . . not to eliminate all possible contentions that the statute *might* be unconstitutional.” (citation omitted)); see also *Clark v. Martinez*, 543 U.S. 371, 385 (2005) (“The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as a *means of choosing between them*.”).

<sup>132</sup> William N. Eskridge, Jr. & Phillip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 76 (1994) (discussing “super-strong clear statement rules” that protect federalism norms).

<sup>133</sup> Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1581 (2000).

<sup>134</sup> For example, consider *United States v. Five Gambling Devices*, 346 U.S. 441 (1953), which involved a challenge to the constitutionality of a federal criminal statute, some portions of which required no nexus to interstate commerce. Three justices thought it appropriate to adopt a counter-intuitive reading of the statute in order to avoid the constitutional question of whether the statute exceeded Congress’s Commerce Clause power or else was unconstitutionally vague. *Id.* at 451-52 (plurality opinion). Two concurring justices, however, rejected the avoidance reading of the statute as simply too improbable, and would have held the statute unconstitutional. *Id.* at 453 (Black, J., concurring).

This evaluation of modern constitutional avoidance is damning, at least in light of the judicial minimalism values that the doctrine was originally intended to serve. However, scholars have backstopped *Catholic Bishop*-style constitutional avoidance by arguing that it accomplishes other important goals. Most prominently, several scholars have proposed that avoidance creates a penumbra that protects under-enforced constitutional rights by imposing hurdles on legislative attempts to come right up to the edge of what is constitutionally permissible.<sup>135</sup> Ernest Young puts this function in terms of “resistance norms,” which protect constitutional values.<sup>136</sup> In his view, the importance of constitutional avoidance lies in its capacity to “function much like super-majority requirements by making it harder—but not impossible—to achieve certain legislative goals that are in tension with the canon’s underlying value.”<sup>137</sup> The canon’s “underlying value” essentially incorporates the Constitution by reference; thus, for example, when the Court narrowly construes a jurisdiction-stripping statute in order to avoid a constitutional question, it is resisting congressional encroachment on Article III.<sup>138</sup> Similarly, constitutional avoidance might protect the underlying constitutional value of non-delegation, because avoidance decisions often limit the interpretive range available to administrative agencies.<sup>139</sup>

Offering additional justification for aggressive constitutional avoidance, Frickey argues that it provides “an intermediate alternative between statutory invalidation and validation,”<sup>140</sup> which preserves a role for legislative override and allows the Court to move incrementally.<sup>141</sup> In effect, avoidance decisions lower the temperature on hot-button decisions that might otherwise call the

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<sup>135</sup> Frickey, *supra* note 130, at 455 (“Commentators who have considered the possible normative justifications for the avoidance canon have identified . . . contexts in which its use may seem particularly appropriate. . . . [One] involves circumstances in which courts, facing institutional impediments to the exercise of traditional judicial review, use the canon to protect what amount to ‘underenforced’ constitutional norms.”).

<sup>136</sup> Young, *supra* note 133, at 1585 (“[T]he value promoted by the avoidance canon is not a general principle of interbranch comity, but rather the value embodied in whatever constitutional provision creates the underlying constitutional ‘doubt’ that is being avoided.”).

<sup>137</sup> *Id.* at 1596.

<sup>138</sup> *Id.* at 1598-99 (“[T]he court is enforcing Article III—nothing more, nothing less.”).

<sup>139</sup> See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331 (2000) (“The principle appears to say that constitutionally sensitive questions (for example, whether a statute would intrude on the right to travel, violate the right to free speech, or constitute a taking) will not be permitted to arise unless the constitutionally designated lawmaker has deliberately and expressly chosen to raise them. The only limitations on the principle are that the constitutional doubts must be serious and substantial, and that the statute must be fairly capable of an interpretation contrary to the agency’s own.”).

<sup>140</sup> Frickey, *supra* note 130, at 452.

<sup>141</sup> See *id.* at 462-63 (explaining that the avoidance canon can be “employ[ed] . . . to truncate [a] statute down to its core purposes”).

Court's legitimacy into question in the eyes of the public.<sup>142</sup> Eskridge advances a related argument that constitutional avoidance allows the Court to protect and express public values by "updat[ing] statutes by construing them to reflect society's evolving values as they relate to the Constitution."<sup>143</sup>

These appealing benefits of modern constitutional avoidance suggest that the canon is valuable, even if it cannot be defended on the grounds of judicial minimalism and fidelity to congressional intent. However, each of these benefits is premised on the ability of Congress to override the Court's statutory reading, and potentially force the constitutional question.<sup>144</sup> Thus, Young's "resistance norms" are explicitly premised on the idea that congressional override is "not impossible."<sup>145</sup> Similarly, Sunstein's concern with non-delegation makes sense only when an agency makes a decision without clear guidance; there is no reason to make it difficult for Congress to give that guidance. Quite the opposite in fact; "[s]o long as government is permitted to act when Congress has spoken clearly, no judicial barrier is in place."<sup>146</sup> And for constitutional avoidance decisions to preserve Court legitimacy, they should genuinely lob the issue back to Congress, rather than simply pretending; if the inter-branch "conversation" is a sham, then it should do little to insulate the Court from criticism.<sup>147</sup>

## 2. Overriding Constitutional Avoidance

Rejecting a Court's avoidance-based narrowing of a statute will be difficult at the best of times; this is why a constitutional avoidance decision can serve a resistance purpose. The numerous "vetogates" that a proposed law must pass through create "an imposing obstacle to the adoption of national legislation."<sup>148</sup> And amending a statute to address a single point will probably require a new

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<sup>142</sup> *Id.*

<sup>143</sup> William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1021 (1989). However, Eskridge criticized the outcome in *Catholic Bishop*, characterizing it as a decision in which the "result 'rewrites' the statute *and* negates clearly expressed legislative expectations that have not been undone by substantially changed circumstances." *Id.* at 1066.

<sup>144</sup> *See* Hasen, *supra* note 126, at 215 (discussing, but rejecting, the descriptive possibility that "the Court will use constitutional avoidance only when doing so would further a dialogue with Congress that has a realistic chance of actually avoiding constitutional problems through redrafting").

<sup>145</sup> Young, *supra* note 133, at 1552.

<sup>146</sup> Sunstein, *supra* note 139, at 335.

<sup>147</sup> *See* CALABRESI, *supra* note 36, at 12 ("The inevitable errors . . . cannot help but raise the specter of judicial, nondemocratic domination and cast doubt on judicial review . . ."); Krotoszynski, *supra* note 36, at 4-9, 46-52 ("[S]trict observance of the passive virtues is as likely to provoke interbranch strife as to prevent it.").

<sup>148</sup> William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441, 1444-46 (2008) (listing nine different "vetogates," or points where a proposed piece of legislation could fail to become law).

set of legislative compromises; when the underlying legislation is controversial, proponents could reasonably fear that reopening the issue to override a court decision will risk losing more than could be gained. Then there is the effect of the constitutional avoidance decision itself to consider. Some legislators might be genuinely reluctant to pass a law that the Court has already declared constitutionally suspect. Others could certainly use the decision to score political points for their preferred position.<sup>149</sup>

There is a final difficulty: the presumption against implied repeal. That presumption “embodies a policy of hostility to the notion of statutory updating unless the legislature makes that updating explicit. In its strongest form, the presumption amounts to a sort of clear-statement rule—allowing for repeal only by express provision—that negates the very notion of an implied repeal.”<sup>150</sup> In other words, implied repeal “requires that before one statute is held to repeal another . . . the two statutes must be logically and physically impossible to apply at the same time.”<sup>151</sup> This means that in overruling a court’s statutory interpretation, Congress must usually do more than speak clearly about the underlying substantive issue; it must also speak clearly about its desire to overrule the Court’s previous decision. Otherwise, Congress runs the risk that courts will seek to reconcile the two, rather than replacing the court’s interpretation with the subsequent legislation.<sup>152</sup>

Applying these two canons together can create an insurmountable barrier for Congress, particularly as Congress is de facto required to refer to constitutional avoidance decisions by name in order to overturn them. *Catholic Bishop* is a perfect example. First, it narrowed the NLRA in a way not anticipated by Congress. Even assuming that this narrowing serves a public value by protecting a penumbra around the religion clauses of the First Amendment from congressional interference, *Catholic Bishop* should have kicked the

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<sup>149</sup> Frickey, *supra* note 130, at 449 (“Although there is no consensus, one may suspect that, while Congress can certainly draft a bill explicit enough to force the Court to reach a constitutional question, support for or opposition to the bill will be based on policy preferences that are either unadorned by constitutional justification or that embrace such justifications as boilerplate simply because they are consistent with the politics driving the support or opposition.”); Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 606 (1983) (“[F]or the most part the legislators are motivated by a desire to enact any particular piece of legislation that fills the perceived needs of the moment. If congressional supporters can draw on the Constitution to bolster their case or to create the appearance of a reasonable decision, so much the better.”).

<sup>150</sup> Karen Petroski, *Rethorizing the Presumption Against Implied Repeals*, 92 CALIF. L. REV. 487, 489 (2004).

<sup>151</sup> Nhan T. Vu & Jeff Schwartz, *Workplace Rights and Illegal Immigration: How Implied Repeal Analysis Cuts Through the Haze of Hoffman Plastic, its Predecessors, and its Progeny*, 29 BERKELEY J. EMP. & LAB. L. 1, 19 (2008).

<sup>152</sup> See Widiss, *supra* note 119, at 877-80 (2012) (discussing ways for the Court to limit congressional overrides of the Court’s own statutory interpretations, even when Congress has spoken clearly of its desire to override the Court).

question of how to handle labor organizing at religiously affiliated employers back to Congress, leaving Congress to contemplate the difficult, but not impossible, task of overriding the case.<sup>153</sup> Yet, it was a foregone conclusion that Congress would not tackle *Catholic Bishop*. First, there is the fact that while *Catholic Bishop* created uncertainty for certain religiously affiliated employers and their employees, it left most employers untouched; from the perspective of a legislator, the issue probably seemed unimportant. Then there is the subject matter to consider: “legislating against ‘religious liberty’ would scare politicians in the best of times and seems laughably inconceivable given Congress’s present dysfunction.”<sup>154</sup> But the law of religious liberty has been positively dynamic when one compares it to federal labor law, which has not been meaningfully updated by Congress for more than fifty years.<sup>155</sup>

If the only issue was that Congress was generally unwilling to legislate in the area of labor law and religious liberty then perhaps we could simply view *Catholic Bishop* as an instance where a resistance norm worked as advertised, though we might question whether the First Amendment was really an area in which a resistance norm was required. But Congress *has* spoken to the question of religious employers and labor law by enacting RFRA, which amends the NLRA along with every other federal law. Moreover, as I discuss in Part II, RFRA provides a superior rubric for handling the objections of religious employers within a Free Exercise-style accommodation framework that focuses on specific conflicts between labor law and religious commitments.<sup>156</sup> Yet, because RFRA did not mention *Catholic Bishop* by name, and because it is possible for the Board and the courts to apply both

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<sup>153</sup> Other commentators have wrestled with ways of improving this interbranch conversation. See Frickey, *supra* note 130, at 452 (“Various commentators have grappled with the notion of provisional judicial review, the idea that the counter-majoritarian difficulty could be mediated if courts had a means of *suspending* the legal effect of a constitutionally doubtful statute pending legislative reconsideration.” (citing PAUL R. DIMOND, *THE SUPREME COURT AND JUDICIAL CHOICE* (1989); Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162 (1977); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973))).

<sup>154</sup> Gregory P. Magarian, *Hobby Lobby in Constitutional Waters: Two Life Rings and an Anchor*, 67 VAND. L. REV. EN BANC 67, 74 (2014).

<sup>155</sup> Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530 (2002) (“The core of American labor law has been essentially sealed off—to a remarkably complete extent and for a remarkably long time—both from democratic revision and renewal and from local experimentation and innovation.”).

<sup>156</sup> Cf. Susan J. Stabile, *Blame it on Catholic Bishop: The Question of NLRB Jurisdiction Over Religious Colleges and Universities*, 39 PEPP. L. REV. 1317, 1344 (2013) (“A better approach would be for the NLRB to determine whether to exercise jurisdiction over Catholic colleges and universities based on an analysis of factors counseling in favor of or against its doing so.”).

RFRA and *Catholic Bishop*, the presumption against implied repeals comes into play and the holding persists.

This means it is doubly unlikely that *Catholic Bishop* will be retired absent further intervention by the Court, because there are two clear statement rule roadblocks in place: one requiring a clear statement regarding the NLRA's application to religious employers and another requiring a clear override of *Catholic Bishop*. The effect is to turn a resistance norm into something closer to a brick wall, undermining the justifications for *Catholic Bishop*-style constitutional avoidance in the process.

A better approach to statutory interpretation in the wake of constitutional avoidance decisions would be to weaken or eliminate the presumption against implied repeals where it would serve to protect a court's handiwork rather than Congress's.<sup>157</sup> This would allow Congress to respond to constitutional avoidance decisions by speaking clearly about the underlying substantive policy choice but not necessarily about the court decision itself. In effect, instead of the presumption against implied repeals functioning similarly to conflict or express preemption—in which a federal statute displaces a state statute only if Congress clearly states its intent to do so or the two cannot possibly be reconciled<sup>158</sup>—it would function more like field preemption when reconciling constitutional avoidance decisions and subsequent legislation.<sup>159</sup> That is to say, Congress's subsequent choice to occupy a substantive area would displace the earlier constitutional avoidance decision.

This proposed approach would not be appropriate in every instance. For example, it would be inappropriate in cases involving old-style constitutional avoidance in which the Court actually decides the constitutional question and then adopts a contrary reading of a statute. Instead, this approach is most likely to be appropriate when the constitutional avoidance decision involves a high degree of speculation in the constitutional question and low degree of plausibility in the subsequent statutory interpretation. Courts and administrative agencies can apply these considerations on a case-by-case basis to reconcile earlier cases with later legislative enactments, much as they do when reconciling other types of legislative amendments that affect the ongoing validity of earlier court decisions.

However, using this approach to reconcile *Catholic Bishop* with RFRA is straightforward. *Catholic Bishop* should yield in light of Congress's later

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<sup>157</sup> Although it is beyond the scope of this Article, this approach could also be appropriate in other situations in which courts apply clear statement rules in statutory interpretation.

<sup>158</sup> See *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-64 (2002) (discussing express and conflict preemption).

<sup>159</sup> See *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisc. Emp't. Relations Comm'n*, 427 U.S. 132, 146-47 (1976) (holding that because Congress occupied the field of private sector labor relations, states could not legislate to restrict tactics that Congress had neither endorsed nor forbidden, but instead left "to the free play of economic forces").

statement about how employers' religious objections under the NLRA should be handled. This outcome is consistent with Congress's likely preferences in that it jettisons the approach to religious employers' exemptions from labor law that Congress never approved and almost certainly did not want, and replaces it with the only approach to this question that Congress did enact into law. Of course, it also leaves in place the possibility that an employer could bring a free-standing constitutional challenge.

The next Part describes in more detail how the Board should apply RFRA in the context of any employer raising a religious objection.

## II. RFRA, RELIGIOUS ACCOMMODATIONS, AND LABOR LAW

Whereas the previous Part focused on nonprofit employers that might arguably be exempt from the NLRA under *Catholic Bishop*, this Part turns to how the Board and courts should apply RFRA to employers who argue that they should be exempt from the NLRA because it conflicts with their religious exercise. The Part begins with a discussion of *Hobby Lobby*, including its controversial holding that RFRA applies to closely held for-profit employers. It then explains how to apply RFRA in the labor law context.

### A. For-Profit Employers and RFRA

No court or Board decision exempts for-profit employers from NLRA coverage based on the religious exercise of their owners.<sup>160</sup> However, this may change, given *Hobby Lobby*'s holding that RFRA applies to closely held for-profit corporations.<sup>161</sup> This Section begins by briefly discussing *Hobby Lobby* in greater detail in order to provide a foundation for the next Sections, which address RFRA's application in the NLRA context.

The employer in *Hobby Lobby* successfully sought an accommodation under RFRA in the form of an exemption from the Affordable Care Act's "contraceptive mandate," which applied to most employers.<sup>162</sup> The primary question that the Court answered in *Hobby Lobby* concerned whether a for-profit corporate employer could impute its owners' religious beliefs, triggering application of RFRA. In holding that RFRA applied in this context, the Court emphasized that "protecting the free-exercise rights of corporations like Hobby Lobby . . . protects the religious liberty of the humans who own and control those companies."<sup>163</sup> However, the Court did not clarify the extent of this holding, leaving various questions about the application of RFRA to corporations whose owners had different religious beliefs, or who were very

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<sup>160</sup> This is not to say that no employers have attempted such an argument. *See, e.g., W. Meat Packers, Inc.*, 148 N.L.R.B. 444, 447 (1964) (employer argued he could not sign a contract with the union because of his religious beliefs), *enforcement denied on other grounds*, 350 F.2d 804 (10th Cir. 1965).

<sup>161</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014).

<sup>162</sup> *Id.* at 2766.

<sup>163</sup> *Id.* at 2768.

diffuse, to be answered in future cases according to the dictates of applicable corporate law.<sup>164</sup>

After concluding that Hobby Lobby and the other corporate plaintiffs were covered by RFRA, the Court turned to the steps of the RFRA analysis. First, the Court considered whether the mandate imposed a “substantial burden” on the corporate plaintiffs.<sup>165</sup> The Court characterized the inquiry as whether the mandate imposed “a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs* . . . .”<sup>166</sup> In practice, though, the Court asked little more than whether the plaintiffs sincerely believed that the mandate imposed a substantial burden, stating that “it is not for us to say that their religious beliefs are mistaken or insubstantial.”<sup>167</sup>

Next, the Court assessed whether the mandate satisfied the compelling interest-least restrictive means inquiry. Assuming that the government had a compelling interest in “guaranteeing cost-free access to the four challenged contraceptive methods,”<sup>168</sup> the Court proceeded to assess whether the government had “shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases.”<sup>169</sup> Here, the Court concluded that HHS could simply provide contraceptives to the plaintiffs’ employees itself,<sup>170</sup> or else it could require insurance companies to provide the benefits directly to employees, as it already did when religious non-profits objected to the contraceptive mandate.<sup>171</sup> Justice Kennedy amplified this conclusion in his separate concurrence, stating that “RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation.”<sup>172</sup> However, the Court did not require HHS to extend the accommodation.<sup>173</sup> This means

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<sup>164</sup> *Id.* at 2774-75; see also sources cited *supra* note 111 (discussing questions raised by the *Hobby Lobby* Court’s discussion of “closely held” employers).

<sup>165</sup> *Hobby Lobby*, 134 S. Ct. at 2775.

<sup>166</sup> *Id.* at 2778.

<sup>167</sup> *Id.* at 2779.

<sup>168</sup> *Id.* at 2780.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 2780-81.

<sup>171</sup> *Id.* at 2782 (explaining that if a nonprofit organization certifies that it religiously opposes providing coverage for contraceptive services, the insurance issuer must directly cover such costs). This solution would ultimately benefit the insurance companies because, as the Court noted, access to contraceptives allows patients to avoid incurring other more substantial medical costs. *Id.* at 2782 n.38 (citing 78 Fed. Reg. 39,877 (July 2, 2013)).

<sup>172</sup> *Id.* at 2786 (Kennedy, J., concurring).

<sup>173</sup> See *id.* at 2760 (majority opinion) (“The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero.”).

that if HHS does not do so voluntarily, employees will be left without contraceptive coverage.

By assuming that HHS could find another method of providing cost-free contraceptives to the plaintiff corporations' employees, the Court avoided confronting head on the question of whether RFRA requires religious accommodations even when those accommodations would deprive third parties of statutory benefits to which they would otherwise be entitled.<sup>174</sup> However, the Court gestured at the factors to be considered in answering this question, stating that although burdens on third parties had to be taken into "adequate account," the fact that a third party would be disadvantaged by a religious exemption was not a sufficient reason to disallow the exemption.<sup>175</sup> Justice Kennedy, though, expressed a greater reluctance to burden third parties, observing that employers' free exercise may not "unduly restrict other persons, such as employees, in protecting their own interests . . . ."<sup>176</sup>

Finally, *Hobby Lobby* emphasized that its holding was "very specific," and that it did not authorize "for-profit corporations and other commercial enterprises [to] 'opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs.'"<sup>177</sup> Similarly, the Court stated that its decision would not necessarily lead to religious exemptions from other requirements, such as those involving immunizations.<sup>178</sup> Further, Justice Kennedy began his concurring opinion by emphasizing that "the Court's opinion does not have the breadth and sweep ascribed to it by the respectful and powerful dissent."<sup>179</sup>

Thus, *Hobby Lobby* leaves in its wake a set of questions that will undoubtedly be hotly contested in a variety of contexts, including labor law. In the remainder of this Article, I discuss how to resolve potential conflicts between employers' religious rights under RFRA and employees' collective bargaining rights under the NLRA.

#### B. *Factual Predicates: Sincere Religious Beliefs*

Any person (corporate or otherwise) claiming entitlement to a RFRA exemption must first establish a sincere religious belief that is substantially burdened by applicable federal law. This formulation requires claimants to fulfill three parts of a prima facie case: that their beliefs are (1) sincere, (2)

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<sup>174</sup> See *id.* at 2781 n.37 ("In any event, our decision in these cases need not result in any detrimental effect on any third party. . . . [T]he Government can readily arrange for other methods of providing contraceptives . . . .").

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 2786-87 (Kennedy, J., concurring).

<sup>177</sup> *Id.* at 2760 (majority opinion) (quoting *id.* at 2787 (Ginsburg, J., dissenting)).

<sup>178</sup> *Id.* at 2783 ("Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat infectious diseases) and may involve different arguments about the least restrictive means of providing them.").

<sup>179</sup> *Id.* at 2785 (Kennedy, J., concurring).

religious rather than secular, and (3) substantially burdened. Of these factual questions, only the third was presented in *Hobby Lobby*, when HHS argued that the plaintiff corporations' religious objection to abortion was not substantially burdened by the obligation to include contraceptive coverage in their insurance policies. However, the Court rejected that argument, instead crediting the plaintiffs' religious beliefs that contraceptives were abortifacients.<sup>180</sup> Thus, the "substantial burden" inquiry largely collapses into the other two questions—whether the relevant beliefs are sincerely held, and whether they are religious.

Accordingly, this Section discusses courts' existing approaches to answering two key questions: whether beliefs that conflict with the requirements of generally applicable law are religious, and whether they are sincerely held. It then discusses whether the NLRA is the least restrictive way of fulfilling a compelling government interest, and—assuming it is not—what accommodations might be available to religious employers.

### 1. Religious or Political Beliefs?

A broad range of arguably religious beliefs might form the basis of RFRA claims for exemption from labor law. To take an easy example, as early as the early 1930s, Anabaptist and Mennonite leaders both condemned membership in labor unions and sought to discourage labor unions from forming in businesses owned by co-religionists.<sup>181</sup> Seventh Day Adventists have long taken a similar position.<sup>182</sup> It is a straightforward matter to categorize such beliefs, when held by modern-day adherents of those faiths, as religious.<sup>183</sup> Thus, when a hospital managed by the Seventh Day Adventist Church argued that it should be exempt from the NLRA under RFRA, the NLRB had no difficulty in categorizing the objection as religious in nature, even though it ultimately rejected the employer's RFRA claim.<sup>184</sup>

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<sup>180</sup> See *id.* at 2775 (majority opinion) (emphasizing that the parties in the case "have a sincere religious belief that life begins at conception").

<sup>181</sup> DONALD B. KRAYBILL, *CONCISE ENCYCLOPEDIA OF AMISH, BRETHREN, HUTTERITES, AND MENNONITES* 123 (2010) (attributing Anabaptist avoidance of labor unions to their belief in nonresistance and their reluctance to join secret societies).

<sup>182</sup> *Religious Objections to Labor Union Membership*, CHURCH STATE COUNCIL, <http://www.churchstate.org/index.php?id=226> [<http://perma.cc/36AN-46AR>].

<sup>183</sup> See *Thomas v. Review Bd., Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981) (holding that an individual's religious beliefs need not be in accord with institutional church doctrine).

<sup>184</sup> *Ukiah Adventist Hosp.*, 332 N.L.R.B. 602, 603 (2000) ("[A]lthough the Employer's primary purpose is secular, we will assume for purposes of the decision that asserting jurisdiction over the Employer creates a 'substantial burden' on the Employer's free exercise of religion within the meaning of RFRA."). The Board ultimately concluded that the hospital was not entitled to an accommodation based on its conclusion that the NLRA was the least restrictive means of furthering a compelling government interest. *Id.* at 614.

The more difficult cases involve intertwined religious and political beliefs. Such entanglement is a common occurrence because both religious institutions and unions are frequently involved in electoral politics. For example, Peter Montgomery describes a manual produced by the Christian Coalition (a self-described “conservative grassroots political organization[]”<sup>185</sup>), stating that “Christians have a responsibility to submit to the authority of their employers.”<sup>186</sup> That directive seems to be aimed at employees rather than employers, but one might imagine an employer arguing that this principle is inconsistent with its own obligation under the NLRA to bargain over terms and conditions of employment with a union. Even further towards the “political” end of the spectrum is another Christian Coalition publication that urges members to support anti-union legislation because of the labor movement’s support of “the effort to normalize homosexuality.”<sup>187</sup> One might imagine a similar argument urging religious adherents who oppose abortion to also oppose labor unions because of their support of pro-choice candidates. That argument would go as follows: refusal to bargain with a union would prevent employees from becoming union members, which would deprive the union of money that might ultimately be contributed to pro-choice candidates.<sup>188</sup>

Despite the potential complexity of the question, RFRA itself says very little about what beliefs qualify as “religious.” In particular, RFRA does not contain its own definition of religion,<sup>189</sup> leaving courts to borrow from other areas of

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<sup>185</sup> *About Us*, CHRISTIAN COALITION OF AMERICA, [http://www.cc.org/about\\_us](http://www.cc.org/about_us) [<http://perma.cc/9XA2-69B6>].

<sup>186</sup> Peter Montgomery, *Jesus Hates Taxes: Biblical Capitalism Created Fertile Anti-Union Soil*, RELIGION DISPATCHES (Mar. 15, 2011), <http://religiondispatches.org/jesus-hates-taxes-biblical-capitalism-created-fertile-anti-union-soil/> [<http://perma.cc/3MFU-WUGR>].

<sup>187</sup> Hans Johnson, *Does God Hate Unions?*, IN THESE TIMES (May 29, 2000), <http://inthesetimes.com/issue/24/13/johnson2413b.html> [<http://perma.cc/22ZK-F8DF>]; see also Kathryn Jean Lopez, *Keeping Faith With Labor: Can Unions and Churches Maintain Their Longtime Friendship?*, CATHOLIC EDUC. RES. CTR., <http://www.catholiceducation.org/en/religion-and-philosophy/social-justice/keeping-faith-with-labor-can-unions-and-churches-maintain-their-longtime-friendship.html> [<http://perma.cc/RG3U-4YQA>] (describing a Southern Baptist’s objection to union membership due to the union’s political stances).

<sup>188</sup> While this is an attenuated burden on religious practice, similar arguments have been advanced. Wheaton College objected to notifying the federal government of its objection to providing contraceptive coverage, because doing so would cause another source to provide the coverage. *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2808 (2014) (Sotomayor, J., dissenting). The Supreme Court has granted certiorari in a set of seven cases presenting this question. Miscellaneous Order (Nov. 6, 2015), [http://www.supremecourt.gov/orders/courtorders/110615zr\\_j4ek.pdf](http://www.supremecourt.gov/orders/courtorders/110615zr_j4ek.pdf) [<http://perma.cc/JQ4G-WTJ6>].

<sup>189</sup> 42 U.S.C. § 2000bb-2 (2012) (“As used in this chapter . . . the term ‘exercise of religion’ means religious exercise, as defined in section 2000cc-5 of this title.”). RFRA incorporates the definition of “exercise of religion” from the Religious Land Use and Institutionalized Persons Act. Pub L. No. 106-274, §§ 7-8, 114 Stat. 806-07 (2000) (codified principally at 42 U.S.C. § 2000cc-5 (2012)) (defining “religious exercise” as including “any

law. One such possible source is the body of case law interpreting the federal conscientious objector statute, which exempts from service in the armed forces individuals who “by reason of their religious training and belief are conscientiously opposed to war in any form.”<sup>190</sup> For example, in *United States v. Seeger*, the Court held that in order to determine which beliefs qualified as religious, courts should look to “whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God . . . .”<sup>191</sup> “Thus, a genuinely held belief that involves matters of the afterlife, spirituality, or the soul, among other possibilities, qualifies as a religion . . . .”<sup>192</sup> In *Welsh v. United States*,<sup>193</sup> the Court noted that opposition to war could qualify as “religious” under the same statute as long as that opposition stemmed from “moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions.”<sup>194</sup>

This definition is broad but not limitless, and the Court rightly shies away from drawing lines between “religious” and “non-religious” beliefs. The *Seeger* Court observed that Congress was “embrac[ing] all religions,” while excluding “essentially political, sociological, or philosophical views.”<sup>195</sup> Similarly, in upholding the Selective Service Act’s requirement that conscientious objectors religiously oppose all war (and not just particular wars) against Establishment and Free Exercise challenges, the Court stated that “opposition to a particular war may more likely be political and nonconscientious, than otherwise.”<sup>196</sup>

While these cases leave countless questions unresolved,<sup>197</sup> they also suggest a dividing line: religion should be separable from electoral politics. The contrary rule would be extremely difficult to administer: religious exemptions would turn on changeable political party platforms.<sup>198</sup> At minimum, such a rule would exclude religious employers who object to the possibility that unions

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exercise of religion, whether or not compelled by, or central to, a system of religious belief”). While this definition implies that the statute should be construed broadly on this point, it also does not define the term.

<sup>190</sup> *United States v. Seeger*, 380 U.S. 163, 164-65 (1965).

<sup>191</sup> *Id.* at 165-66.

<sup>192</sup> *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 448 (7th Cir. 2013) (discussing definition of “religion” in Title VII context).

<sup>193</sup> 398 U.S. 333 (1970).

<sup>194</sup> *Id.* at 339-40.

<sup>195</sup> *Seeger*, 380 U.S. at 165.

<sup>196</sup> *Gillette v. United States*, 401 U.S. 437, 455 (1971).

<sup>197</sup> See generally Chris Naticchia, *Ronald Dworkin, Life’s Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom*, 10 J.L. & POL. 339, 344 & nn.29-33 (1994) (book review) (compiling scholarly articles debating the constitutional definition of religion).

<sup>198</sup> *Id.* at 343 (stating that a constitutional definition of religion must, among other things, involve beliefs that are “distinguishable from political [beliefs]”).

will spend money in support of mostly Democratic politicians. It leaves in play, however, the other examples discussed above, including the religious employer who believes he or she has a biblically based obligation not to bargain but instead to set wages and working conditions unilaterally.

Of course, some of these beliefs closely coincide with employers' own secular interests, raising the question of whether they are sincerely held. The next Section takes up that question.

## 2. Sincere or Insincere Religious Beliefs?

The *Hobby Lobby* Court held that “a corporation’s pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail.”<sup>199</sup> But how will a court or administrative agency separate sincere from insincere religious objections? The question was not presented in *Hobby Lobby* itself and the Court offered relatively little guidance. Instead, the Court limited itself to citing a Tenth Circuit case deciding that two individuals were insincere in their religious defense to a marijuana trafficking charge<sup>200</sup> and observed that courts regularly adjudicate sincerity issues in the prisoner free exercise context.<sup>201</sup> Thus, to the extent the Court signaled at all how sincerity should be handled in the corporate context, it directed lower courts and administrative agencies to adapt the inquiry from the individual context. This approach is unsurprising, considering that the *Hobby Lobby* Court viewed the case through the lens of individual corporate owners who would benefit from corporate religious exemptions. In other words, the real inquiry for the *Hobby Lobby* majority was whether the individuals controlling a closely held corporation held sincere religious beliefs that conflicted with their obligations under federal law.

The difficulty of assessing whether subjective religious beliefs are sincere is palpable.<sup>202</sup> Reflecting on the difficulty of applying standard methods of assessing intent or belief to religious questions, Justice Jackson expressed frustration: “[A]s a matter of either practice or philosophy I do not see how we can separate an issue as to what is believed from considerations as to what is believable.”<sup>203</sup> Yet, courts must assess sincerity in a variety of contexts.<sup>204</sup> The

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<sup>199</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2774 n.28 (2014).

<sup>200</sup> *Id.* (citing *United States v. Quaintance*, 608 F.3d 717, 718-19 (10th Cir. 2010)).

<sup>201</sup> *Id.* at 2774 (“If Congress thought the federal courts were up to the job of dealing with insincere prisoner claims, there is no reason to believe that Congress limited RFRA’s reach out of concern for the seemingly less difficult task of doing the same in corporate cases.”).

<sup>202</sup> *See* *Thomas v. Review Bd. of Ind., Ind. Emp’t Sec. Div.*, 450 U.S. 707, 714 (1981).

<sup>203</sup> *United States v. Ballard*, 322 U.S. 78, 92 (1944) (Jackson, J., dissenting).

<sup>204</sup> RFRA is far from the only situation in which courts must assess religious sincerity. Title VII, for example, protects religious employees from discrimination, and entitles them to accommodations of their sincerely held religious beliefs in relatively narrow circumstances. EEOC, COMPLIANCE MANUAL § 12-I.A.2 (2008), [http://www.eeoc.gov/policy/docs/religion.html#\\_Toc203359488](http://www.eeoc.gov/policy/docs/religion.html#_Toc203359488) [http://perma.cc/268X-

sincerity of business owners' opposition to the requirements of the NRLA will simply be another instance in which a factfinder must undertake this difficult inquiry.<sup>205</sup> Accordingly, this Section considers what types of factual evidence might lead to the conclusion that an employer is or is not sincere in its religious objection to complying with the NLRA.

The sincerity inquiry can be relatively simple when the claimed religious accommodation would not yield secular benefits or, at minimum, when the secular benefits would be offset by other secular disadvantages.<sup>206</sup> The D.C. Circuit nodded to this relationship in *University of Great Falls v. NLRB* when it stated: "While public religious identification will no doubt attract some students and faculty to the institution, it will dissuade others. In other words, it comes at a cost."<sup>207</sup> Similarly, workers who are entitled to a religious exemption from union dues or fees are usually required to pay an equivalent amount to a charity.<sup>208</sup> Again, the reason is clear—the substitution removes the financial incentive to claim a false religious objection to paying union dues or fees.<sup>209</sup> Conversely, the Supreme Court held in *Hosanna-Tabor* that school employee Cheryl Perich was a minister whose firing could not give rise to

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YVYG] [hereinafter EEOC Manual] (explaining that Title VII requires employers to accommodate "sincerely held" religious beliefs and stating that although there must be a sincerity inquiry, "the 'sincerity' of an employee's stated religious belief is usually not in dispute"); see also *United States v. Seeger*, 380 U.S. 163, 166 (1965) (discussing sincerity element of a conscientious objector statute).

<sup>205</sup> The fact that NLRB administrative law judges, rather than a court, will be undertaking the inquiry should not be cause for concern. These judges are experienced in assessing similar questions of motivation. For example, unfair labor practice cases regularly call upon them to determine an employer's motivation in firing or punishing a pro-union employee. Similarly, unfair labor practices involving alleged breaches of the duty to bargain in good faith require determinations about whether the employer or union had the appropriate mindset in bargaining. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 106-07 (1970) (holding the duty to bargain in good faith does not require parties to agree to any particular substantive contract terms, but rather to accept and reject bargaining proposals for legitimate business reasons, rather than for the purpose of frustrating agreement).

<sup>206</sup> See Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417, 1450-51 (2012) ("Many claims for [religious exemptions] . . . seek the ability to perform an act that is not only personally burdensome, but meaningless apart from the religious faith that gives the act meaning.").

<sup>207</sup> 278 F.3d 1335, 1344 (2002). This is not to say the D.C. Circuit's empirical claim is accurate, but instead just that it recognizes that, in general, a religious claim that carries costs as well as benefits is less likely to be advanced insincerely.

<sup>208</sup> See *Reed v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 569 F.3d 576, 581 (6th Cir. 2009) (holding that such a provision would not violate Title VII).

<sup>209</sup> See EEOC Manual, *supra* note 204, § 12-I.A.2 (stating that an employer may contest an employee's religious sincerity when "the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons").

liability under employment discrimination law, relying in part on the fact that she had received a benefit on her taxes that was available only to ministers.<sup>210</sup> Though she declared herself a minister to receive a benefit, the declaration later represented a kind of admission against interest—having received the benefits of ministerial status, she could not evade the drawbacks. Other examples in which religious believers prove their sincerity by accepting adverse consequences from both the state<sup>211</sup> and the market<sup>212</sup> abound.

But assessing sincerity in the context of NLRA exemptions is far more difficult, given that many employers see “union avoidance” as having significant economic benefits and few costs. Given that employers who break the law while fighting union drives for secular reasons face relatively toothless state sanctions and almost non-existent market sanctions, it strains credulity to suggest that employers who invoke RFRA to avoid the NLRA will suffer any significant market backlash. Perhaps in some cases the Board will be able to look to whether the believer’s broader system of religious beliefs calls for other financial sacrifices. However, this inquiry often will not be conclusive.

In that case, the Board will usually have to look to other indicia of sincerity. Courts have not developed a single approach for assessing religious sincerity that could be imported wholesale into Board practice.<sup>213</sup> Instead, courts look to a range of circumstantial evidence,<sup>214</sup> including the believability of the alleged believer’s trial testimony, the timeliness of the assertion of a religious belief and evidence showing the religious belief pre-dated the desire for an

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<sup>210</sup> *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC* 132 S. Ct. 694, 707 (2012).

<sup>211</sup> For example, the objectors in both *Seeger* and *Welsh* were sentenced to incarceration after they refused to submit to induction into the military. *Welsh v. United States*, 398 U.S. 335, 338 (1970) (“Both Seeger and Welsh subsequently refused to submit to induction into the military and both were convicted of that offense.”). While they were ultimately granted conscientious objector status, the fact that they apparently stood ready to be imprisoned rather than serve in the military suggests that their beliefs were sincere. *See id.* at 337.

<sup>212</sup> Kent Greenawalt, *Religious Toleration and Claims of Conscience*, 21 J. CONTEMP. LEGAL ISSUES 449, 462 (2013) (“[I]f the seeking of an exemption is likely to cause irritation of superiors or colleagues that could down the road hurt chances for a promotion or informal benefits, a person has no incentive to make an insincere claim.”); Wilson, *supra* note 206, at 1451 (discussing “significant wrath in the marketplace” felt by individuals who object to facilitating same-sex marriage on religious grounds).

<sup>213</sup> Kevin L. Brady, *Religious Sincerity and Imperfection: Can Lapsing Prisoners Recover Under RFRA and RLUIPA?*, 78 U. CHI. L. REV. 1431, 1433 (2011).

<sup>214</sup> Whether religious beliefs are sincere is a question of fact. *See United States v. Seeger*, 380 U.S. 163, 185 (1965) (holding that question of whether beliefs supporting conscientious objector status are sincerely held was one of fact). Thus, when these questions arise in the NLRA context, they will be resolved in the first instance by the NLRB and then reviewed by appellate courts for “[w]hether on the record as a whole there is substantial evidence to support agency findings . . . .” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951).

accommodation,<sup>215</sup> and whether religious leaders vouch for the believer.<sup>216</sup> However, external evidence such as the testimony of a religious leader is not necessary to the inquiry; some believers do not belong to a system of organized religion with leaders.<sup>217</sup> Conversely, testimony of a religious leader may be insufficient because one could attend church regularly without being a sincere believer.

*United States v. Quaintance*,<sup>218</sup> the marijuana trafficking case cited by the *Hobby Lobby* majority,<sup>219</sup> nicely illustrates the fact-bound nature of the sincerity inquiry. In that case, the Tenth Circuit relied on evidence of insincerity that included instances where the defendants referred to their marijuana operation as a “business” and sold marijuana when they needed money, the hasty religious conversion of one of their associates immediately before a marijuana sale, and the fact that the defendants were frequent recreational users of cocaine, even though their purported religious beliefs related only to marijuana.<sup>220</sup> In other cases, including some of the prisoner cases cited by the *Hobby Lobby* majority,<sup>221</sup> courts have decided religious sincerity questions by relying on the believer’s reputation and courtroom demeanor,<sup>222</sup> as well as unexplained inconsistencies in the believer’s adherence to the asserted beliefs.<sup>223</sup>

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<sup>215</sup> See *Aguayo v. Harvey*, 476 F.3d 971, 981 (D.C. Cir. 2007) (opining that a soldier’s request for conscientious objector status, coming just days before he was due to deploy to Iraq, at least suggests a lack of sincerity absent compelling evidence that his belief pre-dated the application).

<sup>216</sup> *Brady*, *supra* note 213, at 1453-54 (observing that courts assessing conscientious objectors’ sincerity look favorably on the testimony of religious leaders personally acquainted with the registrant and analogizing to RFRA sincerity inquiry).

<sup>217</sup> *Id.* (claiming that the testimony of religious leaders is “not decisive because religious exemptions do not require believers to be members of particular religions”).

<sup>218</sup> 608 F.3d 717 (10th Cir. 2010).

<sup>219</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2774 n.28 (2014) (citing *Quaintance* for the proposition that a pretextual claim of a religious belief does not qualify the corporation for protection under RFRA).

<sup>220</sup> *Quaintance*, 608 F.3d at 722-23.

<sup>221</sup> *Hobby Lobby*, 134 S. Ct. at 2774 & n.29 (citing *Green v. White*, 525 F. Supp 81, 83-84 (E.D. Mo. 1981) and *Abate v. Walton*, 77 F.3d 488, 1996 WL 5320, \*5 (9th Cir. Jan. 5, 1996) (unpublished table decision) as evidence that “the propensity of some prisoners to assert claims of dubious sincerity [is] well documented”).

<sup>222</sup> *Green*, 525 F. Supp. at 83-85.

<sup>223</sup> *Abate*, 1996 WL 5320, at \*5. However, other courts have observed that inconsistencies in religious practices do not necessarily indicate insincerity because strict doctrinal adherence is an impossibly high standard and inconsistencies can be explained by prisoner’s evolving belief system. *Moussazadeh v. Tex. Dep’t of Criminal Justice*, 703 F.3d 781, 791-92 (5th Cir. 2012) (“A finding of sincerity does not require perfect adherence to beliefs expressed by the inmate, and even the most sincere practitioner may stray from time to time.”); *United States v. Zimmerman*, 514 F.3d 851, 854 (9th Cir. 2007) (holding that a

Drawing from the types of considerations that courts have looked to in other contexts, the NLRB may be able to assess an employer's religious sincerity by looking to documents or testamentary evidence that predates a union drive or, better yet, the employer's own involvement in business. Where it is available, the NLRB could also rely on testimony from religious leaders to establish both the nature of their religion's beliefs as well as the employer's sincerity in those beliefs. For example, a Seventh Day Adventist employer today may still be able to easily obtain testimony from a church leader about the church's position on unions and the employer's length of membership in the church. However, it will be much more difficult to prove the sincerity of more idiosyncratic religious beliefs.<sup>224</sup> For example, while the Catholic Church is generally supportive of labor rights,<sup>225</sup> an individual Catholic employer might nonetheless take the position that collective bargaining is inconsistent with his or her own interpretation of Catholic doctrine.<sup>226</sup> It is unlikely that such an employer would have documentary proof of this belief; indeed, such an employer may not have reflected on his or her religious beliefs related to collective bargaining before becoming aware of the union drive. In these cases, NLRB judges will be largely confined to making their decisions based on the credibility of the employer's testimony.

However, there is one way that the sincerity inquiry could be made easier: if successful RFRA claims produce accommodations that meet employers' religious objections without also yielding substantial secular benefits, then there will be little incentive to manufacture insincere objections. Accordingly, the next Section discusses ways of accommodating potential religious objections while simultaneously preserving employees' collective action rights to the greatest extent possible, which will also help discourage insincere claims.

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prisoner's historical drug use and tattoos do not necessarily indicate insincerity because his beliefs may have "changed over time").

<sup>224</sup> This is likely to be a recurring issue as the Supreme Court has held that the protections of the Free Exercise Clause extend even to idiosyncratic beliefs. *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981) ("[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect.").

<sup>225</sup> The United States Conference of Catholic Bishops states: "The Catholic Church has a well-documented tradition on labor and unions, rooted in the human right of association." *Selected Quotations from Catholic Social Thought on the Rights and Responsibilities of Workers and Labor Unions*, U.S. CONFERENCE OF CATHOLIC BISHOPS, <http://www.usccb.org/upload/Primer-labor-Catholic-social-teaching.pdf> [<http://perma.cc/5F6P-R3HN>] (compiling an extensive list of quotations from Catholic leaders in support of collective bargaining rights).

<sup>226</sup> See Brady, *supra* note 65, at 80 (arguing that although the Catholic Church is generally supportive of labor unions, "Church documents addressing labor issues envision collective bargaining in a radically different way than is provided for under the NLRA and state labor laws").

C. *Must The NLRA Yield to Sincere Religious Objectors?*

Once a person has demonstrated that federal law imposes a substantial burden on his or her sincere religious beliefs, the next question is whether the government can show that the federal law is the least restrictive way of satisfying a compelling government interest.<sup>227</sup> I take up that question here, and conclude that there is a good argument that RFRA does not mandate religious accommodations from the NLRA at all because the NLRA satisfies this strict scrutiny analysis. However, recognizing that courts might reach other conclusions, I complete the remainder of the analysis to illustrate how the Board might structure religious accommodations so as to best balance employers' sincere religious beliefs with employees' rights to act collectively under the NLRA.

One topic I do not discuss is whether religious accommodations—particularly those that burden third parties—violate the Establishment Clause. There is already a substantial body of literature on that question, though there is not a scholarly consensus.<sup>228</sup> Furthermore, *Hobby Lobby* did not embrace the argument that burdensome accommodations violate the Establishment Clause, though the Court did observe that the RFRA compelling interest-least restrictive means inquiry should take into account burdens on third parties,<sup>229</sup> with Justice Kennedy making a somewhat stronger statement.<sup>230</sup> Accordingly, I

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<sup>227</sup> 42 U.S.C. § 2000bb-1(b) (2012).

<sup>228</sup> For arguments that at least some RFRA accommodations violate the Establishment Clause, see Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 349 (2014) (arguing that Establishment Clause forbids cost-shifting from religious adherents onto non-adherents); Gregory P. Magarian, *How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution*, 99 MICH. L. REV. 1903, 1977 (2001) (arguing that Establishment Clause bars provision of certain accommodations only to religious believers when nonbelievers are also likely to prefer the accommodation); see also *City of Boerne v. Flores*, 521 U.S. 507, 537 (1997) (Stevens, J., concurring) (claiming that RFRA violates the Establishment Clause). For arguments that RFRA accommodations do not violate the Establishment Clause, see Richard W. Garnett, *Accommodation, Establishment, and Freedom of Religion*, 67 VAND. L. REV. EN BANC 39, 45 (2014) (“[T]o the extent that the Establishment Clause does place limits on accommodations that are excessively burdensome to the public or to identifiable nonbeneficiaries, RFRA would seem to incorporate those limits into its standard of review.”); Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1839 (2006) (arguing that religious exemptions are consistent with original understanding of the Establishment Clause and can generally be made consistent with modern religious neutrality principles); Laycock, *supra* note 38, at 1416 (arguing that religious exemptions that do not create a public subsidy, either directly or via burden shifting, do not violate the Establishment Clause).

<sup>229</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780-82 (2014).

<sup>230</sup> *Id.* at 2786 (Kennedy, J., concurring).

take seriously *Hobby Lobby's* statement that cost-shifting is an important part of the RFRA analysis.

The two-part threshold question—whether the NLRA is the least restrictive means of furthering a compelling government interest—determines whether employers are entitled to religious accommodations under the NLRA at all. The first part of the question requires courts to assess the importance of the government's interest in the NLRA's system of collective bargaining.<sup>231</sup> Then, the second part asks how snugly those interests fit with the Act.<sup>232</sup>

The NLRA sets out findings and policies explaining the federal government's interest in establishing and regulating a system of private-sector collective bargaining.<sup>233</sup> Those government interests fall generally into three categories: (1) to improve working conditions and raise wages; (2) to maintain the free flow of commerce by channeling labor disputes into a bargaining system that is less likely to lead to strikes and violence (the “labor peace” rationale); and (3) to allow workers to bargain effectively for improved working conditions, thereby improving the economy by boosting aggregate demand (the “worker voice” rationale).<sup>234</sup> This statement of governmental interests was transparently drafted to increase the chance that the statute would be found to be a constitutional exercise of Congress's Commerce Clause power.<sup>235</sup> Still, the labor peace rationale persists in cases construing the NLRA and other labor statutes,<sup>236</sup> and the Court has previously recognized that labor peace is at least a “vital” state interest.<sup>237</sup> Potential hair-splitting about the

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<sup>231</sup> 42 U.S.C. § 2000bb-1(b)(1) (2012) (mandating government burdens on religion be “in furtherance of a compelling governmental interest”).

<sup>232</sup> *Id.* § 2000bb-1(b)(2) (mandating government burdens on religion be “the least restrictive means of furthering that compelling governmental interest”).

<sup>233</sup> 29 U.S.C. § 151 (2012).

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* (discussing need for collective bargaining to prevent strikes that impair “the efficiency, safety, or operation of the instrumentalities of commerce” or occur “in the current of commerce” and stating that “inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract . . . substantially burdens and affects the flow of commerce”).

<sup>236</sup> *E.g.*, *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 302-03 (1986) (“[The] governmental interest in labor peace is strong enough to support a[] [collective bargaining arrangement]”); *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 455-56 (1984) (observing that the Railway Labor Act's collective bargaining provisions were “justified by the governmental interest in industrial peace”); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 224 (1977) (“The desirability of labor peace is no less important in the public sector . . . .”); *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 812 (1961) (“Congress legislated to correct what it found to be abuses in the domain of promoting industrial peace.”); *Ry. Emp. Dep't v. Hanson*, 351 U.S. 225, 233 (1956) (“Industrial peace along the arteries of commerce is a legitimate objective; and Congress has great latitude in choosing the methods by which it is to be obtained.”).

<sup>237</sup> *E.g.*, *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991).

difference between a “vital” state interest and a “compelling” one aside, the Court is likely to accept labor peace as a qualifying state interest.<sup>238</sup> Likewise, the Court is likely to accept as a compelling state interest the need to boost workers’ wages and benefits and improve their working conditions and providing them a voice on the job; indeed, at least five members of the *Hobby Lobby* Court accepted that improving workers’ insurance benefits by ensuring that their plans provide contraceptives was a compelling state interest.<sup>239</sup>

But is the NLRA the least restrictive manner of furthering those interests? As to the government’s interest in raising wages and improving benefits, it is possible that, applying the logic of *Hobby Lobby*, there is a less restrictive alternative available<sup>240</sup>—the government could legislate minimum wage and other benefits, rather than requiring collective bargaining. However, as Michael Gottesman has argued, minimum employment standards legislation cannot be a complete substitute for collective bargaining because “[t]here are vast areas of employee interest that can never be captured by such legislation” and bargaining between individual employees and their employers will not yield the same results as collective bargaining.<sup>241</sup> Thus, the government might successfully argue that the NLRA is the least restrictive means of setting minimum work standards that are responsive to the unique conditions within different sectors of the economy. It seems possible, though, that at least some courts will find this explanation unconvincing and instead conclude that Congress could legislate broad standards that could then be adjusted on a more granular level by an administrative agency.

Likewise, there is a strong argument that the NLRA is the least restrictive way of furthering labor peace. First, the Supreme Court has previously endorsed the view that collective bargaining arrangements can be the least

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<sup>238</sup> Although the Court has stopped just short of labeling labor peace as a “compelling state interest,” there is a line of cases in which the Court has treated it as such by holding that it is an interest which justifies the infringement of certain First Amendment rights. *See, e.g., Hudson*, 475 U.S. at 302-03 (“[T]he government interest in labor peace is strong enough to support a[] [collective bargaining arrangement] notwithstanding its limited infringement on nonunion employees’ constitutional rights.”); *Ellis*, 466 U.S. at 455-56 (“It has long been settled that such interference with First Amendment rights is justified by the governmental interest in industrial peace.”); *Abood*, 431 U.S. at 222-23 (holding that although collective bargaining arrangements can have “an impact on [employees’] First Amendment interests” this is “justified by the legislative assessment of the[ir] important contribution to the . . . system of labor relations”).

<sup>239</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2786 (2014) (Kennedy, J., concurring; *id.* at 2799 (Ginsburg, J., dissenting) (“[T]he Government has shown that the contraceptive coverage for which the ACA provides further compelling interest in public health and women’s well being.”).

<sup>240</sup> *Id.* at 2780-81 (majority opinion).

<sup>241</sup> Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 70-71 (1993).

restrictive means for advancing labor peace.<sup>242</sup> Second, there is persuasive empirical evidence on the relationship between the NLRA and labor peace. Michael Wachter has argued that “today’s NLRA can be judged to be successful because of the sharp decline in strike activity and related violence”—violence that “paralyzed the national economy and frequently required the deployment of the National Guard or federal troops to restore order.”<sup>243</sup> The mechanics of Wachter’s argument rely on competition between union and non-union firms; as he puts it, “[t]he ultimate deterrent to employer opportunism is the threat effect of unionization.”<sup>244</sup> In other words, employers who believe they will be disadvantaged if their workers unionize will treat those workers well to remove the incentive to unionize.<sup>245</sup> Relatedly, the presence of some unionized employers who offer higher wages or better working conditions than their non-unionized counterparts will lead non-unionized employers to follow suit in order to be able to effectively compete for the best workers (whether or not those employers also want to avoid unionization). Better wages can also decrease the chance of labor unrest.<sup>246</sup>

These arguments should be persuasive; Wachter’s research gives credence to the conclusion that the NLRA is the least restrictive way of advancing the government interest in labor peace. In other words, Wachter’s explanation suggests that, considering the economy as a whole, the threat of unionization is necessary to spur employers to treat their workforce well enough to avoid labor unrest. When employers are freed from that threat, the NLRA’s labor peace benefits in the non-union sector are lost.<sup>247</sup> Furthermore, this explanation illustrates a way in which the NLRA is narrowly tailored: employers are free to make their case to employees that they should not exercise their rights under

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<sup>242</sup> See *Hudson*, 475 U.S. at 302-03; *Ellis*, 466 U.S. at 455-56; *Abood*, 431 U.S. at 222-23.

<sup>243</sup> Michael L. Wachter, *The Striking Success of the National Labor Relations Act*, in RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW 427, 427, 429 (Cynthia L. Estlund & Michael L. Wachter eds., 2012) (arguing that workers invest their savings in debt instruments like home mortgages which makes them more risk-averse and less likely to strike).

<sup>244</sup> *Id.* at 447.

<sup>245</sup> See *id.* (describing the economic disadvantages of a unionized employer due to “[w]age and benefits . . . be[ing] raised above competitive levels and . . . [incurring] transaction costs . . . [due to] negotiating a collective bargaining agreement that will also impose restrictions on its ability to manage its work force unilaterally”).

<sup>246</sup> For a convincing explanation of why increased income may lead to decreased labor unrest, see Tayyab Mahmud, *Debt and Discipline: Neoliberal Political Economy and the Working Classes*, 101 KY. L.J. 1, 42 (2012).

<sup>247</sup> Wachter, *supra* note 243, at 457 (“Critical to the success of the NLRA is the transformation of the non-union sector from a dysfunctional labor relations system that was an incubator for riots and violence into one in which employees can trust the employer most of the time to enforce the norms of the workplace.”).

the NLRA or to simply treat their employees well enough that they are unlikely to feel the need for union representation.

Accordingly, there is a good argument that the NLRA is the least restrictive method of furthering a compelling state interest—which is the same conclusion reached by the Board and the courts that have considered this issue.<sup>248</sup> Nevertheless, it is possible that some courts may come to a different conclusion in the context of individual RFRA challenges. This is because the *Hobby Lobby* Court emphasized that the compelling government interest-least restrictive means analysis is to be performed with respect to the person seeking the exemption.<sup>249</sup> Stated differently, the question is whether the application of the NLRA to an individual objecting employer is the least restrictive means of achieving labor peace. But the labor peace rationale—which focuses on the national economy as a whole—is in some ways a poor match for this individual employer-focused inquiry. While some courts will likely adopt the analysis laid out above, others could nonetheless conclude that exempting a single employer from the NLRA would be unlikely to disrupt labor peace. Furthermore, some classes of employers are already excluded from the NLRA<sup>250</sup>—a factor that proved persuasive to the *Hobby Lobby* majority in the

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<sup>248</sup> *E.g.*, *NLRB v. Hanna Boys Ctr.*, 940 F.2d 1295, 1306 (9th Cir. 1991) (recognizing the compelling governmental interest in settling industrial disputes); *Cap Santa Vue, Inc. v. NLRB*, 424 F.2d 883, 890 (D.C. Cir. 1970) (holding that industrial peace is a compelling public interest); *Ukiah Adventist Hosp.*, 332 N.L.R.B. 602, 605 (2000) (holding that the NLRA is the least restrictive way of advancing the dual compelling governmental interests of “preventing labor strife and protecting employees’ ability to exercise their rights” to organize under the NLRA); *First Church of Christ, Scientist*, 194 N.L.R.B. 1006, 1007-08 (1972) (holding that “the avoidance or minimization of industrial strife which interferes with the flow of commerce” is a compelling state interest).

<sup>249</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2767 (2013) (citing 42 U.S.C. § 2000bb-1 (2012)); *see also* *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 430-31 (2006).

<sup>250</sup> 29 U.S.C. § 152(2) (2012) (defining “employer” to exclude “the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act . . . or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization” (citation omitted)). However, some of these excluded employers are covered by other labor statutes. Employers covered by the Railway Labor Act, 45 U.S.C. §§ 151-188 (2012), are covered by definition, and many federal employees are covered by the Federal Labor Relations Act, 5 U.S.C. §§ 7101-7211 (2012). In addition, many (but not all) state and municipal governments allow their workers to bargain collectively in varying degrees. *See generally* MILLA SANES & JOHN SCHMITT, CTR. FOR ECON. AND POLICY RESEARCH, REGULATION OF PUBLIC SECTOR COLLECTIVE BARGAINING IN THE STATES, (March 2014), <http://www.cepr.net/documents/state-public-cb-2014-03.pdf> [<http://perma.cc/W9CL-GVNJ>] (providing nationwide survey of collective-bargaining laws related to state and municipal employees). However, the NLRB declines jurisdiction over small employers that otherwise appear to satisfy the statutory definition of

contraceptive mandate context. Finally, this conclusion might be particularly appealing when employers assert that their religious beliefs provide an independent motivation to treat their employees well, as the employers in *Hobby Lobby* did.<sup>251</sup>

However, the final potential government interest—allowing workers a voice on the job—does not suffer from the same individuation problem that labor peace does. There are at least three reasons that worker voice is likely to qualify as a narrowly compelling interest served by the NLRA in the least restrictive way. First, there is convincing evidence that Congress genuinely sought to promote worker voice in enacting the NLRA. By speaking in terms of collective bargaining and “the friendly adjustment of industrial disputes,” the NLRA connects the provision of a mechanism for workers to exercise voice on the job with the Act’s key goals of improving working conditions and reducing industrial unrest.<sup>252</sup> Similarly, the legislative history of the Act reflects a concern with worker voice.<sup>253</sup> Second, worker voice fits with the individualized inquiry that RFRA directs. That is, whereas an aggregate goal like labor peace might or might not be threatened if a relatively small number of workplaces are not covered by the NLRA, an opportunity for worker voice is lost each time an NLRA exemption is granted. Third, the case for the importance of worker voice in the modern economy is compelling.<sup>254</sup>

But the argument that the NLRA is a least restrictive means of serving the compelling government interest of worker voice is not without its challenges.

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employer. See *Jurisdictional Standards*, NLRB, <http://www.nlr.gov/rights-we-protect/jurisdictional-standards> [<http://perma.cc/R6ZZ-MBQF>].

<sup>251</sup> *Hobby Lobby*, 134 S. Ct. at 2757.

<sup>252</sup> 29 U.S.C. § 151 (2012).

<sup>253</sup> See generally Laura J. Cooper, *Letting the Puppets Speak: Employee Voice in the Legislative History of the Wagner Act*, 94 MARQ. L. REV. 837 (2011). Professor Cooper details how the NLRA’s drafters ironically failed to take seriously aspects of workers’ congressional testimony, even while they professed a concern with allowing workers to exercise voice at work. *Id.* at 838.

<sup>254</sup> See, e.g., Harry Arthurs, *Reconciling Differences Differently: Reflections on Labor Law and Worker Voice After Collective Bargaining*, 28 COMP. LAB. L. & POL’Y J. 155, 164 (2007) (describing research demonstrating the “productivity-enhancing potential of humane Human Resources policies and of empowering workers and listening to their voice”); Matthew T. Bodie, *Workers, Information, and Corporate Combinations: The Case for Nonbinding Employee Referenda in Transformative Transactions*, 85 WASH. U. L. REV. 871, 913-23 (2007) (documenting the benefits of worker voice in relation to employee satisfaction, performance and compliance, and the development of social capital both inside and outside the workplace); Jeffrey M. Hirsch & Barry T. Hirsch, *The Rise and Fall of Private Sector Unionism: What Next For The NLRA?*, 34 FLA. ST. U. L. REV. 1133, 1154 (2007) (identifying the importance of “structureless” employee feedback in the modern economy).

Chief among them is the fact that the Act is now severely underinclusive.<sup>255</sup> Many employers and employees are exempted from coverage under the Act.<sup>256</sup> And many employees who want to exercise voice at work nonetheless lack channels that would allow them to do so.<sup>257</sup> This is in part because employers have become adept at defeating union drives<sup>258</sup> and in part because the NLRA limits collective voice schemes short of unionization.<sup>259</sup> Thus, Benjamin Sachs wrote in 2008 that “most scholars believe that the NLRA is a failed regime.”<sup>260</sup> Fifteen years before that, Michael Gottesman “despaired” about the dramatic decline of the NLRA and union representation in the United States over the previous several decades.<sup>261</sup> To be sure the NLRA is an imperfect mechanism for workers to exercise collective voice. Yet, it would be perverse to abandon worker voice as a compelling government interest to which the NLRA is narrowly tailored simply because employers have become adept at fighting union drives.

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<sup>255</sup> Courts view underinclusiveness as relevant both to whether the asserted state interest is compelling—because a lawmaker advancing a truly compelling interest is unlikely to leave many exceptions—and whether the means chosen is the least restrictive—because the compelling interest is evidently achieved through other means with respect to excluded individuals. See James D. Nelson, Note, *Incarceration, Accommodation, and Strict Scrutiny*, 95 VA. L. REV. 2053, 2101 n.218, 2107 (2009) (identifying cases where courts have rejected underinclusive policies as either not serving a compelling government interest or not being the least restrictive option). Justice Alito conducted a similar analysis in *Hobby Lobby*. Although he ultimately did not decide whether ensuring workers’ access to contraceptives qualified as a compelling interest, he nonetheless considered the fact that some employers were exempted from the contraceptive mandate as a factor weighing against the government’s position. *Hobby Lobby*, 134 S. Ct. at 2780. However, Justice Kennedy emphasized in his concurrence that he deemed contraceptive access a compelling government interest. *Id.* at 2786 (Kennedy, J., concurring).

<sup>256</sup> 29 U.S.C. § 152(2), (3) (excluding certain employers and employees from coverage under the NLRA, including government, agricultural, and domestic employees).

<sup>257</sup> See RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* 3 (updated ed. 2006) (“[T]he disconnect between what workers want in the form of influence at their workplaces and what they have remains sizable.”).

<sup>258</sup> Richard B. Freeman & Morris M. Kleiner, *Employer Behavior in the Face of Union Organizing Drives*, 43 INDUS. & LAB. REL. REV. 351, 364 (concluding that management opposition to union drives “is a key component in union inability to organize worker in the United States”).

<sup>259</sup> *Electromation, Inc. v. NLRB*, 35 F.3d 1148, 1170-71 (7th Cir. 1994) (holding that employer-created employee “action committees” violated the NLRA’s prohibition on employer-dominated labor unions).

<sup>260</sup> Benjamin I. Sachs, *Employment Law As Labor Law*, 29 CARDOZO L. REV. 2685, 2685-86 & n.2 (2008) (citing a list of similar statements by prominent labor law scholars).

<sup>261</sup> Gottesman, *supra* note 241, at 60-61 (“Looking back, I can see the decline of the NLRA was underway even as I began my optimistic journey. . . . The system of collective bargaining that the NLRA promotes is invoked by an ever-shrinking percentage of American workers.”).

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Although I conclude that the NLRA represents a least restrictive method of achieving a compelling government interest, I nonetheless complete the RFRA analysis in the following Section in recognition of the fact that some courts might draw alternative conclusions.

D. *Structuring Accommodations*

Regarding RFRA accommodations in the labor and employment context, there is one area in which both employers and employees should be able to agree (at least in the abstract): the interests of all concerned are served when accommodations are as narrow as possible, particularly if they burden third parties. Of course, narrow accommodations minimize encroachments on employees' interests. But, perhaps counterintuitively, religious employers are also better off when RFRA accommodations are narrow. As discussed previously, the sincerity determination will be much easier—and much more likely to come out in an employer's favor—if a desired accommodation will not yield secular as well as religious benefits for the person invoking it.<sup>262</sup> Finally, the Constitution itself demands narrowness: Justice Kennedy has observed that “a religious accommodation demands careful scrutiny to ensure that it does not so burden non-adherents or discriminate against other religions as to become an establishment.”<sup>263</sup> Thus, five Justices (Justice Kennedy plus the *Hobby Lobby* dissenters) may agree that RFRA accommodations are permissible only where they do not burden employees. However, the remainder of this Section proceeds from the assumption that courts may entertain religious exemption claims that impose some degree of burden on employees.

It is difficult to say exactly what a religious accommodation might look like without knowing the precise scope of the conflict between the NLRA and a given employer's religious beliefs. However, this Section offers some suggestions regarding the procedure for settling on an accommodation, as well as strategies for minimizing an accommodation's burden on third parties. It uses as examples two of the most likely conflicts between an employers' religious beliefs and the NLRA: first, the risk that a union will bargain for a specific term (such as insurance coverage for contraceptives or abortion) to which the employer would object on religious grounds; and second, the requirement to bargain in good faith with a duly certified labor union in general.

Accommodation claims are not unique to RFRA; they also arise in other statutes, such as the employment provisions of the Americans With Disabilities

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<sup>262</sup> *Supra* Section II.B.2.

<sup>263</sup> *Bd. of Educ. v. Grumet*, 512 U.S. 687, 722 (1994) (Kennedy, J., concurring). Other scholars have discussed in depth the boundaries that the Establishment Clause imposes on RFRA accommodations. *Supra* note 228 and accompanying text.

Act.<sup>264</sup> In that context, they are generally handled through an interactive process—one in which a disabled employee and an employer exchange information about how a job's essential functions might be restructured to accommodate the employee's needs.<sup>265</sup> This process can be easily adapted to the NLRA/RFRA context; in fact, as a statute that has bargaining at its core, the NLRA is uniquely well suited to an interactive process. In such a process, the person seeking the accommodation—here, the employer—would need to come forward, identifying the precise nature of the conflict between their sincere religious beliefs and the NLRA.<sup>266</sup> Then, assuming that the employer was entitled to an accommodation, the employer and the union—or, where that fails, the NLRB itself—would engage in an interactive process to shape the accommodation. This process has two main advantages. First, it is familiar: it would not need to be constructed from the ground up. Second, it is well suited to the task: the interactive process would allow the Board to educate the employer about the NLRA's requirements (which the employer might not understand correctly, particularly if it is unrepresented), and the employer to educate the Board about the precise nature of its religious objection—both necessary precursors to arriving at an appropriate accommodation.<sup>267</sup>

As described above, if accommodations are to be made available to employers with religious objections to bargaining, the accommodations should be structured to eliminate or at least minimize burdens on third parties. One straightforward way of minimizing these burdens is to require employers to substitute something else that is of the same value to the employees, yet does not implicate the employer's religious beliefs. When the employer's religious objection to labor law is the risk that a union will seek an objectionable employment term during bargaining, this substitution can easily occur within the confines of the bargaining relationship itself. That is, the employer can simply tell the union what proposed terms it opposes on religious grounds—say, contraceptive coverage for its employees—and offer a substitute—say, increased compensation. If the union concludes that the two terms are not of equal value, it can propose a different substitute. To be sure, this raises the risk that unions might hold employers hostage, knowing that the value to the employer of remaining true to its religious beliefs is very high. However, this scenario is unlikely—unions cannot unilaterally impose contract terms, and their negotiating leverage comes mainly from the threat of strikes, during

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<sup>264</sup> See Jessica Leigh Rosenthal, Comment, *The Interactive Process Disabled: Improving the ADA and Strengthening the EEOC Through the Adoption of the Interactive Process*, 57 EMORY L.J. 247, 256 (2007) (describing the interactive process in the ADA context).

<sup>265</sup> *Id.*

<sup>266</sup> See *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 313 (3d Cir. 1999) (holding that the employee, or their representative, has the burden of coming forward and identifying the need for accommodation).

<sup>267</sup> See *id.* at 312.

which employees stand to be permanently replaced by their employers.<sup>268</sup> This strategy is risky, to say the least, and therefore unlikely to create a major obstacle to employers and unions reaching an agreement.

On the other hand, some employers may seek a complete exemption from the obligation to bargain collectively with their employees. One significant burden associated with such an exemption is the employees' lost chance to win improved pay and working conditions. This is not the only burden—employees would also lose the opportunity to exercise voice and self-determination at work—but it is the most tangible and, correspondingly, the most likely to prompt unscrupulous employers to make insincere accommodation claims. However, this burden can be at least partially ameliorated. Good aggregate data exist on the effect of unionization on employees' pay and benefits across a range of variables. Therefore, employers seeking religious exemptions from collective bargaining should be willing to accept that the price of bargaining is paying their employees the wages and other perquisites (such as for-cause protections from termination) typically enjoyed by employees who have had an opportunity to join a union.

To be sure, this accommodation is imprecise; there are by definition some employees who would have achieved more during bargaining and some who would have achieved less. Yet, if employers are going to receive religious exemptions from collective bargaining, those accommodations must take into account the corresponding losses of their employees' opportunity to improve their wages and working conditions through collective bargaining.

#### CONCLUSION

This Article has advanced a new, simplified way to address the conflict between employers' sincere religious beliefs and the requirements of labor law. First, a modest yet fundamental change in the application of the constitutional avoidance canon would better preserve Congress's lawmaking function by preventing entrenchment of Court lawmaking via the constitutional avoidance canon. Applying this adjustment to constitutional avoidance should lead to the retirement of the flawed *Catholic Bishop* decision, which essentially amended the NLRA without congressional approval. In its place, statutory exemptions from labor law should turn only RFRA's free exercise accommodation model. Applying that model leads to the conclusion that religious exemptions from labor law are, as a general matter, inappropriate both because the NLRA is the least restrictive means of furthering a compelling state interest and because of the burdens accommodations would impose on employees. But in any event, courts can minimize both the incentive to manufacture insincere religious claims and the burden of religious accommodations on employees by carefully structuring narrow accommodations that avoid needlessly burdening employees' labor rights. Often, bargaining itself will allow employers to

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<sup>268</sup> *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938) (holding that employers may permanently replace employees striking over economic issues).

structure accommodations through self-help. Where this is not the case, then at minimum, employers should compensate employees for the lost opportunity to improve their wages through collective bargaining. Applying these principles faithfully should ensure that employees' collective rights are not lost as the Board and the Courts apply *Hobby Lobby* in the context of labor law.