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Wynne: Lose or Draw

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Obamacare, RFRA, and the Perils of Legislative History

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I. INTRODUCTION

Taxes have never been popular, and in part for that reason, the Constitution requires tax increases to originate in the House of Representatives. That is to say, they must originate in the legislative body most accountable to the people, where legislators must weigh the need for the tax against the terrible price they might pay at their next election, which is never more than two years off. The Federalist No. 58 defended the decision to give the origination power to the House on the ground that the Chamber that is more accountable to the people should have the primary role in raising revenue. *We have no doubt that Congress knew precisely what it was doing when it rejected an earlier version of this legislation that imposed a tax instead of a requirement-with-penalty.*

– Joint Dissent in *NFIB v. Sebelius*¹

The RLPA debates confirmed the understanding that RFRA applies to for-profit corporations and their owners [T]his was a hard-fought debate about whether to amend a pending bill that was not just *in pari materia* with RFRA, but on the issues presented here, substantially identical to RFRA. *Everyone agreed on the meaning of the unamended language Both sides agreed that that language protected for-profit corporations and their owners. The public meaning of this language was not disputed.*

– Christian Legal Society Amicus Brief
in *Sebelius v. Hobby Lobby*²

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1. 132 S. Ct. 2566, 2655 (Scalia, J., Kennedy, J., Thomas, J., and Alito, J., dissenting) (internal citations, quotation marks, and brackets omitted) (emphasis added).

2. Brief for Christian Legal Society et al. as Amici Curiae Supporting Respondents Hobby Lobby and Conestoga Wood, at 10, 12, 32, *Sebelius v. Hobby Lobby Stores, Inc.*, Nos. 13-354 & 13-356 (U.S. 2014) [hereinafter CLS Brief] (capitalization modified, paragraph breaks omitted) (emphasis added).

It is more than bit ironic that Justice Scalia co-authored the opinion containing the first passage above, which so confidently reads the minds of legislators. A longtime and dedicated opponent of using legislative history to discern congressional intent,³ Justice Scalia relented in the Obamacare case, only to demonstrate spectacularly the perils of the endeavor. In expressing “no doubt” that House Members were trying to duck political accountability when they “rejected” an earlier version of the health care bill that had explicitly described the minimum-coverage provision as a “tax,”⁴ the Joint Dissent overlooked one critical fact: the House actually *passed* the earlier version of the bill with the explicit tax language.⁵

The misguided aspersions that the Joint Dissenters cast on Members of Congress had their seeds in a brief authored by renowned Supreme Court advocate Paul Clement,⁶ who represented the states challenging the minimum-coverage provision. The states’ brief asserted that “Congress made a *deliberate decision* not to enact” a tax statute, as evidenced by the fact that it “considered proposals to enact the kind of tax statute the federal government defends, and it *rejected* each of them *in favor of* a mandate enforced by a penalty.”⁷ As discussed in Part I of this Essay, the actual legislative history tells a much different story—a story of the House passing its preferred version of the bill, which included the explicit tax language, but then grudgingly accepting an alternative version of the bill for a reason that had nothing to do with the relative merits of labeling the minimum-coverage provision a “tax” or a “penalty.”

The latest challenge to Obamacare, in which Clement now represents Hobby Lobby, will provide the Court with another

3. See, e.g., *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment) (“The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators.”); see generally William N. Eskridge, *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 532 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012)) (describing Justice Scalia as “the leading theorist as well as practitioner of what has been dubbed the new textualism,” which maintains that “legislative history should be marginalized or ignored, unless used simply like a dictionary of word use”).

4. *NFIB*, 132 S. Ct. at 2655 (Scalia, J., Kennedy, J., Thomas, J., and Alito, J., dissenting) (citing § 501 of the Affordable Health Care for America Act, H.R. 3962, 111th Cong., 1st Sess. (2009), which was entitled, “Tax on individuals without acceptable health care coverage”).

5. Final Vote Results for Roll Call 887, Affordable Health Care for America Act, H.R. 3962 (220 Ayes, 215 Noes) (Nov. 7, 2009), available at <http://clerk.house.gov/evs/2009/roll887.xml>.

6. “It is indisputable that Paul Clement is one of the best Supreme Court advocates alive. . . . He has the capacity for clarity and precision that is unexcelled by anyone in the law.” Amy Goldstein, *A Conservative Insider More at Home in the Law than in Policy*, WASH. POST, Aug. 28, 2007, at A5 (quoting Walter Dellinger) (internal quotations omitted).

7. Brief for State Respondents on the Minimum Coverage Provision at 51, 55, *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012) (No. 11-398) (emphasis added). See *id.* at 5 (characterizing “Congress’ decision to discard tax proposals”).

opportunity to consider sweeping assertions about legislative history; and perhaps this time Justice Scalia will return to form.⁸ His reengagement of the argument against legislative history would be particularly interesting here given that the dispute now centers on the meaning of the Religious Freedom Restoration Act of 1993 (RFRA), which had the explicit goal of undoing his handiwork in *Employment Division v. Smith*.⁹ Justice Scalia and his colleagues should be skeptical of the assertion that “everyone agreed” in a subsequent congressional debate that RFRA gave religious-exemption rights to for-profit businesses,¹⁰ something never countenanced in the pre-*Smith* jurisprudence RFRA aimed to restore.¹¹ And that skepticism should be hardened by the *NFIB* Joint Dissent’s uncritical embrace of the dubious legislative-history argument made in the first Obamacare case.

Part I of this Essay briefly details the shortcomings of the legislative-history argument in *NFIB*. Part II then addresses the legislative-history argument in *Hobby Lobby*, a case involving a large for-profit business that seeks a religious exemption from Obamacare regulations governing employer-sponsored health plans.¹² Contrary to

8. In an opinion more typical of his approach to legislative history than the joint dissenting opinion in *NFIB v. Sebelius*, Justice Scalia warned that “not the least of the defects of legislative history is its indeterminacy. If one were to search for an interpretive technique that, on the whole, was more likely to confuse than to clarify, one could hardly find a more promising candidate than legislative history.” *Conroy*, 507 U.S. at 519 (1993) (Scalia, J., concurring in the judgment).

9. See RFRA, 42 U.S. § 2000bb(a) (“[I]n *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion [T]he compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests. . . . The purposes of this chapter are . . . to restore the compelling interest test.”).

10. CLS Brief, *supra* note 2, at 10–34; see also Brief for Respondents at 17, *Sebelius v. Hobby Lobby Stores, Inc.*, Nos. 13-354 & 13-356 (U.S. 2014) [hereinafter *Hobby Lobby Brief*] (“[T]he congressional debates . . . displayed an undisputed public understanding that the language in RFRA ‘protected for-profit corporations and their owners.’”) (quoting CLS Brief at 32); Douglas Laycock, *Symposium: Congress Answered this Question: Corporations are Covered*, SCOTUSBLOG (Feb. 19, 2014, 11:27 AM) (“All agreed that the bill as drafted . . . covered for-profit corporations.”), <http://www.scotusblog.com/2014/02/symposium-congress-answered-this-question-corporations-are-covered/>.

11. See *infra* note 45 and accompanying text.

12. Specifically, *Hobby Lobby* is seeking an exemption from “a regulation that requires them . . . to provide certain contraceptive services as a part of their employer-sponsored health care plan. Among these services are drugs and devices that the plaintiffs believe to be abortifacients, the use of which is contrary to their faith.” *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1120–21 (10th Cir. 2013) *cert. granted*, 134 S. Ct. 678 (2013). Although the requirement that employer-sponsored health plans cover contraceptive services is often described as part of a larger “employer mandate,” that term is misleading because employers are not actually required under the law to maintain any health plan for their employees and can instead pay a tax (from which employers with fewer than fifty employees are exempt). See Marty

Hobby Lobby’s argument, a full examination of the relevant congressional debate casts considerable doubt on the claim that it demonstrates an undisputed understanding that RFRA protects for-profit corporations. Accordingly, this Essay concludes that the Court would be better advised to interpret RFRA with reference to the surrounding body of law into which it was explicitly designed to be integrated—the Supreme Court’s pre-1990 jurisprudence, which had pointedly refused to require religious exemptions from statutory schemes regulating “commercial activity.”¹³

II. “WE HAVE NO DOUBT”?

Although it is often difficult to discern why one version of a bill ultimately prevails over another, in the case of the Patient Protection and Affordable Care Act of 2010 (“Affordable Care Act” or “Obamacare”),¹⁴ there truly was “no doubt” about the reason.¹⁵ But contrary to the implication of the Joint Dissent in *NFIB v. Sebelius*, the blindingly obvious reason had nothing to do with House Members seeking to avoid an unpopular tax vote (which they had already taken¹⁶). Rather, as was prominently reported by the press at the time, it was the direct result of Senator Scott Brown’s unexpected election in January 2010, which deprived the Senate Democrats of their filibuster-proof majority.¹⁷ That development rendered the

Lederman, *Symposium: How to Understand Hobby Lobby*, SCOTUSBLOG (Feb. 23, 2014, 7:20 PM), <http://www.scotusblog.com/2014/02/symposium-how-to-understand-hobby-lobby/> (“[C]ontrary to common wisdom and popular rhetoric, there is no ‘employer mandate’ to offer employee health plans, no matter how large the employer. Employers, both large and small, may lawfully decline to offer such plans.”).

13. *United States v. Lee*, 455 U.S. 252, 261 (1982).

14. Pub. L. No. 111-148, 124 Stat. 119 (2010) [hereinafter *Affordable Care Act*] (codified as amended in various sections of 26 and 42 U.S.C.).

15. Although I worked in the White House Office of Legislative Affairs during the passage of the *Affordable Care Act*, the analysis here draws exclusively on public sources of information, including the *Congressional Record* and media reports.

16. *See supra* note 5.

17. *See* Michael Cooper, *G.O.P. Surges to Senate Victory in Massachusetts*, N.Y. TIMES, Jan. 20, 2010, at A1 (“The election left Democrats in Congress scrambling to salvage a bill overhauling the nation’s health care system . . . Mr. Brown has vowed to oppose the bill, and once he takes office the Democrats will no longer control the 60 votes in the Senate needed to overcome filibusters.”); Greg Hitt and Peter Wallsten, *GOP Victory Upends Senate*, WALL ST. J. Jan. 20, 2010, at A1 (“The Brown victory forces the White House and congressional leaders to decide how—or whether—to salvage their long-sought health-care overhaul. . . . Mr. Brown will become the 41st Republican in the Senate, breaking the Democratic Party’s 60-vote majority, and ensuring the minority has enough votes to block legislation.”); *Brown Win Forces Democrats to Re-Evaluate Health Care Reform Game Plan*, FOXNEWS.COM (Jan. 20, 2010) [hereinafter *Brown Win*] (“Democrats are being forced to re-evaluate their plans for health care reform after Republican Scott Brown’s victory . . . Brown’s win Tuesday is a colossal hit to Democrats, since it will break the party’s 60-vote, filibuster-proof majority in the Senate at a time when health

House's preferred version of the legislation effectively dead. The only remaining option for delivering health reform to the President's desk was the House repassing a separate vehicle for health reform that had already been amended and passed in the Senate.¹⁸

In addition to missing the real reason behind Congress's choice of vehicle for the Affordable Care Act, the Joint Dissent completely ignored the most relevant legislative history specific to the final version of the minimum-coverage provision. In a floor debate over the constitutionality of the provision that stretched over several days, Senators both attacked and defended the provision as a "tax." Senator Ensign, who raised the constitutional point of order against the provision, called it an "onerous tax."¹⁹ Senator Baucus, the floor manager of the bill, repeatedly defended the provision as within Congress's "tax and spending powers,"²⁰ as did Senator Leahy, the chairman of the Senate Judiciary Committee.²¹ None of this should be terribly surprising given that the final version of the minimum-coverage provision explicitly amended "Subtitle D of the Internal Revenue Code,"²² which in turn is entitled "Miscellaneous Excise Taxes."²³ Against that background, the charge that Congress had

care reform is in its final stages."), *available at* <http://www.foxnews.com/politics/2010/01/19/brown-win-forces-democrats-evaluate-health-care-reform-game-plan/#>.

18. Gail Russell Caddock, *With Scott Brown's Election, Healthcare Ball in Pelosi's Court*, CHRISTIAN SCI. MONITOR, Jan. 21, 2010, ("[W]ith Republican Scott Brown's victory, the heavy lifting on healthcare shifts back to House Speaker Nancy Pelosi: Can she win over enough Democratic votes in the House to pass the Senate's version of the bill?"), *available at* 2010 WLNR 2736890; *Brown Win*, *supra* note 17 ("Though House Democrats have major misgivings about the Senate version, House Majority Leader Steny Hoyer on Tuesday suggested they'd be willing to consider approving the Senate bill intact, if the alternative is no bill at all.").

19. 155 CONG. REC. S13830 (Dec. 23, 2009) (statement of Senator Ensign) ("In this case, if you choose not to do something—in other words, if you do not choose health insurance—this bill will actually tax you. It will act as an onerous tax."). *See also id.* at S13722 (Dec. 22, 2009) (statement of Senator Ensign) ("This bill taxes Americans for not doing anything at all, other than just existing."); *id.* at S13742 (Dec. 22, 2009) (statement of Mr. Grassley) (criticizing the "individual mandate tax that people are going to pay if they don't buy health insurance"); *id.* at S13824, S13858 (Dec. 23, 2009) (statements of Senator Hatch) (repeatedly criticizing the provision as an "unconstitutional mandate tax" and a "tax penalty"). Similar arguments were made by House Republicans in the House debate over the final provision three months later. *See* 156 CONG. REC. H1864 (Mar. 21, 2010) (statement of Mr. Brady) (complaining that individuals will be "forced to buy the government-approved plan or face the tax man"); *id.* at H1887 (statement of Mr. Dent) ("The bill will levy a tax . . . on Americans who do not comply with the individual mandate, which requires all Americans to maintain acceptable coverage.").

20. 155 CONG. REC. S13830, S13832, S13841–43 (Dec. 23, 2009) (statements of Senator Baucus); *see also id.* at S13721 (Dec. 22, 2009) (statement of Senator Baucus) ("Congress can impose a tax on those who do not purchase insurance.").

21. *See* 155 CONG. REC. S13751–54 (Dec. 22, 2009); *see also* 155 CONG. REC. H1882 (Mar. 21, 2010) (statement of Mr. Miller) ("This provision is grounded in the taxing power.").

22. Affordable Care Act, § 1501(b).

23. 26 U.S.C. Subtitle D.

somehow craftily dodged accountability for utilizing its taxing power loses much of its force.²⁴

In short, prompted by a bald assertion about legislative history by those challenging the Affordable Care Act, four justices in the *NFIB* case were willing to express “no doubt” that Members of Congress had harbored an intent that is nowhere supported by the actual legislative history. Just two years later, the Court is confronting a similarly confident and equally questionable assertion about congressional state of mind in *Hobby Lobby*.

III. “EVERYONE AGREED”?

The legislative-history argument in *Hobby Lobby* concerns the meaning of RFRA, but, interestingly, the argument does not rely on the original 1993 congressional debates over that law. Rather, the argument is that the meaning of RFRA can be discerned by studying subsequent congressional debates in 1998 and 1999. Those debates concerned the never-enacted Religious Liberty Protection Act (RLPA),²⁵ pieces of which were later incorporated into the Religious Land Use and Institutionalized Persons Act (RLUIPA).²⁶

The argument has been developed most thoroughly by Professor Douglas Laycock, one of the nation’s foremost religious liberty scholars.²⁷ In an amicus brief filed on behalf of the Christian

24. Notably, the press and prominent critics of the legislation contemporaneously described the final version of the minimum-coverage provision as a tax. *See, e.g.*, William W. Beach et al., *An Analysis of the Senate Democrats’ Health Care Bill*, HERITAGE.ORG (Dec. 18, 2009) (“The ‘individual responsibility’ provision . . . requires anyone who fails to obtain a qualifying health plan to pay an annual tax penalty of \$750.”); *Enforcing the Individual Mandate*, FACTCHECK.ORG (Jan. 22, 2010) (“Both the House and Senate bills contain a mandate and impose a penalty in the form of a tax on those who fail to comply.”), available at <http://www.factcheck.org/2010/01/enforcing-the-individual-mandate/>; Editorial, *The Health-Care Tax Pledge*, WALL ST. JOURNAL, Dec. 17, 2009 (“Congressional Democrats have loaded up their health bills with provisions raising taxes on the middle-class by stacks and stacks of dimes. . . . Those tax hits include a mandate [in the Senate bill] of up to \$750 a year for Americans who fail to purchase health insurance.”); *cf.* *NFIB v. Sebelius*, 132 S. Ct. 2566, 2597 (majority opinion) (“The joint dissenters argue that we cannot uphold [the minimum-coverage provision] as a tax because Congress did not ‘frame’ it as such. In effect, they contend that even if the Constitution permits Congress to do exactly what we interpret this statute to do, the law must be struck down because Congress used the wrong labels. . . . [L]abels should not control here.”).

25. H.R. 1691, 106th Cong. (1999); H.R. 4019, 105th Cong. (1998).

26. 42 U.S.C. 2000cc.

27. *See* Steven D. Smith, *Religious Liberty, Volume One: Overviews & History*, 89 TEX. L. REV. 917, 917 (2011) (book review) (describing Laycock as the “preeminent lawyer-scholar of religious freedom over the last quarter-century”).

Legal Society,²⁸ and subsequently relied upon by Paul Clement in Hobby Lobby's own brief,²⁹ Laycock lays out the argument as follows:

1. The language of RLPA was “substantially identical to RFRA” in all relevant respects;
2. “Everyone agreed” in the debates over RLPA that it covered for-profit corporations; and
3. Proponents of the “Nadler amendment,” which would have precluded all but the smallest businesses from invoking RLPA as a defense in civil rights cases, “knew they needed an amendment” to ensure that large businesses would not receive protection under RLPA.³⁰

All three aspects of this argument, however, completely fall apart upon close examination of RLPA's text and legislative history. First, the language in the 1999 version of RLPA, which is the version that prompted the Nadler amendment, was *not* substantially identical to RFRA. Second, the full legislative history of RLPA reveals considerable doubt about whether *any* version of the legislation would cover for-profit corporations. Third, Professor Laycock himself testified in 1998 that the then-pending version of RLPA, which *was* substantially identical to RFRA, would not provide protection to large businesses against civil rights claims. This position, if correct, means that the type of amendment eventually offered by Representative

28. See CLS Brief, *supra* note 2.

29. See Hobby Lobby Brief, *supra* note 10, at 17 (citing the CLS Brief for the proposition that subsequent congressional debates “displayed an undisputed public understanding that the language in RFRA ‘protected for-profit corporations and their owners’”).

30. CLS Brief, *supra* note 2, at 10, 12, 30, 32; *see id.* at 38 (“The RLPA debates make clear that for-profit corporations and their owners are protected by RFRA.”).

In general, the Court views “subsequent legislative history” as a “hazardous basis for inferring the intent of an earlier Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law.” *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (internal citation and quotation marks omitted); *see also Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring in part) (“Arguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously, not even in a footnote.”). Professor Laycock maintains that the legislative history of RLPA can nonetheless inform the proper interpretation of RFRA because the RLPA debate was not a “self-conscious attempt to explain the meaning of a prior law,” but rather, a debate revealing an undisputed understanding of a “pending bill” that was “substantially identical to RFRA.” CLS Brief at 12–13. This Essay takes no position on that attempted distinction. Rather, it contends that—even assuming the validity of the distinction—Laycock's underlying claims about RLPA's text and legislative history are mistaken.

Nadler to the broader 1999 version of RLPA was *not* “needed” under the narrower 1998 version of RLPA that mirrored RFRA.

Taking the last point first, during a hearing held on July 14, 1998, Congressman Robert Scott raised a concern about the impact of RLPA on civil rights claims. His specific concern was that if courts did not find the prohibition of sexual-orientation discrimination to be a “compelling interest,” the RLPA/RFRA strict scrutiny standard might preclude application of state and local antidiscrimination laws to businesses that invoke religious belief to discriminate on the basis of sexual orientation.³¹ In response to that concern, and under follow-up questioning by Representative Nadler, Professor Laycock repeatedly reassured the committee that although RLPA *might* protect very small businesses, it would not protect large commercial operations:

In the commercial context, the civil rights claim is going to win always or nearly always. Inside the church, the religious liberty claim ought to win. And the disputed turf is . . . what we call the Mrs. Murphy exception for small landlords with only a few units. People disagree about that, and the courts are going to resolve that.

But in large commercial operations and probably in small commercial operations, the gay rights claim is going to win. . . .

[A] 50-unit building is a commercial operation. And even if it is owned by the church . . . once the courts characterize it as commercial, the religious liberty claim loses

[In the employment context, t]he cases that will be litigated and might produce conflicting results are the three-man office where he says, I want the other two people I am working with to share my religion because what we are doing here. We do a lot of pro bono work for religious organizations.

In those very-small scale operations, courts have disagreed about whether this is really more like the church or more like the outside world. But *courts have never disagreed that in the outside world, religiously motivated people have to comply with the civil rights law. . . .*

The cases where you might get mixed results, at least for a while, are very small operations that can plausibly be characterized as private and as operated in an intensely religious way. You might get mixed results in those cases. *But without the factor of smallness and without the factor of operating in an intensely religious way, I think there is no way in the world courts are going to say that the civil rights laws don't prevail.*³²

Can the seemingly clear message in this testimony—that RLPA would not protect large commercial operations—be reconciled with the RLPA-informed RFRA argument being advanced in *Hobby Lobby*? Some might argue “yes,” contending that Professor Laycock’s 1998 testimony says only that large corporations *will not win* under RLPA, whereas his amicus brief for the Christian Legal Society in *Hobby Lobby* is about the threshold question of whether for-profit

31. *Hearings on H.R. 4019 Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 105th Cong. 235–36 (June 16 and July 14, 1998) [hereinafter 1998 Hearings].

32. *Id.* at 236–38 (emphasis added).

corporate entities can even *qualify as covered persons* under RFRA. But the brief is not so limited. Rather, it argues that “[l]imiting the size of business” that can obtain religious exemptions would be akin to “an historic wrong,”³³ and it concludes that the Supreme Court should affirm the Tenth Circuit’s judgment.³⁴ That judgment was that Hobby Lobby—a “nationwide chain with over 500 stores and more than 13,000 full-time employees”³⁵—is *likely to succeed on the merits* of its RFRA exemption claim.³⁶ The argument that Hobby Lobby is likely entitled to an exemption is in considerable tension with Professor Laycock’s 1998 testimony, which sharply distinguished between “very small-scale operations,” which might occasionally prevail in court on RLPA exemption claims, and “large commercial operations,” which “there is no way in the world courts are going to say” will receive an exemption from civil rights laws.³⁷

In short, under the 1998 version of RLPA as understood at the time by Professor Laycock, it was wholly unnecessary for gay rights advocates to demand anything akin to the 1999 Nadler amendment to

33. CLS Brief, *supra* note 2, at 42.

34. *Id.* at 42–43.

35. Hobby Lobby Brief, *supra* 10, at 7.

36. *Id.* at 11–13 (describing the Tenth Circuit’s judgment).

The CLS brief also goes beyond the threshold “covered person” issue by arguing that Hobby Lobby’s owners can show a “substantial burden” on their exercise of religion by virtue of the commercial regulation of their large corporate business. CLS Brief, *supra* note 2, at 34. Professor Laycock did not specifically address the substantial-burden issue in his 1998 testimony about commercial businesses, but his co-panelist did. *See* 1998 Hearings, *supra* note 31, at 236 (statement of Professor Steven Green) (noting a case in which a court “found that there was no substantial burden on [a] religious claimant’s claim by virtue of her involvement in [a] commercial enterprise”). A year later, in written answers provided to the Senate, Laycock indicated that large businesses would be unable to demonstrate a substantial burden under RLPA. *See Hearing S. 106–689 on Issues Relating to Religious Liberty Protection Before the Comm. on the S. Comm. on the Judiciary*, 106th Cong. 154 (June 23 and Sept. 9, 1999) (Appendix) [hereinafter 1999 Hearings] (“As the employer becomes larger, or the nature of the work becomes less integrated with religious mission, this balance of interests changes. *Soon it becomes impossible for the employer to show a substantial burden on religious exercise* The analysis of apartments is similar [T]he only landlords who can make a plausible claim of burden on religious exercise are those who are personally involved in managing a small number of units.”) (emphasis added).

37. 1998 Hearings, *supra* note 31, at 238. *See also id.* at 240 (statement of Professor Steven Green) (“Professor Laycock is exactly right. It really depends on how close the activity looks like a church or how close it looks like a run-of-the-mill commercial activity.”); 1999 Hearings, *supra* note 36, at 153 (written answers of Douglas Laycock) (“For such a RLPA claim to be plausible, the employer would have to have only a small number of employees, he would have to be personally involved in running the business, and the business would have to be infused or integrated with a religious mission. Otherwise, the claim that his choice of employees is an exercise of religion will not be plausible.”).

ensure that large commercial businesses would not obtain RLPA exemptions from civil rights laws.³⁸

As for the 1999 version of RLPA—which is the version that prompted *all* of the House Member statements Professor Laycock now relies upon for the proposition that “everyone agreed” protection extended to for-profit corporations³⁹—it was introduced with a “broad construction” provision that had not been included in either the 1998 version of RLPA or in the enacted RFRA. The new provision stated: “This Act should be construed in favor of a broad protection of religious exercise, *to the maximum extent permitted* by its terms and the Constitution.”⁴⁰ Moreover, that provision was added to RLPA just months after a split panel of the Ninth Circuit issued a novel and controversial decision recognizing exemption rights in the for-profit commercial context.⁴¹ The Ninth Circuit decision discounted the Supreme Court’s prior indication that religious-exemption rights do not extend to the commercial context⁴² and required religious exemptions for two landlords who refused to rent non-owner-occupied units (i.e., not “Mrs. Murphy” units, but “outside world” units) to unmarried couples in violation of state and local antidiscrimination laws.⁴³

Against the background of those developments, the debate over the 1999 RLPA can hardly be said to reflect an “undisputed public understanding” of the 1993 RFRA,⁴⁴ which (1) was not “substantially identical” to the 1999 RLPA because it did not include a “broad construction” provision and (2) was enacted before any lower federal court questioned the Supreme Court’s pre-*Smith* teaching that

38. Before the Senate in 1999, Laycock continued to maintain that a civil rights amendment would not be necessary to prevent large businesses from obtaining exemptions under RLPA. See 1999 Hearings, *supra* note 36, at 157 (“I am confident that larger commercial enterprises would lose on any RLPA claim to exemption from a civil rights law. . . . [A] civil rights exception designed to cut off these few cases would be gross overkill. . . .”). Compare CLS Brief, *supra* note 2, at 30 (“Supporters of the Nadler Amendment knew they needed an amendment to exclude corporate claims. . . .”).

39. See CLS Brief, *supra* note 2, at 22–30 (exclusively citing statements made during the 1999 floor debate).

40. H.R. 1691, § 5(g) (1999) (emphasis added).

41. See *Thomas v. Anchorage Equal Rights Comm’n*, 165 F.3d 692 (9th Cir. 1999), *vacated on ripeness grounds on rehearing en banc*, 220 F.3d 1134 (2000); see generally CLS Brief, *supra* note 2, at 17 (describing the *Thomas* decision as a turning point that prompted increasing public calls for a civil-rights amendment to RLPA).

42. *Thomas*, 165 F.3d at 712 (discussing *United States v. Lee*, 455 U.S. 252, 261 (1982)).

43. *Id.* at 718; see Brief of Appellees at 7, *Thomas*, 165 F.3d 692 (Nos. 97-35220, 97-35221) (“Baker, together with her husband, is the record owner of five residential rental properties in Anchorage, Alaska. Baker conducts business as a landlord by renting her properties to residential tenants. Thomas jointly and individually owns and manages residential rental properties in Anchorage, Alaska.”).

44. Hobby Lobby Brief, *supra* note 10, at 17.

commercial entities are not entitled to religious exemptions from generally applicable laws.⁴⁵ That teaching hardly could have been clearer:

When 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. Granting an exemption [from an employee benefit program] to an employer operates to impose the employer's religious faith on the employees.⁴⁶

Moreover, even after the 1999 Ninth Circuit decision discounting this passage and granting exemptions to individuals engaged in “commercial activities as landlords,”⁴⁷ and even after RLPA was reintroduced in 1999 with the “broad construction” provision, it still was not the case that “everyone agreed” that RLPA’s language would extend to for-profit *corporations*. Rather, in the testimony that addressed the issue most squarely, the General Counsel of the ACLU, which was one of the major proponents of the Nadler Amendment, provided the following assessment of RLPA: “The question of whether a corporate employer or corporate landlord may raise a religious liberty defense is less clear than whether an individual serving as an employer or landlord may raise that defense.”⁴⁸

In short, the 1998 and 1999 debates over RLPA fall far short of demonstrating an “undisputed public understanding that the language in RFRA protected for-profit corporations and their owners.”⁴⁹

IV. CONCLUSION

In 1989, in one of his earliest opinions cautioning about the perils of using legislative history to interpret statutes, Justice Scalia wrote the following:

45. As noted above, *supra* note 11 and accompanying text, RFRA was intended to restore the Court’s pre-*Smith* jurisprudence, which had held that the Free Exercise Clause sometimes requires exemptions from generally applicable laws. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972) (“[T]here are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability.”).

46. *Lee*, 455 U.S. at 261; *see also Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968) (rejecting as “patently frivolous” a restaurant chain’s argument that, because the owner religiously objected to racial integration, the 1964 Civil Rights Act “constitute[d] an interference with the free exercise of the Defendant’s religion”).

47. *Thomas*, 165 F.3d at 696.

48. *Hearings on H.R. 1691 Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 106th Cong. 165 (statement of Christopher Anders) (1999).

49. Hobby Lobby Brief, *supra* note 10, at 17.

The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind.⁵⁰

In *Hobby Lobby*, the Court is being urged to interpret RFRA based on what a “larger handful of the Members of Congress” understood about a broader statute debated in 1999.⁵¹ The far better approach—and the approach less likely to invite a repeat of the Joint Dissent’s misfire on legislative intent in *NFIB v. Sebelius*—would be to interpret RFRA by (1) asking whether the “ordinary usage” of the phrase “a person’s religious exercise” in 1993 included the operation of a for-profit corporation and (2) asking that question with reference to the “surrounding body of law into which” RFRA was designed to be integrated—the Supreme Court’s pre-*Smith* jurisprudence, which had explicitly refused to require religious exemptions from statutory schemes regulating “commercial activity.”⁵²

50. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring in the judgment).

51. See CLS Brief, *supra* note 2, at 19–30 (relying on statements made by Members in the debate over the 1999 version of RLPA).

52. See *supra* text accompanying note 45.