

# The Defeat of the Contraceptive Mandate in *Hobby Lobby*: Right Results, Wrong Reasons

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## **Last But By No Means Least**

Decided on the last day of the 2013–2014 term, *Burwell v. Hobby Lobby*<sup>1</sup> is this year’s most controversial Supreme Court decision. By a 5–4 vote that broke along conservative–liberal lines, the Court held that the Religious Freedom Restoration Act of 1993 (RFRA) precluded the Department of Health and Human Services (HHS) from issuing regulations under the Affordable Care Act (ACA) that required Hobby Lobby, a family-owned corporation run in accordance with Christian principles, to supply health insurance coverage for contraceptive and abortion services for its female employees at no cost to the employees themselves. RFRA would not have applied at all if the ACA had explicitly required employers to observe the contraceptive mandate, because the latter specific statute would be a congressional trump over the earlier general statute. Indeed, the point is critical because if RFRA had been neutralized by the ACA, *Hobby Lobby* would then have been purely a First Amendment case, where under the pre-RFRA case law it would have had less chance of success. But the ACA’s general command called only for employers to supply coverage for preventive care and screenings at

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<sup>1</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

no cost to female employees, so everyone agreed that RFRA lay at the heart of the legal challenge to the HHS regulations.<sup>2</sup>

RFRA in turn has three requirements:

*First*, the statute asks whether the government action “substantially burden[s]” a person’s exercise of his or her religious rights. This initial test covers both laws directed toward religion and, most critically, laws “of general applicability,” such as HHS’s contraceptive mandate.

*Second*, RFRA addresses the choice of *ends*: the government can prevail only if it shows that it advances “a compelling governmental interest.”

*Third*, if the government prevails on the second point, RFRA addresses the question of *means*: the government must choose the “least restrictive means” to further its compelling interest.<sup>3</sup>

This three-part statutory test has evident constitutional overtones, in large measure because RFRA was passed with huge bipartisan support in response to the Supreme Court’s 1990 decision in *Employment Division v. Smith*, which involved Smith’s use of peyote in a religious rite.<sup>4</sup> *Smith* held that any neutral law of general applicability could not be challenged on the ground of its disparate impact on religious activities. Taken literally, the *Smith* test meant that the U.S. military could require observant Jewish and Muslim soldiers to eat pork under its standard dietary regimen. RFRA was passed to undo *Smith* and to impose by statute what Congress once thought was the appropriate constitutional test under the Free Exercise Clause of the First Amendment.

Although the *Hobby Lobby* decision preferred religious liberty to employer-provided contraceptive services, by its reasoning it also undermined that powerful bipartisan attack against *Smith*. At the same time, the decision has deeply polarized public opinion and led to immediate and harsh denunciations of the Supreme Court. U.S. District Court Judge Richard Kopf, an appointee of George H. W. Bush, pointedly complained that:

<sup>2</sup> 42 U.S.C. § 300gg-13(a)(4).

<sup>3</sup> 42 U.S.C. § 2000bb et seq.

<sup>4</sup> 494 U.S. 872 (1990).

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[F]ive male justices of the Supreme Court, who are all members of the Catholic faith and who each were appointed by a president who hailed from the Republican party, decided that a huge corporation, with thousands of employees and gargantuan revenues, was a “person” entitled to assert a religious objection to the Affordable Care Act’s contraception mandate because that corporation was “closely held” by family members. To the average person, the result looks stupid and smells worse.<sup>5</sup>

Additionally Senator Mark Udall (D-CO) sponsored a failed legislative attempt to carve out the contraceptive mandate from RFRA, saying:

The U.S. Supreme Court’s Hobby Lobby decision opened the door to unprecedented corporate intrusion into our private lives. Coloradans understand that women should never have to ask their bosses for a permission slip to access common forms of birth control or other critical health services. My common-sense proposal will keep women’s private health decisions out of corporate boardrooms, because your boss shouldn’t be able to dictate what is best for you and your family.<sup>6</sup>

His co-sponsor, Senator Patty Murray (D-WA), echoed Louis XIV’s famous dictum, “I am the state,” by writing: “Your health care decisions are not your boss’s business. Since the Supreme Court decided it will not protect women’s access to health care, I will.”<sup>7</sup>

In comparison, the *New York Times* editorial response sounds moderate:

The Supreme Court violated principles of religious liberty and women’s rights in last week’s ruling in the *Hobby Lobby* case, which allowed owners of closely held, for-profit corporations

<sup>5</sup> Cheryl Chumley, Federal Judge Angered by Hobby Lobby Decision Tells Supreme Court to ‘STFU,’ Washington Times, July 8, 2014, available at <http://www.washingtontimes.com/news/2014/jul/8/nebraska-judge-angered-hobby-lobby-tells-supreme-c>.

<sup>6</sup> For one smattering of quotations that reveal the animosity, see Laura Bassett, Democrats Fast-Track Bill to Override Hobby Lobby Decision, Huffington Post (July 8, 2014), [http://www.huffingtonpost.com/2014/07/08/hobby-lobby-override\\_n\\_5568320.html](http://www.huffingtonpost.com/2014/07/08/hobby-lobby-override_n_5568320.html).

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

(most corporations in America) to impose their religious beliefs on workers by refusing to provide contraception coverage for employees with no co-pay, as required by the Affordable Care Act.<sup>8</sup>

These harsh criticisms are way off the mark. The short response is that critics should let Hobby Lobby run its own business. The critics of the decision are guilty of serious intellectual confusion when they equate the simple refusal to deal with coercion—that is, the threat or use of force against another person. It is not as though Hobby Lobby, by not complying with the HHS mandate, is forcing women to either abstain from sex or risk pregnancy. They still retain the option of purchasing contraception independently or switching jobs. Unlike Christians in Mosul, they will not be beheaded or tortured or confined for the exercise of their beliefs.

The more detailed response makes it critical to reconstruct carefully all aspects of *Hobby Lobby*—its historical background, its textual interpretation, its intellectual justifications, and its ultimate consequences. This essay starts with a brief analysis of the constitutional framework that set up the current situation. Section II then parses the application of RFRA to the contraceptive mandate. Section III closes with some general reflections about the current state of the law. My thesis is that the five-member majority reached the right result, albeit for the wrong reasons. Justice Samuel Alito first held correctly that Hobby Lobby had a significant private interest that brought RFRA into play. Second, in a serious mistake, he found it unnecessary to decide whether the government had a compelling state interest in imposing its contraceptive mandate. Third, he then concluded, wrongly, that even if he assumed that the government did have a compelling state interest, it nonetheless failed to choose the least restrictive means for its implementation.

The correct analysis plays out quite differently in the second and third stages. The government has no compelling state interest for imposing the contraceptive mandate. Once it loses at stage two, the question of least restrictive means never arises. The difference in approach turns out to be critical to the proper understanding of RFRA, and it affords the most powerful grounds on which to challenge the

<sup>8</sup> Editorial, *Hobby Lobby's Disturbing Sequel*, N.Y. Times, July 9, 2014, at A20.

oft-mistaken opinion of Justice Ruth Bader Ginsburg for the four liberal dissenters.

## I. The Early Constitutional Background

Two powerful constitutional forces shaped the current struggles in *Hobby Lobby*. First, the epic constitutional battles of 1937 systematically rejected any claim that economic liberties were subject to heightened levels of scrutiny under either the Due Process or Takings Clauses. Key decisions in that regard were *West Coast Hotel v. Parrish*,<sup>9</sup> which upheld the constitutionality of a state minimum-wage law for women only, and *NLRB v. Jones & Laughlin Steel*,<sup>10</sup> which upheld mandatory collective bargaining under the National Labor Relations Act. Years later, that state of affairs was in turn strengthened by the Supreme Court's ringing constitutional endorsement of the antidiscrimination provisions concerning employment and public accommodations found in the Civil Rights Act of 1964.<sup>11</sup> These decisions meant that it was a foregone conclusion that any generalized substantive due process challenge to the ACA on economic liberties or freedom of contract grounds would fail, so much so that none of the many challenges pushed that line.<sup>12</sup>

With that issue "settled," constitutional litigation turned to the question of whether some fraction of individual liberty could be afforded protection under the First Amendment's Free Exercise Clause. Two key prior precedents pointed strongly in that direction. In 1963, *Sherbert v. Verner*<sup>13</sup> allowed the plaintiff to claim unemployment benefits when she refused to take a job that required her to work on the Sabbath. In 1972, *Wisconsin v. Yoder* sustained the rights of the Amish to keep their children out of public education.<sup>14</sup> In both of these cases, the Court took the position that the government was required to make some accommodations for religious beliefs in ways

<sup>9</sup> 300 U.S. 379 (1937).

<sup>10</sup> 301 U.S. 1 (1937).

<sup>11</sup> 42 U.S.C. § 2000a(a) Tit. VII, § 201(a) (2012).

<sup>12</sup> For an early repudiation of the due process argument, see *Florida v. HHS*, 716 F. Supp.2d 1120, 1161–62 (N.D. Fla. 2010).

<sup>13</sup> 374 U.S. 398 (1963).

<sup>14</sup> 406 U.S. 205 (1972).

that exempted both *Sherbert* and *Yoder* from general laws that could not be challenged on substantive due process grounds.

The pivotal moment in the run-up to RFRA, as mentioned above, was Justice Antonin Scalia's sharp about-face on the Free Exercise Clause in the 1990 case *Employment Division v. Smith*. At issue in *Smith* were the activities that Alfred Smith and Galen Black engaged in during a religious ceremony at their Native American church. Their action constituted intentional possession and use of a "controlled substance," clearly criminal under Oregon law. *Smith*, of course, was *not* a criminal prosecution, but a dispute over unemployment benefits. Oregon's Employment Office refused to pay those benefits because Smith and Black were fired due to drug use from their positions as workers in a private drug rehabilitation office. The Court had to decide whether the men's participation in the religious ceremony had to be exempted from the criminal law in order to accommodate their interest in religious liberty.

A skeptical Justice Scalia, writing for five justices, rejected any version of the compelling state interest test, ordinarily used in religious liberty cases, for the reason that he had no idea how to make the appropriate balance:

It is no more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field, than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith?<sup>15</sup>

Justice Scalia then took great pains to distinguish *Sherbert* and *Yoder*, on the grounds that they were "hybrid" free-speech and free-exercise cases.<sup>16</sup> He then added this kicker: "Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"<sup>17</sup>

<sup>15</sup> 494 U.S. at 886–87.

<sup>16</sup> *Id.* at 882.

<sup>17</sup> *Id.* at 879.

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The “subsequent decisions” referred to cases subsequent to *Reynolds v. United States*, which in 1878 upheld a territorial ban on polygamy against charges that it infringed on the religious liberty of members of the Mormon faith.<sup>18</sup>

*Smith* prompted vigorous disagreement and partial dissent. Justice Sandra Day O’Connor sided with Scalia on the outcome, but she emphatically rejected his neutrality framework. After citing *Yoder*, she concluded that the state had shown its overriding interest in preventing the physical harm caused by the use of a Schedule I controlled substance.<sup>19</sup> She did not, however, explain why the state’s interest was so strong that it had to cover specifically this limited religious use of peyote.

In making her claim, she relied (as did Justice Scalia in *Smith*) on *United States v. Lee*, which held that a compelling state interest justified imposing the Social Security tax on Amish who flatly refused to accept any Social Security benefits.<sup>20</sup> Chief Justice Warren Burger thought that the social need to properly fund the Social Security system counted as the compelling state interest. He did not explain, however, why requiring Social Security taxes from those who took no Social Security benefits was a compelling state interest.

Justice O’Connor’s argument in *Smith* is also vulnerable to Justice Harry Blackmun’s dissent in this case, which Justices William Brennan and Thurgood Marshall joined. Blackmun formulated the issue in ways relevant to *Hobby Lobby*: “A statute [that burdens the free exercise of religion] may stand only if the law in general, and the State’s refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means.”<sup>21</sup> At this point, he notes that it is odd in the extreme to call the state’s interest compelling if the state has decided not to enforce its criminal law: “It is not the State’s broad interest in fighting the critical ‘war on drugs’ that must be weighed against respondents’ claim, but the State’s narrow interest in refusing to make an exception for the religious, ceremonial use of peyote.”<sup>22</sup>

<sup>18</sup> 98 U.S. 145 (1878).

<sup>19</sup> *Smith*, 494 U.S. at 893.

<sup>20</sup> 455 U.S. 252 (1982).

<sup>21</sup> *Smith*, 494 U.S. at 907.

<sup>22</sup> *Id.* at 909–10.

The case law prior to RFRA thus shows two competing visions of what constitutes a compelling state interest under *Smith*. The first line, embraced by Justice O'Connor in *Smith*, runs from *Reynolds* through *Lee*.<sup>23</sup> The second, endorsed by Justice Blackmun, runs from *Sherbert* through *Yoder*. The former is more favorable to the state than the latter, and both refer to the triad of significant burden, compelling state interest, and least restrictive means. Justice Scalia's competing vision that any valid and neutral law trumps the claim for religious liberty in all cases rejects both the O'Connor and the Blackmun versions of the compelling state interest argument.

The fierce objection to Scalia's approach fueled the passage of RFRA, which received extensive support in both the House and the Senate and was eagerly signed into law by then President Bill Clinton. One key question under RFRA was whether it adopted the O'Connor or Blackmun view of the compelling state interest test.

RFRA answers that question by stating that its purposes are

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.<sup>24</sup>

*Sherbert* and *Yoder*, not *Reynolds* and *Lee*, govern.<sup>25</sup> It is now time to turn to the two major opinions in *Hobby Lobby* to see how well they fare against RFRA's tripartite standard dealing with substantial burdens, compelling state interest, and least restrictive means.

<sup>23</sup> See also, *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), in which Justice O'Connor allowed the federal government to run a forest road located on government property through an Indian burial ground, notwithstanding the government's admission that its road-building activities "could have devastating effects on traditional Indian religious practices." *Id.* at 451. *Smith* relied on *Lyng*.

<sup>24</sup> 42 U.S.C. § 2000bb(b).

<sup>25</sup> For the extensive debate on this question, see Will Baude, *Is RFRA Limited to Pre-Smith Jurisprudence, or Does RFRA Run Through It?*, *Volokh Conspiracy*, Wash. Post (July 9, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/07/09/is-rfra-limited-to-pre-smith-jurisprudence-or-does-rfra-run-through-it>.



## II. How RFRA Applies to HHS's Contraceptive Mandate

### A. Substantial Burdens on the Exercise of Religion: Are Corporations Covered?

The initial question is whether Hobby Lobby, the firm, counts as a “person” entitled to protection under RFRA. The point was not squarely in the minds of the statutory drafters whose language put Smith’s personal decision to smoke peyote front and center. It is also true that no corporation, recognized by law as an entity separate from its shareholder owners, celebrates religious holidays, attends church, performs religious rites, or observes various religious laws. Conceptually, it could not be otherwise, because the corporation is essentially a group of individuals who come together for a common venture, protected by the shield of limited liability. So protected, tort and contract creditors can ordinarily reach only the assets of the corporation, not the personal assets of the individual shareholders.

At first blush, this insulation of individuals from financial responsibility could be mistaken for some kind of abuse. But limited liability, rightly understood, is the only way to get people of substantial wealth to commit large sums of capital to common ventures over which they exercise no direct control. That large aggregation often *increases* the pool of assets available to various claimants against the corporation. Contracting parties can then secure guarantees from individual shareholders or third parties if they fear that corporate assets might prove insufficient to cover their potential liabilities. The state can, and often does, require corporations to take out insurance to protect tort creditors, who now gain access to potential funds in the hands of independent third parties that contract creditors are not able to reach. The ubiquity of limited liability offers ample testimony to its efficiency.

One key question to frame the discussion asks what conditions, if any, the state may impose on individual investors who seek to take advantage of the corporate form. As noted, requiring insurance to offset tort liability is perfectly appropriate. So too are rules that require the corporation to register in any state where it does business, so that it can be sued locally. But Justice Alito is correct to insist that additional conditions on incorporation cannot be imposed willy-nilly. A state could not deny a certificate of incorporation to parties who do not make political contributions to the dominant political

party. Nor could it deny incorporation rights to individuals who refuse to waive all protections against unreasonable searches and seizures under the Fourth Amendment, or who refuse to waive their right to speak collectively under the First Amendment.

In this context, it is therefore regrettable that Justice Alito did not make explicit reference to the doctrine of unconstitutional conditions, which certainly applies to this case.<sup>26</sup> The individual shareholders, when faced with the monopoly power of the state, can be forced to accept only conditions that offset the privilege they receive, that is, limited liability. This principle is doubly important when the federal government seeks to condition incorporation under state law on the shareholders' willingness to engage in activities that are inconsistent with the religious beliefs of the owners, which for Hobby Lobby were those of its founding couple and their children.

Justice Alito was therefore right to "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."<sup>27</sup> The analysis here follows the form appropriate in antitrust law generally. The inquiry is always whether the condition or restriction is intended to increase the global efficiency of activities in the corporate form or to secure a wealth transfer from one group to another. The former creates a positive-sum game (whereby all parties subject to the regulation are better off) that should be supported, while the latter creates a negative-sum game (whereby the losses to some parties are larger than the gains to others) that should be stoutly opposed. To be sure, this antitrust-type analysis is normally confined to tie-in and exclusive-dealing contracts.<sup>28</sup> And of course, the weak protection of economic liberties under modern law allows the state a free hand in imposing massive transfer payments on various groups, such that corporations are not insulated from that power. But when religious liberty is at issue, RFRA's higher standard of judicial review applies, even as

<sup>26</sup> For my extended treatment, see Richard A. Epstein, *Bargaining with the State* (1993) (stressing the linkage between the doctrine and monopoly power).

<sup>27</sup> *Hobby Lobby*, 134 S. Ct. at 2759.

<sup>28</sup> A tie-in contract is one in which the seller insists that the buyer buy one product (the tied product) in order to buy a second (the tying product). An exclusive-dealing contract holds that a given buyer must take all goods of a given sort from the seller in order to acquire any such goods.

the antitrust-like critique of monopoly behavior by the state carries over.

Justice Ginsburg in dissent misses that point by claiming to take a leaf from Justice John Paul Stevens's dissent in *Citizens United v. Federal Election Commission*.<sup>29</sup> She observes that corporations "have no consciences, no beliefs, no feelings, no thoughts, no desires."<sup>30</sup> But it hardly follows that they have no rights, given that they succeed to the rights of their shareholders. Confiscation of corporate assets not only harms the corporation, but it also hurts the individual shareholders it wipes out. A law that bars corporations from political speech could force the *New York Times* or *Wall Street Journal* to the unpalatable choice of surrendering the protection of limited liability in order to preserve their right to speak. Previously, in the same vein, Justice Ginsburg had seriously erred in *Christian Legal Society v. Martinez* when she resuscitated the long-discredited right/privilege distinction to hold that Hastings Law School could refuse to allow the tiny Christian Legal Society (CLS) access to the school's normal administrative support services unless it admitted into voting membership people who were hostile to its stated religious mission.<sup>31</sup>

The correct position is that any public institution should be open to all comers on equal terms, just like common carriers. There is no way, one hopes, that the state could keep CLS members off the public roads unless they agreed to abandon their exclusive membership policies. Hastings Law School is unlike the public highways, however, because as a "limited public forum" it can keep non-students out of the school. But owing to its tax-supported position, it must evaluate all eligible applicants on equal terms, just like the highway system. What is true about state power over public highways is true about state power over incorporation. Any exercise of state monopoly power brings the doctrine of unconstitutional conditions into play, especially since the United States can show no connection whatsoever between its desire to impose the contraceptive mandate and the basic reasons for incorporation. In light of that yawning gulf,

<sup>29</sup> 558 U.S. 310, 466 (2010).

<sup>30</sup> *Burwell v. Hobby Lobby*, 134 S. Ct. at 2794.

<sup>31</sup> *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661 (2010). For my criticism, see Richard A. Epstein, *Church and State at the Crossroads: Christian Legal Society v. Martinez*, 2009–2010 *Cato Sup. Ct. Rev.* 104 (2010).

it only makes sense to conclude that Hobby Lobby did not sacrifice its RFRA protections when it chose to do business in the corporate form.

*B. Does the Contraceptive Mandate Impose Substantial Burdens?*

The next question is whether the HHS's contraceptive mandate subjects Hobby Lobby to a substantial burden. In *Smith*, Justice Scalia denied that this type of question admitted a principled answer. But that inquiry cannot be ducked under RFRA. Nor is there any reason to do so. Of course, judges should not ask whether anyone's religious beliefs are true. But the centrality of these beliefs to their faith is not a theological inquiry, but instead is a standard evidentiary question that can be answered by examining the central tenets of any given religion. Narrowly stated, the inquiry is whether under RFRA the government imposes a substantial burden on Hobby Lobby's sincere religious beliefs by requiring it to purchase insurance for employees' contraceptives services. Justice Alito attacks this problem in the wrong way when he insists that the cost of noncompliance, measured in fines that can run into the millions, shows that the burden is substantial.<sup>32</sup> The correct analysis does not look at the cost of noncompliance, which may be high, but at the cost of compliance, which in monetary terms is far lower. It is incorrect to insist that the only measure of a substantial burden is the size of the expenditure. Of equal importance is the purpose to which it is put.

In this connection, it is instructive to compare the question of compelled contributions for the purchase of contraceptive insurance to the forced contributions demanded of union members under a collective-bargaining agreement. As is all too typical of the over-compartmentalization of Supreme Court decisions, neither Justice Alito nor Justice Ginsburg refers to the Court's important decision in *Harris v. Quinn*,<sup>33</sup> decided the same day as *Hobby Lobby*. One key issue that bubbled up in *Harris* was whether individual employees should have the right to opt out of any public union on the ground that, in dealing with public bodies, the political and economic interests are so intertwined that any payment of union dues amounts to a form of compelled speech forbidden under First Amendment

<sup>32</sup> 134 S. Ct. at 2759.

<sup>33</sup> 134 S. Ct. 2618 (2014).

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law. Justice Alito skirted that question in *Harris* by deciding, correctly in my view, that the so-called “joint employment” arrangement, whereby the state became a second employer of home health care workers, was a sham. Its only function was to allow the Service Employees International Union to run elections that forced Pamela Harris, a mother who cared for her seriously disabled adult child, to be designated in one audacious statutory maneuver as an employee of both her son and of Illinois.

Yet for these purposes, the key concession comes from Justice Elena Kagan, who in dissent in *Harris*, insisted that the 37-year-old rule in *Abood v. Detroit Board of Education*<sup>34</sup> should govern in *Harris*. In her view, *Abood* made the right accommodation for compelled speech insofar as it held that dissenting workers “may constitutionally prevent the Union’s spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative.”<sup>35</sup> This decision is yet another application of the doctrine of unconstitutional conditions that “a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment.”<sup>36</sup>

Just that principle is at stake here. HHS interprets the ACA as imposing a general mandate under which employers are compelled to contribute money to causes they oppose on religious grounds. That compelled contribution counts as a significant burden for the same reason here that it does in *Abood*: what matters is the cause, not the amount. In dealing with this issue in *Wheaton College v. Burwell*, the follow-up decision to *Hobby Lobby* that involved eleemosynary religious institutions, Justice Sonia Sotomayor dismissed the seriousness of this concern in saying, “But *thinking* one’s religious beliefs are substantially burdened—no matter how sincere or genuine the belief may be—does not make it so.”<sup>37</sup> Her one-liner hearkens back to the same indefensible skepticism of Justice Scalia in *Smith* on the ability of courts to determine the centrality of certain beliefs to religious people. So long as the compulsion is to make *any* financial

<sup>34</sup> 431 U.S. 209 (1977).

<sup>35</sup> *Id.* at 234.

<sup>36</sup> *Id.*

<sup>37</sup> *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2812 (2014) (emphasis in original).

contribution to a cause that is repugnant to one's religious beliefs, it is a substantial burden. Whether the restriction is justified by some compelling state interest raises a separate question. But it is hard to think that *any* explicit requirement that someone perform an action that violates his or her core religious beliefs could ever be dismissed as an insignificant burden.

This analysis does not render the requirement of a sincere religious belief toothless. In general, virtually any matter that deals with birth, marriage, and death falls within the core area of religious beliefs. It is, for example, these and only these issues that drove the Roman Catholic Church and many evangelical Christian churches in 2009 to issue The Manhattan Declaration, which stresses the sanctity of life, traditional marriage, and religious liberty.<sup>38</sup> That last term is not given a broad construction, but covers only those cases where religious institutions are forced to perform actions that go against conscience in order to remain in business.<sup>39</sup>

So the only remaining question is whether an employer or even a church could claim in good faith that its participation in ordinary business activities deserves protection under RFRA. As an initial point, it is worth noting that no such broader claim has yet to be made under RFRA since its passage in 1993, which is not surprising given that most churches have thicker conceptions of mutual moral obligations than those embodied in any libertarian code that stresses individual autonomy, thereby denying any legal obligation to assist

<sup>38</sup> Manhattan Declaration: A Call of Christian Conscience (November 20, 2009), available at [http://manhattandecoration.org/man\\_dec\\_resources/Manhattan\\_Declaration\\_full\\_text.pdf](http://manhattandecoration.org/man_dec_resources/Manhattan_Declaration_full_text.pdf). The statement was drafted by Professor Robert George, McCormick Professor of Jurisprudence, Princeton University; Professor Timothy George, Beeson Divinity School, Samford University; and Chuck Colson, Founder, the Chuck Colson Center for Christian Worldview.

<sup>39</sup> See *id.* at 8:

After the judicial imposition of "same-sex marriage" in Massachusetts, for example, Catholic Charities chose with great reluctance to end its century-long work of helping to place orphaned children in good homes rather than comply with a legal mandate that it place children in same-sex households in violation of Catholic moral teaching. In New Jersey, after the establishment of a quasi-marital "civil unions" scheme, a Methodist institution was stripped of its tax exempt status when it declined, as a matter of religious conscience, to permit a facility it owned and operated to be used for ceremonies blessing homosexual unions.

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others in their time of need.<sup>40</sup> Indeed, the more common practice is for many religious groups to champion their conception of social justice, thereby supporting minimum wages and family-leave legislation. It is thus highly unlikely that any religious group would be tempted to make, let alone make in good faith, the claims Justice Ginsburg fears will follow in the wake of *Hobby Lobby*.

Justice Ginsburg does not cite any such example in her opinion, but only asks the question: "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."<sup>41</sup> But there is nothing to her point. The two cases she cites were both decided before *Smith* and before RFRA. Moreover, both claims failed. In *Alamo Foundation*, an employer lost its challenge to a statutory requirement that it fill out the minimum-wage form under the Fair Labor Standards Act (FLSA), in which it vainly insisted that the "application of the Act's record-keeping requirements would have the 'primary effect' of inhibiting religious activity and would foster 'an excessive government entanglement with religion,' thereby violating the Establishment Clause."<sup>42</sup> In *Shenandoah*, the Fourth Circuit held that church-operated schools were covered by the FLSA, making their teachers and staff employees under that law. Citing both *Sherbert* and *Yoder*, it rejected a free-exercise challenge to the FLSA, which it held advanced a compelling state interest.<sup>43</sup>

In my view, the result in *Shenandoah* is not beyond criticism. There is no question that the substantive due process objections to the Fair Labor Standards Act were brushed aside in *United States v. Darby*,<sup>44</sup>

<sup>40</sup> See, e.g., Most Reverend William F. Murphy, Labor Day Statement, A New "Social Contract" for Today's "New Things," available at [http://www.usccb.org/issues-and-action/human-life-and-dignity/labor-employment/upload/labor\\_day\\_2010.pdf](http://www.usccb.org/issues-and-action/human-life-and-dignity/labor-employment/upload/labor_day_2010.pdf) ("Workers need a new 'social contract.' Currently, the rewards and 'security' that employers and society offer workers in return for an honest day's work do not reflect the global economy of the 21st century in which American workers are now trying to compete.").

<sup>41</sup> *Hobby Lobby*, 134 S. Ct. at 2802 (Ginsburg, J., dissenting) (citing *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303 (1985) and *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392 (4th Cir. 1990), respectively).

<sup>42</sup> *Tony and Susan Alamo Found.*, 471 U.S. 290 at 305.

<sup>43</sup> *Shenandoah Baptist Church*, 899 F.2d at 1398.

<sup>44</sup> 312 U.S. 100, 125 (1941).

on the authority of the earlier decision of the Supreme Court in *West Coast Hotel v. Parrish*.<sup>45</sup> *West Coast Hotel* in turn relied on the weaker rational basis formulation in *Nebbia v. New York*.<sup>46</sup> It is therefore at least open to question whether the FLSA does represent a compelling state interest, given its interference with competitive markets,<sup>47</sup> or whether the claim is upgraded solely to meet the religious free-exercise claim, which is judged by some higher standard. But for the moment at least, this issue is dead in the water.

The bottom line, therefore, is that both cases cited by Justice Ginsburg rejected all claims of religious liberty, and there is not a hint anywhere that RFRA was meant to overturn their results. Perhaps some future case under RFRA will raise line-drawing problems, but no such case could call into question the bona fides of Hobby Lobby's religious objections to the contraceptive mandate. The remote danger of some outlandish religious challenge should not gut the protections that religious groups receive under RFRA.

### *C. Does the Government Nevertheless Have a Compelling Interest in Pursuing the Mandate?*

The second question is whether the government has a compelling state interest in forcing Hobby Lobby to comply with its contraceptive mandate. In dealing with this issue, Justice Alito made a serious intellectual and tactical mistake. His intellectual mistake was to think that it is possible to leap from the first to the third question under RFRA without addressing this middle question. The tactical mistake was that the very question he sought to elide was brought front and center in *Wheaton College*, decided within a week after *Hobby Lobby* came down.

In *Wheaton College*, Justice Stephen Breyer joined the five-member majority in *Hobby Lobby* in issuing an "interim order." It said that Wheaton College could have given HHS notice that it refused to supply contraceptive coverage without filling out its required form that also gave notice of its position to its health insurer or third-party administrator. The narrow grounds of the majority's decision was that

<sup>45</sup> 300 U.S. 379 (1937).

<sup>46</sup> 291 U.S. 502, 507 (1934) (cited in *West Coast Hotel*, 300 U.S. at 397–98).

<sup>47</sup> See the discussion in the next section regarding competitive markets and cross-subsidies.



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the notice that *Wheaton College* provided was sufficient “to facilitate the provision of full contraceptive coverage under the Act.”<sup>48</sup> In essence, the omission was treated as a form of harmless error.

That limited decision provoked an impassioned dissent from Justice Sonia Sotomayor, who pointed out that *Hobby Lobby* had already decided that “[e]ven assuming that the accommodation somehow burdens *Wheaton’s* religious exercise, the accommodation is permissible under RFRA because it is the least restrictive means of furthering the Government’s compelling interests in public health and women’s well-being.”<sup>49</sup> Worse, she claimed that the Court had just resolved this question when “as justification for its decision in *Hobby Lobby*—issued just this week—the very Members of the Court that now vote to grant injunctive relief concluded that the accommodation ‘constitutes an alternative that achieves all of the Government’s aims while providing greater respect for religious liberty.’”<sup>50</sup>

She may be right about the flip-flop—though *Hobby Lobby’s* owners were never offered the accommodation, so the least-restrictive-alternative argument may have sufficed in their case even if it didn’t for *Wheaton College*. Analytically, however, this line of argument is *not* available if the compelling state interest issue in *Hobby Lobby* had been resolved against the government, as it should have been, because then the question of least restrictive means never comes up. Justice Alito, however, was so convinced that *Hobby Lobby* could be decided on the “least restrictive means” prong of RFRA that he just assumed for the sake of argument, that the advancement of “women’s health” was a compelling state interest that warranted the imposition of the contraceptive mandate against *Hobby Lobby*. That was an important mistake of legal principle. Note that this case does not fit the narrower conception of compelling state interest that was championed by Justice Brennan in *Sherbert* and *Yoder* and Justice Blackmun in *Smith*. In this regard, Blackmun adopted the instructive line taken by Robert Clark:

The purpose of almost any law can be traced back to one or another of the fundamental concerns of government: public health and safety, public peace and order, defense, revenue.

<sup>48</sup> *Wheaton College*, 134 S. Ct. at 2807.

<sup>49</sup> *Id.* at 2808 (Sotomayor, J., dissenting).

<sup>50</sup> *Id.*

To measure an individual interest directly against one of these rarified values inevitably makes the individual interest appear the less significant.<sup>51</sup>

The last sentence is of special relevance. The global interest in public health and safety may justify the general control of the street and commercial use of drugs under the Controlled Substances Act, but it hardly justifies the restriction as it applies to the ingestion of peyote as part of a religious rite. The interest in general revenues may justify the income taxation from which no one should be immune, but it hardly justifies forcing the Amish to pay into a Social Security system from which they have abjured all benefits. So too in *Hobby Lobby*, whether we speak of “women’s health” or “public health,” the claim is idle unless it is tested in its concrete instantiation.

One easy test for this exercise is to note the various types of necessity for which there is no simple market-based solution. Just that situation arises in the public-necessity cases, such as war, contagion, fire, floods, earthquakes, and other natural disasters. Similarly, there is no good market solution to murder and theft. The vulnerable position of infants and insane persons is often met by state-regulated guardianship arrangements. A system of general taxation is needed to supply genuine public goods (the form of tax that was *not* at issue in *Lee*); given the collective-action problem, those taxes cannot be raised voluntarily. There is also a compelling government interest, not mentioned by Clark, in the regulation of natural and legal monopolies as with common carriers and public utilities. But contraceptive services don’t fit here because they are readily available in the marketplace to all comers at competitive prices. The right of any woman to access these services surely implies for others, including employers, a correlative duty not to interfere. But *Hobby Lobby* is worlds apart from *Griswold v. Connecticut*,<sup>52</sup> which involved a successful challenge to a Connecticut law that forbade the sale of contraceptives between consenting parties. Why must the state compel employers to make payments or public declarations that violate their religious beliefs when the very services at issue are freely available elsewhere?

<sup>51</sup> Robert Clark, Guidelines for the Free Exercise Clause, 83 Harv. L. Rev. 327, 330–31 (1969) (cited in Smith, 494 U.S. at 910 (Blackmun, J., dissenting)).

<sup>52</sup> 381 U.S. 479 (1965).

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This logic is at no point addressed in Justice Ginsburg's dissent. Instead, she takes the view that the decision of Congress to require key women's health services at no cost is a belated recognition of a looming moral imperative that an all-wise Congress fulfilled. Her evidence starts with the proposition that "[t]he 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."<sup>53</sup> No one would care to disagree with a proposition that should play no role in this dispute. Prior to the adoption of the ACA, every woman was entitled to control her reproductive life by whatever means she chose, either at her own expense or with the assistance of other individuals. Justice Ginsburg is right to insist that many prominent health care professionals have concluded that these contraceptive services "are critically important" to women's health. All the more reason for women to spend their own resources to acquire them. But it is no reason to require others to violate their religious views to foot the bill.

It is equally vacuous to conclude, as Justice Ginsburg does, that "Congress left health care decisions—including the choice among contraceptive methods—in the hands of women, with the aid of their health care providers." Both points remain true even if the contraceptive mandate is rejected, just as it was true before the ACA was enacted, and is true today for women in small firms not covered under the ACA. *Hobby Lobby* doesn't want to make decisions for women. It just wants to make its own business decision not to pay for practices that it opposes on sincere religious grounds. The focus of Justice Ginsburg's argument looks exclusively at the condition and needs of women, which works at far too high a level of abstraction for the compelling state interest test. What she has to do, but does not attempt, is explain why the state has a compelling state interest in imposing the correlative duty on an employer with sincere religious beliefs at the employer's expense.

Her argument gains no further traction with this observation: "Women paid significantly more than men for preventive care, the amendment's proponents noted; in fact, cost barriers operated to block many women from obtaining needed care at all,"<sup>54</sup> especially

<sup>53</sup> *Hobby Lobby*, 134 S. Ct. at 2787 (Ginsburg, J., dissenting) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992)).

<sup>54</sup> *Id.* at 2788.

the expenses associated with pregnancy and childbirth. Her first mistake is to overlook the benefit side of the health care equation. Women pay far more than men for health care during their working years because their medical expenses are on average higher. They pay more because they get more in return, just as they do for health care insurance supplied outside the employment relationship. The differential rates for insurance reflect the simple and desirable dynamic that competitive markets eliminate inefficient cross-subsidies. But where lies the compelling state interest in forcing one group of individuals to pay for benefits received by another?

Just this issue arose in 1976 in *General Electric v. Gilbert*,<sup>55</sup> which sparked a major congressional response when the Court held it was not a form of sex discrimination for General Electric to refuse to provide disability benefits to women “for time lost due to pregnancy and childbirth,” on the ground that pregnancy was neither a disability nor an accident. The point was not that women got a raw deal under GE’s practices, because the record showed that the cost of coverage for women in the relevant year was, even without pregnancy benefits, close to twice that for men: \$82.57 for women as opposed to \$45.76 for men in 1970, and \$112.91 for women and \$62.08 for men in 1971.<sup>56</sup>

Faced with such numbers, *Gilbert*’s economic logic is impeccable. The stability of any insurance plan depends on its ability to guard against cross-subsidies, lest the entire program dissolve by adverse selection, which happens if the parties who are charged excessive premiums leave the plan. The extra sums paid out for pregnant women are not covered by their lower premiums, so their inclusion in the plan should, in economic terms, count as discrimination against men, who receive in aggregate lower benefits than women for each dollar they put into the program. An equal rate of premiums for unequal benefits is in economic terms a form of discrimination against the party who pays extra to secure the health care of others.

It is worth noting that even if *Gilbert* is rejected, the legal definition of discrimination as applied under Title VII *increases* the economic discrimination above and beyond that in the marketplace.<sup>57</sup> Just that

<sup>55</sup> 429 U.S. 125 (1976).

<sup>56</sup> *Id.* at 130–31 n.9.

<sup>57</sup> What is true of pregnancy is true of pensions, see *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702 (1978), which requires that pension levels be set equally for

happened when the firestorm of protest against *Gilbert* prompted the swift passage of the Pregnancy Discrimination Act of 1978,<sup>58</sup> which expands the definition of sex discrimination to cover any action “because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions.” Under the prevailing constitutional view that affords scant protection to economic liberties, no one could mount a viable constitutional challenge against this law, notwithstanding that it increases the wealth transfer from men to women, and from older women to women of childbearing age.

Nonetheless, Justice Ginsburg finishes with a flourish:

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. See *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 93 (2004). (“We are unaware of any decision in which . . . [the U.S. Supreme Court] has exempted a religious objector from the operation of a neutral, generally applicable law despite the recognition that the requested exemption would detrimentally affect the rights of third parties.”). 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).<sup>59</sup>

There are two serious difficulties with this passage. The first relates to Ginsburg’s serious misconstruction of the quote from Zechariah Chafee. The full passage relates to his views on the initial post-World War I cases where political protestors claimed their First Amendment protections:

Or to put the matter another way, it is useless to define free speech by talk about rights. The agitator asserts his

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men and women even though women as a group live longer than men. The entire enterprise is yet another instance of a statutory cross-subsidy in favor of women. For the economic analysis, see George Benston, *The Economics of Gender Discrimination in Employer Fringe Benefits: Manhart Revisited*, 49 *U. Chi. L. Rev.* 489 (1982).

<sup>58</sup> Adding section 701(k).

<sup>59</sup> *Hobby Lobby*, 134 S. Ct. at 2790–91 (Ginsburg, J., dissenting).

constitutional right to speak, the government asserts its constitutional right to wage war. The result is a deadlock. Each side takes the position of the man who was arrested for swinging his arms and hitting another in the nose, and asked the judge if he did not have a right to swing his arms in a free country. "Your right to swing your arms ends just where the other man's nose begins."<sup>60</sup>

It is quite proper to take Chafee to task for the same kind of linguistic skepticism that infects Justice Scalia's opinion in *Smith*. Chafee is at sixes and sevens in dealing with these great cases of agitation, *Schenck v. United States*,<sup>61</sup> *Frohwerk v. United States*,<sup>62</sup> and *Debs v. United States*,<sup>63</sup> all of which resulted in convictions for agitation or worse under the Espionage Act of 1917. It turns out that Chafee's article, which was published in June 1919, makes no reference to *Abrams v. United States*,<sup>64</sup> which was decided only in November 1919, and which of course is well known for Justice Oliver Wendell Holmes's famous recantation of his earlier opinion in *Schenck*. The difference between *Schenck* and *Abrams* really matters for these purposes. Under the skeptical attitude revealed in the complete Chafee passage, the government will always get the nod, because there is no clear principle to oppose it. But not so with Holmes in *Abrams*:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.<sup>65</sup>

Take this point of view with its references to "free trade in ideas" and "competition of the market," and lo and behold, it is possible

<sup>60</sup> Zechariah Chafee, *Freedom of Speech in War Time*, 32 Harv. L. Rev. 932, 957 (1919).

<sup>61</sup> 249 U.S. 47 (1919).

<sup>62</sup> 249 U.S. 204 (1919).

<sup>63</sup> 249 U.S. 211 (1919).

<sup>64</sup> 250 U.S. 616 (1919).

<sup>65</sup> *Id.* at 630.

to craft a principle that works tolerably well, notwithstanding our inability to predict the future perfectly. The government is allowed to punish conduct “that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent.”<sup>66</sup> Nothing in the potted quotation from Chafee indicates that Justice Ginsburg had any idea about what he was talking about.

Her use of the Chafee quotation is even odder because, read in isolation, it endorses the very libertarian view that she rejects. For whatever it is worth, Chafee does not get his causation example correct because, in fact, it is possible to tell where one’s arm moves and one’s nose ends. The basic trespass rule imposes liability on the party who moved his arm into someone else’s nose. The exception is where the party who moves has the right of way, as, for example, on public highways. The point of the basic prohibition is to constrain the use of force, which is the ultimate evil when done by way of aggression and not self-defense. What is so odd about Justice Ginsburg’s quotation is that she wrongly equates the failure to provide the contraceptive benefit required under the ACA with the use of force by a private party. But the entire structure of the common law (to which she implicitly appeals) draws a sharp distinction between the use of force and the refusal to deal with other people. The latter right has to be observed as a general matter, for otherwise any person could compel any other person to enter into a transaction with him on whatever terms he dictates. With that one maneuver, there can never be such thing as a competitive market because now every employer has to submit to any term that Congress mandates.

There are, of course, cases in which the refusal to deal does attract serious attention, but all of them involve common carriers and public utilities in monopoly positions. There, the refusal to deal shuts one person out of the market, so that the legal response is to impose the duty to serve, subject to the correlative duty to pay compensation that covers the fixed and variable costs of service that the ACA, as will become evident, does not even begin to calibrate. The equation of the refusal to deal in a competitive market with the use of force shows just how far off the rails the Ginsburg analysis goes. The only compelling state interest at work in *Hobby Lobby* is to prevent

<sup>66</sup> *Id.* at 627.

government from using its legislative power to make one person pay for the care of another in the supposed name of women's health. Those heavy-handed government exactions may hold up in a rational basis world in which economic liberties and private rights receive limited protection, but they abjectly fail under RFRA, which is by design more stern. The state has no compelling interest in requiring any employer with sincere religious beliefs to subsidize the health of its female—or, for that matter, male—employees.

*D. Does the Government Use the Least Restrictive Means to Achieve Its "Compelling" Goal?*

The last of the three prongs of RFRA asks whether the ACA regulations adopt the least restrictive alternative to achieve the compelling state interest. On the view just taken, there is no compelling state interest for the government to force those who pay for health care to fund those procedures that they regard as grave moral sins. So long as that is the case, the issue of the least restrictive alternative never arises. But once Justice Alito declines to face that issue head on, he can knock out the ACA regulations on contraception only by showing that the means chosen—having Hobby Lobby pay for the insurance benefits—are not the least restrictive available.

In order to make that showing, he reverts to the basic tripartite scheme of the regulations. In dealing with these accommodations, HHS takes the position that religious houses of worship are exempted from the entire system on the supposed empirical ground that they "are more likely than other employers to employ people of the same faith who share the same objection" so that they "would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan."<sup>67</sup> The regulations then add that the only way that other religious non-profit organizations can lawfully opt out of their ACA duty to provide contraceptive coverage is to certify their religious objections to their insurance administrator or provider. Once done, the plan administrator or provider has to supply the needed coverage at no expense to the female participants in the program, without charging back

<sup>67</sup> Coverage of Certain Preventative Services under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,874 (July 2, 2013).



any of the associated costs to the protected religious institution.<sup>68</sup> No relief of either sort was offered to for-profit corporations like Hobby Lobby, which had to provide the coverage, pay the fine, or abandon the provision of all health care to its employees.

In his analysis, Justice Alito insisted that the accommodation that HHS offered to nonprofit religious organizations should have been made available also to for-profit corporations like Hobby Lobby. From that he concluded that this lesser restrictive alternative could have, and should have, been offered to Hobby Lobby. His argument is at best incomplete because it brought no scrutiny to the overall system that it validated.

The first difficulty comes with HHS's purported rationales for excluding houses of worship from its contraceptive mandate. It is striking that the quoted passages stress the identity of the interests of most employees of these organizations with the religious objectives of their employer. At no point, however, does the regulation answer the obvious objection that, nonetheless, the mandate should be retained if only to protect even a tiny sliver of nonreligious employees. Quite simply, there is no reason to worry about religious employees, for they don't have any interests in need of protection, so why not adopt a rule that lets the few women who work for these institutions get health insurance coverage for contraceptive services that they want? Indeed, the only justification for the blanket exemption of churches is to protect the church as such. Yet the HHS regulation is consciously written to avoid just that conclusion.

The second portion of the purported HHS synthesis is every bit as shaky as the first. The HHS argument is that a covered nonprofit religious institution merely has to sign a certification that it authorizes its insurer or plan administrator to provide the coverage in question. Thereafter, the HHS regulations take steps to ensure that this party is not able, either directly or indirectly, to charge back any portion of those premiums to either the employer or the beneficiaries under the program.<sup>69</sup> The point of this maneuver is to allow the employee to receive the benefits without imposing any costs on the employer.

<sup>68</sup> *Id.* at 39,873–76. Accommodations in Connection with Coverage of Preventative Health Services, 29 C.F.R. §§ 2590.715-2713A(b)(1), (b)(2)(i)–(iii), (c)(2) (2013).

<sup>69</sup> Exemption and Accommodations in Connection with Coverage of Preventative Health Services, 45 C.F.R. § 147.131.

This system itself, however, is subject to two strong objections: one for the employer and one for the insurer. The first of these is that the regulations insist that the for-profit religious organization fill out a form that requests that the insurer or the administrator pick up the entire slack. But why require that form at all? If the government wants to impose this regime, it can simply order the insurance carrier or administrator to comply and dispense with asking the for-profit organization to fill out the religious form. The obvious response is that forcing religious institutions to sign these declarations is a minimal burden, but then so too is a requirement that all Jehovah's Witnesses recite the Pledge of Allegiance, which has no financial consequences at all. Does it sound far-fetched? Well, no, given that Justice Scalia's decision in *Smith* contained this passage cited approvingly from Justice Felix Frankfurter's majority opinion in *Minersville School District Board of Education v. Gobitis*:

Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities (footnote omitted).<sup>70</sup>

How quickly we forget, it seems, the wiser words of Justice Robert Jackson in *West Virginia Board of Education v. Barnett*:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess *by word or act* their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.<sup>71</sup>

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<sup>(c)</sup> Contraceptive coverage—insured group health plans—

<sup>(2)(ii)</sup> With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

<sup>70</sup> 310 U.S. 586, 594–95 (1940).

<sup>71</sup> 319 U.S. 624, 642 (1943) (emphasis added).

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The prohibition is absolute, even without any assistance from RFRA.

At this point, the supposed synthesis should fall of its own weight. But there is still more, for Justice Alito's treatment of the issue never once asks whether it is proper for the HHS regulation to impose the costs of the contraception mandate on the insurer or the plan administrator. There are two possible scenarios here. First, notwithstanding the regulation, the insurer charges back all or some portion of the cost of contraception in its general rates, at which point the desired financial separation fails. Second, this division is watertight, at which point the inquiry shifts to asking by what warrant does the ACA force this obligation on this insurer or administrator, instead of bearing the costs itself.

Start with some of the institutional details. The ACA's obligation is, of course, unliquidated, so that it can only be estimated. But the function of insurance is to pool risks and therefore to supply a precise premium that the employer as the insured party pays the insurer. The HHS regulation flat-out denies the insurer or administrator any opportunity to collect the premium, but makes no provision for its payment from the public treasury. At this point, the ACA provision looks quite different from the general rate regulations of the insurance industry, which are intended either to prevent excessive rates or to ensure plan solvency. Rather, the HHS regulation can only be described as a naked transfer of funds from the insurer or plan administrator to the women's contraceptive services that the government deems appropriate. Even today's current lax rules on insurance regulation do not let the government require any insurance company to underwrite any government-selected service for free. The insurers are not required to either submit to confiscatory rates or go out of business.<sup>72</sup> That rule applies not only to the regulation of an entire business, but also to a single line.<sup>73</sup> The most relevant precedent is *Armstrong v. United States*, where Justice Hugo Black gave this oft-quoted summation of the central objective of the Takings Clause: "The Fifth Amendment's guarantee that private property shall not

<sup>72</sup> *Aetna Cas. & Sur. Co. v. Comm'r of Ins.*, 263 N.E.2d 698, 703 (Mass. 1970). See also *Jersey Cent. Power & Light Co. v. Fed. Energy Regulatory Comm'n*, 810 F.2d 1168 (D.C. Cir. 1987) (proof of potential bankruptcy not necessary to attack government rate regulation); *Calfarm Ins. Co. v. Deukmejian*, 771 P.2d 1247, 1253–56 (Cal. 1989) (same).

<sup>73</sup> *Brooks-Scanlon Co. v. R.R. Comm'n of La.*, 251 U.S. 396 (1920).

be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."<sup>74</sup>

At issue in *Armstrong* was whether a subcontractor who filed a ship's lien against a group of navy vessels could be stripped of an otherwise valid lien for work done when the United States Navy dissolved the lien by sailing its boats out of Maine waters. The repair work on naval vessels was done for all citizens equally and thus should be supported by tax revenues. By forcing the subcontractor to sacrifice his lien, the United States imposed a huge portion of the funding for this public good on a single subcontractor even though its revenues counted for only a tiny fraction of GDP. Why then should circumstances require it to foot a large portion of this repair bill? The public-choice explanation for the *Armstrong* rule is that making—and keeping—all these expenses on the government balance sheet not only prevents the singling out of vulnerable parties, but also reduces the likelihood of unwise expenditures by blocking off-budget exactions from the subcontractor. The *Armstrong* rule thus preserves democratic transparency and prevents the inexorable overconsumption of government services.

One possible ground to distinguish *Armstrong* is that it involves only a lien held by a single party, as opposed to the general regulation that HHS issued. However, any systematic distinction between the discrete and the general cannot survive close examination.<sup>75</sup> To see why, just assume that the government instituted, by regulation, a general program that moved all military vessels subject to valid liens out of state waters. Centralizing the decision does not obviate the wrong. Quite the opposite: institutionalizing this program only multiplies the risks of political misconduct and thus should be subject to, if anything, greater not lesser constitutional control. The situation here stands in sharp contrast with those cases where careful application of a single rule to multiple parties generates *reciprocal* benefits to all concerned. At that point, those benefits then provide implicit-in-kind compensation to each party that offsets its particu-

<sup>74</sup> *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

<sup>75</sup> For a systematic development, see Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* ch. 14 (1985) ("Implicit In-Kind Compensation").

lar loss. But there is not a trace of any return benefit in either *Armstrong* or *Hobby Lobby*.

There is a second difference between *Armstrong* and the ACA regulations that also cuts the wrong way for the government. Under *Armstrong*, no one can deny that the repair of navy vessels counts as a public use. In contrast, the HHS regulations transfer funds from general revenues to particular individuals for private benefit, which provide no nonexclusive benefits to the public at large. In my view, these transfer payments should be blocked whether the matter is treated as a taking or as a tax. With regard to the former, there is no public use, the Supreme Court notwithstanding, in the creation of these private benefits.<sup>76</sup> Under the taxing power, the ACA funds are not spent “to pay the Debts and provide for the common Defence and general Welfare of the United States,” where the last term “general welfare” refers to some government-supplied collective good.<sup>77</sup> After the Court’s decision in *NFIB v. Sebelius*, these arguments for a limited taxing power gain no traction under current case law.<sup>78</sup> But the *Armstrong* prohibition against massive uncompensated transfers has to be *stronger* for specific payments made to particular persons than it is for providing traditional nonexclusive public goods. Accordingly, even under current law, the government can require companies to fund this obligation only if it is prepared to reimburse them out of general revenues. The off-balance-sheet financing authorized by the HHS regulations cannot be tolerated. If these extra charges can be imposed upon the current insurer or administrator, why can’t they be imposed with equal logic upon any insurer or administrator as a condition for getting a license to do any business at all? In both cases, the demand that any insurance carrier or administrator bear this charge in order to remain in business counts as yet another exaction, which should be condemned as illegal under the unconstitutional conditions doctrine. The only reasonable accommodation, therefore, is for the government to foot the entire bill. The total absence of current political support for this proposal offers the

<sup>76</sup> See *id.* at ch. 12.

<sup>77</sup> U.S. Const. art. I, § 8, cl. 1. For discussion, see Richard A. Epstein, *The Classical Liberal Constitution* 194–98 (2014).

<sup>78</sup> 132 S. Ct. 2566, 2579 (2012) (Roberts, C.J.).

best reason to reject the HHS accommodation that currently shifts the entire burden to private parties.

To Justice Alito, however, these consequences to third persons form no part of the equation. Instead, he conducts his analysis as follows:

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.<sup>79</sup>

Justice Alito never explains why accommodation would not also work with houses of worship, whose dissenting women could then get health care benefits for free, courtesy of an insurer or plan administrator. Nor does he recognize that neither churches nor female employees have to pay even if the government bears the total cost of the accommodation of the employer's good-faith religious beliefs.

Instead, he makes these unwise concessions to deflect two complaints by the Ginsburg dissent. The first is designed to prevent the unfortunate situation where for-profit "corporations have free rein to impose "disadvantages . . . on others" or to require "the general public [to] pick up the tab."<sup>80</sup> But this Ginsburg objection gets it exactly backward. Alito's narrative wrongly treats the corporation as imposing the burdens on the public at large, when HHS is doing the imposing—putting its hand into Hobby Lobby's pocket by imposing a mandate inconsistent with the owners' religious beliefs. The Senate, for the time being at least, has rejected on partisan party lines the "Not My Boss's Business Act,"<sup>81</sup> when the only question on the table is whether a modification of RFRA can force Hobby Lobby to make these payments, which are surely part of its business. However, no one has yet proposed the "Not My Employees' Business Act" to recognize the right of any business to decide how to spend its own money. Hobby Lobby is more than happy to stay out of its employees' business so long as the government stays out of Hobby

<sup>79</sup> Hobby Lobby, 134 S. Ct. at 2760.

<sup>80</sup> *Id.*

<sup>81</sup> Kristina Peterson, Senate Bill to Nullify Hobby Lobby Decision Fails, Wall St. J., July 16, 2014, available at <http://online.wsj.com/articles/senate-bill-against-hobby-lobby-decision-fails-1405537082>.

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Lobby's business, which it decidedly will not do. As demonstrated above, the government should never be given free rein in its legislative directives. It *should* pick up the tab if it wants to impose the program in question, for otherwise there is no counterweight to prevent the abuse whereby the government dictates what it wants, free of all financial constraint.

Justice Alito also gives far too much credit to Justice Ginsburg's second point when he writes, "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.'"<sup>82</sup> The answer here is again simple: force these items on the public budget, and this concern is solved, without the imposition on Hobby Lobby or anyone else. Keep them on the insurers, and there is an adverse third-party effect, which Justice Ginsburg should take into account, given her reliance on *Catholic Charities of Sacramento's* holding that no accommodation can work if it "detrimentally affect[s] the rights of third parties."<sup>83</sup> This broad injunction covers *both* the potential beneficiaries under the program *and* the insurance carriers on whom the HHS regulators impose the full cost under the ACA. Only public funding avoids both invidious third-party effects—assuming it can gain a political foothold, which at present it can't.

At this point, the burden shifts to both Justice Alito and Justice Ginsburg to explain why Congress gets the power to impose mandates by fiat. Justice Alito writes:

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.<sup>84</sup>

<sup>82</sup> *Hobby Lobby*, 134 S. Ct. at 2760.

<sup>83</sup> *Id.* at 2790 (citing *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527, 565 (2004)).

<sup>84</sup> *Id.* at 2783.

It is too easy for anyone on either side of this debate to play the race card in a religion case. But once it is laid on the table, it requires a clear response, which neither Justice Alito nor Justice Ginsburg provides. Two questions come to mind: why is there a compelling government interest in prohibiting racial discrimination, and why does the current law choose the right balance?

Justice Alito is wrong on both ends and means. Start with the choice of ends, and test his compelling state interest claim as articulated in the Clark excerpt that Justice Blackmun relied on in *Smith*. In all those cases, a strong competitive market negated any compelling state interest. In civil rights cases, however, there was an absence of a competitive market in 1964 for two reasons: common-carrier status or private abuse of force.<sup>85</sup>

By the first, a common carrier enjoys a natural or legal monopoly in standardized services such as train service and air traffic. Segregation on these facilities was a national disgrace, and the Civil Rights Act did well to rid us of it. Similarly, the organized repressive regimes in the Old South and elsewhere imposed brutal restraints on entry in many markets, including those for labor. The use of a nondiscrimination statute is a perfectly sensible second-best solution, but one that should not be kept in place now that the coercive institutional structure of segregation has been dismantled. Once competitive forces are allowed to work, open entry offers the best protection for all workers regardless of race.

The point becomes clearer when one reflects on the means–ends question. On this score, the transformation of the 1964 Civil Rights Act from a colorblind statute into a two-sided law bears notice. On the one side, strong disparate impact tests first announced in *Griggs v. Duke Power Co.*, with little or no statutory support, resulted in overkill, especially on matters of ability and aptitude testing.<sup>86</sup> On the other side, affirmative action programs were given wide sweep by

<sup>85</sup> I develop these themes most recently in Richard A. Epstein, *Public Accommodations under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 *Stan. L. Rev.* 1241 (2014). For the earlier version of this argument, see Richard A. Epstein, *Forbidden Grounds: The Case against Employment Discrimination* (1992).

<sup>86</sup> 401 U.S. 424 (1971). For criticism, see Michael Evan Gold, *The Similarity of Congressional and Judicial Lawmaking under Title VII of the Civil Rights Act of 1964*, 18 *U.C. Davis L. Rev.* 721 (1985); Epstein, *Forbidden Grounds* at 192–200.



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equally dubious interpretations of the basic statutory language in *Steelworkers v. Weber*.<sup>87</sup> *Griggs* should be rejected for its distortion of testing markets. *Weber* should be endorsed solely because it amounts in part to a repeal of the Civil Rights Act that has no sensible function in private competitive markets. The law could not have survived if *Griggs*'s "business necessity" standard had been applied to block private affirmative action programs. But given the divergence between *Griggs* and *Weber* on both sides of the ledger, the 1964 Act does not have any sensible fit to the abstract end of eliminating racial discrimination across the board. By repealing the Civil Rights Act, disparate impact would be history, and affirmative action programs could survive to the extent that they can garner private support, which is as it should be.

The point matters. Accept Justice Alito's account of the race discrimination law and then the compelling state interest test expands beyond its proper contours, as demonstrated by his uncritical acceptance of the government accommodation. This one point dooms his argument on the least restrictive alternative. That issue came to a head just three days after *Hobby Lobby*, when Wheaton College claimed that it should not be required to sign any form that authorized the insurance company payouts. Justice Alito should have been trapped given his explicit praise of that solution in *Hobby Lobby*, and Wheaton College sent packing. But no, in *Wheaton College* a cautiously worded opinion led to a temporary injunction, without prejudice on the merits. A fiery dissent by Justice Sotomayor then asked why *Hobby Lobby* did not control, for which there is no good answer. Note that none of these issues could have arisen if Justice Alito had not treated the advancement of women's health under the ACA as a compelling state interest.

### III. The Future

The early rounds of jostling over the contraceptive mandate are over, with the battle lines drawn as sharply as ever. Just what will happen next no one knows. Will Congress amend RFRA to force the mandate? That is doubtful, but if so, when the matter goes back to the Court, that selective repeal will ironically be attacked by conservatives as constitutionally infirm along the lines rejected by the

<sup>87</sup> 443 U.S. 193 (1979).

conservative majority in *Schuette v. Coalition to Defend Affirmative Action*.<sup>88</sup> That argument is likely to lose. More likely in my view is that the constitutional issue decided in *Smith* will reappear. Recall that *Gobitis* was overruled by *Barnette*, and in my view it is quite likely that *Smith* will be either overruled or, more probably, qualified to preserve the *Hobby Lobby* result. After all, the last Supreme Court decision to deal with the neutrality principle, *Hosanna-Tabor Evangelical v. EEOC*,<sup>89</sup> made quick work of *Smith* as dealing with “only outward physical acts” rather than “an internal church decision that affects the faith and mission of the church itself.”<sup>90</sup> In so doing, the chief justice disregarded the pervasive reach of *Smith*’s neutrality rationale. To be sure, *Hobby Lobby* is no church, but recall that the Free Exercise Clause applies to individuals as well as churches, and their exercise of religion textually covers more than worship. No one can be sure of what will happen, but it is at least even money that *Smith* is further limited, with the reluctant acquiescence of a grumpy Justice Scalia.

Yet the larger issue looms: why this intellectual mess? On this score, note that my own sympathies on the religion issues lie with Justices Blackmun, Brennan, and Marshall, not your typical conservative icons. On these issues at least, their civil libertarian views aligned with libertarian views more generally. But today the American left is far less libertarian, far more impatient, and far more authoritarian than before. And often it is met with equal vehemence by portions of the conservative right. What both sides tend to forget is that live-and-let-live is a central position for any group, libertarian or not, that wants to preserve civil peace. Only if members of group A are willing to understand that members of group B are entitled to take actions that they, as devout members of group A, find deeply offensive can citizens in a widely diverse society live together. Think of the lesson of the flag-burning cases.<sup>91</sup> Modern progressives do not accept that position, and modern conservatives match them stride for stride. But in *Hobby Lobby*, the critical intellectual gaffe comes

<sup>88</sup> 134 S. Ct. 1623 (2014).

<sup>89</sup> 132 S. Ct. 694 (2012).

<sup>90</sup> *Id.* at 697.

<sup>91</sup> See *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“[T]he government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

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from the progressive wing of the Democratic Party that insists that the refusal to supply a set of legislated benefits in a competitive market is a form of coercion, the proverbial gun to the head. Not so. All Hobby Lobby wants is to be left alone. Unfortunately, two doctrinal developments block that simple demand. First is the weak protection of economic liberties, which opens the field up to massive regulation such as that found in the ACA, and second is the utter unwillingness to make sensible accommodations whenever religious norms conflict with general laws.

It should be otherwise. Any coherent theory of liberty protects business, speech, and religion in roughly the same proportions. The doctrinal developments that have expanded the gaps between different substantive areas have served to make the modern law more treacherous. There is nothing in RFRA's framework of basic rights, compelling state interest, and least restrictive means that cannot be generalized to cover all human activity. The broader the principles are, the fewer the ad hoc judgments, and the more consistent the social commitment will be to individual liberty in all its manifestations. The good news about *Hobby Lobby* is that a bare majority of the Supreme Court stumbled to the right conclusion. The bad news is that the weak doctrinal analysis from the fractured Court has created a legal and political whirlwind from which it will be difficult for this nation to emerge unscathed given the current political tumult.