The American Constitutional Order

The History, Philosophy and Structure of the American Constitution

Individual Rights and the American Constitution

Fourth Edition
2015 Supplement

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INTRODUCTION

This is the 2014-15 Supplement to the Fourth Edition of Kmiec, Presser & Eastman, *The American Constitutional Order* (2014), and two companion volumes, *Individual Rights and the American Constitution* and *The History, Philosophy and Structure of the American Constitution.* The major case from the most recent term was the decision in *Obergefell v. Hodges* finding an implied due process mandate that States redefine the institution of marriage to encompass same-sex relationships. So that instructors and their students need not juggle more than one supplement, this supplement also contains materials covering the Court's work in the term prior to the most recent one – namely, OT 2013. Thus, the coverage of this supplement is from OT 2013 to the present. The Fourth Edition of our main volume was published recently in 2014.

In the final days of the October 2014 term, Chief Justice Roberts mustered a 6–3 majority to save the Affordable Care Act's interlocking health reforms. (*King v. Burwell*, 135 S. Ct. 2480 (2015)). Those lacking enough money to buy insurance would receive a subsidy to acquire it from a so-called exchange. A section of the ACA seemed to confine subsidies to insurance purchases from an "exchange established by the state." But to the consternation of dissenters, the majority found that the ACA allows for tax credits when purchases are made on federal exchanges as well. To the Chief Justice, the ruling manifested respect for the Congress to make reforms work as likely intended. To Justice Antonin Scalia, legal interpretation with an eye on consequences is "quite absurd."

The Chief Justice did dissent from Justice Anthony Kennedy's impassioned embrace of same-sex marriage in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), however, taking his colleagues to task for displacing the democratic process in the States —35 of which had quite recently, and generally by large margins, reaffirmed the long-standing, biologically-rooted definition of marriage. The loss of opportunity to democratically persuade was lamented in all four of the dissents, and Justice Scalia in particular lambasted the writing of Kennedy as descending from the disciplined reasoning of the legendary Marshall to the "mystical aphorisms of the fortune cookie."

A number of other important developments bear mention. Justice Kennedy, writing for a slim 5-4 majority, found that claims based merely on disparate impact, rather than intentional discrimination, could be brought under the Fair Housing Act. In dissent, Justice Samuel Alito illustrated how such a ruling perversely discourages even the enforcement of health and safety measures, to the disadvantage of the poor. (*Tex. Dept. of Hous. and Cmty. Affairs v. The Inclusive Cmtys. Project, Inc.*, 135 S. Ct.2507 (2015)).

The president has the exclusive power to grant formal recognition to a foreign sovereign, according to another Kennedy opinion, invalidating a statute requiring the State Department to list, upon request, "Israel" as the country of birth on passports for a person born in Jerusalem. (*Zivotofsky v.Kerry*,

135 S. Ct. 2076 (2015).) Regarding North Carolina's oversight of dentists, the Court held that state-action immunity from antitrust liability depends on active state supervision in the regulatory process. (*N.C. Bd. of Dental Exam'r v. FTC*, 135 S. Ct. 1101 (2015)).

A bare 5–4 majority, led this time by Justice Ruth Bader Ginsburg, upheld the people's initiative to delegate Arizona's redistricting process to an independent commission, despite the requirement in the Constitution that the "Times, Places and Manner of holding Elections" for federal office are to be determined by "the Legislature" of the State. The word *legislature*, wrote Justice Ginsburg, includes any lawful means authorized by the state to make law. Chief Justice Roberts and Justices Scalia, Thomas, and Alito all dissented, arguing that the history of the 17th Amendment shows that the words "the legislature" could not have included "the people" without another constitutional amendment. (*Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015)).

A local ordinance that identifies various categories of outdoor signs based on the type of information they convey amounts to content-based restriction, and so must satisfy a compelling governmental interest, Justice Clarence Thomas wrote for the unanimous Court, albeit with a number of separate concurrences. (*Reed v. Town of Gilbert*,Ariz., 135 S. Ct. 2218 (2015)).

In an 8–1 decision written by Justice Scalia, the Court concluded that Title VII prohibits prospective employers from refusing to hire based on an applicant's religious practice when that practice can be accommodated without undue hardship. The need for accommodation does not have to be highlighted or specifically requested by the applicant. All that must be shown is that the need for the accommodation was a motivating factor in the employer's decision. (*EEOC v. Abercrombie & Fitch*, 135 S. Ct. 2028 (2015)).

The two major cases from the previous term (OT 2013) were *Hobby Lobby, infra.* and *Noel Canning,* dealing with the scope of the President's recess appointment authority. Beyond the edited copies of the major cases in the supplementary period are summaries of most of the decisions mentioned in this introduction.

In the "big" case, *Burwell v. Hobby Lobby*,[1] Justice Alito for a 5-4 majority found that the Religious Freedom Restoration Act (RFRA) is designed to protect the religious liberty of "persons," which is statutorily defined to include corporations, and it doesn't matter whether the individuals are expressing those beliefs as individuals outside or inside a private, closely-held corporation. He further held that mandating that the evangelical Christian owners of Hobby Lobby facilitate access to abortion-inducing contraceptives contrary to the teaching of their church was a substantial burden on their free exercise of religion that, even assuming such a mandate furthered a compelling governmental interest, could not survive strict scrutiny because the government could accomplish its purpose in more narrowly-tailored ways, such as getting those contraceptives into the hands of the employees itself. Justice Alito believes that awarding this exemption will not lead to broader claims of exemption from

[1] *Burwell v. Hobby Lobby*, 573 U.S. ____ (2014).

employment discrimination and other generally-applicable laws unrelated to contraception. The differentiation is more than likely to arise in making the two inquiries under RFRA: is the law a substantial burden? And does the law accomplish a compelling objective in the least burdensome fashion? Exempting Hobby Lobby from dispensing contraceptives is one thing; an excuse to discriminate quite another. So too, the Court should have an easier time differentiating the treatment of publicly traded companies from privately held ones, and the Court says it cannot envision for practical reasons a publicly traded company claim succeeding, although as a logical matter, it is possible to imagine a major, publicly-traded company being organized around a corporate charter that includes certain religious tenets, just as there are already publicly-traded companies that explicitly organize themselves around various claims of "social" or "environmental" justice (think Starbucks, or Ben & Jerry's Ice Cream).

Back during the George W. Bush administration, Senate Democrats decided not to adjourn for the customary Christmas holiday recess to prevent President Bush from making executive appointments under the Constitution's Recess Appointments Clause. Instead, they went into "pro forma" sessions, with two members of the Senate (1 Democrat, 1 Republican) who lived close to Washington, D.C. meeting briefly every third day to conduct any necessary business under the Senate's unanimous consent rules. When the tables were turned and Republicans controlled the Senate and Democrat Barack Obama was in the White House, Republicans likewise went into pro forma sessions. But President Obama made controversial recess appointments anyway, stacking the National Labor Relations Board with aggressively pro-union appointees and filling the vacancy at the head of the Consumer Financial Protection Bureau, an appointment that Republicans had blocked because of concerns that the agency had been unconstitutionally delegated too much unfettered power. The recess appointments decision[2] included here resulted from a lawsuit challenging the validity of those appointments. The Supreme Court unanimously agreed that the President had exceeded his authority under the Recess Appointments Clause, but it did not embrace the careful textual analysis of the lower court that called into question a number of the "mission-creep" uses of the Recess Appointment power that had gradually expanded over the course of the nation's history, effectively ratifying many of the prior uses that had themselves exceeded the textual authority.

In *Schuette v. Coalition to Defend Affirmative Action*,[3] the Court held by a 6-2 vote that racial preferences in higher education admissions can be prohibited by voter initiative. Justice Kennedy, joined by Chief Justice Roberts and Justice Alito, wrote the plurality opinion, noting that whether to utilize race-based admissions policies to achieve racial diversity on campus is a decision that the Constitution leaves to the voters of a state. Justice Scalia, joined by Justice Thomas, concurred in the judgment, contending that because treating people according to their race for any purpose other than to remedy prior discrimination violates Equal Protection, it cannot possibly be the case that a voter initiative that requires

[2] *NLRB v. Canning*, 573 U.S. ____ (2014).
[3] *Schuette v. Coalition to Defend Affirmative Action*,134 S.Ct. 1623 (2014).

equal treatment runs afoul of the Equal Protection clause. Justice Breyer also concurred in the judgment, but on much narrower grounds. Justice Sotomayor, joined by Justice Ginsburg (Justice Kagan was recused) dissented, arguing that by putting the ban on race-based admissions into the state constitution, the voters of Michigan had made it more difficult for racial minorities to obtain preferential treatment, in violation of the Equal Protection Clause. Of course, that's the rub: what is bedrock denial of equal protection in dissent was, for the majority, a reaffirmation of the principle that citizens are to be judged by the content of their character, not the color of their skin.

In *Harris v. Quinn*[4] Justice Alito authored an opinion for a 5-4 majority that fashioned a category of partial public employees who could not be required to pay union dues to the public employee union. Prior decisions had established that a non-member could be compelled to pay for the proportionate part of Union dues devoted to terms of employment or collective bargaining. Home health care works are, as a practical matter, under the immediate direction of their patients, and thus, not really free-riding, said the Court.

A home health care worker may not be the same as a nurse in a public hospital, but Justice Breyer for a majority of six found the virtually simultaneous re-broadcast on the internet to subscribers of over-the-air television programming to require a royalty payment.[5] That programming was not accessed until an individual subscriber chose it and was sent to each subscriber separately over tiny antennas (nothing said about little green men) did not take the transmission outside the compensation requirements of the 1976 copyright act. Within days of the ruling, Aereo suspended operations, but said it would be back.

The Court unanimously found police need a warrant to search a cellphone of a person under arrest, absent exigent circumstances like the phone being used as a trigger.[6] What's that? Is that the already listening, but self-gulaged, voice of Edward Snowden drifting across the Siberian plain shouting "Hooray for privacy!"

The large looming question from the mandating of same-sex marriage in *Obergefell* is to what extent, and over what set of activities, are religious institutions or religious individuals or even employers like Hobby-Lobby, where faith is claimed to guide their commercial endeavors, now subject to having their faith claims ignored or displaced in order to avoid "discrimination" in these respective venues against same-sex couples. If faith beliefs or practices cannot be protected from a conception of marriage at odds with particular doctrine is that a denial of free exercise? Is it the establishment of religion insofar as it can

[4] *Harris v. Quinn*, 573 U.S. ___ (2014).
[5] *ABC, Inc. et. al., v. Aereo, Inc.*, 573 U.S. ___ (2014).
[6] *Riley v. California*, 573 U.S. ___ (2014).

be argued to have the effect of favoring one religious conception of marriage over another (although almost all churches define marriage as between a man and a women, a handful have recently started to sanction same sex unions as marriage) contrary to the *Lemon* "effect" standard of establishment? But if the newly articulated fundamental right to marriage is that favoritism, why weren't the laws that previously favored marriage only between man and woman also an establishment? While the Justices finding an implied right were preoccupied with the claimed justification for their implication, and did not address a frontal establishment challenge, they did inquire at oral argument whether a nonconforming religion could be punished for adhering to its beliefs. The Solicitor General did not rule out the possibility of sanction. With both sides claiming to have right on their side, the Court has landed anew in a culturally divisive issue of the highest order.

DWK August 2015
SJP
JCE

Chapter 2 THE DECLARATION AND ITS CONSTITUTION—LINKING FIRST PRINCIPLE TO NECESSARY MEANS

II. THE SPECIAL SIGNIFICANCE OF PREFERRED RELIGIOUS FREEDOM

C. THE FREE EXERCISE CLAUSE—GOVERNMENT MAY NOT PROHIBIT RELIGIOUS EXPRESSION

6. The "Ministerial Exception"

ACO, p.262; Individual Rights, p. 203:

Insert after Hosanna-Tabor:

BURWELL v. HOBBY LOBBY STORES, INC.
___ U.S. ___ (2014)

* * *

JUSTICE ALITO delivered the opinion of the Court.

We must decide in these cases whether the Religious Freedom Restoration Act of 1993 (RFRA), permits the United States Department of Health and Human Services (HHS) to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners. We hold that the regulations that impose this obligation violate RFRA, which prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest.

In holding that the HHS mandate is unlawful, we reject HHS's argument that the owners of the companies forfeited all RFRA protection when they decided to organize their businesses as corporations rather than sole proprietorships or general partnerships. The plain terms of RFRA make it perfectly clear that Congress did not discriminate in this way against men and women who wish to run their businesses as for-profit corporations in the manner required by their religious beliefs.

Since RFRA applies in these cases, we must decide whether the challenged HHS regulations substantially burden the exercise of religion, and we hold that they do. The owners of the businesses have religious objections to abortion, and according to their religious beliefs the four contraceptive methods at issue are abortifacients. If the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price—as much as $1.3 million per day, or about $475 million per year, in the case of one of the companies. If these consequences do not amount to a substantial burden, it is hard to see what would.

Under RFRA, a Government action that imposes a substantial burden on religious exercise must serve a compelling government interest, and we assume that the HHS regulations satisfy this requirement. But in order for the HHS mandate to be sustained, it must also constitute the least restrictive means of serving that interest, and the mandate plainly fails that test. There are other ways in which Congress or HHS could equally ensure that every woman has cost-free access to the particular contraceptives at issue here and, indeed, to all FDA-approved contraceptives.

In fact, HHS has already devised and implemented a system that seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage. The employees of these religious nonprofit corporations still have access to insurance coverage without cost sharing for all FDA-approved contraceptives; and according to HHS, this system imposes no net economic burden on the insurance companies that are required to provide or secure the coverage.

Although HHS has made this system available to religious nonprofits that have religious objections to the contraceptive mandate, HHS has provided no reason why the same system cannot be made available when the owners of for-profit corporations have similar religious objections. We therefore conclude that this system constitutes an alternative that achieves all of the Government's aims while providing greater respect for religious liberty. And under RFRA, that conclusion means that enforcement of the HHS contraceptive mandate against the objecting parties in these cases is unlawful.

As this description of our reasoning shows, our holding is very specific. We do not hold, as the principal dissent alleges, that for-profit corporations and other commercial enterprises can "opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs." Nor do we hold, as the dissent implies, that such corporations have free rein to take steps that impose "disadvantages ... on others" or that require "the general public [to] pick up the tab." And we certainly do not hold or suggest that "RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on ... thousands of women employed by Hobby Lobby." 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. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing.

I

* * *

B

At issue in these cases are HHS regulations promulgated under the Patient Protection and Affordable Care Act of 2010(ACA), 124 Stat. 119. ACA generally requires employers with 50 or more full-time employees to offer "a group health plan or group health insurance coverage" that provide "minimum essential coverage." Any covered employer that does not provide such coverage must pay a substantial price. Specifically, if a covered employer provides group health insurance but its plan fails to

comply with ACA's group-health-plan requirements, the employer may be required to pay $100 per day for each affected "individual." And if the employer decides to stop providing health insurance altogether and at least one full-time employee enrolls in a health plan and qualifies for a subsidy on one of the government-run ACA exchanges, the employer must pay $2,000 per year for each of its full-time employees.

Unless an exception applies, ACA requires an employer's group health plan or group-health-insurance coverage to furnish "preventive care and screenings" for women without "any cost sharing requirements." Congress itself, however, did not specify what types of preventive care must be covered. Instead, Congress authorized the Health Resources and Services Administration (HRSA), a component of HHS, to make that important and sensitive decision. The HRSA in turn consulted the Institute of Medicine, a nonprofit group of volunteer advisers, in determining which preventive services to require.

… The [HHS] Guidelines provide that nonexempt employers are generally required to provide "coverage, without cost sharing" for "[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling." Although many of the required, FDA-approved methods of contraception work by preventing the fertilization of an egg, four of those methods (those specifically at issue in these cases) may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus.

HHS also authorized the HRSA to establish exemptions from the contraceptive mandate for "religious employers." That category encompasses "churches, their integrated auxiliaries, and conventions or associations of churches," as well as "the exclusively religious activities of any religious order." In its Guidelines, [HHS] exempted these organizations from the requirement to cover contraceptive services.

In addition, HHS has effectively exempted certain religious nonprofit organizations, described under HHS regulations as "eligible organizations," from the contraceptive mandate. An "eligible organization" means a nonprofit organization that "holds itself out as a religious organization" and "opposes providing coverage for some or all of any contraceptive services required to be covered ... on account of religious objections." To qualify for this accommodation, an employer must certify that it is such an organization. When a group-health-insurance issuer receives notice that one of its clients has invoked this provision, the issuer must then exclude contraceptive coverage from the employer's plan and provide separate payments for contraceptive services for plan participants without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries. Although this procedure requires the issuer to bear the cost of these services, HHS has determined that this obligation will not impose any net expense on issuers because its cost will be less than or equal to the cost savings resulting from the services.

In addition to these exemptions for religious organizations, ACA exempts a great many employers from most of its coverage requirements. Employers providing "grandfathered health plans"—those that existed prior to March 23, 2010, and that have not made specified changes after that date—need not comply with many of the Act's requirements, including the contraceptive mandate. And employers with

fewer than 50 employees are not required to provide health insurance at all.

All told, the contraceptive mandate "presently does not apply to tens of millions of people." This is attributable, in large part, to grandfathered health plans: Over one-third of the 149 million nonelderly people in America with employer-sponsored health plans were enrolled in grandfathered plans in 2013. The count for employees working for firms that do not have to provide insurance at all because they employ fewer than 50 employees is 34 million workers.

II

A

Norman and Elizabeth Hahn and their three sons are devout members of the Mennonite Church, a Christian denomination. The Mennonite Church opposes abortion and believes that "[t]he fetus in its earliest stages ... shares humanity with those who conceived it."

* * *

The Hahns believe that they are required to run their business "in accordance with their religious beliefs and moral principles."

* * *

In opposing the requirement to provide coverage for the contraceptives to which they object, the Hahns argued that "it is immoral and sinful for [them] to intentionally participate in, pay for, facilitate, or otherwise support these drugs." The District Court denied a preliminary injunction, and the Third Circuit affirmed in a divided opinion, holding that "for-profit, secular corporations cannot engage in religious exercise" within the meaning of RFRA or the First Amendment. The Third Circuit also rejected the claims brought by the Hahns themselves because it concluded that the HHS "[m]andate does not impose any requirements on the Hahns" in their personal capacity.

B

David and Barbara Green and their three children are Christians who own and operate two family businesses. Forty-five years ago, David Green started an arts-and-crafts store that has grown into a nationwide chain called Hobby Lobby. There are now 500 Hobby Lobby stores, and the company has more than 13,000 employees. Hobby Lobby is organized as a for-profit corporation under Oklahoma law.

One of David's sons started an affiliated business, Mardel, which operates 35 Christian bookstores and employs close to 400 people. Mardel is also organized as a for-profit corporation under Oklahoma law.

* * *

Like the Hahns, the Greens believe that life begins at conception and that it would violate their

religion to facilitate access to contraceptive drugs or devices that operate after that point. They specifically object to the same four contraceptive methods as the Hahns and, like the Hahns, they have no objection to the other 16 FDA-approved methods of birth control. …

The Greens, Hobby Lobby, and Mardel sued HHS and other federal agencies and officials to challenge the contraceptive mandate under RFRA and the Free Exercise Clause. The District Court denied a preliminary injunction, and the plaintiffs appealed, moving for initial en banc consideration. The Tenth Circuit granted that motion and reversed in a divided opinion. Contrary to the conclusion of the Third Circuit, the Tenth Circuit held that the Greens' two for-profit businesses are "persons" within the meaning of RFRA and therefore may bring suit under that law.

The court then held that the corporations had established a likelihood of success on their RFRA claim. The court concluded that the contraceptive mandate substantially burdened the exercise of religion by requiring the companies to choose between "compromis[ing] their religious beliefs" and paying a heavy fee—either "close to $475 million more in taxes every year" if they simply refused to provide coverage for the contraceptives at issue, or "roughly $26 million" annually if they "drop[ped] health-insurance benefits for all employees."

The court next held that HHS had failed to demonstrate a compelling interest in enforcing the mandate against the Greens' businesses and, in the alternative that HHS had failed to prove that enforcement of the mandate was the "least restrictive means" of furthering the Government's asserted interests. After concluding that the companies had "demonstrated irreparable harm," the court reversed and remanded for the District Court to consider the remaining factors of the preliminary-injunction test.

We granted certiorari. 571 U.S. ——, 134 S.Ct. 678, 187 L.Ed.2d 544 (2013).

III
A

RFRA prohibits the "Government [from] substantially burden[ing] *a person's* exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to *the person*—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." The first question that we must address is whether this provision applies to regulations that govern the activities of for-profit corporations like Hobby Lobby, Conestoga, and Mardel.

HHS contends that neither these companies nor their owners can even be heard under RFRA.

* * *

HHS would put these merchants to a difficult choice: either give up the right to seek judicial protection of their religious liberty or forgo the benefits, available to their competitors, of operating as corporations.

As we have seen, RFRA was designed to provide very broad protection for religious liberty. By enacting RFRA, Congress went far beyond what this Court has held is constitutionally required. Is there any reason to think that the Congress that enacted such sweeping protection put small-business owners to the choice that HHS suggests? An examination of RFRA's text, to which we turn in the next part of this opinion, reveals that Congress did no such thing.

* * *

In holding that Conestoga, as a "secular, for-profit corporation," lacks RFRA protection, the Third Circuit wrote as follows:

> "General business corporations do not, *separate and apart from the actions or belief systems of their individual owners or employees*, exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors."

All of this is true—but quite beside the point. Corporations, "separate and apart from" the human beings who own, run, and are employed by them, cannot do anything at all.

B

1

As we noted above, RFRA applies to "a person's" exercise of religion, and RFRA itself does not define the term "person." We therefore look to the Dictionary Act, which we must consult "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise."

Under the Dictionary Act, "the wor[d] 'person' ... include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." …

We see nothing in RFRA that suggests a congressional intent to depart from the Dictionary Act definition, and HHS makes little effort to argue otherwise.

* * *

2

The principal argument advanced by HHS and the principal dissent regarding RFRA protection for Hobby Lobby, Conestoga, and Mardel focuses not on the statutory term "person," but on the phrase "exercise of religion." According to HHS and the dissent, these corporations are not protected by RFRA because they cannot exercise religion. Neither HHS nor the dissent, however, provides any persuasive explanation for this conclusion.

Is it because of the corporate form?

* * *

Some lower court judges have suggested that RFRA does not protect for-profit corporations because the purpose of such corporations is simply to make money. This argument flies in the face of modern corporate law. "Each American jurisdiction today either expressly or by implication authorizes corporations to be formed under its general corporation act for *any lawful purpose* or business." …

HHS would draw a sharp line between nonprofit corporations (which, HHS concedes, are protected by RFRA) and for-profit corporations (which HHS would leave unprotected), but the actual picture is less clear-cut. Not all corporations that decline to organize as nonprofits do so in order to maximize profit. For example, organizations with religious and charitable aims might organize as for-profit corporations because of the potential advantages of that corporate form, such as the freedom to participate in lobbying for legislation or campaigning for political candidates who promote their religious or charitable goals. In fact, recognizing the inherent compatibility between establishing a for-profit corporation and pursuing nonprofit goals, States have increasingly adopted laws formally recognizing hybrid corporate forms. Over half of the States, for instance, now recognize the "benefit corporation," a dual-purpose entity that seeks to achieve both a benefit for the public and a profit for its owners.

In any event, the objectives that may properly be pursued by the companies in these cases are governed by the laws of the States in which they were incorporated—Pennsylvania and Oklahoma—and the laws of those States permit for-profit corporations to pursue "any lawful purpose" or "act," including the pursuit of profit in conformity with the owners' religious principles. …

4

Finally, HHS contends that Congress could not have wanted RFRA to apply to for-profit corporations because it is difficult as a practical matter to ascertain the sincere "beliefs" of a corporation. HHS goes so far as to raise the specter of "divisive, polarizing proxy battles over the religious identity of large, publicly traded corporations such as IBM or General Electric."

These cases, however, do not involve publicly traded corporations, and it seems unlikely that the sort of corporate giants to whom HHS refers will often assert RFRA claims. HHS has not pointed to any example of a publicly traded corporation asserting RFRA rights, and numerous practical restraints would likely prevent that from occurring. For example, the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable. In any event, we have no occasion in these cases to consider RFRA's applicability to such companies. The companies in the cases before us are closely held corporations, each owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs.

HHS has also provided no evidence that the purported problem of determining the sincerity of an asserted religious belief moved Congress to exclude for-profit corporations from RFRA's protection. On the contrary, the scope of RLUIPA shows that Congress was confident of the ability of the federal courts to weed out insincere claims. RLUIPA applies to "institutionalized persons," a category that consists

primarily of prisoners, and by the time of RLUIPA's enactment, the propensity of some prisoners to assert claims of dubious sincerity was well documented. Nevertheless, after our decision in *City of Boerne*, Congress enacted RLUIPA to preserve the right of prisoners to raise religious liberty claims. If Congress thought that 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. And if, as HHS seems to concede, Congress wanted RFRA to apply to nonprofit corporations, what reason is there to think that Congress believed that spotting insincere claims would be tougher in cases involving for-profits?

* * *

For all these reasons, we hold that a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with RFRA.

IV

Because RFRA applies in these cases, we must next ask whether the HHS contraceptive mandate "substantially burden[s]" the exercise of religion. We have little trouble concluding that it does.

A

As we have noted, the Hahns and Greens have a sincere religious belief that life begins at conception. They therefore object on religious grounds to providing health insurance that covers methods of birth control that, as HHS acknowledges, may result in the destruction of an embryo. By requiring the Hahns and Greens and their companies to arrange for such coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs.

If the Hahns and Greens and their companies do not yield to this demand, the economic consequences will be severe. If the companies continue to offer group health plans that do not cover the contraceptives at issue, they will be taxed $100 per day for each affected individual. For Hobby Lobby, the bill could amount to $1.3 million per day or about $475 million per year; for Conestoga, the assessment could be $90,000 per day or $33 million per year; and for Mardel, it could be $40,000 per day or about $15 million per year. These sums are surely substantial.

It is true that the plaintiffs could avoid these assessments by dropping insurance coverage altogether and thus forcing their employees to obtain health insurance on one of the exchanges established under ACA. But if at least one of their full-time employees were to qualify for a subsidy on one of the government-run exchanges, this course would also entail substantial economic consequences. The companies could face penalties of $2,000 per employee each year. § 4980H. These penalties would amount to roughly $26 million for Hobby Lobby, $1.8 million for Conestoga, and $800,000 for Mardel.

B

Although these totals are high, *amici* supporting HHS have suggested that the $2,000

per-employee penalty is actually less than the average cost of providing health insurance, and therefore, they claim, the companies could readily eliminate any substantial burden by forcing their employees to obtain insurance in the government exchanges. We do not generally entertain arguments that were not raised below and are not advanced in this Court by any party, and there are strong reasons to adhere to that practice in these cases. …

Even if we were to reach this argument, we would find it unpersuasive. As an initial matter, it entirely ignores the fact that the Hahns and Greens and their companies have religious reasons for providing health-insurance coverage for their employees. Before the advent of ACA, they were not legally compelled to provide insurance, but they nevertheless did so—in part, no doubt, for conventional business reasons, but also in part because their religious beliefs govern their relations with their employees.

Putting aside the religious dimension of the decision to provide insurance, moreover, it is far from clear that the net cost to the companies of providing insurance is more than the cost of dropping their insurance plans and paying the ACA penalty. Health insurance is a benefit that employees value. If the companies simply eliminated that benefit and forced employees to purchase their own insurance on the exchanges, without offering additional compensation, it is predictable that the companies would face a competitive disadvantage in retaining and attracting skilled workers.

The companies could attempt to make up for the elimination of a group health plan by increasing wages, but this would be costly. Group health insurance is generally less expensive than comparable individual coverage, so the amount of the salary increase needed to fully compensate for the termination of insurance coverage may well exceed the cost to the companies of providing the insurance. In addition, any salary increase would have to take into account the fact that employees must pay income taxes on wages but not on the value of employer-provided health insurance. Likewise, employers can deduct the cost of providing health insurance, but apparently cannot deduct the amount of the penalty that they must pay if insurance is not provided; that difference also must be taken into account. Given these economic incentives, it is far from clear that it would be financially advantageous for an employer to drop coverage and pay the penalty.

In sum, we refuse to sustain the challenged regulations on the ground—never maintained by the Government—that dropping insurance coverage eliminates the substantial burden that the HHS mandate imposes. We doubt that the Congress that enacted RFRA—or, for that matter, ACA—would have believed it a tolerable result to put family-run businesses to the choice of violating their sincerely held religious beliefs or making all of their employees lose their existing healthcare plans.

C

In taking the position that the HHS mandate does not impose a substantial burden on the exercise of religion, HHS's main argument (echoed by the principal dissent) is basically that the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated. HHS and the dissent note that providing the coverage would not itself result in the destruction of an embryo; that would occur only if an employee

chose to take advantage of the coverage and to use one of the four methods at issue.

This argument dodges the question that RFRA presents (whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*) and instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable). The Hahns and Greens believe that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage. This belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another. Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step.

* * *

HHS nevertheless compares these cases to decisions in which we rejected the argument that the use of general tax revenue to subsidize the secular activities of religious institutions violated the Free Exercise Clause. But in those cases, while the subsidies were clearly contrary to the challengers' views on a secular issue, namely, proper church-state relations, the challengers never articulated a *religious* objection to the subsidies. As we put it in *Tilton,* they were "unable to identify any coercion directed at the practice or exercise of their religious beliefs." Here, in contrast, the plaintiffs do assert that funding the specific contraceptive methods at issue violates their religious beliefs, and HHS does not question their sincerity. Because the contraceptive mandate forces them to pay an enormous sum of money—as much as $475 million per year in the case of Hobby Lobby—if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs.

V

Since the HHS contraceptive mandate imposes a substantial burden on the exercise of religion, we must move on and decide whether HHS has shown that the mandate both "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."

A

* * *

The objecting parties contend that HHS has not shown that the mandate serves a compelling government interest, and it is arguable that there are features of ACA that support that view. As we have noted, many employees—those covered by grandfathered plans and those who work for employers with fewer than 50 employees—may have no contraceptive coverage without cost sharing at all.

HHS responds that many legal requirements have exceptions and the existence of exceptions does not in itself indicate that the principal interest served by a law is not compelling. Even a compelling interest may be outweighed in some circumstances by another even weightier consideration. In these cases, however, the interest served by one of the biggest exceptions, the exception for grandfathered plans, is simply the interest of employers in avoiding the inconvenience of amending an existing plan. Grandfathered plans are required "to comply with a subset of the Affordable Care Act's health reform provisions" that provide what HHS has described as "particularly significant protections." But the contraceptive mandate is expressly excluded from this subset.

We find it unnecessary to adjudicate this issue. We will assume that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA, and we will proceed to consider the final prong of the RFRA test, *i.e.*, whether HHS has shown that the contraceptive mandate is "the least restrictive means of furthering that compelling governmental interest."

B

The least-restrictive-means standard is exceptionally demanding, and it is not satisfied here. HHS has not 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.

The most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections. This would certainly be less restrictive of the plaintiffs' religious liberty, and HHS has not shown that this is not a viable alternative. … It seems likely, however, that the cost of providing the forms of contraceptives at issue in these cases (if not all FDA-approved contraceptives) would be minor when compared with the overall cost of ACA. According to one of the Congressional Budget Office's most recent forecasts, ACA's insurance-coverage provisions will cost the Federal Government more than $1.3 trillion through the next decade. If, as HHS tells us, providing all women with cost-free access to all FDA-approved methods of contraception is a Government interest of the highest order, it is hard to understand HHS's argument that it cannot be required under RFRA to pay *anything* in order to achieve this important goal.

HHS contends that RFRA does not permit us to take this option into account because "RFRA cannot be used to require creation of entirely new programs." But we see nothing in RFRA that supports this argument, and drawing the line between the "creation of an entirely new program" and the modification of an existing program (which RFRA surely allows) would be fraught with problems. We do not doubt that cost may be an important factor in the least-restrictive-means analysis, but both RFRA and its sister statute, RLUIPA, may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs. HHS's view that RFRA can never require the Government to spend even a small amount reflects a judgment about the importance of religious liberty that was not shared by the Congress that enacted that law.

In the end, however, we need not rely on the option of a new, government-funded program in order

to conclude that the HHS regulations fail the least-restrictive-means test. HHS itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs. HHS has already established an accommodation for nonprofit organizations with religious objections. …

We do not decide today whether an approach of this type complies with RFRA for purposes of all religious claims. At a minimum, however, it does not impinge on the plaintiffs' religious belief that providing insurance coverage for the contraceptives at issue here violates their religion, and it serves HHS's stated interests equally well.

The principal dissent identifies no reason why this accommodation would fail to protect the asserted needs of women as effectively as the contraceptive mandate, and there is none. Under the accommodation, the plaintiffs' female employees would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives, and they would continue to "face minimal logistical and administrative obstacles," because their employers' insurers would be responsible for providing information and coverage. Ironically, it is the dissent's approach that would "[i]mped[e] women's receipt of benefits by 'requiring them to take steps to learn about, and to sign up for, a new government funded and administered health benefit,' because the dissent would effectively compel religious employers to drop health-insurance coverage altogether, leaving their employees to find individual plans on government-run exchanges or elsewhere. This is indeed "scarcely what Congress contemplated."

C

HHS and the principal dissent argue that a ruling in favor of the objecting parties in these cases will lead to a flood of religious objections regarding a wide variety of medical procedures and drugs, such as vaccinations and blood transfusions, but HHS has made no effort to substantiate this prediction. HHS points to no evidence that insurance plans in existence prior to the enactment of ACA excluded coverage for such items. Nor has HHS provided evidence that any significant number of employers sought exemption, on religious grounds, from any of ACA's coverage requirements other than the contraceptive mandate.

It is HHS's apparent belief that no insurance-coverage mandate would violate RFRA—no matter how significantly it impinges on the religious liberties of employers—that would lead to intolerable consequences. Under HHS's view, RFRA would permit the Government to require all employers to provide coverage for any medical procedure allowed by law in the jurisdiction in question—for instance, third-trimester abortions or assisted suicide. The owners of many closely held corporations could not in good conscience provide such coverage, and thus HHS would effectively exclude these people from full participation in the economic life of the Nation. RFRA was enacted to prevent such an outcome.

In any event, our decision in these cases is concerned solely with the contraceptive mandate. Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer's religious beliefs. Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and

may involve different arguments about the least restrictive means of providing them.

The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.

HHS also raises for the first time in this Court the argument that applying the contraceptive mandate to for-profit employers with sincere religious objections is essential to the comprehensive health-insurance scheme that ACA establishes. HHS analogizes the contraceptive mandate to the requirement to pay Social Security taxes, which we upheld in *Lee* despite the religious objection of an employer, but these cases are quite different. Our holding in *Lee* turned primarily on the special problems associated with a national system of taxation. We noted that "[t]he obligation to pay the social security tax initially is not fundamentally different from the obligation to pay income taxes." Based on that premise, we explained that it was untenable to allow individuals to seek exemptions from taxes based on religious objections to particular Government expenditures: "If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax." We observed that "[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief."

Lee was a free-exercise, not a RFRA, case, but if the issue in *Lee* were analyzed under the RFRA framework, the fundamental point would be that there simply is no less restrictive alternative to the categorical requirement to pay taxes. Because of the enormous variety of government expenditures funded by tax dollars, allowing taxpayers to withhold a portion of their tax obligations on religious grounds would lead to chaos. Recognizing exemptions from the contraceptive mandate is very different. ACA does not create a large national pool of tax revenue for use in purchasing healthcare coverage. Rather, individual employers like the plaintiffs purchase insurance for their own employees. …

In its final pages, the principal dissent reveals that its fundamental objection to the claims of the plaintiffs is an objection to RFRA itself. The dissent worries about forcing the federal courts to apply RFRA to a host of claims made by litigants seeking a religious exemption from generally applicable laws, and the dissent expresses a desire to keep the courts out of this business. In making this plea, the dissent reiterates a point made forcefully by the Court in *Smith*. But Congress, in enacting RFRA, took the position that "the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." The wisdom of Congress's judgment on this matter is not our concern. Our responsibility is to enforce RFRA as written, and under the standard that RFRA prescribes, the HHS contraceptive mandate is unlawful.

* * *

The contraceptive mandate, as applied to closely held corporations, violates RFRA. Our decision on that statutory question makes it unnecessary to reach the First Amendment claim raised by Conestoga

and the Hahns.

The judgment of the Tenth Circuit is affirmed; the judgment of the Third Circuit is reversed, and that case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY, concurring.

It seems to me appropriate, in joining the Court's opinion, to add these few remarks. At the outset it should be said that the Court's opinion does not have the breadth and sweep ascribed to it by the respectful and powerful dissent. The Court and the dissent disagree on the proper interpretation of the Religious Freedom and Restoration Act of 1993 (RFRA), but do agree on the purpose of that statute. It is to ensure that interests in religious freedom are protected. (GINSBURG, J., dissenting).

* * *

"[T]he American community is today, as it long has been, a rich mosaic of religious faiths." *Town of Greece v. Galloway* (2014) (KAGAN, J., dissenting). Among the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling. In these cases the means to reconcile those two priorities are at hand in the existing accommodation the Government has designed, identified, and used for circumstances closely parallel to those presented here. RFRA requires the Government to use this less restrictive means. As the Court explains, this existing model, designed precisely for this problem, might well suffice to distinguish the instant cases from many others in which it is more difficult and expensive to accommodate a governmental program to countless religious claims based on an alleged statutory right of free exercise.

For these reasons and others put forth by the Court, I join its opinion.

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, and with whom JUSTICE BREYER and JUSTICE KAGAN join as to all but Part III–C–1, dissenting.

In a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs. Compelling governmental interests in uniform compliance with the law, and disadvantages that religion-based opt-outs impose on others, hold no sway, the Court decides, at least when there is a "less restrictive alternative." And such an alternative, the Court suggests, there always will be whenever, in lieu of tolling an enterprise claiming a religion-based exemption, the government, *i.e.*, the general public, can pick up the tab.

The Court does not pretend that the First Amendment's Free Exercise Clause demands religion-based accommodations so extreme, for our decisions leave no doubt on that score. Instead, the

Court holds that Congress, in the Religious Freedom Restoration Act of 1993 (RFRA), dictated the extraordinary religion-based exemptions today's decision endorses. In the Court's view, RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners' religious faith—in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ. Persuaded that Congress enacted RFRA to serve a far less radical purpose, and mindful of the havoc the Court's judgment can introduce, I dissent.

I

"The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Planned Parenthood of Southeastern Pa. v. Casey* (1992). Congress acted on that understanding when, as part of a nationwide insurance program intended to be comprehensive, it called for coverage of preventive care responsive to women's needs. Carrying out Congress' direction, the Department of Health and Human Services (HHS), in consultation with public health experts, promulgated regulations requiring group health plans to cover all forms of contraception approved by the Food and Drug Administration (FDA). The genesis of this coverage should enlighten the Court's resolution of these cases.

* * *

II

Any First Amendment Free Exercise Clause claim Hobby Lobby or Conestoga[7] might assert is foreclosed by this Court's decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith* (1990).

* * *

The exemption sought by Hobby Lobby and Conestoga would override significant interests of the corporations' employees and covered dependents. It would deny legions of women who do not hold their employers' beliefs access to contraceptive coverage that the ACA would otherwise secure. In sum, with respect to free exercise claims no less than free speech claims, " '[y]our right to swing your arms ends just where the other man's nose begins.' " Chafee, Freedom of Speech in War Time, 32 Harv. L.Rev. 932, 957 (1919).

III

A

Lacking a tenable claim under the Free Exercise Clause, Hobby Lobby and Conestoga rely on RFRA, a statute instructing that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government shows that application of the burden is "the least restrictive means" to further a "compelling governmental interest." In RFRA, Congress "adopt[ed] a statutory rule comparable to the constitutional rule rejected in *Smith*."

Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal (2006).

RFRA's purpose is specific and written into the statute itself. The Act was crafted to "restore the compelling interest test as set forth in *Sherbert v. Verner* (1963) and *Wisconsin v. Yoder* (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened."

* * *

B

Despite these authoritative indications, the Court sees RFRA as a bold initiative departing from, rather than restoring, pre-*Smith* jurisprudence.

* * *

C

With RFRA's restorative purpose in mind, I turn to the Act's application to the instant lawsuits. That task, in view of the positions taken by the Court, requires consideration of several questions, each potentially dispositive of Hobby Lobby's and Conestoga's claims: Do for-profit corporations rank among "person[s]" who "exercise ... religion"? Assuming that they do, does the contraceptive coverage requirement "substantially burden" their religious exercise? If so, is the requirement "in furtherance of a compelling government interest"? And last, does the requirement represent the least restrictive means for furthering that interest?

Misguided by its errant premise that RFRA moved beyond the pre-*Smith* case law, the Court falters at each step of its analysis.

1

RFRA's compelling interest test, as noted, applies to government actions that "substantially burden *a person's exercise of religion*." This reference, the Court submits, incorporates the definition of "person" found in the Dictionary Act, which extends to "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." The Dictionary Act's definition, however, controls only where "context" does not "indicat[e] otherwise." Here, context does so indicate. RFRA speaks of "a person's *exercise of religion*." Whether a corporation qualifies as a "person" capable of exercising religion is an inquiry one cannot answer without reference to the "full body" of pre-*Smith* "free-exercise caselaw." There is in that case law no support for the notion that free exercise rights pertain to for-profit corporations.

Until this litigation, no decision of this Court recognized a for-profit corporation's qualification for a religious exemption from a generally applicable law, whether under the Free Exercise Clause or RFRA. The absence of such precedent is just what one would expect, for the exercise of religion is characteristic of natural persons, not artificial legal entities. As Chief Justice Marshall observed nearly two centuries

ago, a corporation is "an artificial being, invisible, intangible, and existing only in contemplation of law." Corporations, Justice Stevens more recently reminded, "have no consciences, no beliefs, no feelings, no thoughts, and no desires." *Citizens United v. Federal Election Comm'n* (2010).

The First Amendment's free exercise protections, the Court has indeed recognized, shelter churches and other nonprofit religion-based organizations. "For many individuals, religious activity derives meaning in large measure from participation in a larger religious community," and "furtherance of the autonomy of religious organizations often furthers individual religious freedom as well." No such solicitude is traditional for commercial organizations.[15] Indeed, until today, religious exemptions had never been extended to any entity operating in "the commercial, profit-making world."

The reason why is hardly obscure. Religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations. Workers who sustain the operations of those corporations commonly are not drawn from one religious community. Indeed, by law, no religion-based criterion can restrict the work force of for-profit corporations. The distinction between a community made up of believers in the same religion and one embracing persons of diverse beliefs, clear as it is, constantly escapes the Court's attention. One can only wonder why the Court shuts this key difference from sight.

Reading RFRA, as the Court does, to require extension of religion-based exemptions to for-profit corporations surely is not grounded in the pre-*Smith* precedent Congress sought to preserve. Had Congress intended RFRA to initiate a change so huge, a clarion statement to that effect likely would have been made in the legislation. The text of RFRA makes no such statement and the legislative history does not so much as mention for-profit corporations.

The Court notes that for-profit corporations may support charitable causes and use their funds for religious ends, and therefore questions the distinction between such corporations and religious nonprofit organizations. Again, the Court forgets that religious organizations exist to serve a community of believers. For-profit corporations do not fit that bill. Moreover, history is not on the Court's side. Recognition of the discrete characters of "ecclesiastical and lay" corporations dates back to Blackstone, see 1 W. Blackstone, Commentaries on the Laws of England 458 (1765), and was reiterated by this Court centuries before the enactment of the Internal Revenue Code. To reiterate, "for-profit corporations are different from religious non-profits in that they use labor to make a profit, rather than to perpetuate [the] religious value[s] [shared by a community of believers]."

* * *

The Court's determination that RFRA extends to for-profit corporations is bound to have untoward effects. Although the Court attempts to cabin its language to closely held corporations, its logic extends to corporations of any size, public or private. Little doubt that RFRA claims will proliferate, for the Court's expansive notion of corporate personhood—combined with its other errors in construing RFRA—invites for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faith.

2

Even if Hobby Lobby and Conestoga were deemed RFRA "person[s]," to gain an exemption, they must demonstrate that the contraceptive coverage requirement "substantially burden[s] [their] exercise of religion." Congress no doubt meant the modifier "substantially" to carry weight. In the original draft of RFRA, the word "burden" appeared unmodified. The word "substantially" was inserted pursuant to a clarifying amendment offered by Senators Kennedy and Hatch. See 139 Cong. Rec. 26180. In proposing the amendment, Senator Kennedy stated that RFRA, in accord with the Court's pre-*Smith* case law, "does not require the Government to justify every action that has some effect on religious exercise."

The Court barely pauses to inquire whether any burden imposed by the contraceptive coverage requirement is substantial. Instead, it rests on the Greens' and Hahns' "belie[f] that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage." I agree with the Court that the Green and Hahn families' religious convictions regarding contraception are sincerely held. But those beliefs, however deeply held, do not suffice to sustain a RFRA claim. RFRA, properly understood, distinguishes between "factual allegations that [plaintiffs'] beliefs are sincere and of a religious nature," which a court must accept as true, and the "legal conclusion ... that [plaintiffs'] religious exercise is substantially burdened," an inquiry the court must undertake.

* * *

Importantly, the decisions whether to claim benefits under the plans are made not by Hobby Lobby or Conestoga, but by the covered employees and dependents, in consultation with their health care providers. Should an employee of Hobby Lobby or Conestoga share the religious beliefs of the Greens and Hahns, she is of course under no compulsion to use the contraceptives in question. But "[n]o individual decision by an employee and her physician—be it to use contraception, treat an infection, or have a hip replaced—is in any meaningful sense [her employer's] decision or action." It is doubtful that Congress, when it specified that burdens must be "substantia[l]," had in mind a linkage thus interrupted by independent decision makers (the woman and her health counselor) standing between the challenged government action and the religious exercise claimed to be infringed. Any decision to use contraceptives made by a woman covered under Hobby Lobby's or Conestoga's plan will not be propelled by the Government, it will be the woman's autonomous choice, informed by the physician she consults.

3

Even if one were to conclude that Hobby Lobby and Conestoga meet the substantial burden requirement, the Government has shown that the contraceptive coverage for which the ACA provides furthers compelling interests in public health and women's well-being. Those interests are concrete, specific, and demonstrated by a wealth of empirical evidence. To recapitulate, the mandated contraception coverage enables women to avoid the health problems unintended pregnancies may visit on them and their children. The coverage helps safeguard the health of women for whom pregnancy may be hazardous, even life threatening. And the mandate secures benefits wholly unrelated to pregnancy, preventing certain

cancers, menstrual disorders, and pelvic pain.

That Hobby Lobby and Conestoga resist coverage for only 4 of the 20 FDA-approved contraceptives does not lessen these compelling interests. Notably, the corporations exclude intrauterine devices (IUDs), devices significantly more effective, and significantly more expensive than other contraceptive methods. Moreover, the Court's reasoning appears to permit commercial enterprises like Hobby Lobby and Conestoga to exclude from their group health plans all forms of contraceptives.

* * *

Stepping back from its assumption that compelling interests support the contraceptive coverage requirement, the Court notes that small employers and grandfathered plans are not subject to the requirement. If there is a compelling interest in contraceptive coverage, the Court suggests, Congress would not have created these exclusions.

Federal statutes often include exemptions for small employers, and such provisions have never been held to undermine the interests served by these statutes.

The ACA's grandfathering provision allows a phasing-in period for compliance with a number of the Act's requirements (not just the contraceptive coverage or other preventive services provisions). Once specified changes are made, grandfathered status ceases. Hobby Lobby's own situation is illustrative. By the time this litigation commenced, Hobby Lobby did not have grandfathered status. Asked why by the District Court, Hobby Lobby's counsel explained that the "grandfathering requirements mean that you can't make a whole menu of changes to your plan that involve things like the amount of co-pays, the amount of co-insurance, deductibles, that sort of thing." Counsel acknowledged that, "just because of economic realities, our plan has to shift over time. I mean, insurance plans, as everyone knows, shif[t] over time." The percentage of employees in grandfathered plans is steadily declining, having dropped from 56% in 2011 to 48% in 2012 to 36% in 2013.

The Court ultimately acknowledges a critical point: RFRA's application "*must* take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." No tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others—here, the very persons the contraceptive coverage requirement was designed to protect.

4

After assuming the existence of compelling government interests, the Court holds that the contraceptive coverage requirement fails to satisfy RFRA's least restrictive means test. But the Government has shown that there is no less restrictive, equally effective means that would both (1) satisfy the challengers' religious objections to providing insurance coverage for certain contraceptives (which they believe cause abortions); and (2) carry out the objective of the ACA's contraceptive coverage requirement, to ensure that women employees receive, at no cost to them, the preventive care needed to safeguard their health and well being. A "least restrictive means" cannot require employees to relinquish benefits accorded them by federal law in order to ensure that their commercial employers can adhere

unreservedly to their religious tenets.

Then let the government pay (rather than the employees who do not share their employer's faith), the Court suggests. "The most straightforward [alternative]," the Court asserts, "would be for the Government to assume the cost of providing ... contraceptives ... to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections." The ACA, however, requires coverage of preventive services through the existing employer-based system of health insurance "so that [employees] face minimal logistical and administrative obstacles." 78 Fed.Reg. 39888. Impeding women's receipt of benefits "by requiring them to take steps to learn about, and to sign up for, a new [government funded and administered] health benefit" was scarcely what Congress contemplated.

And where is the stopping point to the "let the government pay" alternative? Suppose an employer's sincerely held religious belief is offended by health coverage of vaccines, or paying the minimum wage, or according women equal pay for substantially similar work? Does it rank as a less restrictive alternative to require the government to provide the money or benefit to which the employer has a religion-based objection? Because the Court cannot easily answer that question, it proposes something else: Extension to commercial enterprises of the accommodation already afforded to nonprofit religion-based organizations. "At a minimum," according to the Court, such an approach would not "impinge on [Hobby Lobby's and Conestoga's] religious belief." I have already discussed the "special solicitude" generally accorded nonprofit religion-based organizations that exist to serve a community of believers, solicitude never before accorded to commercial enterprises comprising employees of diverse faiths.

Ultimately, the Court hedges on its proposal to align for-profit enterprises with nonprofit religion-based organizations. "We do not decide today whether [the] approach [the opinion advances] complies with RFRA for purposes of all religious claims." Counsel for Hobby Lobby was similarly noncommittal. Asked at oral argument whether the Court-proposed alternative was acceptable, counsel responded: "We haven't been offered that accommodation, so we haven't had to decide what kind of objection, if any, we would make to that."

Conestoga suggests that, if its employees had to acquire and pay for the contraceptives (to which the corporation objects) on their own, a tax credit would qualify as a less restrictive alternative. A tax credit, of course, is one variety of "let the government pay." In addition to departing from the existing employer-based system of health insurance, Conestoga's alternative would require a woman to reach into her own pocket in the first instance, and it would do nothing for the woman too poor to be aided by a tax credit.

In sum, in view of what Congress sought to accomplish, *i.e.*, comprehensive preventive care for women furnished through employer-based health plans, none of the proffered alternatives would satisfactorily serve the compelling interests to which Congress responded.

IV

* * *

Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)?[31] According to counsel for Hobby Lobby, "each one of these cases ... would have to be evaluated on its own ... apply [ing] the compelling interest-least restrictive alternative test." Not much help there for the lower courts bound by today's decision.

The Court, however, sees nothing to worry about. Today's cases, the Court concludes, are "concerned solely with the contraceptive mandate. Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer's religious beliefs. Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means of providing them." But the Court has assumed, for RFRA purposes, that the interest in women's health and well being is compelling and has come up with no means adequate to serve that interest, the one motivating Congress to adopt the Women's Health Amendment.

There is an overriding interest, I believe, in keeping the courts "out of the business of evaluating the relative merits of differing religious claims," or the sincerity with which an asserted religious belief is held. Indeed, approving some religious claims while deeming others unworthy of accommodation could be "perceived as favoring one religion over another," the very "risk the Establishment Clause was designed to preclude." The Court, I fear, has ventured into a minefield by its immoderate reading of RFRA. I would confine religious exemptions under that Act to organizations formed "for a religious purpose," "engage[d] primarily in carrying out that religious purpose," and not "engaged ... substantially in the exchange of goods or services for money beyond nominal amounts."

* * *

For the reasons stated, I would reverse the judgment of the Court of Appeals for the Tenth Circuit and affirm the judgment of the Court of Appeals for the Third Circuit.

JUSTICE BREYER and JUSTICE KAGAN, dissenting.

We agree with Justice GINSBURG that the plaintiffs' challenge to the contraceptive coverage requirement fails on the merits. We need not and do not decide whether either for-profit corporations or their owners may bring claims under the Religious Freedom Restoration Act of 1993. Accordingly, we join all but Part III–C–1 of Justice GINSBURG's dissenting opinion.

Chapter 3 A STRUCTURALLY-DIVIDED, BUT WORKABLE, GOVERNMENT

B. THE SEPARATION OF POWERS—IN CONSTITUTIONAL PRACTICE

2. The Legislative Power

ACO p. 333; History, p. 141

Insert before Note 7 the following new Note 7 after *Chadha,* and renumber existing notes 7-10 to 8-11:

7. In several opinions during the 2014-2015 term, Justice Thomas invited wholesale reconsideration of the Court's moribund non-delegation doctrine. In *Michigan v. EPA*, 135 S. Ct. 2699 (2015), for example, Justice Thomas wrote a separate concurring opinion to point out that the "appropriate and necessary" language in the environmental protection statute, which the Court interpreted as requiring agency consideration of costs, was actually so open-ended as to be a potentially unconstitutional delegation of Congress's lawmaking power. He wrote:

> Should EPA wield its vast powers over electric utilities to protect public health? A pristine environment? Economic security? We are told that the breadth of the word "appropriate" authorizes EPA to decide for itself how to answer that question. . . . Although we hold today that EPA exceeded even the extremely permissive limits on agency power set by our precedents, *we should be alarmed that it felt sufficiently emboldened by those precedents to make the bid for deference that it did here*. . . . As in other areas of our jurisprudence concerning administrative agencies . . . *we seem to be straying further and further from the Constitution without so much as pausing to ask why.* We should stop to consider that document before blithely giving the force of law to any other agency "interpretations" of federal statutes.

Similarly, in *Department of Transportation* v. *Association of American Railroads,* 135 S. Ct. 1225 (2015), in which the Court unanimously held that Amtrak was acting as part of the federal government and not a private entity when adopting rules for the usage of rail lines, Justice Thomas wrote separately to question whether Amtrak, or any federal agency, could be delegated the power to "formulate generally applicable rules of private conduct," when the Constitution explicitly vests the lawmaking power in Congress. In his view,

> We should return to the original meaning of the Constitution: The Government may create generally applicable rules of private conduct only through the proper exercise of legislative power. *I accept that this would inhibit the Government from acting with the speed and efficiency Congress has sometimes found desirable*. . . . We have too long abrogated our duty to enforce the separation of powers required by our Constitution. We have overseen and sanctioned the growth of an administrative system that concentrates the power to make laws and the power to enforce them in the hands of a vast and unaccountable administrative

> apparatus that finds no comfortable home in our constitutional structure. The end result may be trains that run on time (although I doubt it), but the cost is to our Constitution and the individual liberty it protects.

Do you think Justice Thomas's invitation will yield a serious reconsideration of the non-delegation doctrine?

3. The Executive Power

b. The Practical Exercise of Executive Authority—The President and the Bureaucracy

(1) Power of Appointment

ACO p. 367; History, p. 174

Insert after the notes following *Myers*:

NLRB v. NOEL CANNING

573 U.S. ___, 134 S. Ct. 2550 (2014)

JUSTICE BREYER delivered the opinion of the Court.

* * *

Ordinarily the President must obtain "the Advice and Consent of the Senate" before appointing an "Office[r] of the United States." Art. II, § 2, cl. 2. But the Recess Appointments Clause creates an exception. It gives the President alone the power "to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." Art. II, § 2, cl. 3. We here consider three questions about the application of this Clause. The first concerns the scope of the words "recess of the Senate." Does that phrase refer only to an inter-session recess (*i.e.*, a break between formal sessions of Congress), or does it also include an intra-session recess, such as a summer recess in the midst of a session? We conclude that the Clause applies to both kinds of recess.

The second question concerns the scope of the words "vacancies that may happen." Does that phrase refer only to vacancies that first come into existence during a recess, or does it also include vacancies that arise prior to a recess but continue to exist during the recess? We conclude that the Clause applies to both kinds of vacancy.

The third question concerns calculation of the length of a "recess." The President made the appointments here at issue on January 4, 2012. At that time the Senate was in recess pursuant to a December 17, 2011, resolution providing for a series of brief recesses punctuated by "*pro forma*

session[s]," with "no business ... transacted," every Tuesday and Friday through January 20, 2012. In calculating the length of a recess are we to ignore the *pro forma* sessions, thereby treating the series of brief recesses as a single, month-long recess? We conclude that we cannot ignore these *pro forma* sessions.

Our answer to the third question means that, when the appointments before us took place, the Senate was in the midst of a 3–day recess. Three days is too short a time to bring a recess within the scope of the Clause. Thus we conclude that the President lacked the power to make the recess appointments here at issue.

I

The case before us arises out of a labor dispute [involving refusal to put in writing and execute a collective bargaining agreement]. The National Labor Relations Board (NLRB) found that a Pepsi–Cola distributor, Noel Canning, had [acted] unlawfully . . .. The Board ordered the distributor to execute the agreement and to make employees whole for any losses. The Pepsi–Cola distributor claimed that three of the five Board members had been invalidly appointed, leaving the Board without the three lawfully appointed members necessary for it to act. The distributor argued that the Recess Appointments Clause did not authorize those appointments. It pointed out that on December 17, 2011, the Senate, by unanimous consent, had adopted a resolution providing that it would take a series of brief recesses beginning the following day. Pursuant to that resolution, the Senate held *pro forma* sessions every Tuesday and Friday until it returned for ordinary business on January 23, 2012. The President's January 4 appointments were made between the January 3 and January 6 *pro forma* sessions. In the distributor's view, each *pro forma* session terminated the immediately preceding recess. Accordingly, the appointments were made during a 3–day adjournment, which is not long enough to trigger the Recess Appointments Clause.

II

Before turning to the specific questions presented, we shall mention two background considerations that we find relevant to all three. First, *the Recess Appointments Clause sets forth a subsidiary, not a primary, method for appointing officers of the United States*. The immediately preceding Clause—Article II, Section 2, Clause 2—provides the primary method of appointment. It says that the President "shall nominate, *and by and with the Advice and Consent of the Senate*, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States" (emphasis added).

The Federalist Papers make clear that the Founders intended this method of appointment, requiring Senate approval, to be the norm (at least for principal officers). At the same time, the need to secure Senate approval provides "an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity." [The Federalist No. 76.] Hamilton further explained that the "ordinary power of appointment is confided to the President and Senate *jointly*, and can therefore only be exercised during the session of the Senate; but as it would have been improper to oblige this body to be continually in session for the appointment of officers; and as vacancies might happen *in their recess*,

which it might be necessary for the public service to fill without delay, the succeeding clause is evidently intended to authorize the President *singly* to make temporary appointments." The Federalist No. 67.

Thus the Recess Appointments Clause reflects the tension between, on the one hand, the President's continuous need for "the assistance of subordinates," *Myers v. United States*, 272 U.S. 52, 117 (1926), and, on the other, the Senate's practice, particularly during the Republic's early years, of meeting for a single brief session each year. We seek to interpret the Clause as granting the President the power to make appointments during a recess but not offering the President the authority routinely to avoid the need for Senate confirmation.

Second, *in interpreting the Clause, we put significant weight upon historical practice*. For one thing, the interpretive questions before us concern the allocation of power between two elected branches of Government . . .*The Pocket Veto Case* (1929).

We recognize, of course, that the separation of powers can serve to safeguard individual liberty, and that it is the "duty of the judicial department"—in a separation-of-powers case as in any other—"to say what the law is," *Marbury v. Madison*. But it is equally true that the longstanding "practice of the government," *McCulloch*, can inform our determination of "what the law is." That principle is neither new nor controversial. As James Madison wrote, it "was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms & phrases necessarily used in such a charter ... and that it might require a regular course of practice to liquidate & settle the meaning of some of them." And our cases have continually confirmed Madison's view. *Mistretta v. United States* (1989); *Dames & Moore v. Regan*, (1981); *Youngstown Sheet & Tube Co. v. Sawyer*, (1952) (Frankfurter, J., concurring); *McCulloch*; *Stuart v. Laird*, (1803). These precedents show that this Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era. See *Mistretta* ("While these [practices] spawned spirited discussion and frequent criticism, ... 'traditional ways of conducting government ... give meaning' to the Constitution" (quoting *Youngstown*) (Frankfurter, J., concurring)); *Regan* ("[E]ven if the pre–1952 [practice] should be disregarded, congressional acquiescence in [a practice] since that time supports the President's power to act here").

There is a great deal of history to consider here. Presidents have made recess appointments since the beginning of the Republic. Their frequency suggests that the Senate and President have recognized that recess appointments can be both necessary and appropriate in certain circumstances. We have not previously interpreted the Clause, and, when doing so for the first time in more than 200 years, we must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached.

III

The first question concerns the scope of the phrase "*the recess* of the Senate."(emphasis added). The Constitution provides for congressional elections every two years. And the 2–year life of each elected Congress typically consists of two formal 1–year sessions, each separated from the next by an "inter-session recess. "The Senate and the House also take breaks in the midst of a session. The Senate or

the House announces any such "intra-session recess" by adopting a resolution stating that it will "adjourn" to a fixed date, a few days or weeks or even months later. All agree that the phrase "the recess of the Senate" covers inter-session recesses. The question is whether it includes intra-session recesses as well.

In our view, the phrase "the recess" includes an intra-session recess of substantial length. Its words taken literally can refer to both types of recess. Founding-era dictionaries define the word "recess," much as we do today, simply as "a period of cessation from usual work…"

The Founders themselves used the word to refer to intra-session, as well as to inter-session, breaks. See, e.g., 3 Records of the Federal Convention of 1787, p. 76 (M. Farrand rev. 1966) (hereinafter Farrand) (letter from GeorgeWashington to John Jay using "the recess" to refer to an intra-session break of the ConstitutionalConvention); *id.*, at 191 (speech of Luther Martin with a similar usage); 1 T. Jefferson, A Manual of Parliamentary Practice § LI, p. 165 (2d ed. 1812) (describing a "recess by adjournment" which did not end a session).

We recognize that the word "the" in "*the* recess" might suggest that the phrase refers to the single break separating formal sessions of Congress. That is because the word "the" frequently (but not always) indicates "a particular thing." 2 Johnson 2003. But the word can also refer "to a term used generically or universally." 17 OED 879. The Constitution, for example, directs the Senate to choose a President *pro tempore* "in *the* Absence of the Vice–President." Art. I, § 3, cl. 5 (emphasis added). And the Federalist Papers refer to the chief magistrate of an ancient Achaean league who "administered the government in *the* recess of the Senate." Federalist No. 18 (Madison) (emphasis added). Reading "the" generically in this way, there is no linguistic problem applying the Clause's phrase to both kinds of recess. And, in fact, the phrase "the recess" was used to refer to intra-session recesses at the time of the founding. See, *e.g.*, 3 Farrand 76 (letter from Washington to Jay); New Jersey Legislative–Council Journal, 5th Sess., 1st Sitting 70, 2d Sitting 9 (1781) (twice referring to a 4–month, intra-session break as "the Recess").

The constitutional text is thus ambiguous. And we believe the Clause's purpose demands the broader interpretation. The Clause gives the President authority to make appointments during "the recess of the Senate" so that the President can ensure the continued functioning of the Federal Government when the Senate is away. The Senate is equally away during both an inter-session and an intra-session recess, and its capacity to participate in the appointments process has nothing to do with the words it uses to signal its departure.

History also offers strong support for the broad interpretation. We concede that pre-Civil War history is not helpful. But it shows only that Congress generally took long breaks between sessions, while taking no significant intra-session breaks at all (five times it took a break of a week or so at Christmas). Obviously, if there are no significant intra-session recesses, there will be no intra-session recess appointments. In 1867 and 1868, Congress for the first time took substantial, nonholiday intra-session breaks, and President Andrew Johnson made dozens of recess appointments. The Federal Court of Claims upheld one of those specific appointments. Attorney General Evarts also issued three opinions concerning the constitutionality of President Johnson's appointments, and it apparently did not occur to him that the distinction between intra-session and inter-session recesses was significant. Similarly, though the 40th

Congress impeached President Johnson on charges relating to his appointment power, he was not accused of violating the Constitution by making intra-session recess appointments.

In all, between the founding and the Great Depression, Congress took substantial intra-session breaks (other than holiday breaks) in four years: 1867, 1868, 1921, and 1929. And in each of those years the President made intra-session recess appointments.

Since 1929, and particularly since the end of World War II, Congress has shortened its inter-session breaks as it has taken longer and more frequent intra-session breaks; Presidents have correspondingly made more intra-session recess appointments. Indeed, if we include military appointments, Presidents have made thousands of intra-session recess appointments. Not surprisingly, the publicly available opinions of Presidential legal advisers that we have found are nearly unanimous in determining that the Clause authorizes these appointments. We must note one contrary opinion authored by President Theodore Roosevelt's Attorney General Philander Knox. Knox advised the President that the Clause did not cover a 19–day intra-session Christmas recess. But in doing so he relied heavily upon the use of the word "the," a linguistic point that we do not find determinative. And Knox all but confessed that his interpretation ran contrary to the basic purpose of the Clause. Moreover, only three days before Knox gave his opinion, the Solicitor of the Treasury came to the opposite conclusion. We therefore do not think Knox's isolated opinion can disturb the consensus advice within the Executive Branch taking the opposite position.

What about the Senate? Since Presidents began making intra-session recess appointments, individual Senators have taken differing views about the proper definition of "the recess." But neither the Senate considered as a body nor its committees, despite opportunities to express opposition to the practice of intra-session recess appointments, has done so.

The upshot is that restricting the Clause to inter-session recesses would frustrate its purpose. It would make the President's recess-appointment power dependent on a formalistic distinction of Senate procedure. Moreover, the President has consistently and frequently interpreted the word "recess" to apply to intra-session recesses, and has acted on that interpretation. The Senate as a body has done nothing to deny the validity of this practice for at least three-quarters of a century. And three-quarters of a century of settled practice is long enough to entitle a practice to "great weight in a proper interpretation" of the constitutional provision. *The Pocket Veto Case*.

[S]ome argue that the Founders would likely have intended the Clause to apply only to inter-session recesses, for they hardly knew any other. The problem with this argument, however, is that it does not fully describe the relevant founding intent. The question is not: Did the Founders at the time think about intra-session recesses? Perhaps they did not. The question is: Did the Founders intend to restrict the scope of the Clause to the form of congressional recess then prevalent, or did they intend a broader scope permitting the Clause to apply, where appropriate, to somewhat changed circumstances? The Founders knew they were writing a document designed to apply to ever-changing circumstances over centuries. After all, a Constitution is "intended to endure for ages to come," and must adapt itself to a future that can only be "seen dimly," if at all. *McCulloch*. We therefore think the Framers likely did intend the Clause to

apply to a new circumstance that so clearly falls within its essential purposes, where doing so is consistent with the Clause's language.

Second, some argue that the intra-session interpretation permits the President to make "illogic[ally]" long recess appointments. A recess appointment made between Congress' annual sessions would permit the appointee to serve for about a year, *i.e.*, until the "end" of the "next" Senate "session." But an intra-session appointment made at the beginning or in the middle of a formal session could permit the appointee to serve for 1 ½; or almost 2 years (until the end of the following formal session).

We agree that the intra-session interpretation permits somewhat longer recess appointments, but we do not agree that this consequence is "illogical." A President who makes a recess appointment will often also seek to make a regular appointment, nominating the appointee and securing ordinary Senate confirmation. And the Clause ensures that the President and Senate always have at least a full session to go through the nomination and confirmation process. A recess appointment that lasts somewhat longer than a year will ensure the President the continued assistance of subordinates that the Clause permits him to obtain while he and the Senate select a regular appointee.

Third, the Court of Appeals believed that application of the Clause to intra-session recesses would introduce "vagueness" into a Clause that was otherwise clear. One can find problems of uncertainty, however, either way. In 1867, for example, President Andrew Johnson called a special session of Congress, which took place during a lengthy intra-session recess. Consider the period of time that fell just after the conclusion of that special session. Did that period remain an intra-session recess, or did it become an inter-session recess? Historians disagree or suppose that Congress adjourns *sine die*, but it does so conditionally, so that the leadership can call the members back into session when "the public interest shall warrant it." If the Senate Majority Leader were to reconvene the Senate, how would we characterize the preceding recess? Is it still inter-session? On the narrower interpretation the label matters; on the broader it does not.

The greater interpretive problem is determining how long a recess must be in order to fall within the Clause. Is a break of a week, or a day, or an hour too short to count as a "recess"? The Clause itself does not say.[W]e think it most consistent with our constitutional structure to presume that the Framers would have allowed intra-session recess appointments where there was a long history of such practice.

Moreover, the lack of a textual floor raises a problem that plagues both interpretations—Justice Scalia's and ours. Today a brief inter-session recess is just as possible as a brief intra-session recess.

The Recess Appointments Clause seeks to permit the Executive Branch to function smoothly when Congress is unavailable. And though Congress has taken short breaks for almost 200 years, and there have been many thousands of recess appointments in that time, we have not found a single example of a recess appointment made during an intra-session recess that was shorter than 10 days. The lack of examples suggests that the recess-appointment power is not needed in that context. There are a few historical examples of recess appointments made during inter-session recesses shorter than 10 days. But when considered against 200 years of settled practice, we regard these few scattered examples as anomalies. We therefore conclude, in light of historical practice, that a recess of more than 3 days but less than 10 days is

presumptively too short to fall within the Clause. We add the word "presumptively" to leave open the possibility that some very unusual circumstance—a national catastrophe, for instance, that renders the Senate unavailable but calls for an urgent response—could demand the exercise of the recess-appointment power during a shorter break. [T]he phrase "the recess" applies to both intra-session and inter-session recesses. If a Senate recess is so short that it does not require the consent of the House, it is too short to trigger the Recess Appointments Clause. And a recess lasting less than 10 days is presumptively too short as well.

IV

The second question concerns the scope of the phrase "vacancies *that may happen* during the recess of the Senate." Art. II, § 2, cl. 3 (emphasis added). All agree that the phrase applies to vacancies that initially occur during a recess. But does it also apply to vacancies that initially occur before a recess and continue to exist during the recess? In our view the phrase applies to both kinds of vacancy.

We believe that the Clause's language, read literally, permits, though it does not naturally favor, our broader interpretation. We concede that the most natural meaning of "happens" as applied to a "vacancy" (at least to a modern ear) is that the vacancy "happens" when it initially occurs. See 1 Johnson 913 (defining "happen" in relevant part as meaning "[t]o fall out; to chance; to come to pass"). But that is not the only possible way to use the word.

[T]he linguistic question here is not whether the phrase can be, but whether it must be, read more narrowly. The question is whether the Clause is ambiguous. *The Pocket Veto Case*. We consequently go on to consider the Clause's purpose and historical practice. The Clause's purpose strongly supports the broader interpretation. That purpose is to permit the President to obtain the assistance of subordinate officers when the Senate, due to its recess, cannot confirm them.

Examples are not difficult to imagine: An ambassadorial post falls vacant too soon before the recess begins for the President to appoint a replacement; the Senate rejects a President's nominee just before a recess, too late to select another. Thus the broader construction, encompassing vacancies that initially occur before the beginning of a recess, is the "only construction of the constitution which is compatible with its spirit, reason, and purposes; while, at the same time, it offers no violence to its language." [quoting opinion of Attorney General William Wirt]

We do not agree with Justice Scalia's suggestion that the Framers would have accepted the catastrophe envisioned by Wirt because Congress can always provide for acting officers, and the President can always convene a special session of Congress. Acting officers may have less authority than Presidential appointments. Moreover, to rely on acting officers would lessen the President's ability to staff the Executive Branch with people of his own choosing, and thereby limit the President's control and political accountability. Special sessions are burdensome (and would have been especially so at the time of the founding). The point of the Recess Appointments Clause was to avoid reliance on these inadequate expedients.

At the same time, we recognize one important purpose-related consideration that argues in the opposite direction. A broad interpretation might permit a President to avoid Senate confirmations as a matter of course. If the Clause gives the President the power to "fill up all vacancies" that occur before, and continue to exist during, the Senate's recess, a President might not submit any nominations to the Senate. He might simply wait for a recess and then provide all potential nominees with recess appointments. He might thereby routinely avoid the constitutional need to obtain the Senate's "advice and consent."

Wirt thought considerations of character and politics would prevent Presidents from abusing the Clause in this way. He might have added that such temptations should not often arise. It is often less desirable for a President to make a recess appointment. A recess appointee only serves a limited term. That, combined with the lack of Senate approval, may diminish the recess appointee's ability, as a practical matter, to get a controversial job done. And even where the President and Senate are at odds over politically sensitive appointments, compromise is normally possible. Moreover, the Senate, like the President, has institutional "resources," including political resources, "available to protect and assert its interests." In an unusual instance, where a matter is important enough to the Senate, that body can remain in session, preventing recess appointments by refusing to take a recess. In any event, the Executive Branch has adhered to the broader interpretation for two centuries, and Senate confirmation has always remained the norm for officers that require it.

[W]e believe the narrower interpretation risks undermining constitutionally conferred powers more seriously and more often. It would prevent the President from making any recess appointment that arose before a recess, no matter who the official, no matter how dire the need, no matter how uncontroversial the appointment, and no matter how late in the session the office fell vacant. Overall, like Attorney General Wirt, we believe the broader interpretation more consistent with the Constitution's "reason and spirit."

Historical practice over the past 200 years strongly favors the broader interpretation. The tradition of applying the Clause to pre-recess vacancies dates at least to President James Madison. There is no undisputed record of Presidents George Washington, John Adams, or Thomas Jefferson making such an appointment, though the Solicitor General believes he has found records showing that Presidents Washington and Jefferson did so. We know that Edmund Randolph, Washington's Attorney General, favored a narrow reading of the Clause. Randolph believed that the "Spirit of the Constitution favors the participation of the Senate in all appointments," though he did not address—let alone answer—the powerful purposive and structural arguments subsequently made by Attorney General Wirt.

President Adams seemed to endorse the broader view of the Clause in writing, though we are not aware of any appointments he made in keeping with that view. His Attorney General, Charles Lee, later informed Jefferson that, in the Adams administration, "whenever an office became vacant so short a time before Congress rose, as not to give an opportunity of enquiring for a proper character, they let it lie always till recess." We know that President Jefferson thought that the broad interpretation was linguistically supportable, though his actual practice is not clear. But the evidence suggests that James Madison—as familiar as anyone with the workings of the Constitutional Convention—appointed Theodore Gaillard to replace a district judge who had left office before a recess began. It also appears that