# A Modest Proposal to Address Burden-Shifting in Public Schools

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## INTRODUCTION

The 2014 Supreme Court decision in *Burwell v. Hobby Lobby*, in which the so-called contraception mandate in the Affordable Care Act was struck down, brought new attention to the free exercise clause, the less well-known of the religion clauses in the first amendment to the U.S. Constitution.[1] The free exercise clause has long been seen as a protection for religious minorities, whose beliefs and religious expression might be compromised by laws that do not take them into account. Famous free exercise cases include *Sherbert v. Verner* (1963), which involved a group of Seventh Day Adventists who asked for an exemption from unemployment compensation law because they would not take jobs requiring them to work on Saturday, their Sabbath.[2] Unemployment compensation law requires not only that the unemployed apply for jobs, but also that, if they receive a job offer, they must accept it. In an educational context, the most famous free exercise case was *Wisconsin v Yoder* (1972). At issue in this case was a request by a group of Amish for an exemption from the state of Wisconsin's compulsory attendance law, which requires attendance in school until the age of 16. The Amish were willing to send their children to school until the age of 14, but argued that the exposure their children would have, in what would amount to the first two years of high school, could compromise their religious way of life.[3] Most relevant to this essay, however, is *Employment Division v. Smith* (1990). In this case, two drug counselors, both Native American, were fired from their state jobs for testing positive for peyote – a controlled substance.[4] They argued its use was for religious, not recreational, purposes. Troubled by what was seen as a judicial error, then President Bill Clinton, along with a near unanimous Congress, passed the federal Religious Freedom Restoration Act (RFRA) in an effort to ensure that religious minorities' beliefs are protected.[5]

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Effectively, President Clinton and the U.S. Congress felt that the Supreme Court had gotten it wrong in *Smith*, and that a pluralist country had to be respectful of all religions, even those that sit far outside the Christian mainstream. To be inhospitable to some religions sent the wrong message about the tolerance and respect implicit in U.S. pluralism.

From a legal standpoint, the Supreme Court decision in *Smith* invoked the high threshold of "compelling interest" first articulated by Sandra Day O'Conner in *Sherbert v. Verner*. Writing for the majority, she concluded:

> First, when the government attempts to deny a free exercise claim, it must show that an unusually important interest is at stake, whether that interest is denominated "compelling," "of the highest order," or "overriding." Second, the government must show that granting the requested exemption will do substantial harm to that interest, whether by showing that the means adopted is the "least restrictive" or "essential," or that the interest will not "otherwise be served."[6]

President Clinton and the Congress demurred, arguing that in this instance the claimants held a sincere religious belief, which included the use of peyote for religious rituals, and that granting them an exemption from the consequences of a positive drug test did not cause substantial harm to that interest. RFRA, then, was created as a way to maximize and ensure the protection of religious freedom for religious minorities.

In contrast, in the 2014 *Hobby Lobby* case, the Supreme Court invoked RFRA, rather than the compelling interest threshold, as the grounds for allowing the owners of the privately held Hobby Lobby business to be exempt from participating in a specific component of the Affordable Care Act that they found religiously problematic. Invoking RFRA, rather than compelling interest, allowed the court to side with the owners of the Hobby Lobby company at the expense of its employees, particularly its female employees. The rationale provided by the majority essentially boiled down to a claim that the beliefs of the owners - that certain forms of contraception are tantamount to

murder - was a sincere belief and, therefore, they should not be compelled to compromise these sincere beliefs by paying for this aspect of the employees' health insurance.[7]

Given the high threshold established in *Sherbert* and the significantly lower threshold invoked in *Hobby Lobby*, it seems reasonable to surmise that when making a case that one's free exercise rights are compromised, one need only invoke RFRA, rather than compelling interest. Further, it seems reasonable to conclude that RFRA opens up the possibility that all kinds of religious actors, not just religious minorities, will make claims to free exercise infringement. Both speculations appear to be the case. Within two years of the *Hobby Lobby* decision, more than twenty states created a version of the federal RFRA legislation to make it as easy as possible for individuals to pursue this option in the event they felt there was a need. Also, the majority of RFRA cases brought forward in the last year have been by members of various traditional Christian denominations, arguing that their free exercise rights have been infringed upon.[8]

Not only do these recent events increase the likelihood that free exercise claims will rise, but also – and perhaps most problematic – the fact that the Court, in its *Hobby Lobby* decision, did not take into account the rights of the employees, specifically female employees, may cause substantial harm to others. On this last point, Justice Ginsburg was particularly concerned, and it formed the core of her scathing dissent in *Hobby Lobby*. Rhetorically, she asked: "Would the exemption … 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)?"[9] This essay shares in Ginsburg's concern and worries about the ease with which actors, who subscribe to a version of religious orthodoxy, could significantly limit other rights holders' access and opportunities in a variety of ways. In fact, it seems to be a substantive flaw in the majority decision that the Court did not consider the impact of this decision on third parties. In this essay I will argue that in most cases, especially in the case of public schools, the interests of third parties – those who actually receive the

benefits – should outweigh the sincerely held religious beliefs of the principle actor(s). In fact, especially in a public school setting, it seems harmful not to consider the interests of third parties, when those third parties are children.

What Ginsburg emphasized in her dissent was that the court had a duty in rendering its decision to refrain from burden shifting. This term, first coined in *Caldor v. Flores* (1997), warns that a decision in favor of a plaintiff cannot significantly shift a burden to a third party.[10] For instance, if a group from a particular religion, requested an exemption from paying taxes such that the tax burden on the remainder of the community would be sufficiently increased, the accommodation would not be granted. It seems to me that any policy to adjudicate free exercise claims, especially in the domain of public schooling, must address burden shifting. To ignore the impact that a free exercise accommodation could have on a minor, who is compelled by state law to attend a public school, has significant implications.

If the Hobby Lobby case created an opening to an increase in free exercise claims, it was *Obergefell v. Hodges* (2015) that affixed free exercise claims to the public sphere. In this case, decided nearly one year to the date of *Hobby Lobby,* the Supreme Court overturned lower court rulings limiting marriage to one man and one woman.[11] The "marriage equality" case was largely hailed as a triumph of justice in most sectors of the country. However, in the days and weeks following this landmark decision, a different response began to take hold across the U.S., most notably in Rowan County, Kentucky. There, an elected county clerk refused to sign off on marriage licenses for same sex couples. Citing her sincerely held religious beliefs, effectively invoking RFRA, she argued that she was under no obligation to do so.[12] Word of Kim Davis' refusal to issue marriage licenses based on RFRA spread quickly. Could a *public* employee refuse to fulfill essential parts of her job if those essential parts violated her sincerely held religious beliefs?

The Davis case bears mentioning for three central reasons. First, it demonstrates how quickly RFRA replaced compelling interest as a way to advocate for religious freedom. Second, Davis and her supporters argued that her rights to religious freedom should not be weighed against any potential harm that

could come to others. Third, this was the first instance where a public employee invoked RFRA in order to justify a refusal to fulfill central elements of a job.

If Kim Davis could opt out of fulfilling her public job responsibilities, what would stop a teacher, principal, or other public school official from doing the same? Further, if teachers, principals, or other public school officials could opt out of aspects of their jobs because of claims to a substantial burden on their religious beliefs, without considering the burden to others, what impact would that have on the students they serve and indeed on the pluralism our public schools are supposed to cultivate?

In this essay I argue that, in all respects, but especially in the case of public schools, all rights holders, not just principal rights holders, must be considered before granting a free exercise accommodation. The public school context is especially important because many of the existing rights holders are minors who are compelled by law to attend. It is also a special context because public schools in the U.S. are responsible for attending to our collective goals, broadly understood as complete non-discrimination in terms of access, and unfettered exposure to the principles of democracy: toleration and respect. Here I offer a modest proposal that attempts both to respect the sincerely held religious beliefs of public school employees and to ensure that other existing rights holders are taken into consideration.

## THE PUBLIC SCHOOL CONTEXT

Public schools in the United States are charged with ensuring that individual students are given meaningful opportunities to flourish, and that collective goals of our democracy are realized. In order for individual students to have a real opportunity to succeed, public schools must abide by the principle of complete non-discrimination.[13] No student may be denied access to public school. In addition to equal access, schools must also strive to provide equal opportunity within their walls. In order to provide equal opportunity, schools must help students learn to tolerate and respect a diverse student body. Mutual respect is a central component of a thriving pluralist society. Further, schools

must provide all students with a common core of knowledge and information and must refrain from withholding knowledge and information from some. To achieve our collective goals, schools must provide students with a basic understanding and, at least, the primary tools to practice democratic ways of thinking and acting. Mitigating factors often get in the way of public schools successfully attaining all of these goals. One historic limit on public school personnel, which has enabled a closer approximation of collective goals, has been the first amendment. Linking public school personnel to the prohibition of religious establishment has better ensured that individual teachers' and principals' religious views have not entered into classroom curricula. In fact, since the 1940s, it has been established that teachers, as agents of the state, do not have the same unfettered free exercise rights as regular citizens while in the service of their jobs. This has limited their ability, should they wish, to infuse religious doctrine, faith, epistemology, or ideology into their classrooms, and has, in turn, better secured the principle of non-repression,[14] thus ensuring that students have a right to rationally deliberate about competing conceptions of the good life.

The *Hobby Lobby* decision, lowering the threshold for free exercise claims, and the fallout from *Obergefell*, landing free exercise claims in the public realm, effectively compromise the long held precedent that public school personnel are limited by establishment. Now it would appear that public school personnel not only have the right to make free exercise claims, but also that they need only meet the lower threshold of RFRA to do so.

## ILLUSTRATIVE CASES

The cases outlined below imagine, through curriculum, pedagogy, and policy, how individual and/or collective goals of public schools could be compromised were public school employees permitted unfettered opportunity to invoke free exercise while in the service of their job.

*Ms. Smith is a long standing young earth Creationist, believing the earth was created in six 24 hour days. Emboldened by recent court cases and public events, she has*

*decided that teaching standards-based evolutionary theory violates her sincerely held religious beliefs and vows not only not to teach evolutionary theory to her 8th grade biology students, but also to replace it with a young earth creationist account of human origins. Parents complain to the School Board that their students are being denied standards-based knowledge, and demand that they take appropriate action against Ms. Smith. Ms. Smith refuses to change her position and argues that as a citizen of the United States she is guaranteed the right to free religious expression.*

*Mr. Jones teaches a high school class in contemporary controversial issues. Hearing about the recent Obergefell decision, prior to the start of class, students begin a discussion about whether or not same sex marriage should be legal. While Mr. Jones was pleased with the students' initiative to begin discussion on such a significant and topical matter, he is disturbed that no students seem to invoke a religious perspective on the merits of marriage equality. Using a version of Socratic method, Mr. Jones gets the students to see that the Bible, not the Constitution, is the authoritative law of the land and that there is no possible justification for allowing same sex couples to marry. Hearing about this discussion, parents are appalled; not only at Mr. Jones' conclusions, but also at the way in which he silenced alternative views by using his superior dialogical skills to get students to agree to the absolute authority of the Bible. They complain to the principal. When the principal speaks with Mr. Jones, he simply states that he has a right to share his sincerely held religious beliefs with his students, particularly since in a controversial issues class, multiple perspectives on an issue must be raised.*

*Ms. Davis is a fifth grade teacher in a local elementary school. She is about to begin her tenth year as a fifth grade public school teacher. A devout Christian, she is troubled when she receives her class roster and notices that one of the students in her class is Tim Stone. Tim came out as gay during the end of the fourth grade. Ms. Davis does not want Tim in her class since she believes homosexuality is sinful, and it violates her sincerely held religious beliefs. She requests that her principal move Tim to another fifth grade class in the school.*

### *Practical and Expressive Burdens*

In each of the cases described above, a public school teacher invokes his or her sincere religious beliefs as grounds to alter some typical function of their classroom. In the first instance, Ms. Smith cites her religious beliefs as

grounds to withhold the standards-based science curriculum from her students and replace it with her privately held religious beliefs. In the second instance, Mr. Jones injects his religious beliefs pedagogically, so as to ensure that his students understand the compelling nature of his religious views. In the third example, because the student has publicly expressed the fact that he is gay, it compromises Ms. Davis' sincerely held religious beliefs that homosexuality is sinful.

While these cases are hypothetical, and it is not entirely clear that any teacher would actually invoke RFRA as grounds to do any of the things described above, theorizing about how to address these types of cases is important given the seeming ease with which an individual can invoke RFRA. In each instance, given current judicial thinking, the impact of whether to grant the religious accommodation or not would only be based on the merits of the teachers' beliefs. That is, to what degree is the belief sincerely held, and to what degree does not accommodating the teacher burden the religious believer? Nowhere in the thinking would the decision need to be based on the burden to the other existing rights holders.

Like Justice Ginsburg, I argue that the burden to primary *and* third party rights holders must be taken into consideration when trying to determine how much accommodation is possible. As Kara Loewentheil points out, in order to determine whether and to what degree excessive burden shifting has taken place we must examine two types of burden – practical and expressive.[15]

A practical burden is one in which the burden to the other existing rights holders is real and tangible. In the case of Ms. Smith, her refusal to teach a component of a standards-based curriculum poses a real, tangible – indeed practical – problem for students. High stakes state tests include questions from the state approved standards. Students in Ms. Smith's class are at a distinct disadvantage if they have not been given a meaningful opportunity to learn Darwinian evolutionary theory. A further practical problem is the degree to which evolutionary theory is foundational to more sophisticated science. If Ms. Smith has cut off meaningful opportunities for students to explore science in greater depth and in a way that could lead to a science-based career, then perhaps we would conclude that the burden to students is too great for them to bear. But

can the same be said of Mr. Jones?

Mr. Jones injects his views not only because he believes them, but also because he feels a particular perspective was missing from class discussions. Presumably, part of the goal of a controversial issues class is to examine a range of views. Does Mr. Jones pose a potential practical harm to his students by providing his religiously based view on marriage equality? Perhaps it is not what Mr. Jones says, but the way in which he said it? Using his superior dialogical skills, he was able to employ the Socratic method in such a way that, effectively, his position won. Simply invoking a religious perspective may not cause students harm, but the way in which he went about it, dogmatically, could be said to be overly determinant in terms of providing students with competing visions of the good life. For this reason, it could be considered, practically speaking, harmful.

The third example is perhaps the toughest of all, Ms. Davis appears to use her religious ideology to justify her homophobia. However, no matter how despicable her request appears, it does not seem that it would be harmful from a practical perspective to accommodate Ms. Davis. If the other fifth grade teachers are credentialed, then it does not seem that moving the student from one class to another would cause any practical harm. In fact, we might argue that it will cause less harm if the teacher of the class to which the student is moved is more tolerant.

Yet, the idea that that a teacher in a public school in our pluralist democracy could request that a student be moved because of a teacher's narrow-minded beliefs seems troubling, to say the least. Here is where Loewentheil's notion of expressive burdens proves especially useful. An expressive burden is a symbolic problem. In contrast to a practical problem, where tangible costs can be demonstrated, an expressive problem is one in which the very idea of granting or not granting an accommodation has a symbolic cost. What then are the symbolic costs to granting Ms. Davis' request that the student be moved to another classroom because the teacher refuses to teach a gay student? Referencing Ira Lupu, Lowentheil argues: "Discrimination is about insult and psychic injury as well as access to goods, and the state's interest in avoiding those harms may be very strong indeed."[16] As Cass Sunstein suggests, an anti-discrimination law

may prove to have practical benefits, but the very fact that a government will enact an anti-discrimination law has a symbolic effect as well – it announces to the world that discrimination is widely recognized as a harm and expresses the idea that the state supports equality.[17] In the case of Ms. Davis, while there is no practical harm to moving the student, accommodating Ms. Davis' religious beliefs would effectively send a symbolic message of hate and intolerance, which could cause lasting harm to the student.[18]

*A Modest Proposal*

RFRA has created an environment where we can no longer invoke establishment clause as grounds to insist that public school personnel refrain from invoking religious beliefs while on the job. A policy is needed that takes account not only of the sincerely held religious beliefs of school personnel but also of the burden of those beliefs on students. Contrary to the manner in which the Court arrived at its decision in *Burwell v. Hobby Lobby*, the burden to other existing rights holders, in this case students, is essential in determining whether to grant an accommodation to public school personnel. Three main reasons drive this position. First, the students are minors. As such they are in the process of developing their identities and understandings and can be easily influenced by their teachers. Second, they are compelled by law to attend school and, in most states, they are compelled by law to attend specific schools. Therefore, unlike in the case of Kim Davis, where a same-sex couple *could* go to another county to receive their marriage license, students do not have the choice of where they attend school or their classroom placement. Third, schools are responsible not only for helping individuals gain knowledge and information, but they are also charged with infusing democratic values and tools, which include mutual respect. Any assessment of whether to grant an accommodation to public school personnel must therefore take into account the burden such an accommodation will have on students.

Borrowing again from Loewentheil, I suggest that in the case of public schools, whenever an accommodation would cause an expressive burden

to students, the accommodation should never be granted. A chief function of the state is to ensure the inherent dignity and equality of all. Granting an accommodation that may not deliver practical goods or harms, but would send a message of intolerance, is socially destructive and diminishes the collective goals of public schools to foster mutual respect. The fact that in the schooling context the other existing rights holders are children makes this argument that much more compelling.

In cases where the practical burden is non-existent or minimal, however, the accommodation may be granted. In the cases described above, *if* Ms. Smith can show that sharing her religious point of view is part of her sincerely held religious belief but she also agrees to teach evolutionary theory robustly and in accord with the standards, then it does not seem that students would be practically harmed. It is her refusal to teach evolutionary theory at all that makes it impossible to accommodate the request. As much as one might disagree with the relevancy of creationism to science class, the practical harm to students does not come from exposing them to the view but only when she withholds central scientific theories from her formal class instruction.

In the case of Mr. Jones, if he can offer his religious perspective in a less authoritarian manner, as one of a range of competing ideas, I do not think it would cause any practical burden to the students. In fact, one might argue it would be an example of truly non-repressive pedagogy, as a chief purpose of the class is for students to wrestle with competing visions and perspectives on a range of ideas.

In the third case, even if the student was never made aware of the fact that he was moved to a different class because of his teacher's intolerance towards LGBTQ people, the fact that such an accommodation would be granted carries profound symbolic meaning. Sunstein is correct. Public policy has two purposes: one is to ensure, from a practical perspective, that people are not harmed; the second is to express the values of our society. Nowhere is this more crucial than in our public schools. Denying the accommodation carries significant expressive importance, it conveys the belief that our public schools value all students.

## CONCLUSION

Recent developments in first amendment free exercise law have drawn attention to issues of religious accommodation by public employees. This under-theorized area has the potential to cause harm to individual public school students as well as to undermine central foundations of the pluralist public school. If, as a society, we are going to be more accommodating of public school personnel in terms of their sincerely held religious beliefs, then we must develop a mechanism by which to adjudicate their requests for accommodations. In contrast to the manner in which the Supreme Court has handled recent cases, the policy I advocate places the burdens of other rights holders – in this case, students – in a privileged position. While a religiously tolerant society must cut both ways and allow truly sincere beliefs of public school personnel not to be compromised, those beliefs must be weighed against the practical and expressive burdens that could fall to students. In cases where the burdens are too big – practically or symbolically – the public school personnel's beliefs must give way. Ultimately, public schooling is about the benefits to students and to society at large, not to its employees.

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1 Burwell v. Hobby Lobby, 573 U.S.__ (2014).

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

3 Wisconsin v. Yoder, 406 U.S. 205 (1972).

4 Employment Division v. Smith, 494 U.S. 872 (1990).

5 Religious Freedom Restoration Act, 42 U.S.C. §2000bb (1993).

6 Employment Division v. Smith, 494 U.S. 872, 900-918 (1990).

7 Burwell v. Hobby Lobby, 573 U.S.__ (2014).

8 National Council of State Legislators, "State Religious Freedom Restoration Act." Retrieved from http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx. (2015).

9 Burwell v. Hobby Lobby, 573 U.S.__, 92-93 (2014).

10 Caldor v. Flores, 521 U.S. 507 (1997)

11 Obergefell v. Hodges, 576 U.S. ___ (2015).

12 Alan Blinder and Richard Pérez-Peña, "Kentucky Clerk Denies Same-Sex Marriage Licenses, Defying Court, The New York Times, September 1, 2015.

13 Amy Gutmann, Democratic Education (Princeton, NJ: Princeton University Press, 1987), 45.

14 Ibid., 44.

15 Kara Loewentheil, "When Free Exercise is a Burden: Protecting 'Third Parties' in Religious Accommodation Law," Drake Law Review 62, no. 2 (2015): 433-502.

16 Ibid., 442.

17 Cass R. Sunstein, "Backlash's Travels," Harvard. C.R.-C.L. L. Review 435 (2007).

18 While the argument here focuses on the LGBTQ community, presumably it could extend to religious minorities, undocumented immigrants, and any other group that might be outside the mainstream.