

GENDERING CORPORATE CONSCIENCE

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INTRODUCTION

A firestorm over religious rights of corporations ignited in response to the Affordable Care Act’s requirement that employee health insurance cover contraceptives.¹ Faced with healthcare only women need, courts across the country exempted secular, for-profit corporations from the contraceptive mandate on religious liberty grounds. In *Burwell v. Hobby Lobby*, the Supreme Court did so as well. For the first time, the Court endorsed religious liberty for for-profit corporations.² In a radical break with religious liberty

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¹ Coverage of Preventive Services Under Patient Protection and Affordable Care Act, 45 C.F.R. § 147.130(a)(1)(iv) (2013); Coverage of Preventive Services Under Patient Protection and Affordable Care Act, 78 Fed. Reg. 8456-01 (Feb. 6, 2013) (to be codified at 40 C.F.R. pt. 86).

² *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2759, 2759 (2014).

doctrine, the Court exempted for-profit, secular corporations from employer regulations. It seemingly repudiated the long tradition of denying judicial exemptions to businesses (typically religiously affiliated, non-profits) from compliance with insurance and antidiscrimination laws. In the controversy over contraception, a new and potentially expansive doctrine of corporate conscience was born.

This Article poses the woman question to identify and problematize the assumptions behind the doctrine of corporate conscience.³ The woman question makes women visible. It requires us to ask why corporate conscience is succeeding with regard to women, what the development says about sex equality, and whether the doctrine can be confined to its gendered roots. Asking the woman question does not provide any definitive answer to the ongoing conflict between religious objectors and equality law. It does, however, bring to light gendered baselines and disadvantages to women that must be recognized in order to balance interests in religion and equality.

This Article argues, that even as women were effaced from the courts' religious liberty analysis, women's gender was central both to the substantive development of corporate conscience and to the pragmatic limits on its reach. In the litigation, women's gender purportedly was irrelevant. Courts dismissed women, their burdens, and their experiences of discrimination. Yet, gender simultaneously was central. It allowed the courts to implement significant changes in religious liberty doctrine. It also acted as an implicit limit on corporate conscience.

Part II describes the religious liberty challenges to the Affordable Care Act's contraceptive mandate and the Supreme Court's decision in *Burwell v. Hobby Lobby*. It explains that *Hobby Lobby* breaks with past doctrine and represents a potentially wide-ranging expansion of religious liberty doctrine. Corporate conscience claims have succeeded—rapidly and mightily—where similar claims had previously failed.

As the courts sided with for-profit objectors to the contraceptive mandate, their analysis was characterized by a tension. On the one hand, as Part III indicates, the courts treated women as irrelevant to their legal analysis. Women's decisions and earning of benefits were erased from consideration. Any burdens on their rights were immaterial. Sex equality disappeared as a government interest in the contraceptive mandate.

On the other hand, as Parts IV and V argue, gender was central to the rise of corporate conscience. As Part IV contends, gender's blurring of the public-private divide facilitated the shift in religious liberty doctrine. Courts relegated healthcare only women use to the private family and presumed a male baseline for employer-based insurance. Conversely, they retrenched the

³ Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 831 (1990) (defining asking the woman question as "identifying and challenging those elements of existing legal doctrine that leave out or disadvantage women and members of other excluded groups").

family wage-welfare model by assuming that where the family cannot provide for women's needs, the government should step in.

As Part V shows, gender also became an implicit limiting factor on the potentially enormous effects of the *Hobby Lobby* decision for business regulation. The gendered context served to assuage fears that corporate conscience might have expansionist effects (or ambitions). Part V explores the possibility that gender—whether defined by reference to reproduction, sexuality, or sex—might cabin corporate conscience and examines the implications for the equal citizenship of women (and sexual minorities).

I. THE UNPRECEDENTED SUCCESS OF CORPORATE CONSCIENCE CLAIMS

The Affordable Care Act's contraceptive mandate launched an outcry from businesses across the country. Corporations—for-profit and non-profit, religiously affiliated and secular—filed more than a hundred lawsuits challenging the mandate.⁴ Against this background, challenges from two large, for-profit corporations—craft store Hobby Lobby and cabinet manufacturer Conestoga Wood—arrived at the Supreme Court.

The challengers relied primarily on the Religious Freedom Restoration Act (RFRA).⁵ RFRA establishes that, even with regard to a rule of general applicability, the federal government may only substantially burden a person's exercise of religion when the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."⁶ The corporations contended that the contraceptive mandate substantially burdens their free exercise of religion by requiring them to provide, facilitate, or pay for coverage for healthcare for employees that they believe to be immoral. They described the contraceptive regulation as presenting a "stark dilemma: either comply with the contraceptive coverage requirement, and violate their religious convictions, or refuse to comply, and face ruinous penalties."⁷

This litigation seemed to be of a kind with previous challenges to employer obligations. Commercial businesses—typically religiously affiliated organizations—had resisted compliance with antidiscrimination and insurance laws for religious reasons. They almost uniformly failed to win exemptions. Refusal to contribute to or provide access to employment-based insurance—whether unemployment, worker's compensation, or health insur-

⁴ Becket Fund, *HHS Mandate Information Central*, THE BECKET FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/hhsinformationcentral/>, archived at <http://perma.cc/6Z7K-6VDA>.

⁵ Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb(b) (2012).

⁶ *Id.* § 2000bb-1(b).

⁷ *Autocam Corp. v. Sebelius*, No. 1:12-CV-1096, 2012 WL 6845677, at *3 (W.D. Mich. Dec. 24, 2012).

ance—consistently went unaccommodated by the courts.⁸ The Supreme Court denied employers exemptions from social security and wage-and-hour laws.⁹ Courts bound religious organizations to laws prohibiting discrimination on the basis of sex and sexual orientation.¹⁰ Notably, the highest courts of New York and California both had recently upheld the application of state contraceptive mandates to religiously affiliated employers.¹¹

Given the failure of other employers—particularly religious organizations—to win exemptions from employer regulations, one would have expected for-profit, secular corporations to lose. Yet, litigation against the contraceptive mandate has turned out differently, marking a sudden and dramatic shift in religious freedom protections.

In *Burwell v. Hobby Lobby*, the Court sided with the for-profit corporate challengers and laid out new, potentially broad interpretations of religious liberty doctrine.¹² For the first time, the Court granted the right to exercise religion to for-profit corporations. This threshold question—whether for-profit corporations exercise religion—had resulted in a circuit split. Relying on the near universal acceptance that RFRA's use of the word "persons" includes non-profit corporations, the Court determined "persons" should equally encompass for-profit corporations.¹³ It concluded that—like

⁸ See, e.g., *United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 628 (7th Cir. 2000) (unemployment insurance); *Koolau Baptist Church v. Dep't of Labor & Indus. Relations*, 718 P.2d 267, 268 (Haw. 1986) (same); *Baltimore Lutheran High Sch. Ass'n v. Emp't Sec. Admin.*, 490 A.2d 701, 714 (Md. 1985) (same); *Salem Coll. Acad., Inc. v. Emp't Div.*, 695 P.2d 25, 27 (Or. 1985) (same); see also *South Ridge Baptist Church v. Indus. Comm'n*, 911 F.2d 1203, 1208, 1211 (6th Cir. 1990) (worker's compensation insurance); *Big Sky Colony, Inc. v. Mont. Dep't of Labor & Indus.*, 291 P.3d 1231, 1234 (Mont. 2012) (same); *St. John's Lutheran Church v. State Comp. Ins. Fund*, 830 P.2d 1271, 1273 (Mont. 1992) (same); *Victory Baptist Temple, Inc. v. Indus. Comm'n*, 442 N.E.2d 819, 819 (Ohio Ct. App. 1982) (same). Individual landlords and sole proprietors of businesses also routinely lost claims for judicial exemptions. See, e.g., *Braunfeld v. Brown*, 366 U.S. 599, 608–10 (1961); *United States v. Lee*, 455 U.S. 252, 254 (1982); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 283 (Alaska 1994).

⁹ See, e.g., *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 306 (1985) (denying religiously based exemption from minimum wage and recordkeeping under the Fair Labor Standards Act); *Lee*, 455 U.S. at 254 (denying a religious exemption from paying into social security); see also *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 389–92 (1990) (denying religiously based exemption from payment of sales taxes).

¹⁰ See, e.g., *Equal Emp't Opportunity Comm'n v. Fremont Christian Sch.*, 781 F.2d 1362, 1366 (9th Cir. 1986) ("While . . . religious institutions may base relevant hiring decisions upon religious preferences, 'religious employers are not immune from liability [under Title VII] for discrimination based on . . . sex.'") (quoting *Equal Emp't Opportunity Comm'n v. Pac. Press*, 676 F.2d 1272, 1276 (9th Cir. 1982)).

¹¹ See *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 461 (N.Y. 2006); *Catholic Charities of Sacramento, Inc. v. Super. Ct.*, 85 P.3d 67, 94–95 (Cal. 2004) (holding that state contraceptive mandate withstood both the rational basis and strict scrutiny constitutional tests).

¹² *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759–60 (2014).

¹³ *Hobby Lobby*, 134 S. Ct. at 2769 ("[N]o conceivable definition of the term ['person' in RFRA] includes natural persons and nonprofit corporations, but not for-profit corporations.").

religious non-profits—closely held, secular for-profit corporations equally “further[] individual religious freedom” of individuals united in the enterprise.¹⁴

The Court then exempted for-profit objectors from compliance with the contraceptive mandate.¹⁵ It determined that the mandate substantially burdened the corporations’ exercise of religion under RFRA.¹⁶ It assumed, without deciding, that the government’s interest in guaranteeing cost-free access to contraceptives was compelling.¹⁷ Nonetheless, the Court said, the contraceptive mandate was not the least restrictive means of furthering this interest. The government had accommodated non-profit religious organizations, allowing them to exclude contraceptive coverage from their employee insurance plans and requiring their insurance companies to offer a no-cost contraceptive-only policy directly to employees once given notice of the employer’s objection.¹⁸ The Court decided that the government could similarly accommodate for-profit objectors,¹⁹ while ensuring their employees still have access to insurance for contraceptives.²⁰

While *Hobby Lobby* involved objections to emergency contraception and IUDs rather than all contraceptives, the reasoning applies with equal force to employers challenging the full scope of the contraceptive mandate.²¹ The Court made this clear, saying, “[t]here are other ways in which Congress or HHS could equally ensure that every woman has cost-free access to the particular contraceptives at issue here and, indeed, to all FDA-approved contraceptives.”²² Following *Hobby Lobby*, it vacated and remanded those

¹⁴ *Id.* Justice Ginsburg’s dissent distinguished protection for religious organizations as promoting the existence of community of co-religionists and service to the community. *Id.* at 2794–96 (Ginsburg, J., dissenting).

¹⁵ *Hobby Lobby*, 134 S. Ct. at 2785.

¹⁶ *Id.* at 2779. The Court further rejected the argument that *Hobby Lobby* stores would likely save money by dropping insurance even after paying the taxes and raising salaries. *Id.* at 2776 (“[I]t is far from clear that the net cost to the companies of providing insurance is more than the cost of dropping their insurance plans and paying the ACA penalty.”).

¹⁷ *Id.* at 2780 (“We will assume that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA”).

¹⁸ Coverage of Preventive Services under Patient Protection and Affordable Care Act, 78 Fed. Reg. 8456-01, 8462 (Feb. 6, 2013) (to be codified at 40 C.F.R. pt. 86). With regard to self-insured plans, a third-party administrator of the plan must provide contraception coverage at no cost. U.S. Dep’t of Health & Human Serv., *Administration Issues Final Rules on Contraception Coverage and Religious Organizations* (June 28, 2013), <http://www.hhs.gov/news/press/2013pres/06/20130628a.html>, archived at <http://perma.cc/6FK-M4NB>.

¹⁹ Coverage of Preventive Services Under Patient Protection and Affordable Care Act, 78 Fed. Reg. at 8462.

²⁰ *Hobby Lobby*, 134 S. Ct. at 2782.

²¹ See, e.g., *Gilardi v. Sebelius*, 926 F. Supp. 2d 273 (D.D.C. 2013).

²² *Hobby Lobby*, 134 S. Ct. at 2759.

cases in which the lower courts had denied injunctions to for-profit corporations that object to all contraceptives.²³

Although the majority described its opinion as “very specific,” *Hobby Lobby* signals significant change in religious liberty doctrine. First and most evidently, for the first time the Court held that secular for-profit corporations may request religious exemptions from generally applicable, neutral economic regulations. Such claims had, until recently, been exceptionally rare.²⁴ In *United States v. Lee*, the Supreme Court itself had soundly rejected exemptions for for-profit employers due to the burdens on employees.²⁵ In *Newman v. Piggie Park*, it described as “patently frivolous” the claim that antidiscrimination laws interfered with the religious liberty of the Piggie Park barbecue chain and its owner.²⁶

Second, the Court discarded religious liberty precedent. In enacting RFRA, Congress sought to reinstate the constitutional strict scrutiny standard that the Supreme Court had rejected in *Employment Division v. Smith*.²⁷ In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, the Court itself characterized RFRA as “expressly adopt[ing] the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder*”²⁸ and relied on Free Exercise precedent to reach its decision under RFRA.²⁹ Lower courts and litigants similarly understood pre-*Smith* First Amendment case law to be central to RFRA cases (including to the contraceptive litigation).³⁰

²³ *Autocam Corp. v. Burwell*, 134 S. Ct. 2901, 2901 (2014) (mem.); *Gilardi v. Dep’t of Health & Human Servs.*, 134 S. Ct. 2902, 2902 (2014) (mem.); *Eden Foods, Inc. v. Burwell*, 134 S. Ct. 2902, 2902 (2014) (mem.).

²⁴ *See, e.g.*, *Equal Emp’t Opportunity Comm’n v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 611 (9th Cir. 1988) (prohibiting mandatory prayer services in the workplace); *State by McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 853 (Minn. 1985) (“Sports and Health, however, is not a religious corporation—it is a Minnesota business corporation engaged in business for profit. By engaging in this secular endeavor, appellants have passed over the line that affords them absolute freedom to exercise religious beliefs.”); *N. Coast Women’s Care Med. Gr., Inc. v. Super. Ct.*, 189 P.3d 959, 963 (Cal. 2008) (requiring fertility clinic to provide fertility services without discrimination to a lesbian, despite physicians’ religious objections); *Atl. Dep’t Store, Inc. v. State’s Att’y*, 323 A.2d 617, 622 (Md. Ct. Spec. App. 1974) (enjoining retail corporations from violation of Sunday closing statute and holding that “[a]s artificial, unnatural, persons they have neither religion nor non-religion, in the free exercise of which the First Amendment protects individuals”).

²⁵ *United States v. Lee*, 455 U.S. 252 (1982).

²⁶ *Newman v. Piggie Park Enters.*, 390 U.S. 400, 403 (1968).

²⁷ 42 U.S.C. § 2000bb(b)(1) (stating this purpose); *see also* *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) (observing that Congress “adopt[ed] a statutory rule comparable to the constitutional rule rejected in *Smith*”); Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 *BYU L. REV.* 221, 221 (1991) (“[RFRA] would enact a statutory version of the Free Exercise Clause.”).

²⁸ *O Centro*, 546 U.S. at 431 (internal citations omitted).

²⁹ *Id.*

³⁰ *See, e.g.*, *Goodall v. Stafford Cnty. Sch. Bd.*, 60 F.3d 168, 171 (4th Cir. 1995) (“Since RFRA does not purport to create a new substantial burden test, we may look to pre-RFRA cases in order to assess the burden on the plaintiffs for their RFRA claim.”); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1146 (10th Cir. 2013) (noting that

In *Hobby Lobby*, the Court instead read the Religious Freedom Restoration Act, as amended by the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”), as “an obvious effort to effect a complete separation from First Amendment case law.”³¹ The Court instructed that “nothing in the text of RFRA as originally enacted suggested that the statutory phrase ‘exercise of religion under the First Amendment’ was meant to be tied to this Court’s pre-*Smith* interpretation of that Amendment.”³² As Micah Schwartzman has argued, neither RFRA’s statutory text nor its legislative history supports this radical theory.³³ This shift—at minimum—introduces significant unpredictability for future religious liberty claims.

Third, the Court relaxed the requirement that objectors establish that the burden on their religious freedom is substantial. Following *Hobby Lobby*, courts cannot examine objectors’ proximity and responsibility to the alleged wrongdoing (and thus the substantiality of the burden upon them).³⁴ Under this new substantial burden standard, any corporation may claim a sincerely held religious belief, assert that the burden of compliance with a regulation is substantial, and, with pleadings alone, shift the burden of proof to the government.³⁵ As one court said, this converts “substantial” burden to “any burden.”³⁶

Fourth, the Court sent the message that the government’s burden of showing a compelling interest in regulation may be heightened in future cases. The majority opinion criticized interests in public health and sex equality as “couched in very broad terms” and perhaps too general to be

“case law analogizes RFRA to a constitutional right”); see also *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 129 (D.D.C. 2012) (concluding that RFRA “covers the same types of rights as those protected under the Free Exercise Clause of the First Amendment”).

³¹ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761–62 (2014).

³² *Id.* at 2772 (quoting 42 U.S.C. § 2000bb–2(4) (1994)).

³³ Micah J. Schwartzman, *What Did RFRA Restore?*, CORNERSTONE, (Sept. 11, 2014), <http://berkeleycenter.georgetown.edu/cornerstone/hobby-lobby-the-ruling-and-its-implications-for-religious-freedom/responses/what-did-rfra-restore>, archived at <http://perma.cc/3H3N-C3CL>.

³⁴ *Hobby Lobby*, 134 S. Ct. at 2779 (“[I]t is not for us to say that their religious beliefs are mistaken or insubstantial.”). The Supreme Court itself distinguished between inquiry into the centrality of belief—prohibited to the courts—and analysis of the substantiality of the burden—required of the courts. See *Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989). Other courts did so as well under RFRA. See, e.g., *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008) (accepting plaintiffs’ beliefs as sincere and religious, but “not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened”).

³⁵ Under RFRA, plaintiff must also propose a less restrictive means that the government might use to attain its interests. *Hobby Lobby*, however, suggests this requirement can be met in almost any circumstance.

³⁶ *Gilardi v. Sebelius*, 926 F. Supp. 2d 273, 282 (D.D.C. 2013); see also *Autocam Corp. v. Sebelius*, No. 1:12-CV-1096, 2012 WL 6845677, at *7 (W.D. Mich. Dec. 24, 2012) (“This would subject virtually every government action to a potential private veto based on a person’s ability to articulate a sincerely held objection tied in some rational way to a particular religious belief.”).

compelling.³⁷ It further indicated that the existence of exemptions—as the Court called the exception for small businesses and grandfathering of existing plans—may render the government’s interest less than compelling.³⁸ Nonetheless, it—“grudgingly” in the words of Justice Ginsburg³⁹—assumed that a narrower interest in “ensuring that all women have access to all FDA-approved contraceptives without cost sharing” was compelling.⁴⁰ Although Justice Kennedy concurred to highlight this assumption, like the majority he formulated the government’s interest narrowly as “the health of female employees.”⁴¹

Finally, *Hobby Lobby* suggests that the government may face a high hurdle to show that a law is the least restrictive means to further a compelling interest. As a procedural matter, the Court seemed to require the government to anticipate and disprove less restrictive means not raised by plaintiffs (such as the non-profit accommodation). As a substantive matter, the Court stated its support for the view that “[t]he most straightforward way of [advancing its interest] would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers’ religious objections.”⁴² The Court avoided so holding by extending the non-profit accommodation to for-profit corporations, but refused to confirm that the accommodation “complies with RFRA for purposes of all religious claims.”⁴³ Given that many non-profits already challenge the accommodation as an infringement on their free exercise (and even the litigants in *Hobby Lobby* may not find the accommodation acceptable), this less restrictive means seems unlikely to hold even in the short term.

Justice Kennedy will determine whether this last shift occurs. In his concurrence, Kennedy emphasized the existence of the non-profit accommodation.⁴⁴ But he also indicated that RFRA requires the government to treat

³⁷ *Hobby Lobby*, 134 S. Ct. at 2779.

³⁸ *Id.* at 2780 (describing grandfathering of plans and inapplicability to small employers as “features of ACA that support [the] view” that the mandate does not serve a compelling interest).

³⁹ *Id.* at 2800 n.23 (Ginsburg, J., dissenting).

⁴⁰ *Id.* at 2780 (majority opinion).

⁴¹ *Id.* at 2786 (Kennedy, J., concurring) (writing to “confirm that a premise of the Court’s opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees”).

⁴² *Hobby Lobby*, 134 S. Ct. at 2780. Lower courts had so held. *See, e.g., Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1298 (D. Colo. 2012) (holding that government must disprove that “government provision of free birth control” is an alternative). The same argument, of course, could be made about any number of employer regulations: the government could theoretically finance and provide social security, unemployment benefits, workers’ compensation, and minimum wages through general revenue. The government could also clean up Superfund sites without corporate responsibility for costs, employ people that businesses refuse to hire because of their age or disability, and retrofit private buildings to comply with safety or environmental standards.

⁴³ *Hobby Lobby*, 134 S. Ct. at 2782.

⁴⁴ *Id.* at 2787 (Kennedy, J., concurring) (observing that the existing accommodation “might well suffice to distinguish the instant cases from many others in which it is more

different categories of religious believers equally.⁴⁵ This statement might foretell Kennedy's approach in other contraceptive challenges where religiously affiliated organizations, which are accommodated, demand to be exempted entirely from the mandate as religious employers are.⁴⁶

In the interim at least, the Court sent a strong signal to lower courts to broaden exemptions to the contraceptive mandate (and perhaps other employer regulation). Only days after the *Hobby Lobby* decision, the Court took the unusual step of granting an emergency injunction of the mandate to Wheaton College, a non-profit that objects to the requirement that it file a form with its insurance company in order to take advantage of the accommodation.⁴⁷ Lower courts immediately read the Court to require exemptions to the accommodation for non-profits.⁴⁸ Following the Court's decision, HHS revised the contraceptive mandate to allow objecting organizations to notify HHS of their objections so that the government may contact the insurance company to set up contraceptive-only plans for employees without any involvement of the employer.⁴⁹ Objecting employers nonetheless remain unsatisfied.⁵⁰

The *Hobby Lobby* Court's rapid shift in doctrine meant unparalleled success for the for-profit corporations bringing claims for religious exemptions. Even if one finds the Court's legal analysis well supported, to stop there masks its assumptions and its effects on gender equality. The next two

difficult and expensive to accommodate a governmental program to countless religious claims based on an alleged statutory right of free exercise").

⁴⁵ *Id.* at 2786 ("RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation.").

⁴⁶ Non-profit challengers mount an argument in precisely these terms. *See* *Wheaton Coll. v. Burwell*, 1:13-CV-08910, 2014 WL 2826336, at *6 (N.D. Ill. June 23, 2014) (plaintiff arguing that "[i]he Mandate violates the Religion Clauses because it impermissibly discriminates among religious institutions asserting the exact same religious objection. Some favored 'religious employers' are exempt from the Mandate and the requirement to execute EBSA Form 700. Yet others like Wheaton, who wish to engage in the exact same religious exercise as 'religious employers,' are forced to comply or pay massive penalties.").

⁴⁷ *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2807 (2014).

⁴⁸ *See, e.g.,* *Eternal Word Television Network, Inc. v. Burwell*, 756 F.3d 1339, 1340 (11th Cir. 2014) (enjoining enforcement of non-profit accommodation). Judge Pryor concurred to reach the merits of the case and concluded the challengers would prevail and that "the accommodation provision is not the least restrictive means" for the government to ensure women have access to cost free contraceptives. *Id.* at 1349 (Pryor, J., concurring); *see also* *Archdiocese of St. Louis v. Burwell*, No. 4:13-CV-2300-JAR, 2014 WL 2945859, at *10 (E.D. Mo. June 30, 2014) (enjoining the mandate, including the non-profit accommodation, in its entirety).

⁴⁹ Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51092, 51094 (Aug. 27, 2014) (to be codified at 45 C.F.R. pt. 147).

⁵⁰ *See* Cathy Lynn Grossman, *Catholic Bishops, Becket Fund Slam Newest HHS Contraception Mandate Rules*, RELIGION NEWS SERV. (Aug. 22, 2014), <http://www.religion-news.com/2014/08/22/contraception-mandate-catholic-bishops/>, archived at <http://perma.cc/sc95-jkcx>.

Parts unmask the role that gender plays in facilitating exemptions for for-profit corporations from employer regulations.

II. GENDER AS IRRELEVANT

Corporate conscience claims, and their subsequent judicial acceptance, relied on denying the relevance of the woman question—that is, the ways in which legal doctrine disadvantages women or other excluded groups. The voices of women affected by religious exemptions were absent from the contraceptive proceedings across the country.⁵¹ Faced with a case involving healthcare only women use, the Supreme Court made women immaterial to its analysis.

Under existing doctrine, however, women should have come into the RFRA analysis at three junctures. First, as Part A shows, in considering the substantiality of a burden on religious liberty, previous cases recognized that the acts of another person—in this case, a woman—could cut off an objector’s responsibility for the alleged bad act, rendering the burden on his free exercise insubstantial. Second, as Part B explains, the burdens that religious exemption imposes on third parties, which *Hobby Lobby* dismissed as irrelevant, had been an important part of doctrine. Courts hesitated to grant exemptions where they would have significantly burdened a discrete and identifiable group of people. While—on the particulars of the Court’s decision—Hobby Lobby’s employees may suffer no financial burden, the employees of other challengers may not fare as well. In all cases, the Court’s opinion overlooks the dignitary harm to women. Finally, as Part C contends, in exempting employers, courts ignored the issue of discrimination, even as they set up a latent conflict between corporate religious claims and sex equality guarantees under the Civil Rights Act.

A. *Erasing Women’s Decisions about Contraception and Their Earning of Insurance*

In the contraceptive cases, courts effectively effaced women’s decision-making and earning of wages from the analysis. Yet, previous case law had focused on the connection between the religious objector’s act compelled by the government and the alleged wrongdoing. Where the objector’s act was attenuated—removed in terms of proximity, time, or necessity—courts con-

⁵¹ In one notable exception, the Seventh Circuit Court of Appeals permitted students at Notre Dame to intervene in the university’s challenge to the non-profit accommodation. *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 558 (7th Cir. 2014); see also Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VANDERBILT L. REV. 51, 65 (2014) (“The most depressing aspect of discussions surrounding the Hobby Lobby litigation is the total failure to acknowledge the women who would be harmed by RFRA exemptions from the Mandate.”).

sidered the burden of regulation insubstantial. Under this precedent, one might have expected women to be relevant to determining whether the contraceptive mandate imposed a substantial burden on the religion of their employers in two ways.

First, a woman's decision to use contraception could have been understood to reduce her employer's responsibility. In the past, courts regularly distinguished being required to contribute to insurance from being required to accept or use it.⁵² Courts denied Free Exercise and RFRA exemptions to paying into student health insurance that covered abortion, reasoning that any harm of paying into such an insurance system was attenuated by the independent decisions of third parties.⁵³

Lower courts that rejected challenges to the contraceptive mandate underscored that women's independent decisions cut off any responsibility on the part of their employers. The *Conestoga Wood* district court stated, "it is worth emphasizing that the ultimate and deeply private choice to use an abortifacient contraceptive rests not with the [corporation's shareholders], but with Conestoga's employees."⁵⁴ The *Autocam* district court similarly observed that "implementing the challenged mandate will keep the locus of decision-making in exactly the same place: namely, with each employee, and not the [employer]."⁵⁵ The employers, another court concluded, "remain free to exercise their religion, by not using contraceptives and by discouraging employees from using contraceptives."⁵⁶

Second, employees—not employers—could have (and should have) been seen as earning (and therefore paying for) their insurance plans. As economists agree, employees trade off wages against benefits and earn a

⁵² See, e.g., *United States v. Lee*, 455 U.S. 252, 261 n.12 (1982) ("We note that here the statute compels contributions to the system by way of taxes; it does not compel anyone to accept benefits."); *South Ridge Baptist Church v. Indus. Comm'n*, 911 F.2d 1203, 1211 n.6 (6th Cir. 1990) (distinguishing employer paying into worker's compensation from compelling "an employee of the church who entertains similar views as a matter of personal conviction to accept any of the benefits"); *Mead v. Holder*, 766 F. Supp. 2d 16, 42 (D.D.C. 2011) (concluding that being required to pay into health insurance or pay a tax is a *de minimis* burden on the religious freedom of plaintiffs who object to medical care).

⁵³ See, e.g., *Goehring v. Brophy*, 94 F.3d 1294, 1300 (9th Cir. 1996) (any harm flowing from fact that university registration fee was used in part to fund health insurance program that subsidized abortions was too attenuated to be a "substantial burden"; *Erzinger v. Regents of Univ. of California*, 137 Cal. App. 3d 389, 393 (Cal. Ct. App. 1983) (rejecting objection to student registration fee for health insurance because students were not forced "to use the student health service programs, receive pregnancy counseling, have abortions, perform abortions or endorse abortions").

⁵⁴ *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 414 (E.D. Pa. 2013).

⁵⁵ *Autocam Corp. v. Sebelius*, 1:12-CV-1096, 2012 WL 6845677, at *6 (W.D. Mich. Dec. 24, 2012).

⁵⁶ *O'Brien v. U.S. Dep't of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012).

compensation package that includes both.⁵⁷ In effect, employees “buy” benefits—including health insurance—with their wages.⁵⁸ A study of Massachusetts’ health insurance reform, which the ACA largely mirrors, uncovered an almost dollar-for-dollar relationship between the cost of health benefits to the employer and the corresponding fall in wages, with employees earning an average of \$6,058 less in wages (or nearly exactly the cost of annual health insurance premiums).⁵⁹ As courts have previously held in the Free Exercise context, employer contributions toward employee insurance “are financial burdens only in the same sense that the costs of employing paid workers at all are financial burdens.”⁶⁰

In denying objectors preliminary injunctions against the mandate, courts recognized this economic reality. For example, in *O’Brien v. HHS*, the court noted that the objecting employers provide only “indirect financial support” for contraception, because benefits and wages have virtually no functional difference.⁶¹ Another court observed that employers “are responsible to pay wages or benefits that their employees earn; and in neither situation do the wages and benefits earned pay—directly or indirectly—for contraception products and services unless an employee makes an entirely independent decision to purchase them.”⁶² Indeed, objecting employers acknowledged that their employees’ purchase of contraception with wages does not substantially burden the employers’ religious liberty.⁶³ The wage-benefit tradeoff in employee compensation suggests the same is true of health insurance.

The Supreme Court’s *Hobby Lobby* opinion, however, omitted any consideration of women’s independent decisions or their wage-benefit tradeoff.

⁵⁷ See Ezekiel J. Emanuel & Victor R. Fuchs, *Who Really Pays for Health Care? The Myth of “Shared Responsibility,”* 299 J. AM. MED. ASS’N 1057, 1057–58 (2008) (summarizing theoretical and empirical support for wage-benefit tradeoff).

⁵⁸ Employees pay an average of 8.6% of their gross income for their employer-based health insurance, primarily in the form of foregone wages. Tom Baker, *Health Insurance, Risk, and Responsibility After the Patient Protection and Affordable Care Act*, 159 U. PA. L. REV. 1577, 1617 n.176 (2011); see also Richard D. Miller Jr., *Estimating the Compensating Differential for Employer-Provided Health Insurance*, 4 INT’L J. HEALTH CARE FIN. & ECON. 27, 27 (2004) (finding a compensating differential for health insurance equal to ten to eleven percent of wages).

⁵⁹ Jonathan T. Kolstad & Amanda E. Kowalski, *Mandate-Based Health Reforms and the Labor Market: Evidence From the Massachusetts Reform* 4, 29 (Nat’l Bureau of Econ. Research, Working Paper No. 17933, 2012), archived at <http://perma.cc/S2RX-QQVE>.

⁶⁰ *Salem Coll. Acad., Inc. v. Emp. Div.*, 695 P.2d 25, 35 (Or. 1985).

⁶¹ *O’Brien*, 894 F. Supp. 2d at 1159–60; see also *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 414 (E.D. Pa. 2013).

⁶² *Autocam Corp. v. Sebelius*, 1:12-CV-1096, 2012 WL 6845677, at *6 (W.D. Mich. Dec. 24, 2012); see also *Grote v. Sebelius*, 708 F.3d 850, 861 (7th Cir. 2013) (Rovner, J., dissenting) (“[C]onsider that health insurance is an element of employee compensation. How an employee independently chooses to use that insurance arguably may be no different in kind from the ways in which she decides to spend her take-home pay.”).

⁶³ See, e.g., *Autocam*, 2012 WL 6845677, at *6 (“Plaintiffs do not seek to control what an employee or his or her dependents do with the wages and healthcare dollars we provide.”).

The Court cut off the inquiry into the connection between the employer's act and the alleged wrongdoing.⁶⁴ It instructed courts that, under RFRA, they may not question a litigant's view of the substantiality of the harm of regulation.⁶⁵ The Court disregarded the wage-benefit tradeoff altogether. The employee's financial interest in health insurance that she earned was made to disappear.

With women's decisionmaking and earned compensation invisible, insurance coverage and its use to purchase contraceptives were attributed to the corporation. The Supreme Court framed the contraceptive mandate as "a legal obligation requiring the plaintiff to confer benefits on third parties."⁶⁶ The Seventh Circuit similarly insisted that, for employers, the contraceptive mandate "coerces *them* to pay for something—insurance coverage for contraception."⁶⁷ The relevant act and payment became the employer's, rather than the employee's.

B. *Rendering Women's Burdens Irrelevant*

The contraceptive mandate aimed to lift financial and dignitary burdens from women. In enacting the Affordable Care Act, Congress responded to evidence that women pay sixty-eight percent more in out-of-pocket health costs as compared to men,⁶⁸ in large part because they bear the costs of contraception and reproduction. Women's out-of-pocket costs were not the only concern. Insurance is closely linked to access to contraceptives, which is essential to women's participation in the work force.⁶⁹ Lack of coverage also impedes the ability of women (and their partners) to live out their own religious and moral beliefs about reproduction.⁷⁰

⁶⁴ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2798 (2014).

⁶⁵ *Id.* at 2779.

⁶⁶ *Id.* at 2817 n.37.

⁶⁷ *Korte v. Sebelius*, 735 F.3d 654, 687 (7th Cir. 2013).

⁶⁸ Rachel Benson Gold, *The Need for and Cost of Mandating Private Insurance Coverage of Contraception*, 1 GUTTMACHER REP. ON PUB. POL'Y. 5, 5 (1998).

⁶⁹ See Dawn Johnsen, *Corporations Who Worship – 1, Women Who Work – 0*, SCOTUSBLOG (July 1, 2014), <http://www.scotusblog.com/2014/07/hobby-lobby-symposium-corporations-who-worship-1-women-who-work-0>, archived at <http://perma.cc/QW98-E3J6> (showing impact of financial and logistical barriers on access to healthcare); see also Martha J. Bailey et al., *The Opt-In Revolution? Contraception and the Gender Gap in Wages*, 4 AM. ECON. J.: APPLIED ECON. 225, 225 (2012) (estimating that access to oral contraceptives "can account for 10 percent of the convergence of the gender gap in the 1980s and 30 percent in the 1990s").

⁷⁰ See *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 468 (N.Y. 2006) (describing state contraceptive benefit as designed "to protect those employees' legitimate interests in doing what their own beliefs permit"); see also *South Ridge Baptist Church v. Ind. Comm'n of Ohio*, 911 F.2d 1203, 1211 n.6 (6th Cir. 1990) ("[T]o preclude some other employee not exercising such belief from the benefits of [worker's compensation] merely because the Church itself opposes them or prefers to provide for them in a different manner, could not escape the prospective danger of denying that employee the equal protection of the state's law merely because of the personal religious beliefs of his employer.").

Under existing doctrine, the burdens that religious exemptions to the mandate would re-impose on women seemed to counsel against siding with their employers. Courts had routinely rejected exemptions for employers where there were significant burdens on employees and the public at large. In its leading case, *United States v. Lee*, which involved an Amish employer who objected to paying social security insurance, the Supreme Court reasoned that

When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees.⁷¹

The Court recently had underscored that, in exempting religious objectors from law, "courts must take adequate account of the burdens a requested accommodation may impose on non-beneficiaries."⁷² Similarly, the Supreme Court of California could find no precedent for exempting a religious objector where "the requested exemption would detrimentally affect the rights of third parties" when it refused to carve out exemptions from the state's contraceptive mandate.⁷³

Yet, as the litigation against the federal mandate percolated through the courts, many judges enjoined the law and deprived employees of their statutory rights. While it avoided enjoining the mandate in its entirety, the *Hobby Lobby* majority also treated the burdens imposed on third parties—here, women—as minimal or not pertinent to its analysis. It described any burdens as falling on "third parties," "employees," or "individuals." It dismissed the

⁷¹ *United States v. Lee*, 455 U.S. 252, 261 (1982); see also *Droz v. Comm'r*, 48 F.3d 1120, 1121–23 (9th Cir. 1995) (rejecting similar claim under the Religious Freedom Restoration Act by looking to *Lee*); *South Ridge Baptist Church*, 911 F.2d at 1211 (rejecting challenge to worker's compensation insurance due, in part, to impact on welfare of others). The Supreme Court even seemed perturbed by the prospect of employer exemptions to Sunday closing rules, due to the impact on employees for whom Sunday is a day to see family, relax, and participate in leisure activities. See *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961).

⁷² *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (interpreting RLUIPA, which is phrased much like RFRA); see also *Sherbert v. Verner*, 374 U.S. 398, 409 (1963) ("[R]ecognition of the appellant's right to unemployment benefits under the state statute [does not] serve to abridge any other person's religious liberties."); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–10 (1985) (invalidating law mandating time off for religious Sabbath observers in part because law required non-observant co-workers to work on weekend); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84–85 (1977) (construing Title VII to require religious accommodation only where substantial costs are not imposed on owner or co-workers). But see *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 329–30 (1987) (holding that the application of Title VII's religious organization exemption to secular nonprofit activities of religious organization did not violate the Establishment Clause).

⁷³ *Catholic Charities of Sacramento, Inc. v. Superior Ct.*, 85 P.3d 67, 93 (Cal. 2004).

concern it had expressed in *United States v. Lee* as “squarely inconsistent with the plain meaning of RFRA.”⁷⁴

The Supreme Court’s extension of the non-profit accommodation to for-profit corporations avoids stripping employees of coverage through a complete exemption. For fully insured plans, the employer’s insurance company must provide a separate policy to employees once notified by the employer of its objection. For self-insured plans, the employer’s third-party administrator must purchase a separate policy and will be compensated by the government. The Court thus stated that its decision had “precisely zero” effect.⁷⁵ It may, indeed, not impact access for employees of Hobby Lobby and Conestoga Wood. Moreover, Justice Kennedy’s concurrence can be read to affirm that some burdens on third parties will remain important to future RFRA cases.⁷⁶

Nonetheless, the Court denied review in several other cases that had granted preliminary injunctions—in toto—to for-profit corporations objecting to the contraceptive mandate. It thus left in place decisions that deprive employees of access to contraceptives for the course of litigation.⁷⁷ Additionally, the Court’s injunction in favor of Wheaton College rewrote the accommodation in a way that may not preserve access. As Justice Sotomayor said in dissent, the injunction “risks depriving hundreds of Wheaton’s employees and students of their legal entitlement to contraceptive coverage” and, “because Wheaton is materially indistinguishable from other nonprofits that object to the Government’s accommodation, the issuance of an injunction in this case will presumably entitle hundreds or thousands of other objectors to the same remedy.”⁷⁸

The non-profit accommodation also has had the unintended effect of denying workers contraceptive coverage. The ACA’s employer mandate requires employers to secure coverage that includes preventive care, including contraception, or pay a tax. The non-profit accommodation, however, lifts this obligation from employers and transfers it to their employee benefit plans under the Employee Retirement Income Security Act (ERISA). Religious non-profit organizations then have a path to strip employees of coverage altogether. If they select church plans which are not subject to ERISA,⁷⁹ their employees will not receive coverage.⁸⁰ Having elevated for-profits to

⁷⁴ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2784 n.43 (2014).

⁷⁵ *Id.* at 2760.

⁷⁶ *Id.* at 2786 (Kennedy, J., concurring).

⁷⁷ *Burwell v. Newland*, 134 S. Ct. 2902, 2902 (2014) (mem.); *Burwell v. Korte*, 134 S. Ct. 2903, 2903 (2014) (mem.).

⁷⁸ *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2814 n.6 (2014) (Sotomayor, J., dissenting).

⁷⁹ Employee Retirement Income Security Act, 29 U.S.C. § 1002(33) (2012) (defining and discussing church plans).

⁸⁰ Timothy Jost, *Implementing Health Reform: New Affordable Care Act Guidance; Church Plans and Contraceptive Coverage*, HEALTH AFFAIRS BLOG (Jan. 10, 2014), <http://healthaffairs.org/blog/2014/01/10/implementing-health-reform-new-affordable->

the same status as religious non-profits, *Hobby Lobby* raises the question: could for-profits also gain access to church plans (previously reserved to particular religiously affiliated non-profits) and impede employees' access to coverage?

Consider too that the Court's compromise position depends on the existence of a willing insurer or third-party administrator. What happens if the insurance company objects for religious reasons? Such claims seem far-fetched, but in some states, insurance companies already are exempted from state contraceptive coverage regulations for religious reasons.⁸¹

As compared to the lower courts, the Supreme Court largely side-stepped the issue of third-party burdens. Nonetheless, it disapproved their relevance in future RFRA cases. As corporate conscience litigation continues, the question of third-party burdens will necessarily become more pointed.

C. Denying Sex Discrimination

The Supreme Court could have treated *Hobby Lobby* as implicating women's status in society. As feminists have long recognized, without control over their reproductive health, women can pursue their professional and educational ambitions only with great difficulty.⁸² Empirical studies confirm that access to contraception contributes to higher educational attainment and more financially desirable jobs for women, in turn reducing the gender pay gap.⁸³ Women themselves experience the use of contraception as enabling them "to take better care of themselves or their families, support themselves financially, complete their education, or get or keep a job."⁸⁴

The fact that only women bear children and (due to the limits of today's technology) use prescription contraceptives is biological, but the imposition

care-act-guidance-church-plans-and-contraceptive-coverage/, archived at <http://perma.cc/LY85-ADFA>.

⁸¹ See, e.g., NEV. REV. STAT. ANN. § 689A.0417 (West 2012) ("An insurer which offers or issues such a policy of health insurance and which is affiliated with a religious organization is not required to provide the coverage for health care service related to contraceptives required by this section if the insurer objects on religious grounds.").

⁸² See, e.g., Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 819 (2007) ("Control over whether and when to give birth is practically important to women for reasons inflected with gender-justice concern: It crucially affects women's health and sexual freedom, their ability to enter and end relationships, their education and job training, their ability to provide for their families, and their ability to negotiate work-family conflicts . . .").

⁸³ See generally ADAM SONFIELD ET AL., *The Social and Economic Benefits of Women's Ability to Determine Whether and When to Have Children*, GUTTMACHER INST., (2013), archived at <http://perma.cc/M5J6-77FA> (compiling and discussing the results of sixty empirical studies).

⁸⁴ Adam Sonfield, *What Women Already Know: Documenting the Social and Economic Benefits of Family Planning*, 16 GUTTMACHER POLY REV. 8, 8 (2013), archived at <http://perma.cc/DZ9A-4TD5> (reporting results of a survey of 2,000 women).

of financial burdens on reproductive control is social.⁸⁵ By allowing employers to exclude contraceptives from insurance plans, society, not biology, has subjected women to inequality. With the women's preventive services mandate, Congress responded to this inequality.

The courts instead treated gender equality as extraneous to the federal contraceptive mandate.⁸⁶ The D.C. Circuit, for example, derided of the importance of inequality, saying "'gender equality' is a bit of a misnomer" because the "issue at interest is resource parity."⁸⁷ It found the government's reliance on the application of nondiscrimination requirements to a private association in *Roberts v. Jaycees* inapposite because the Jaycees had "shut women out entirely from a superior class of membership," rather than charge them "disparate membership fees" (a "resource parity" issue).⁸⁸ In so doing, the court conceptualized discrimination as exclusion, rather than subordination.

By granting employers injunctions against the mandate and thereby preventing employees from accessing contraceptive coverage, the lower courts set up a collision between religious exemption and equality guarantees under Title VII. With the Pregnancy Discrimination Act (PDA),⁸⁹ Congress amended Title VII to override *General Electric Co. v. Gilbert*,⁹⁰ in which the Supreme Court held that an employer's denial of coverage for pregnancy-related conditions in an insurance plan was not sex discrimination under Title VII.⁹¹ The PDA embraced the dissenting opinions in *Gilbert*, which made clear that classifying employees differently based on their risk of pregnancy violated Title VII.⁹²

⁸⁵ See Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 375, 382–83 (1985) (arguing that reproductive control matters because society, not biology, stigmatizes unmarried women and creates the expectation that women shoulder the major care-giving and financial responsibility for children).

⁸⁶ See *Korte v. Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013) (rejecting interests in public health and gender equality as too generalized and requiring government to show it has a compelling interest in compliance of specific employers); *Legatus v. Sebelius*, 901 F. Supp. 2d 980, 994 (E.D. Mich. 2012) (admitting the possibility that the government has compelling interest but expressing "uncertain[ty] that the Government will be able to prove a *compelling* interest in promoting the specific interests at issue in this litigation") (emphasis in original); *Beckwith Elec. Co. v. Sebelius*, 960 F. Supp. 2d 1328, 1347 (M.D. Fla. 2013) (describing government's interests as "generalized").

⁸⁷ *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1221 (D.C. Cir. 2013).

⁸⁸ *Id.* at 1222.

⁸⁹ Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2006).

⁹⁰ 429 U.S. 125 (1976).

⁹¹ *Id.* at 127.

⁹² See *id.* at 160 (Brennan, J., dissenting); see also *U.A.W. v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (interpreting the PDA to prohibit discrimination on "the basis of potential for pregnancy"); Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 481 (2011) (excluding oral contraceptives from a health plan "replicates *Gilbert's* logic").

In 2000, the EEOC determined that the exclusion of contraception from an employee health insurance plan was a violation of the PDA's guarantees of equality in the workplace.⁹³ It said:

Contraception is a means by which a woman controls her ability to become pregnant. The PDA's prohibition on discrimination against women based on their ability to become pregnant thus necessarily includes a prohibition on discrimination related to a woman's use of contraceptives. Under the PDA, for example, Respondents could not discharge an employee from her job because she uses contraceptives. So, too, Respondents may not discriminate in their health insurance plan by denying benefits for prescription contraceptives when they provide benefits for comparable drugs and devices.⁹⁴

Although the courts split, most agreed that failing to cover contraception that only women use was illegal discrimination.⁹⁵ In applying strict scrutiny to its own state's contraceptive mandate, the Supreme Court of California emphasized that granting an employer a religious exemption "sacrifices the affected women's interest in receiving equitable treatment with respect to health benefits."⁹⁶

Nonetheless, in *Hobby Lobby*, the Supreme Court denied the relevance of sex equality and Title VII. Narrowing the government's interest to "ensuring that all women have access to all FDA-approved contraceptives without cost sharing," the Court did not discuss gender equality.⁹⁷ It could not perceive that denying contraceptive coverage in an employee insurance plan discriminates against female employees. It thus disclaimed any implication

⁹³ EEOC Commission Decision on Coverage of Contraception (Dec. 14, 2000), archived at <http://perma.cc/KE2X-VV5E>.

⁹⁴ *Id.*; see also Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 374 (1998) (arguing that, as was then widespread "when an employer covers all prescription drugs except for contraception, the discrimination against women is explicit").

⁹⁵ See *E.E.O.C. v. United Parcel Serv., Inc.*, 141 F. Supp. 2d 1216, 1219–20 (D. Minn. 2001) (finding employees had sufficiently alleged intentional disparate treatment and disparate impact in the exclusion of contraceptives); *Mauldin v. Wal-Mart Stores, Inc.*, CIV.A.1:01-CV2755JEC, 2002 WL 2022334 (N.D. Ga. Aug. 23, 2002) (certifying class of female employees); *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1268 (W.D. Wa. 2001) (holding that "the selective exclusion of prescription contraceptives from defendant's generally comprehensive prescription plan constitutes discrimination on the basis of sex"); *Cooley v. DaimlerChrysler Corp.*, 281 F. Supp. 2d 979, 981 (E.D. Mo. 2003). *But see In re Union Pacific Railroad Employment Practices Litigation*, 479 F.3d 936, 939–45 (8th Cir. 2008) (In a split decision, a panel of the Eighth Circuit subsequently held that when a plan excludes "all types of contraception, whether prescription, non-prescription or surgical and whether for men or women," it does not violate the PDA or Title VII.).

⁹⁶ *Catholic Charities of Sacramento, Inc. v. Superior Ct.*, 85 P.3d 67, 93 (Cal. 2004).

⁹⁷ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014).

of its holding for antidiscrimination law.⁹⁸ The Court admittedly did not invite Title VII claims to recover the out-of-pocket costs of contraception as the lower courts had. The Court, however, was blind to discrimination beyond economic harm.

Whereas, in Kenneth Karst's words, in its recognition of a right to use contraceptives "*Eisenstadt* itself is correctly seen as a case involving the status of women,"⁹⁹ *Hobby Lobby* represents a significant loss for women's status in the workplace. Irrespective of whether the decision preserves alternate access to coverage, it approves discrimination in employee benefits. For women who work for objecting employers, their employers can singularly object to and exclude their healthcare from employees' health plans.

The experience of being treated unequally inflicts substantial dignitary harm. Refusal to provide a woman with contraceptive coverage sends the message that society does not value her ability to make decisions about her life and her body.¹⁰⁰ It suggests to a woman that she has transgressed by engaging in sex, whether voluntary or coerced. It tells women that their decisions to use contraception—which may themselves be religiously or morally motivated—are immoral. By categorizing emergency contraception and IUDs as abortion and then condemning it as murder, some corporate objectors denounce women who use such forms of contraception as murderers. Other objectors approve of contraception use for the "right" reasons—to treat endometriosis, for example—differentiating "good" women from "bad" women.

The fact that coverage will, in some cases, be provided by another entity does not undo the discrimination. When lunch counters refuse service to blacks, we do not inquire as to whether they might eat elsewhere. When an employer denies benefits to married women, we do not ask whether they can access health insurance through their spouses instead.¹⁰¹

Discrimination represents a serious harm in its own right—regardless of the availability of alternatives. A black person made to sit at the back of the bus is harmed, though he arrives at his destination. A woman denied employment on the basis of sex is not made whole, though she secures a position elsewhere. A same-sex couple refused service by one bakery suffers injury, though a second bakery will serve them. By the logic of *Hobby Lobby*, however, any time a state or private entity fills the gap caused by a business's discriminatory denial of statutory rights, its employees and would-be customers are not harmed.

⁹⁸ *Id.* at 2758 (noting that its holding would not allow religious exemptions to "cloak illegal discrimination").

⁹⁹ Kenneth L. Karst, *The Freedom of Intimate Association*, 89 *YALE L.J.* 624, 676 (1980).

¹⁰⁰ Carolyn McLeod, *Harm or Mere Inconvenience? Denying Women Emergency Contraception*, 25 *HYPATIA* 11, 19 (2010).

¹⁰¹ See *Equal Emp't Opportunity Comm'n v. Fremont Christian School*, 781 F.2d 1362, 1362–64 (9th Cir. 1986) (rejecting religious school's objection to providing health insurance benefits to married women).

With women and the burdens on them effaced from the controversy, women provide no counterweight to religious liberty. The courts' sole focus is the religious objector. They neglect the gendered effects of their decisions and the gendered assumptions in their analysis. As Parts III and IV show, gender is central both to the substantive development and to the pragmatic limits of corporate conscience.

III. GENDER AS CENTRAL

Despite women's purported irrelevance to the religious liberty analysis, their gender was central to the rise of corporate conscience. At each turn in the contraceptive litigation, courts made choices between public and private that reflected gendered assumptions and disadvantaged workers, particularly women.

This Part argues that the courts' analyses of the compelling interest and least-restrictive means prongs of RFRA exemplify (and take advantage of) the ways in which gender complicates the public-private divide. As legal theorists have shown, the public and the private—previously thought of as neutral or natural—represent fictions constructed by law, courts, and legislatures. Public life, defined as political and commercial spheres, is separated from private life, defined as the home. Simultaneously, the government is set against the market. Courts use various concepts of public and private, contrasting interference and freedom, where private refers to a “sphere in which others do not interfere.”¹⁰² As the contraceptive context manifests, the choice to categorize something as public or private frequently reflects gendered assumptions with profound implications for how society is structured.¹⁰³ The dichotomy “tends to legitimate and mystify patterns of inequality and structures of power through which individual autonomy, social institutions, and legal action are accomplished.”¹⁰⁴

¹⁰² Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 6 (1992).

¹⁰³ See Suzanne A. Kim, *Reconstructing Family Privacy*, 57 HASTINGS L.J. 557, 559 (2006) (identifying “concerns that the public-private distinction—no matter how drawn—inherently poses problems of coercion for those with less power within so-called private spheres.”).

¹⁰⁴ Gerald Turkel, *The Public/Private Distinction: Approaches to the Critique of Ideology*, 22 LAW & SOC'Y REV. 801, 801–02 (1988). See Gavison, *supra* note 102, at 3 (arguing that the public-private distinction plays “a part in creating or perpetuating injustice, in reaching or justifying bad decisions, and in paralyzing the forces needed for reform”); Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONST. COMMENT. 319, 319 (1993) (“‘Private’ is not a natural attribute nor descriptive in a factual sense, but rather is a political and contestable designation.”); Karl Klare, *The Public-Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1361 (1982) (“[T]he social function of the public/private distinction is to repress aspirations for alternative political arrangements by predisposing us to regard comprehensive alternatives to the established order as absurd.”).

The contraceptive litigation relies on dueling notions of the public-private divide. As Part A shows, courts indicated that women's reproductive healthcare and its costs belong in the privacy of the family and expressed skepticism of a public interest in including contraception in employer-based plans. At the same time, as Part B argues, in their analysis of less-restrictive means, courts made contraception and its costs public. So doing, they replicated the welfare-wage labor divide—according to which women's needs are more appropriately delivered through a public, welfare model, while men's needs are situated within the realm of commercial, wage labor.

A. *Private Choice, Family Cost*

In the contraceptive cases, a number of courts relegated women's health needs to the private family and presumed a male baseline for employer based-insurance. In so doing, they excised women's reproductive needs from commercial life and political concern. They separated contraceptive coverage from the universe of employment-based social insurance.

Plaintiffs, and judges siding with them, described contraception as a purely private matter in which employees should not involve their employers. Corporate objectors disclaimed any attempt to interfere with their employees' private lives, but insisted on a right to refuse to "pay for" or "subsidize" their morally irresponsible choices.¹⁰⁵ In *Korte v. Sebelius*, the Seventh Circuit echoed this reasoning, noting that employers "may neither inquire about nor interfere with the private choices of their employees on these subjects."¹⁰⁶

Categorizing contraception as a private, familial act led here to imposing its costs on the family. Objecting businesses and scholars supportive of them asked why women can't simply pay for contraception themselves, instead of demanding that their employers violate their consciences. Gender was implicit and sometimes explicit in the question: Why should I (man) pay for healthcare for you (woman)?¹⁰⁷ On this account, women choose to regu-

¹⁰⁵ Brief for Respondents, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13–354 (Feb. 10, 2014), 2014 WL 546899, at *41 (arguing that Respondents' religious beliefs are not burdened by their employees' health care decisions but by the government's demand that Respondents "enable access to contraceptives that [they] deem morally problematic" and noting that "[r]espondents have never filed suit regarding any decisions by their employees") (citation omitted).

¹⁰⁶ *Korte v. Sebelius*, 735 F.3d 654, 684 (7th Cir. 2013).

¹⁰⁷ Brief for Respondents, *supra* note 105, at *59 ("[T]he ultimate question here is not whether there will be an exception to an otherwise uniform mandate, but who will pay for a third-party's religiously sensitive abortifacients."); John Eastman, *No Free Lunch, But Dinner and a Movie (and Contraceptives for Dessert)?*, SCOTUSBLOG (July 7, 2014), <http://www.scotusblog.com/2014/07/symposium-no-free-lunch-but-dinner-and-a-movie-and-contraceptives-for-dessert/>, archived at <http://perma.cc/HN85-DX3Q> ("The Sandra Flukes of the world might have the 'liberty' to use contraceptives if they choose (whether that includes abortifacients is another matter entirely, but I'll save that for another commentary), but forcing others to pay for their contraceptive use is not the exercise of liberty."); Irin Carmon, *Eden Foods Doubles Down in Birth Control Flap*, SALON,

late their reproduction and should bear the costs within their family structures. They do not earn insurance coverage that meets their needs in public as employees. Rather, the family must fund the costs of contraception.

This claim of privacy distinguishes the private family from the public market sphere.¹⁰⁸ It categorizes women's health needs—as law and practice have traditionally done—as belonging in “the ‘private’ recesses of society.”¹⁰⁹ As Deborah Dinner argues, employer practices and judicial doctrine historically allocated the costs of reproduction to the family.¹¹⁰ Into the 1980s, for example, employers resisted coverage of maternity care and pregnancy disability insurance on the ground that their costs were “the inherent responsibility of the private family.”¹¹¹

Rendering contraceptive coverage private is facilitated by the male baseline of employer-based insurance.¹¹² Employee benefits—as they developed through collective bargaining and later through government regulation—reflected the needs of men.¹¹³ As a result, as recently as 1998, forty-nine percent of traditional indemnity insurance plans covered none of the reversible prescription contraceptives most commonly used by women.¹¹⁴ Plans treated prescription contraception used only by women less favorably than medical contraception (sterilization) for men.¹¹⁵ Yet, Viagra was widely

(Apr. 15, 2013), archived at <http://perma.cc/3X97-V58J> (reporting Eden Foods' CEO's explanation for why he filed a lawsuit: “Because I'm a man, number one and it's really none of my business what women do.”).

¹⁰⁸ See Janet Halley, *What Is Family Law?: A Genealogy Part I*, 23 *YALE J.L. & HUMAN.* 1, 2–3 (2011) (discussing the “separation of the law of familial intimacy from the law of productive labor”).

¹⁰⁹ AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY xiii (Martha Albertson Fineman & Nancy Sweet Thomadsen, eds., 1991); see also Margaret A. Baldwin, *Public Women and the Feminist State*, 20 *HARV. WOMEN'S L.J.* 47, 48 (1997) (“Women's confinement to the private sphere traditionally has been a defining aspect of the ‘private.’”).

¹¹⁰ Dinner, *supra* note 92, at 423.

¹¹¹ *Id.* at 444, 456.

¹¹² See Bartlett, *supra* note 3, at 837 (explaining that the woman question “assumes that some features of the law may be not only nonneutral in a general sense, but also ‘male’ in a specific sense”).

¹¹³ See JENNIFER KLEIN, FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA'S PUBLIC-PRIVATE WELFARE STATE 13 (2003); Deborah Dinner, *Recovering the Laflour Doctrine*, 22 *YALE J.L. & FEMINISM* 343, 373 (2010) (“The family-wage system took as one premise that bread-winning men would pay for the costs associated with pregnancy and childbirth.”); NANCY LEVIT, FEMINIST LEGAL THEORY: A PRIMER 47 (2006) (observing that feminists have shown that workplace insurance is “based on a set of moral and economic obligations that acknowledge an employer's responsibility toward an employee who is assumed to be a man. What the ‘typical man’ needs for his minimum peace of mind.”).

¹¹⁴ Law, *supra* note 94, at 372. Due in significant part to state contraceptive coverage mandates passed in the early 2000s, the number fell to two percent by 2002. Adam Sonfeld et al., *U.S. Insurance Coverage of Contraceptives and the Impact of Contraceptive Coverage Mandates*, 2002, 36 *PERSP. ON SEXUAL & REPROD. HEALTH*, 72, 76–78 (2004), archived at <http://perma.cc/Y3F2-DRDS> (finding that state mandates accounted for 30–40% of the increase in coverage).

¹¹⁵ Law, *supra* note 94, at 372.

covered as an employment-based prescription benefit immediately after its introduction.¹¹⁶

Even as the designation as private removes contraception from the “public” labor relationship, it also calls into question any public (that is, governmental) interest in contraceptive coverage.¹¹⁷ When issuing injunctions in favor of for-profit corporations, courts portrayed the government as having little interest in women’s private decisions. The Tenth Circuit, for example, said that exemption would not undermine the government’s interest because employees remain “free” to purchase contraception themselves.¹¹⁸ By treating reproductive decisions as private and women as “free” to make them, courts invoked a norm of state non-intervention.¹¹⁹ Contraceptive coverage became of little public concern.

Yet, objections to the Affordable Care Act’s contraceptive mandate closely resemble previous challenges to social insurance requirements.¹²⁰ The ACA—and its contraceptive mandate—functions much like employment-based social insurance. Like social security, health insurance requires employers to administer funding, contribute a share, and provide a mechanism through which employees pay in. The tax system similarly enforces employer responsibilities. The “public” thus is central to so-called private benefits. State and federal regulators dictate the administration, structure, and content of employee plans. As Robert Field observes, “the government shapes, oversees, and indirectly funds the private market for employer-provided coverage” to an extent that “means that this product is not offered through a truly private mechanism.”¹²¹

In siding with the contraceptive challengers, however, courts artificially excised health insurance—at least as it pertains to women’s “private” choice

¹¹⁶ Lee Korland, *Sex Discrimination or A Hard Pill for Employers to Swallow: Examining the Denial of Contraceptive Benefits in the Wake of Erickson v. Bartell Drug Co.*, 53 CASE W. RES. L. REV. 531, 531 (2002).

¹¹⁷ Martha Albertson Fineman, *Feminist Legal Theory*, 13 AM. U. J. GENDER SOC. POL’Y & L. 13, 21 (2005).

¹¹⁸ *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2012 WL 6930302, at *20 (10th Cir. Dec. 20, 2012); see also Ilya Shapiro, *Mandates Make Martyrs Out of Corporate Owners*, SCOTUSBLOG (Feb. 24, 2014), <http://www.scotusblog.com/2014/02/symposium-mandates-make-martyrs-out-of-corporate-owners/>, archived at <http://perma.cc/PK7W-M8PT> (“Without the HHS rule, women will still be free to obtain contraceptives, abortions, and whatever else isn’t illegal.”).

¹¹⁹ See CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 187 (1989); see also Gavison, *supra* note 102, at 24 (“The belief that private acts are relatively inconsequential helps to justify noninterference as well as to perpetuate low visibility and an absence of public concern.”).

¹²⁰ Health insurance most closely resembles worker’s compensation, which similarly involves an employer mandate—though in that case compulsory—to purchase private insurance or self-insure through premiums paid for by employees in the form of foregone wages. Worker’s compensation insurance has survived federal and state religious liberty challenges. Elizabeth Sepper, *Contraception and the Birth of Corporate Conscience*, 22 AM. U. J. GENDER SOC. POL’Y L. 303, 329–35 (2014).

¹²¹ Robert I. Field, *Government as the Crucible for Free Market Health Care: Regulation, Reimbursement, and Reform*, 159 U. PA. L. REV. 1669, 1709, 1712 (2011).

to use contraception—from other “public” social insurance programs. The Seventh Circuit expressed it starkly: “The government has not explained why free contraception deserves to be ranked as a governmental interest akin to the Social Security system in order of importance to the public good.”¹²² The Supreme Court firmly rejected the comparison between the contraceptive challenge and the objection to social security insurance that it had refused to accommodate in *United States v. Lee*.¹²³ The Court described the cases as “quite different.”¹²⁴

The recognition that the use of contraception is private need not have ineluctably led courts to exclude its costs from employment compensation or public interest. Our constitutional law acknowledges that reproductive choices—including the use of contraception—“involv[e] the most intimate and personal choices a person may make” and belong to “the private realm of family life”¹²⁵ Similarly, the Family and Medical Leave Act, Pregnancy Discrimination Act, and Equal Pay Act each accept that decisions about sex and maternity “may rightly belong (solely) in the private sphere.”¹²⁶ Nonetheless, these statutes signify that women should be able to make them “under employment conditions that respect whatever those decisions may be.”¹²⁷ In other words, society has an interest in ensuring reproductive freedom in the workplace, and employers owe duties to their employees in this regard.

Privatization of contraception’s costs gives women more of what Anita Allen terms “the wrong kind of privacy.”¹²⁸ It makes invisible the ways in which lack of insurance coverage for contraception effectively impedes women’s “freedom” to avoid reproduction. Many women cite cost as a major factor inhibiting their contraceptive use and report that they would use long-lasting, more expensive modes of contraception—IUDs, in particular—were cost no barrier.¹²⁹ Here, as Catharine MacKinnon said with regard to abortion, “abstract privacy protects abstract autonomy without inquiring into

¹²² *Korte v. Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013).

¹²³ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783–84 (2014).

¹²⁴ *Id.* at 2784.

¹²⁵ *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

¹²⁶ Baldwin, *supra* note 109, at 94.

¹²⁷ *Id.*

¹²⁸ Anita L. Allen, *Privacy at Home: The Twofold Problem*, in REVISIONING THE POLITICAL: FEMINIST RECONSTRUCTIONS OF TRADITIONAL CONCEPTS IN WESTERN POLITICAL THEORY 193, 208 (Nancy J. Hirschmann & Christine Di Stefano eds., 1996); see also Olsen, *supra* note 104, at 325 (“Privacy is most enjoyed by those with power. To the powerless, the private realm is frequently a sphere not of freedom but of uncertainty and insecurity.”).

¹²⁹ See David Eisenberg et al., *Cost as a Barrier to Long-Acting Reversible Contraceptive (LARC) Use in Adolescents*, 52 J. ADOLESCENT HEALTH S59, S59 (2013) (concluding cost is a “major barrier” for adolescents); Aileen M. Gariepy et al., *The Impact of Out-of-Pocket Expense on IUD Utilization Among Women with Private Insurance*, 84 CONTRACEPTION e39, e40 (2011) (finding that only twenty-five percent of women who requested an IUD had one inserted after learning of its costs).

whose freedom of action is being sanctioned, at whose expense.”¹³⁰ Such privacy, in practice, coerces women into choices they might not otherwise make.¹³¹

Consider too that the choice to use contraceptives is forced, to some degree, into the “public” by the corporate challengers to the mandate. Some will cover contraception if used for non-contraceptive purposes, interjecting the employer into the private doctor-patient relationship.¹³² In so doing, they mirror the ways that law and medicine have intervened in and limited women’s access to contraceptives, abortion, and childbirth methods—making public what might be considered private rights.

B. *Women’s Dependency, Public Burden*

The contraception litigation manifests the contradictory nature of the market within the public-private dichotomy. On the one hand, the market is public and distinct from the private family, which bears the cost of contraception. On the other, the market is private and safeguarded from public/government regulation.

Having categorized contraception as private to the family for the purposes of evaluating the public interest in insurance coverage, courts allowed that if the costs of contraception were to be lifted from the family, they must fall on the government, not the market. A number of lower courts determined that the government had a means at hand that would not restrict the *private* sphere of corporate religious exercise: namely, a government-run and financed program.¹³³ The Seventh Circuit suggested several options: “The government can provide a ‘public option’ for contraception insurance; it can give tax incentives to contraception suppliers to provide these medications and services at no cost to consumers; it can give tax incentives to consumers of contraception and sterilization services.”¹³⁴ Other courts saw the existence of Title X family planning funding for low-income women as a means to provide contraceptive access to all women less restrictive of employers’ religious beliefs.¹³⁵

¹³⁰ MACKINNON, *supra* note 119, at 194.

¹³¹ *See id.* at 187; *see also* Gavison, *supra* note 102, at 24 (“The belief that private acts are relatively inconsequential helps to justify noninterference as well as to perpetuate low visibility and an absence of public concern.”).

¹³² *See, e.g.,* Irin Carmon, *This Is the Next Hobby Lobby*, MSNBC (July 30, 2014), <http://www.msnbc.com/msnbc/the-next-hobby-lobby>, archived at <http://perma.cc/K9J9-P3B2> (reporting Notre Dame’s coverage of contraceptives used for purportedly medical reasons). A number of state contraceptive mandates require contraceptive coverage for non-contraceptive purposes even by religious objectors. MICHELLE L. OXMAN, WOLTERS KLUWER L. & BUS., STATE MANDATES FOR INSURANCE COVERAGE OF CONTRACEPTION BEFORE AND AFTER HEALTH REFORM 7 (2013), archived at <http://perma.cc/SV6P-THY4>.

¹³³ *See, e.g.,* *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1298–99 (D. Colo. 2012).

¹³⁴ *Korte v. Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013).

¹³⁵ *See, e.g.,* *Beckwith Electric Co. v. Sebelius*, 960 F. Supp. 2d 1328, 1349 n.16 (M.D. Fla. 2013); *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377, 415 (3d

Although the Court in *Hobby Lobby* avoided adopting this reasoning, it devoted several paragraphs to endorsing direct government funding as the “most straightforward” less restrictive means of furthering the government’s interests.¹³⁶ It opined that, “[I]f, as HHS tells us, providing all women with cost-free access to all FDA-approved methods of contraception is a Government interest of the highest order, it is hard to understand HHS’s argument that it cannot be required under RFRA to pay *anything* in order to achieve this”¹³⁷ The Court went so far as to use the entire cost of the Affordable Care Act as the appropriate reference point to analyze the feasibility of government funding.¹³⁸ The majority suggests—as Justice Ginsburg put it—“let the government pay.”¹³⁹ Government financing or provision, of course, is rendered practically impossible by politics; yet, this entirely theoretical less restrictive means became the “most straightforward” option. Already, one lower court has read *Hobby Lobby* to require the government to show that it cannot provide coverage directly or offer grants or tax credits to employees.¹⁴⁰

Even under the Court’s expanded accommodation, contraception (or insurance coverage for it) ultimately is funded through the public coffers. The federal government has long provided significant tax benefits to employers for compensating employees with health benefits in the place of wages.¹⁴¹ Now, in order to ensure that these benefit plans meet minimum standards of covering preventive care, including contraception, and observe other new regulatory requirements, the Affordable Care Act imposes stiff taxes for failure to offer ACA-compliant health benefits. In seeking a religious exemption from the contraceptive mandate, employers effectively demand a tax subsidy from the government—despite their failure to conform to the new minimum standards. Having received a Supreme Court-mandated accommodation, *Hobby Lobby*, for example, continues to receive a substantial tax subsidy,

Cir. 2013) (Jordan, J., dissenting) (“[T]he government already provides free contraception to some women, and there has been no showing that increasing the distribution of it would not achieve the government’s goals.”).

¹³⁶ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780–81 (2014).

¹³⁷ *Id.* at 2781.

¹³⁸ *Id.*

¹³⁹ *Id.* at 2802 (Ginsburg, J., dissenting); see also *The Reid Report*, MSNBC (June 30, 2014), https://archive.org/details/MSNBCW_20140630_180000_The_Reid_Report#start/1080/end/1140 (Professor Laurence Tribe explaining that “[W]hat the court said was that as long as the government can provide the contraception at public expense, there is no need to burden the religious beliefs of closely held corporations whose owners basically operate the business. That’s not as radical a decision as some people think.”).

¹⁴⁰ *Archdiocese of St. Louis v. Burwell*, No. 4:13-cv-02300, 2014 WL 2945859, at *10 (E.D. Mo. June 30, 2014).

¹⁴¹ CONGRESSIONAL BUDGET OFFICE, *THE DISTRIBUTION OF MAJOR TAX EXPENDITURES IN THE INDIVIDUAL INCOME TAX SYSTEM 14* (2013), archived at <http://perma.cc/5CAS-SHYB> (the federal government itself pays one third of the aggregate premium for employer-sponsored health insurance); see also Field, *supra* note 121, at 1709, 1712 (tax subsidy amounts to one third of premiums paid to private establishments).

even though it offers insurance that does not comply with the ACA's requirements.¹⁴²

Self-insured plans receive an even more straightforward government subsidy. Under the accommodation, the third-party administrators of self-insured plans arrange for contraceptive-only plans. The government then reimburses them for the costs of these plans through reductions in fees imposed on insurance companies in the federal insurance exchanges.¹⁴³ As a result, as Solicitor General Verrilli said at oral argument in *Hobby Lobby*, the expansion of the non-profit accommodation to for-profit businesses imposes an "open-ended increase in the cost to the government."¹⁴⁴ Corporations that self-insure may receive an additional subsidy, because they likely will enjoy any cost-savings that result from reduced rates of unintended pregnancy without having to pay for contraception.

In the contraceptive cases, the courts' analysis revives the traditional dichotomy between the family-wage model for men and government-welfare model for women.¹⁴⁵ This separation of women's needs from employer-based insurance reflects a long-standing history of social citizenship "highly inflected by gender" whereby "citizens usually gain entitlements and benefits based on sex or on types of status that are gender-related, such as employment, military service, and motherhood."¹⁴⁶ As a general matter, the family-wage model presumed women to be temporary interlopers in the workforce and more suitably situated in the home.¹⁴⁷ Consequently, occupations in which women were concentrated typically were excluded from employee protections and insurance programs at their origins, including social security, unemployment compensation, and wage-and-hour laws.¹⁴⁸ In establishing old age insurance, for example, Congress excluded teachers, religious work-

¹⁴² In the absence of the religious exemption, *Hobby Lobby* would effectively lose the subsidy in the sense that the subsidy would be dwarfed by the taxes for providing non-ACA-compliant insurance plans (\$100 a day per employee and an annual tax assessment). See 26 U.S.C. §§ 4980D, 4980H.

¹⁴³ U.S. Dep't of Health & Human Serv., *Administration Issues Final Rules on Contraception Coverage and Religious Organizations* (June 28, 2013), <http://www.hhs.gov/news/press/2013pres/06/20130628a.html>, archived at <http://perma.cc/YJ97-EA78>.

¹⁴⁴ Transcript of Oral Argument at 66, *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356), archived at <http://perma.cc/WM9R-R5YQ>.

¹⁴⁵ See Barbara J. Nelson, *The Origins of the Two-Channel Welfare State: Workmen's Compensation and Mothers' Aid*, in *WOMEN, THE STATE, AND WELFARE* 123, 124 (Linda Gordon ed., 1984).

¹⁴⁶ Sonya Michel, *A Tale of Two States: Race, Gender, and Public/Private Welfare Provision in Postwar America*, 9 *YALE J.L. & FEMINISM* 123, 123 (1997).

¹⁴⁷ See Ann R. Tickamyer, *Public Policy and Private Lives: Social and Spatial Dimensions of Women's Poverty and Welfare Policy in the United States*, 84 *KY. L.J.* 721, 729-30 (1996) (noting that women "who have weak attachments to the labor market for whatever reason also have more tenuous claims on the rights of citizenship both in practice and in popular opinion").

¹⁴⁸ See ALICE KESSLER-HARRIS, *IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN TWENTIETH CENTURY AMERICA* 95-96 (2001).

ers, and social and welfare workers, the vast majority of whom were women, at the urging of employers.¹⁴⁹

In the development of corporate conscience doctrine, private dependency within the family and public responsibility for dependency co-existed. Women were treated as marginal employees, rather than as full participants in the market. Whereas employment-based insurance was expected to cover men's health, women were shunted into (theoretical) government-funded family planning clinics. The gender of women thus played a central role in *Hobby Lobby's* substantive revision of religious liberty doctrine. It also, as the next Part explains, was employed as a potential limit on corporate conscience.

IV. GENDER AS LIMITING

Imagine a corporation—let's call it NickNack Corp.—that claims an exemption from a hypothetical requirement that employers provide health insurance to spouses of employees. It asserts a sincere belief that the law will substantially burden its religious beliefs. Like *Hobby Lobby*, NickNack is willing to comply with the law in most cases, but balks at extending coverage to spouses in interracial marriages based on its religious convictions. The “broad” interests at stake seem to be public health and equality, as in *Hobby Lobby*. The narrower interest would be access to health insurance. Assume, as a federal law, this requirement has exceptions for small businesses and, like the ACA, permits employers to pay a tax rather than offer insurance at all. NickNack could plausibly argue that the government has a less restrictive means at hand to ensure everyone receives health insurance—namely, the health insurance exchanges.

Consider another corporation—McCarthy Corp.—that has religious objections to covering vaccination as required under the ACA's preventive services mandate. Like contraceptives, vaccines serve an interest in public health. Small employers and grandfathered plans are not subject to the mandate. McCarthy alleges that, even were the government to have a compelling interest, the “most straightforward” less restrictive means to further this interest is direct government funding in the form of the extant Vaccines for Children program.¹⁵⁰

Virtually everyone agrees that no court would exempt NickNack and McCarthy. The former case is seen as ludicrous.¹⁵¹ The second is considered

¹⁴⁹ See SUZANNE METTLER, *DIVIDING CITIZENS: GENDER AND FEDERALISM IN NEW DEAL PUBLIC POLICY* 73 (1998) (“Women employees accounted for 75.7% of all teachers, 74.6% of all religious workers, and 64.3% of all social and welfare workers.”).

¹⁵⁰ *Vaccines for Children Program*, CENTERS FOR DISEASE CONTROL (Feb. 14, 2014), <http://www.cdc.gov/vaccines/programs/vfc/about/index.html>, archived at <http://perma.cc/8LR4-PYNE>.

¹⁵¹ A Google search turned up exceptionally few commentators entertaining concerns about racial discrimination. Greg Stohr, *Gay Marriage Stirs Backlash as Businesses As-*

plausible but swiftly dispatched.¹⁵² Why is the outcome in these cases so obvious? What differentiates NickNack's and McCarthy's claims from Hobby Lobby's?

One answer is that the contraceptive mandate contains a religious accommodation that preserves employee access to insurance coverage and that could be expanded to include for-profit corporations. But this is too facile. When the lower courts entirely exempted for-profits from the mandate such that employees did not retain access, their decisions were not decried as unthinkable. Even in *Hobby Lobby*, a Supreme Court decision exempting employers from the mandate altogether was viewed as possible, perhaps even probable. And, today, the lower courts continue to exempt non-profits from the accommodation in a way that deprives employees of coverage.

The material distinction, this Part argues, is gender. Part A contends that the *Hobby Lobby* Court implied that gender would limit the potentially broad reach of its decision. Faced with healthcare that only women need and that relates closely to their ability to engage in society on equal terms, the Court suggested—as the lower courts had determined—that contraception is about neither health nor equality. In so doing, it intimated that outside this gendered context, health and antidiscrimination efforts will not be affected by its ruling. Part B engages with the possibility that gender—with reference to reproduction, sexuality, or sex—might shore up the slippery slope.

A. *The Implied Gender Limit in Hobby Lobby*

The overarching doctrinal change in *Hobby Lobby*—namely, the acceptance of corporate conscience, the refusal to evaluate claims of substantiality, and the increase in the burden on the government—makes demands for exemption from a wide array of employment and consumer protections more likely to succeed. If, as the Court suggested, exceptions render the govern-

sert Religion, BLOOMBERG (July 18, 2014), <http://www.bloomberg.com/news/2014-07-18/gay-marriage-stirs-backlash-as-businesses-assert-religion.html>, archived at <http://perma.cc/6C94-TQNW> (quoting lawyer with Alliance Defending Freedom, which represents a number of objectors, saying, “Objections based on race are a lot different from objections based on sexual behavior and morality. . . . The Bible is clear about sexual morality. It’s clear about marriage being between a man and a woman.”).

¹⁵² Jim Spencer, *Hobby Lobby Case Empowers Millions of Businesses to Sue Government*, *Experts Say*, STAR TRIB., July 6, 2014, archived at <http://perma.cc/8K3P-GHBD> (quoting Daniel Kleinberger, a professor at William Mitchell College of Law, as saying, “Even a genuine belief against vaccination has to yield to public health. No one has made an argument that the presence or absence of contraception is life-threatening.”); Bob Egelko, *Supreme Court Birth Control Ruling Could Ripple Widely*, S.F. GATE, Dec. 6, 2013, archived at <http://perma.cc/Q84U-AZBL> (quoting Micah Schwartzman, a University of Virginia law professor, as saying that “A court might say that contraception is relatively inexpensive and that failure to provide coverage for it is not sufficiently compelling to justify burdening an employer’s religious liberty, while at the same time holding that failure to provide coverage for blood transfusions or vaccinations goes too far because of the costs of getting those treatments and the potential health consequences of not having them.”).

ment's interest less than compelling, few laws, particularly at the federal level, will meet the standard.¹⁵³ The Court's skepticism of interests in public health and sex equality, in particular, calls into question antidiscrimination and public health laws.

The libertarian ethos of the contraceptive challenges—now part of doctrine—stands in tension with our longstanding commitment to equality in commercial life and to regulation of powerful economic actors. As I argue elsewhere, the doctrinal result of the social phenomenon of religious libertarianism is free exercise Lochnerism.¹⁵⁴ Like *Lochner's* liberty of contract, *Hobby Lobby's* corporate conscience threatens the integrity of a wide array of regulations of commercial life.

Yet the *Hobby Lobby* Court struggled to articulate any principle that might contain corporate conscience. For example, even as it repeatedly invoked the “closely held”¹⁵⁵ nature of *Hobby Lobby* and *Conestoga Wood*, it said “[n]o known understanding of the term ‘person’ includes some but not all corporations.”¹⁵⁶ The Court could offer only pragmatic predictions, rather than principled reasons, for why its holding would not equally extend to public corporations.¹⁵⁷

In the absence of limiting principles, the Court implied that in practice gender will limit corporate religious claims. It insisted that its decision was limited to the contraceptive mandate.¹⁵⁸ The mandate, however, had been justified by reference to public health and equality interests and differed little from existing state insurance mandates and other ACA provisions. In order to assuage fears that public health and antidiscrimination laws were at risk, the Court sought to separate contraception from healthcare and access to contraceptive coverage from equality in the workplace.

¹⁵³ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2800–01 (2014) (Ginsburg, J., dissenting).

¹⁵⁴ Elizabeth Sepper, *Free Exercise Lochnerism* (June 3, 2014) (unpublished manuscript) (on file with the *Harvard Journal of Law and Gender*).

¹⁵⁵ Closely held corporations are not traded publicly and, as a general rule, have a limited number of shareholders. Definitions vary, however. See INTERNAL REVENUE SERVICE, PUBLICATION 542, archived at <http://perma.cc/L3BH-AKMN> (defining a “closely held corporation” as one in which “at any time during the last half of the tax year, more than 50% of the value of its outstanding stock is, directly or indirectly, owned by or for five or fewer individuals. ‘Individual’ includes certain trusts and private foundations.”); MO. REV. STAT. § 351.755 (2012) (defining a closely held corporation as one with up to fifty shareholders “whose articles of incorporation contain a statement that the corporation is a statutory close corporation”). As many as 90% of businesses are closely held; they employ over half of the American workforce. See William Patterson University, CENTER FOR CLOSELY HELD BUSINESSES, <http://www.wpunj.edu/CloselyHeld/EconomicImpact.dot>, archived at <http://perma.cc/M3VZ-R5UZ>.

¹⁵⁶ *Hobby Lobby*, 134 S. Ct. at 2769.

¹⁵⁷ *Id.* at 2774 (“It seems unlikely that the sort of corporate giants to which HHS refers will often assert RFRA claims.”).

¹⁵⁸ *Id.* at 2783.

1. “*Different Interests*” of Other Insurance Mandates

With regard to health, the Court stated, “[O]ur decision should not be understood to hold that an insurance coverage mandate must necessarily fall if it conflicts with an employer’s religious beliefs.”¹⁵⁹ Responding to the possibility of challenges to covering vaccines or blood transfusions, the Court again invoked pragmatic considerations. It noted that it knew of no evidence that insurance plans excluded vaccines or blood transfusions before the ACA.¹⁶⁰ Of course, precisely such evidence existed with regard to contraception.

The Court said that other coverage requirements “may involve *different arguments* about the least restrictive means of providing them.”¹⁶¹ The import of this statement depends on a number of questions: Was the accommodation for non-profits crucial to *Hobby Lobby*, potentially restricting its holding to other statutes with accommodations or religious exemptions? Could the existence of the contraceptive accommodation be used to argue that such an accommodation is workable (and less restrictive on employers’ religion) with regard to other mandated care? The Court devoted several paragraphs to endorsing direct government funding as a less restrictive means.¹⁶² If the government has provided no accommodation, is direct public funding or administration the less restrictive means? And how do preexisting programs factor in? If Title X is relevant to the least restrictive means analysis for contraception, by the same logic the federal Vaccines for Children program is a less restrictive means to deliver immunizations.¹⁶³ If measured against the total cost of the ACA, as the Court suggests,¹⁶⁴ any expansion of the program would seem financially feasible.

The Court distinguished contraception in another way, saying, “Other coverage requirements, such as immunizations, may be supported by *different interests* (for example, the need to combat the spread of infectious diseases).”¹⁶⁵ This phrasing raises more questions than it answers. How are other requirements for insurance “different” from an insurance mandate for contraception? All such mandates further the governmental interest in public health. The invocation of “infectious” diseases seems to differentiate immunizations from contraception, but many of the Affordable Care Act’s insurance mandates—such as diabetes, cholesterol, and depression screenings—do not involve the potential for infection.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 2780.

¹⁶³ *Vaccines for Children Program*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Feb. 14, 2014), <http://www.cdc.gov/vaccines/programs/vfc/about/index.html>, archived at <http://perma.cc/8LR4-PYNE>.

¹⁶⁴ *Hobby Lobby*, 134 S. Ct. at 2781.

¹⁶⁵ *Id.* at 2783.

The difference lies in the Court's refusal to see women's reproductive healthcare as healthcare. As Jessie Hill explains, "Underlying the government's contraceptives mandate is a judgment that maintaining control of one's reproductive life is a basic medical need and that prescription contraceptives are a morally and socially appropriate means of meeting that need."¹⁶⁶ The government compiled extensive data showing the health benefits of contraception to women, their children, and society.¹⁶⁷

The challengers and courts siding with them, however, portrayed contraception as only minimally related to health. In *Conestoga Wood Specialties Corp. v. Sebelius*, for example, the dissenting opinion distinguished contraceptives from "a litany of laudatory things" that are mandated by the ACA and described contraception as "one fatal dish" on the menu of "healthful" things.¹⁶⁸ The Seventh Circuit dismissed interests in "public health" and "gender equality" as overly general and concluded that whether "broaden[ing] access to free contraception and sterilization so that women might achieve greater control over their reproductive health qualifies as an interest of surpassing importance is both contestable and contested."¹⁶⁹ The D.C. Circuit found unconvincing the government's argument that the mandate prevents "negative health consequences for both the woman and the developing fetus" and instead suggested that contraceptives might actually impair women's health.¹⁷⁰ It said, "While we do not exclude the possibility that the state's interest in safeguarding maternal or fetal health sometimes may be compelling, we cannot draw such a conclusion in this particular context."¹⁷¹

The *Hobby Lobby* Supreme Court also questioned the link between public health and contraception. The majority compared contraception to abortion.¹⁷² In so doing, it invoked a legislative and judicial tradition of omitting abortion from healthcare and rendered contraception's categorization as healthcare suspect.

Justice Kennedy's concurrence reflected this view. He said:

¹⁶⁶ Jessie Hill, *The Contraceptives Coverage Controversy—What's Old Is New Again*, SCOTUSBLOG (Feb. 21, 2014), <http://www.scotusblog.com/2014/02/symposium-the-contraceptives-coverage-controversy-whats-old-is-new-again/>, archived at <http://perma.cc/M5TS-KTTM>.

¹⁶⁷ INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS (2011), archived at <http://perma.cc/HW7D-MT44>.

¹⁶⁸ *Conestoga Wood Specialties Corp. v. Sebelius*, No. 5–12–cv–06744, 2013 WL 1277419, at *7 (3d Cir. Feb. 8, 2013) (Jordan, J., dissenting).

¹⁶⁹ *Korte v. Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013) (noting but dismissing the government's arguments that the mandate "furthers these interests by reducing unintended pregnancies, achieving greater parity in health-care costs, and promoting the autonomy of women both economically and in their reproductive capacities").

¹⁷⁰ *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1221 (D.C. Cir. 2013).

¹⁷¹ *Id.*

¹⁷² *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014).

[T]he Department of Health and Human Services (HHS) makes the case that the mandate serves the Government's compelling interest in providing insurance coverage that is necessary to protect the health of female employees, coverage that is significantly more costly than for a male employee. There are many medical conditions for which pregnancy is contraindicated. It is important to confirm that a premise of the Court's opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees.¹⁷³

Justice Kennedy's language indicates that contraception *can* be healthcare, but only for women for whom pregnancy would aggravate preexisting or latent medical conditions. Differentiating contraception used for "medical conditions" from that used to avoid reproduction mirrors the separation of "medically necessary" abortions from those of "convenience" in doctrine and legislation.¹⁷⁴

2. *No "Illegal (Race?) Discrimination"*

Having excised contraception from other healthcare, the Court went on to disclaim the import of its holding for antidiscrimination law. It rejected the possibility that its decision might shield "discrimination in hiring, for example on the basis of race," because "[t]he 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."¹⁷⁵

This part of the opinion, however, was most notable for what the Court did not say. In responding to the dissent's examples of cases involving discrimination on the basis of religion, sex, sexual orientation, marital status, and race,¹⁷⁶ the majority acknowledged only the importance of norms against race discrimination. In so doing, the Court called into question whether the government has a compelling interest in preventing discrimination on any other basis and whether antidiscrimination laws are the least restrictive means of doing so.

¹⁷³ *Id.* at 2785–86 (Kennedy, J., concurring) (citations omitted).

¹⁷⁴ See Maya Manian, *The Consequences of Abortion Restrictions for Women's Healthcare*, 71 WASH. & LEE L. REV. 1317, 1336 (2014) ("Realigning abortion with healthcare and repositioning the law to recognize access to abortion care as a critical part of the continuum of women's medical needs is essential to protecting women's health."); Lisa C. Ikemoto, *Abortion, Contraception and the ACA: The Realignment of Women's Health*, 55 HOW. L.J. 731, 763 (2012) (with regard to abortion, "[w]omen's health, as defined by federal policy, now omits a procedure that an estimated three in ten women will have by the age of 45" and "has lost the key link to the rights of self-determination and equality").

¹⁷⁵ *Hobby Lobby*, 134 S. Ct. at 2783.

¹⁷⁶ *Id.* at 2804–05 (Ginsburg, J., dissenting).

It was self-evident to the Court that race discrimination in employment could not be allowed to stand. The Court, however, was non-committal with regard to sex and sexual orientation. It perceived race discrimination in hiring under Title VII as quite different from sex discrimination in providing benefits under the same statute. Litigants and scholars similarly noted that future cases might raise discrimination concerns, but ignored the inequality inherent in a health plan that meets all of men's health needs and fails to meet women's.¹⁷⁷ Yet, as Dawn Johnsen observes, "The ability to bear children is to sex discrimination what dark skin is to race discrimination. It is the immutable characteristic that distinguishes the disadvantaged from the advantaged and which historically has been used to justify the subordination of the disadvantaged."¹⁷⁸

B. *Cabining Future Collisions Between Equality and Corporate Religious Exemption?*

In *Hobby Lobby*, the Court implied that objections to contraception are *sui generis*, such that accommodating them will not oil the slippery slope. But can corporate religious claims be so cabined? This Part engages with the possibility that gender—whether defined by reference to reproduction, sexuality, or sex—might shore up the slide toward corporate conscience.

Hobby Lobby might be read to turn on the Court's view of reproduction. Reproduction has long confounded courts called upon to determine whether contraception, abortion, or prenatal care is properly understood as health-care.¹⁷⁹ It has confused and restricted the Court's interpretation of sex equal-

¹⁷⁷ See also Tom Hayes, *USC Law Professor: Hobby Lobby Decision Narrow in Scope*, S.C. RADIO NETWORK (July 1, 2014), <http://www.southcarolinaradionetwork.com/2014/07/01/usc-law-professor-hobby-lobby-decision-narrow-in-scope/>, archived at <http://perma.cc/F73D-9537> ("You have people who have very fundamentalist beliefs of different religions that are very oppressive to other people," [Professor Eleanor] Fox said, adding that this fact raises the question: "Can corporations use this religious exemption to protect them in doing very bigoted things? The Supreme Court tried to be very careful to say that they did not want this to be used as an excuse for discrimination that would be otherwise unlawful, but you may have people try."); Josh Blackman, *What About RFRA Challenges to Discrimination Laws?*, JOSH BLACKMAN'S BLOG (Mar. 26, 2014), <http://joshblackman.com/blog/2014/03/26/what-about-rfra-challenges-to-discrimination-laws/>, archived at <http://perma.cc/6RGS-R8QY> (arguing, with regard to the *Hobby Lobby* oral argument, that "sooner or later we will see a conflict of RFRA and an anti-discrimination law"). Although some contraceptive challengers cover contraceptives for "medical reasons," commentators do not categorize their selective refusal as discriminatory. See Gabriel Arana, *Hobby Lobby's Gay Mystery*, SALON, July 3, 2014, archived at <http://perma.cc/B86X-23VJ> ("[Jenny] Pizer [at Lambda Legal] says the courts are unlikely to sanction decisions targeted at a minority group. 'One likely answer is that an exclusion of coverage based on antipathy for a group should not succeed given what the court does here,' Pizer says. 'If an employer were to say 'We'll provide insurance coverage for people who got HIV through X,' I don't see court [sic] accepting that distinction.'").

¹⁷⁸ Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 622 (1986).

¹⁷⁹ See, e.g., *State Bd. of Nursing & State Bd. of Healing Arts v. Ruebke*, 913 P.2d 142, 147 (Kan. 1996) (holding that pregnancy and childbirth, since they do not mean that

ity protections under the Constitution and federal statutes.¹⁸⁰ Now, in *Hobby Lobby*, reproduction confounds religious liberty doctrine.

What would it mean if corporate conscience were limited to reproduction? Most obviously, regulations requiring pharmacies to fill prescriptions for emergency contraception would be vulnerable,¹⁸¹ especially to the extent that state courts follow the Supreme Court in interpreting state religious freedom restoration acts.¹⁸² Employers might seek to fire women for using contraception.¹⁸³ Insurance companies—some of which are religiously affiliated and others of which have religious shareholders or directors—might object to providing insurance for an array of reproductive care. Courts could create a judicially enforceable right for healthcare facilities to refuse medical services to patients in need.

As the recent experience of medical conscience legislation shows, one can expect that, once granted accommodation, objectors will increase the pitch and frequencies of their demands. As I have argued elsewhere, exemptions for medical providers did not resolve clashes over abortion but instead intensified claims to further exemptions for a wider array of procedures (eventually, in some states, to any medical care).¹⁸⁴ Religious carve-outs did not result in a civil peace.

The contraceptive mandate controversy is itself a microcosm of this phenomenon. First, the regulation involved substantial religious accommodation. When religious employers were exempted, religiously affiliated non-profits demanded—and won—accommodation.¹⁸⁵ Despite this, they contin-

someone is sick, do not fall within the definitions of the practice of medicine and nursing).

¹⁸⁰ See, e.g., Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 955 (1984); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 264–65 (1992) (arguing, with regard to abortion, that Equal Protection doctrine “lacks the critical capacity to discern gender bias in reproductive regulation, a grasp of how regulation respecting pregnancy—a ‘real’ physical difference between the sexes—can nevertheless be sexually discriminatory”).

¹⁸¹ Sarah Padbury, *Family-Owned Pharmacy Leans on Hobby Lobby Ruling for Support*, WORLD (Aug. 14, 2014), http://www.worldmag.com/2014/08/family_owned_pharmacy_leans_on_hobby_lobby_ruling_for_support, archived at <http://perma.cc/NNB3-N9KS>.

¹⁸² See, e.g., Barr v. Sinton, 295 S.W.3d 287, 296 (Tex. 2009) (“Because TRFRA, RFRA, and RLUIPA were all enacted in response to *Smith* and were animated in their common history, language, and purpose by the same spirit of protection of religious freedom, we will consider decisions applying the federal statutes germane in applying the Texas statute.”).

¹⁸³ Laura Bassett, *Arizona Birth Control Bill Penalizes Women For Using Contraception For Non-Medical Reasons*, HUFFINGTON POST (Mar. 14, 2012), http://www.huffingtonpost.com/2012/03/14/arizona-birth-control-bill-contraception-medical-reasons_n_1344557.html, archived at <http://perma.cc/UW8R-7J8G>.

¹⁸⁴ Elizabeth Sepper, *Doctoring Discrimination in the Same-Sex Marriage Debates*, 89 IND. L.J. 703, 754, 741 (2014); see also Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 1501, 1509–12 (2012) (reviewing the history of medical conscience legislation).

¹⁸⁵ Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725,

ued to insist on ever-greater exemptions for both the non-profit and for-profit sectors. Second, in a concession to abortion opponents, the ACA prohibited abortion from being mandated as an essential health benefit for insurance plans sold on the insurance exchanges.¹⁸⁶ But now the very definition of abortion is contested. Emergency contraception and IUDs become abortion. Vaccines or other treatments made possible through embryonic stem cell research could follow.

Although courts treated contraception as uniquely morally objectionable as they expanded religion to corporations, religious beliefs around women who work when married, pregnant, or mothers are myriad. As in the contraceptive context, employers might seek to deny care selectively, for example, covering prenatal care for married, but not unmarried, women or for women who conceive in the conventional way, but not for those who use assisted reproductive technologies. Not so long ago, coverage of prenatal care and maternity benefits faced widespread opposition from employers.¹⁸⁷ Such care benefits others in much the same way contraception does—ensuring maternal and infant health to the benefit of society. Suggesting maternity benefits would face resistance today might seem outlandish, but economic conservatives have recently taken to the airwaves to oppose covering maternity care because pregnancy is a “choice” and they should not have to pay for care only women need.¹⁸⁸ The Pregnancy Discrimination Act and Family Medical Leave Act could be eviscerated through piecemeal exemptions.

Alternately, one could read the contraceptive controversy as about sexuality. Contraceptive coverage first came to the national spotlight with Rush Limbaugh’s diatribe against Georgetown law student Sandra Fluke for wanting “taxpayers to pay for her to have sex.”¹⁸⁹ A number of contraceptive challengers based their objections on the view “that human sexuality serves two purposes: to unite husband and wife and to generate new life”¹⁹⁰—that is, that only married, heterosexual, reproductive sex is morally permissible. Amici for the Hobby Lobby corporation similarly expressed concern that access to contraception harms women by making them “the mere instrument

8726 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147) (“These commenters included some religiously-affiliated educational institutions, health care organizations, and charities. Some . . . expressed concerns about paying for such services and stated that doing so would be contrary to their religious beliefs.”).

¹⁸⁶ See Alina Salganicoff et al., *Coverage for Abortion Services and the ACA*, KAISER FAMILY FOUNDATION 155 (Sept. 2014), <http://files.kff.org/attachment/coverage-for-abortion-services-and-the-aca-issue-brief>, archived at <http://perma.cc/E3EN-GZLQ>.

¹⁸⁷ See Dinner, *supra* note 92, at 452.

¹⁸⁸ Garance Franke-Rutanov, *Why Is Maternity Care Such an Issue for Obamacare Opponents?*, THE ATLANTIC (Nov. 22, 2013), <http://www.theatlantic.com/politics/archive/2013/11/why-is-maternity-care-such-an-issue-for-obamacare-opponents/281396/>, archived at <http://perma.cc/XY63-AFEP> (compiling examples).

¹⁸⁹ *Rush Limbaugh vs. Sandra Fluke: A Timeline*, THE WEEK (Mar. 9, 2012), <http://theweek.com/article/index/225214/rush-limbaugh-vs-sandra-fluke-a-timeline>, archived at <http://perma.cc/E3V9-6HDW>.

¹⁹⁰ *Mersino Mgmt. Co. v. Sebelius*, No. 13-cv-11296, 2013 WL 3546702, at *3 (E.D. Mich. July 11, 2013).

for the satisfaction of men's own desires" and encourages marital infidelity.¹⁹¹ Such objections reflect discomfort with women's sexuality and stereotyping about sex roles. Women's ability to have sex without suffering the consequences (pregnancy, childbirth, and childrearing) lies at their heart. Perhaps, in questioning public health and equality interests in contraception, courts signaled that they too perceive contraception as about sexual pleasure or non-repronormativity, which cannot, in their view, constitute a government interest.¹⁹²

Anxiety about non-hetero and non-reproductive sex arguably unites resistance to the contraceptive mandate with other claims of corporate conscience.¹⁹³ Pharmacies (and grocery stores) recently have demanded religious exemptions from regulations that require them to fill prescriptions for any Food and Drug Administration-approved drug, including birth control.¹⁹⁴ Photography businesses, florist shops, dress stores, bakeries, and hotels also have asserted corporate religious freedom as a shield to enable them to refuse services to same-sex marrying couples in violation of antidiscrimination law.¹⁹⁵ Across these contexts, the focus on sex works to disclaim the relevance of antidiscrimination law. Objectors reject the notion that any gender implications or stereotypes are at work. They describe covering contraception or baking a wedding cake as facilitating a sexually immoral act. Same-sex marriage objectors, like the contraceptive challengers, analogize to abortion.¹⁹⁶ They deny discrimination, noting that they otherwise serve

¹⁹¹ Brief for Am. Freedom Law Ctr. as Amici Curiae Supporting Hobby Lobby and Conestoga, et al., *Sebelius v. Hobby Lobby Stores, Inc.*, Nos. 13-354, 13-356 (Jan. 27, 2014), 2014 WL 333888, at *9; *see also* Brief for Beverly LaHaye Inst. as Amici Curiae Supporting Hobby Lobby and Conestoga et al., *Sebelius v. Hobby Lobby Stores, Inc.*, Nos. 13-354, 13-356 (Jan. 28, 2014), 2014 WL 316715, at *18 n.38 (contending that contraception impairs "women's ability to enter into and maintain desired marital relationships").

¹⁹² *See generally* Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001) (setting out feminist critique of repronormativity); Margo Kaplan, *Sex-Positive Law*, 89 N.Y.U. L. REV. 89 (2014) (suggesting that law should encourage sexual pleasure).

¹⁹³ Christopher Shea, *Beyond Belief: The Debate Over Religious Tolerance*, CHRONICLE OF HIGHER ED., June 9, 2014, archived at <http://perma.cc/BYA9-6X9E> (quoting Douglas Laycock describing objections to the contraceptive mandate and serving at same-sex weddings as reflecting a "conflict over sexual morality [that] is turning much of the country against religious freedom").

¹⁹⁴ *See Stormans v. Selecky*, 586 F.3d 1109, 1110 (9th Cir. 2009); *Morr-Fitz, Inc. v. Quinn*, 976 N.E. 2d 1160, 1160 (Ill. App. Ct. 2012).

¹⁹⁵ *See, e.g.*, *Elane Photography v. Willock*, 309 P.3d 53, 61 (N.M. 2013); *Cervelli v. Aloha Bed & Breakfast*, No. 11-1-3103-12 ECN, 2013 WL 1614105 (Haw. Cir. Ct. Apr. 11, 2013); *Katie McDonough, Yet Another Bakery Refuses to Make Cake for Gay Wedding* SALON (May 15, 2013), http://www.salon.com/2013/05/15/yet_another_bakery_refuses_cake_for_gay_wedding/, archived at <http://perma.cc/TDR6-6JEC>; *Nina Terrero, N.J. Bridal Shop Refused to Sell Wedding Dress to Lesbian Bride: Owner Says 'That's Illegal'*, ABC NEWS (Aug. 19, 2011), <http://abcnews.go.com/US/nj-bridal-shop-refused-sell-wedding-dress-lesbian/story?id=14342333#.UZqtN7Wkrlw>, archived at <http://perma.cc/76V9-5HRF>.

¹⁹⁶ *See, e.g.*, Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in SAME-SEX MARRIAGE AND RELIGIOUS LIB-

gays.¹⁹⁷ On this account, the issue is the act, not the status of women or gays.¹⁹⁸

If corporate conscience turns on the relationship of objections to sex, it is possible that the doctrinal change would be largely focused on women's sexuality and non-heterosexual sex. While gays and women transgress more openly, heterosexual men would also face serious consequences.¹⁹⁹ Denial of contraception alone would impose risk of child support obligations and raise costs for the entire family. Religious objectors could secure exemptions from public health and antidiscrimination laws where they can establish a conceivable link to "sexual morality"—such as dismissal of unmarried pregnant women, insurance coverage for STD treatment, and granting benefits for domestic partners or same-sex spouses. Religious challenges to marital status nondiscrimination laws could be revived to resist allowing visitation in medical facilities, benefits to domestic partners, or renting to cohabiting unmarried couples.

ERTY: EMERGING CONFLICTS 70, 77 (Douglas Laycock et al., eds., 2008) ("It is difficult to ignore the parallels emerging between same-sex marriage and the recently renewed debates about the limits of conscience in healthcare."); Thomas C. Berg, *What Same-Sex Marriage and Religious-Liberty Claims Have in Common*, 5 Nw. J. L. & Soc. POL'Y 206, 233 (2010) (objection to same-sex marriage "fits comfortably with the widely accepted 'conscience clauses' that protect refusal to participate in or directly facilitate an abortion, another specific form of conduct").

¹⁹⁷ See, e.g., *Arlene's Flowers v. Ferguson*, No. 13-2-00871-5, Third-Party Compl. at *7 (Wa. Benton County Sup. Ct. May 14, 2013) ("Arlene's Flowers has never refused to sell flowers to someone simply because of sexual orientation. But because of Barronelle Stutzman's Christian faith, she cannot as a matter of conscience participate in or facilitate a same-sex wedding.").

¹⁹⁸ See Letter from Robin Fretwell Wilson, Professor of Law, Wash. & Lee School of Law et al., to Brian E. Frosh, Md. State Sen., Chairman (Jan. 30, 2012) at 13 (arguing that objection "arises not from anti-gay animus, but from a sincere religious belief in traditional marriage"). But see Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 330 (1992) ("[T]hose interested in regulating the conduct of pregnant and fertile women do not openly impugn women's rights as equal citizens of this nation; rather, they insist that sex-specific regulation of women's conduct as parents is warranted for reasons specific to the physiology of the female body—to protect unborn life that women alone may bear.").

With regard to interracial marriage as well, objectors contended that religious beliefs specific to marriage—not biases based on status—were at work. See, e.g., Carlos A. Ball, *The Blurring of the Lines: Children and Bans on Interracial Unions and Same-Sex Marriages*, 76 FORDHAM L. REV. 2733, 2736 (2008) ("[B]oth antimiscegenation statutes and bans against same-sex marriage have been used to construct and reify essentialized and dualistic understandings of race and sex/gender."); Josephine Ross, *The Sexualization of Difference: A Comparison of Mixed-Race and Same-Gender Marriage*, 37 HARV. C.R.-C.L. L. REV. 255, 256 (2002) (arguing that both gay and interracial couples suffered similar sexualization of their marriages).

¹⁹⁹ See, e.g., Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1308–09 (1991) ("Although reproduction has a major impact on both sexes, men are not generally fired from their jobs, excluded from public life, beaten, patronized, confined, or made into pornography for making babies. . . . [W]omen, because of their sex, are subjected to social inequality at each step in the process of procreation.").

As reproduction and sexuality are subsets of gender discrimination, a third possibility exists: namely, that religious objections will supplant gender equality. *Hobby Lobby* sets up a collision between the Civil Rights Act and the Religious Freedom Restoration Act, both of which arguably have quasi-constitutional status.²⁰⁰ The Court suggests that when the two laws collide over race, the Civil Rights Act will prevail. The Court's dismissive take on sex equality, however, might indicate that when they collide over sex, RFRA will triumph.

At least in the interim, the lower courts' skepticism toward sex equality as a compelling interest suggests the fate of Title VII's prohibition on sex discrimination. As the D.C. district court in *Tyndale* admitted, under its reasoning, a for-profit corporation would be able to raise RFRA as a defense to Title VII claims.²⁰¹ The court analogized the contraceptive mandate to the application of antidiscrimination law to landlords opposed to cohabitation by unmarried people. It then concluded that both pose "a threat to the very continued existence" of the business, a "Hobson's choice" that constitutes a substantial burden without any further showing.²⁰²

Future litigation seems likely to challenge laws prohibiting discrimination on the basis of sexual orientation. New requirements that employers extend spousal benefits to same-sex couples²⁰³ and federal contractors not discriminate on the basis of sexual orientation in employment²⁰⁴ may generate challenges. Under state RFRAs and constitutions, businesses will argue that antidiscrimination laws requiring them to serve same-sex couples for their weddings substantially burden their religious beliefs. As in *Hobby Lobby*, the law will be depicted as burdening business owners to benefit third parties; same-sex couples will be described as seeking a positive entitlement from others.²⁰⁵ Whether assuming a broad interest in equality or a narrow interest in access to wedding goods, litigants will point to exceptions that exist in some states for small businesses or religious organizations. Echoing *Hobby Lobby*, proponents will note the existence of other alternatives—nearby vendors ready to provide.

²⁰⁰ Victoria F. Nourse, *The Accidental Feminist*, in *TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY* 339, 349 (Martha Albertson Fineman, ed., 2011) ("These conventions are not embodied necessarily in formal amendments but in . . . small 'c' constitutionalism—framework statutes like the [ADA] and the Civil Rights Act of 1964 . . . which reconstitute the people and their image of themselves in light of the nation's most basic principles."); Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 *BYU L. REV.* 221, 254 (1993) ("RFRA is a quasi-constitutional statute that should not be lightly amended.").

²⁰¹ *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 119 n.13 (D.D.C. 2012).

²⁰² *Id.* at 121–22.

²⁰³ I.R.S. Rev. Rul. 2013-17, 2013-38 C.V. 201, (Aug. 29, 2013), archived at <http://perma.cc/A99A-CKT4>.

²⁰⁴ Proclamation No. 1,367,279, 79 Fed. Reg. 42,971 (July 21, 2014).

²⁰⁵ See Douglas Laycock, *Afterword*, in *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* 189, 192 (Douglas Laycock, et al., eds. 2008).

Despite the similarity between these claims and objections to providing contraceptives through insurance or at pharmacies, consensus seems to be emerging that corporate conscience will not affect gay rights. For example, Doug NeJaime foresees Justice Kennedy joining the liberal wing of the court against corporate religious objectors.²⁰⁶ Ira Lupu and Robert Tuttle agree that “[t]here is every reason to believe that a majority of the Supreme Court . . . would find a compelling government interest in ensuring that no discrimination occurs against partners in same-sex marriages, and that the government has no ready alternative to make up for the losses that such discrimination would cause.”²⁰⁷

Such predictions imply that sexual orientation may be diverging from sex as a suspect category. They admit that women’s equality will continue to face successful attacks, while discrimination against gays will turn out differently. This view is all the more remarkable in that, at the moment, the government can be seen to have a more compelling interest in women’s rights than in gay rights. Federal antidiscrimination law enumerates sex, but not sexual orientation, as a prohibited basis for discrimination. Yet, with Justice Kennedy as the deciding vote, it may be reasonable to suspect that religious exemptions will not be granted where they affect gay rights, but will be permitted with regard to women’s equality (especially as concerns their reproductive capacity).²⁰⁸

The divergence of sexual orientation—as a constitutional and/or statutory class—may suggest the development of a hierarchy of suspect categories with race at the top, sexual orientation in the middle, and sex (that is, women) at the bottom. Sex difference in the form of women’s capacity for childbirth consequently would subordinate them in the civil rights framework. RFRA would become a vehicle for women’s unequal treatment in the workplace and beyond.

²⁰⁶ Dylan Scott, *Hobby Lobby’s Supreme Court Win Sets Up Battle Over Anti-Gay Discrimination*, TALKING POINTS MEMO (June 30, 2014), <http://talkingpointsmemo.com/dc/hobby-lobby-decision-gay-rights>, archived at <http://perma.cc/UM8C-8TJF> (quoting Professor Douglas NeJaime).

²⁰⁷ Ira Lupu & Robert Tuttle, *Hobby Lobby in the Long Run*, CORNERSTONE (July 1, 2014), <http://berkeleycenter.georgetown.edu/rfp/blog/hobby-lobby-in-the-long-run>, archived at <http://perma.cc/5VXE-853A>; see also Mark Joseph Stern, *Why Are Women Losing While Gays Win? It’s All About Sex*, SLATE (July 7, 2014), http://www.slate.com/blogs/outward/2014/07/07/feminism_loses_while_gay_equality_wins_and_it_s_all_about_sex.html, archived at <http://perma.cc/CX67-EJW7>; Paul Horwitz & Adam Liptak, *Justices’ Rulings Advance Gays; Women Less So*, N.Y. TIMES, Aug. 5, 2014, at A1, archived at <http://perma.cc/3FUC-MHHD>. But see Peter Moskowitz, *Why Hobby Lobby Could Open a Pandora’s Box of Legal Discrimination*, ALJAZEERA (July 3, 2014), <http://america.aljazeera.com/articles/2014/7/3/hobby-lobby-future.html>, archived at <http://perma.cc/H7WC-HGVW>.

²⁰⁸ David S. Cohen, *Justice Kennedy’s Gendered World*, 59 S.C. L. REV. 673, 691–93 (2008) (reviewing Kennedy’s decisions related to gender and concluding that in cases involving the child-parent relationship, pregnancy, and abortion, Kennedy employs gender stereotypes and idealizes motherhood).

CONCLUSION

The gender of women plays an important role in the *Hobby Lobby* Court's rewriting of religious liberty doctrine. Yet it operates in contradictory ways. It is purportedly irrelevant, as reflected in the dismissal of women, their burdens, and the discrimination that they face. Women's gender, simultaneously, is central. It allows the Court to implement significant changes to the way we think about who exercises religion, what regulations place substantial burdens on religion, which interests are compelling, and whether alternatives to commercial regulations are viable.

Gender is presented as a potential limit on corporate conscience. And, certainly, many religious beliefs relate to sex roles and stereotypes that deny the equality of women and sexual minorities. Courts already have before them claims by pharmacies to be exempted from mandatory fill laws and litigation by wedding vendors to be freed from antidiscrimination laws. The legislative and executive branches now hear that future antidiscrimination statutes must permit employers to discriminate provided they act on religion.²⁰⁹

Ultimately, however, gender may have obscured the broader stakes of litigation. Religious beliefs are not limited to gender. Some subscribe to the inferiority of particular religious groups or races. Others deny the importance of a living wage or worker's compensation. Others still seek to hurry "the end of days" whether through climate change or war. The *Hobby Lobby* decision throws open the courtroom door to corporations and hands them the now-powerful weapon of corporate conscience to fight off regulation that protects the full and equal citizenship of the people.

²⁰⁹ Molly Ball, *Hobby Lobby Is Already Creating New Religious Demands on Obama*, THE ATLANTIC (July 2, 2014), <http://www.theatlantic.com/politics/archive/2014/07/hobby-lobby-is-already-creating-new-religious-demands-on-obama/373853/>, archived at <http://perma.cc/6USP-B49V>.

